

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO**

**Case No. 2001-1518**

Plaintiff,

vs.

**LARRY JAMES GAPEN**

**THIS IS A DEATH PENALTY  
CASE**

Defendant.

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**STATE'S MEMORANDUM IN OPPOSITION  
TO DEFENDANT'S MOTION FOR ORDER OR RELIEF  
PURSUANT TO S.CT. PRAC.R. 4.01**

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## MEMORANDUM

Defendant Larry James Gapen asks this Court to vacate his death sentence and remand the matter to the trial court for a new sentencing hearing consistent with his Sixth Amendment right to a jury trial. (Motion for Order or Relief, p. 2) The State of Ohio hereby responds pursuant to S.Ct. Prac.R. 4.01(B)(1).

To support his claim that he is entitled to a new sentencing hearing, Gapen relies on the United States Supreme Court's recent opinion of *Hurst v. Florida*, -- U.S. --, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). *Hurst* ruled Florida's capital sentencing scheme, which required the judge to find the existence of an aggravating circumstance, unconstitutional as violating the Sixth Amendment's right to a jury trial. *Id.* at 624.

*Hurst* does not require the relief that Gapen seeks. The holding of *Hurst* is not nearly as broad as he asserts. Gapen claims in his motion for order or relief that "*Hurst* now makes clear that the independent review and conclusion reached by this Court violated Gapen's Sixth Amendment rights." (Motion for Order or Relief, p. 5) He states that "[f]ollowing *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." (*Id.* at 8)

*Hurst* did not hold that appellate reweighing after conviction and imposition of the death penalty violates the Sixth Amendment. Nowhere in *Hurst* did the United States Supreme Court even address the appellate process or the independent review and reweighing that appellate courts engage in as part of a capital defendant's direct appeal. Rather, the Court considered the procedure by which a Florida judge imposed the death penalty *at trial*.

In Florida, " '[a] person who has been convicted of a capital felony shall be punished by death' only if an additional sentencing proceeding 'results in findings *by the court* that such

person shall be punished by death.’ ” (Emphasis added.) *Hurst*, at 620. The United States Supreme Court explained the process:

The additional sentencing proceeding Florida employs is a “hybrid” proceeding “in which [a] jury renders an advisory verdict but the judge makes the ultimate sentencing determinations.” First, the sentencing judge conducts an evidentiary hearing before a jury. Next, the jury renders an “advisory sentence” of life or death without specifying the factual basis of its recommendation. “Notwithstanding the recommendation of a majority of the jury, *the court*, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death.” If the court imposes death, it must “set forth in writing its findings upon which the sentence of death is based.” Although the judge must give the jury recommendation “great weight,” the sentencing order must “reflect the trial judge’s independent judgment about the existence of aggravating and mitigating factors.”

(Emphasis added.)(Internal citations omitted.) *Id.*

Ohio’s capital procedure is not at all similar to Florida’s. In a capital jury trial in Ohio, the jury finds the defendant guilty or not guilty of aggravating circumstances specifications. R.C. 2929.03(B). If the jury finds the defendant guilty of the charge but not guilty of each of the aggravating circumstances specifications, the sentence to be imposed is life without parole, life with parole in twenty years, life with parole in twenty-five years, or life with parole in thirty years. R.C. 2929.03(C)(1). However, if the jury finds the defendant guilty of both the charge and one or more of the aggravating circumstances specifications, the penalty to be imposed is death or one of the life sentence options. R.C. 2929.03(C)(2)(a). The jury, in a capital jury trial

in Ohio, shall determine whether the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. R.C. 2929.03(D)(2). If the jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors, the jury shall recommend to the court that the sentence of death be imposed. *Id.* Absent such a finding, the jury shall recommend that the defendant be sentenced to one of the life sentence options. *Id.* If the jury recommends one of the life sentence options, the judge has to impose it. *Id.* If the jury recommends a death sentence, the court will impose that sentence only if the court finds by proof beyond a reasonable doubt that the aggravating circumstances the defendant was found guilty of committing outweigh the mitigating factors. R.C. 2929.03(D)(3). Absent such a finding by the court, the court must impose one of the life sentence options. *Id.*

