

**IN THE SUPREME COURT OF OHIO**

<b>STATE OF OHIO</b>	)	<b>Case No. 2001-1518</b>
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>LARRY JAMES GAPEN,</b>	)	
	)	
<b>Defendant.</b>	)	<b><u>THIS IS A DEATH PENALTY CASE</u></b>

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**MOTION FOR ORDER OR RELIEF**  
**Pursuant to Supreme Court Rule of Practice 4.01**

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Mathias H. Heck, Jr. (0014171)  
Prosecuting Attorney

Kirsten A. Brandt (0070162)  
Assistant Prosecuting Attorney  
Counsel of Record  
P.O. Box 972  
301 West Third Street  
Dayton, Ohio 45422  
Tel. (937) 225-4117

**Counsel for Plaintiff**  
**State of Ohio**

Deborah L. Williams  
Federal Public Defender

Sharon A. Hicks (0076178)  
Assistant Federal Public Defender  
Counsel of Record

Carol A. Wright (0029782)  
Assistant Federal Public Defender,  
CHU Supervising Attorney

Allen L. Bohnert (0081544)  
Assistant Federal Public Defender

Office of the Federal Public Defender  
For the Southern District of Ohio  
Capital Habeas Unit  
10 West Broad Street, Suite 1020  
Columbus, Ohio 43215  
Tel. (614) 469-2999  
Fax (614) 469-5999

**Counsel for Defendant**  
**Larry Gapen**

**MOTION FOR ORDER OR RELIEF**

Larry Gapen respectfully moves the Court, under Supreme Court Rule of Practice 4.01, to vacate his death sentence and remand the matter to the trial court for a new sentencing hearing consistent with Gapen’s Sixth Amendment right to a jury trial.

This Court determined in Gapen’s direct appeal that Gapen was improperly convicted of the breaking detention capital specification at trial because the pretrial electronic monitoring to which Gapen was subjected did not constitute “detention” as set forth in Ohio Revised Code § 2929.04(A)(4). *State v. Gapen* 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶¶55-73. Rather than remand for a new penalty phase with a jury, however, this Court conducted its own independent evaluation to determine whether Gapen deserved a death sentence. *Id.* at ¶148.

The United States Supreme Court’s recent opinion in *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016), makes clear that the Sixth Amendment requires the defendant’s death sentence to be based on a jury verdict, not a judge’s factfinding. *Id.* at 624 (“The Sixth Amendment protects a defendant’s right to an impartial jury. This right required Florida to base Timothy Hurst’s death sentence on a jury’s verdict, not a judge’s factfinding.”). Accordingly, a death sentence rendered by this Court is unconstitutional, and this Court must remand to the trial court for a new penalty phase. *See State v. Kirkland*, 2010-0854, 2016-Ohio-2807 (May 4, 2015 Case Announcements).

This argument is more fully laid out in the attached memorandum.

Respectfully submitted,

Deborah L. Williams  
Federal Public Defender

by

/s/ Sharon A. Hicks

**Sharon A. Hicks (0076178)**  
Assistant Federal Public Defender  
Counsel of Record for Defendant Gapen

*/s/ Carol A. Wright*

**Carol A. Wright (0029782)**  
Assistant Federal Public Defender  
CHU Supervising Attorney  
Co-Counsel for Defendant Gapen

*/s/ Allen L. Bohnert*

**Allen L. Bohnert (0081544)**  
Assistant Federal Public Defender  
Co-Counsel for Defendant Gapen

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for the Southern District of Ohio  
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Columbus, Ohio 43215  
614-469-2999

[Sharon\\_Hicks@fd.org](mailto:Sharon_Hicks@fd.org)  
[Carol\\_Wright@fd.org](mailto:Carol_Wright@fd.org)  
[Allen\\_Bohnert@fd.org](mailto:Allen_Bohnert@fd.org)

## MEMORANDUM IN SUPPORT OF MOTION

Larry Gapen exercised his right to a jury trial and was convicted of aggravated murder and sentenced to death. *State v. Gapen* 104 Ohio St. 3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶1. One of the specifications—and the associated evidence—the jury considered to reach its death verdict was that the murder was committed in the course of breaking detention under Ohio Revised Code § 2929.04(A)(4). *Id.* On appeal, this Court concluded that the breaking detention specification was invalid because it was based on pretrial electronic home monitoring. Such monitoring as a condition of bond did not constitute detention for purposes of § 2929.04(A)(4). *Id.* at ¶¶72–73. Accordingly, this Court vacated the conviction for escape and the guilty finding on the § 2929.04(A)(4) death specification. Rather than grant Gapen a new sentencing hearing due to the error, however, this Court upheld Gapen’s death sentence through the use of appellate reweighing. *Id.* at ¶¶148, 181. The use of appellate reweighing to cure this sentencing error violated Gapen’s right to trial by jury under the Sixth Amendment and the Supreme Court’s recent decision in *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016). This Court should therefore grant Gapen a new sentencing hearing.

**I. *Hurst* makes clear that the “cure” applied to the violation of Gapen’s constitutional rights was itself another constitutional violation.**

In *Hurst*, decided on January 12, 2016, the Supreme Court of the United States confirmed what has been clear since it decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000): The Sixth and Fourteenth Amendments require that a jury, rather than a judge, find every fact necessary to impose a death sentence. *Hurst*, 136 S. Ct. at 619. This Court has held that the facts necessary to impose a death sentence under “Ohio’s capital sentencing scheme” include “the existence of any statutory aggravating circumstances and whether those aggravating circumstances are

sufficient to outweigh the defendant's mitigating evidence." *State v. Hoffner*, 102 Ohio St. 3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶69 (citing Ohio Rev. Code § 2929.03(B) and (D)). And Ohio law "charges the jury with determining" those facts "by proof beyond a reasonable doubt." *Id.* The Sixth Amendment demands a jury determination of those issues, and the State of Ohio may not substitute a court determination in its place.

*Hurst* now makes clear that the independent review and conclusion reached by this Court violated Gapen's Sixth Amendment rights. *Hurst*, 136 S. Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."). The jury's determination in Gapen's case was invalidated when the breaking detention specification was dismissed on appeal, and the findings of the Justices of this Court could not replace the jury's verdict. *Id.* at 624 ("The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding.").

Gapen cannot have his right to have a jury determine whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt restored by the independent review of an appellate court. *Hurst*, 136 S. Ct. at 619. Gapen's right to trial by jury was violated when his jury's sentencing consideration and final determination that the aggravating circumstances outweighed the mitigation evidence was infected and rendered invalid by the jury's consideration of an invalid aggravating circumstance and associated evidence. *Id.* The jury in Gapen's case never made a determination that aggravating circumstances absent the breaking detention circumstance outweighed the mitigating factors beyond a reasonable doubt. That finding was made for the first time on Gapen's direct appeal to this Court, and it violated

Gapen's right to trial by jury. *Id.* This error was further exacerbated in Gapen's case when the jury considered evidence in its sentencing determination that was before the jury solely in support of the invalid aggravating factor.

This Court recently granted Anthony Kirkland's motion for order or relief and remanded his case for a new penalty phase. *State v. Kirkland*, 2010-0854, 2016-Ohio-2807 (May 4, 2015 Case Announcements). Kirkland's motion was based on *Hurst* and this Court's use of appellate reweighing to cure a penalty phase error. *See State v. Kirkland*, No. 2010-0854, Docket at Mar. 3, 2016. *Hurst* and this Court's recent order in *Kirkland* establish that the jury's function cannot be usurped by judges' independent review.

**II. *Hurst* affects the case law on which the validity of such “independent reweighing” relies.**

*Hurst* has a significant impact on *Clemons v. Mississippi*, 494 U.S. 738 (1990).

Previously, *Clemons* provided guidance about the constitutionality of independent reweighing.

But the language in *Clemons* is telling in light of *Hurst*:

Nothing in the Sixth Amendment as construed by our prior decisions indicates that a defendant's right to a jury trial would be infringed where an appellate court invalidates one of two or more aggravating circumstances found by the jury, but affirms the death sentence after itself finding that the one or more valid remaining aggravating factors outweigh the mitigating evidence. Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court. *Cabana v. Bullock*, 474 U.S. 376 (1986), held that an appellate court can make the findings required by *Enmund v. Florida*, 458 U.S. 782 (1982), in the first instance and stated that “[t]he decision whether a particular punishment—even the death penalty—is appropriate in any given case is not one that we have ever required to be made by a jury.” 474 U.S., at 385.

*Clemons*, 494 U.S. at 745-46. There is no reconciling *Hurst*'s holding with *Clemons*. Compare *Hurst*, 136 S. Ct. at 619 (“The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death;”) with *Clemons*, 494 U.S. at 745 (“Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.”). See also *State v. Kirkland*, 140 Ohio St. 3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶¶199-204 (O’Neill, J., dissenting) (“curing” sentencing error with this Court’s independent review “undermines the very foundation of the jury system in Ohio. And it does not comport with the Sixth Amendment to the United States Constitution, which in this context requires that the facts permitting the imposition of a death sentence must be found by a jury.”).

Moreover, in *Hurst*, the Supreme Court explicitly overruled the important cases on which *Clemons* relies. In *Clemons*, the Court had stated:

*Spaziano v. Florida*, 468 U.S. 447 (1984), ruled that neither the Sixth Amendment, nor the Eighth Amendment, nor any other constitutional provision provides a defendant with the right to have a jury determine the appropriateness of a capital sentence; neither is there a double jeopardy prohibition on a judge’s override of a jury’s recommended sentence. Likewise, the Sixth Amendment does not require that a jury specify the aggravating factors that permit the imposition of capital punishment, *Hildwin v. Florida*, 490 U.S. 638 (1989), nor does it require jury sentencing, even where the sentence turns on specific findings of fact. *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986).

*Clemons*, 494 U.S. at 746. But in *Hurst*, the Court “expressly overrule[d] *Spaziano* and *Hildwin* in relevant part,” and found that “[t]ime and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*.” *Hurst*, 136 S. Ct. at 623, 624.

This Court has relied upon *Clemons*’s authority to cure errors with its independent reweighing. See, e.g., *State v. Combs*, 62 Ohio St. 3d 278, 286, 581 N.E.2d 1071 (1991)

(rejecting argument that appellate reweighing cannot be used for error correction “where the jury’s deliberations are tainted by prosecutorial misconduct, injection of nonstatutory aggravating circumstances, or other error”); *State v. Lott*, 51 Ohio St. 3d 160, 170–72 (1990) (consideration of invalid aggravating circumstances was sentencing error cured by appellate reweighing). And those cases all lead back to reliance on *Clemons*. Following *Hurst*, it is clear that appellate reweighing can no longer be used to rectify the type of error that took place in Gapen’s case. *Hurst*’s effect in a case like Gapen’s is inescapable: when the defendant invoked his right to a jury trial and then was deprived of his right to have the jury determine that the valid aggravating circumstances that had actually been proven beyond a reasonable doubt outweighed the mitigating factors beyond a reasonable doubt, the only constitutional remedy is a new, fair, penalty phase at which the jury can decide his fate in accordance with the Sixth Amendment. This Court should therefore grant Gapen relief.

### **CONCLUSION**

When this Court decided Gapen’s case, it did not have the benefit of the Supreme Court’s Sixth Amendment analysis in *Hurst*. Gapen invoked his right to a jury trial. Subsequently the State erred in offering evidence of an invalid aggravator, and the trial court erred in instructing the jury to consider this invalid aggravator. The jury found Gapen guilty of this invalid aggravator and then weighed it and the associated evidence in its sentencing calculus. The jury in Gapen’s case never made a determination that the remaining aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. That constitutional violation cannot be remedied by the findings of this Court’s Justices. *See Hurst*, 136 S. Ct. at 624 (“The

Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding.'").

The appropriate remedy is to remand the case to the trial court for a new sentencing hearing, one that is free from the effect of the invalid aggravator and associated evidence. *See State v. Kirkland*, 2010-0854, 2016-Ohio-2807 (May 4, 2015 Case Announcements).

For the reasons stated, Gapen moves the Court to issue an Order vacating his death sentence and remanding the matter to the trial court to conduct a new sentencing hearing.

Respectfully submitted,

Deborah L. Williams  
Federal Public Defender

by

/s/ Sharon A. Hicks  
**Sharon A. Hicks (0076178)**  
Assistant Federal Public Defender  
Counsel of Record for Defendant Gapen

/s/ Carol A. Wright  
**Carol A. Wright (0029782)**  
Assistant Federal Public Defender  
CHU Supervising Attorney  
Co-Counsel for Defendant Gapen

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[Sharon\\_Hicks@fd.org](mailto:Sharon_Hicks@fd.org)

[Carol\\_Wright@fd.org](mailto:Carol_Wright@fd.org)  
[Allen\\_Bohnert@fd.org](mailto:Allen_Bohnert@fd.org)

**CERTIFICATE OF SERVICE**

I hereby certify that on May 11, 2016 a copy of the foregoing was sent via first class, United States mail, to Kirsten A. Brandt, P.O. Box 972, 301 West Third Street, Dayton, Ohio, 45422, Counsel for Plaintiff State of Ohio.

*/s/ Sharon A. Hicks*

**Sharon A. Hicks (0076178)**

Assistant Federal Public Defender

Office of the Federal Public Defender

Capital Habeas Unit

10 West Broad Street, Suite 1020

Columbus, Ohio 43215

614-469-2999

[Sharon\\_Hicks@fd.org](mailto:Sharon_Hicks@fd.org)

Counsel of Record for Defendant Gapen