These requirements were scrupulously followed in Gapen's trial. The jury found Gapen guilty of each aggravated murder count and each of the aggravating circumstances specifications attached to those counts. (Tr. 3893-3930) The jury's finding made Gapen eligible for the death penalty. In the penalty phase, the jury found beyond a reasonable doubt that the aggravating circumstances that Gapen was found guilty of committing outweighed the mitigating factors as to Count 13, the aggravated murder of thirteen-year-old Jesica Young with prior calculation and design, and recommended to the court that the death penalty be imposed against Gapen. (Tr. 4301-4302) As to all other aggravated murder counts, the jury found that the aggravating circumstances did not outweigh the mitigating factors and recommended that Gapen be sentenced to life without parole. (Tr. 4295-4304) The court imposed life without parole as to those counts. (Tr. 4332-4333) As to Count 13, after the jury recommended that the death penalty be imposed, the court independently found by proof beyond a reasonable doubt that the

aggravating circumstances outweighed the mitigating factors and imposed the death penalty. (Tr. 4323-4324)

On direct appeal, this Court vacated the jury's guilty findings on the breaking detention aggravating circumstances specifications. *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, at ¶73. Nevertheless, this Court affirmed Gapen's sentence of death. *Id.* at ¶183. This Court conducted an independent review and reweighing of all of the facts and evidence disclosed in the record of the case under R.C. 2929.05(A) to determine whether the aggravating circumstances outweighed the mitigating factors and whether the death sentence was appropriate. *Id.* at ¶148-182. In doing so, this Court expressly did not consider the breaking detention aggravating circumstances. *Id.* at ¶148. Weighing the remaining four aggravating circumstances against the mitigating factors, this Court concluded that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. *Id.* at ¶181. This Court explained: "Gapen's murder of Jessica during the course of a burglary, robbery, and attempted rape, and his course of conduct in multiple killings are grave aggravating circumstances. In contrast, Gapen offered no substantial mitigation to weigh against these collective aggravating circumstances." *Id.*

Gapen now challenges this Court's independent review and reweighing of the aggravating circumstances and mitigating factors as violating his Sixth Amendment right to have the jury determine every fact necessary for imposition of the death penalty. As stated above, *Hurst* did not hold that appellate reweighing after conviction and imposition of the death penalty violates the Sixth Amendment. Nor did *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), upon which the United States Supreme Court relied heavily in *Hurst*. Nor did this Court state that that was the basis of its May 4, 2016 order remanding for a new

mitigation and sentencing hearing in *State v. Kirkland*, Case No. 2010-0854. See 5/4/2016 Case Announcements, 2016-Ohio-2807.

The United States Supreme Court held in *Clemons v. Mississippi*, 494 U.S. 738, 741, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), that it is constitutionally permissible for an appellate court to uphold a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review. Gopen questions the validity of *Clemons* in light of *Hurst*. However, *Hurst* did not address appellate reweighing or the appellate process at all. The United States Supreme Court did not even mention *Clemons* in its decision.

Since the United States Supreme Court's decision in *Ring v. Arizona*, holding that aggravating circumstances must be found by a jury and not a judge, this Court has continued to cite *Clemons* as authority for an appellate court's reweighing of aggravating circumstances and mitigating factors. See, e.g., *State v. Wesson*, 137 Ohio St.3d 309, 2013-Ohio-4575, 999 N.E.2d 557, at ¶97 (reversing finding of guilt on third aggravating circumstances specification, concluding that the trial court erred by considering that specification as an aggravating circumstance, but curing that error by excluding that specification from the Court's independent review of sentence); *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, 822 N.E.2d 1239, at ¶102. Indeed, in *Sapp*, the defendant argued that appellate reweighing of aggravating circumstances and mitigating factors was unconstitutional under *Ring*. *Id.* at ¶102. This Court rejected that argument, noting that "*Ring* specifically declined to address appellate reweighing." *Id.* This Court instead followed precedent – *Clemons*, *State v. Landrum*, 53 Ohio St.3d 107, 115, 559 N.E.2d 710 (1990), and *State v. Lott*, 51 Ohio St.3d 160, 170, 555 N.E.2d 293 (1990) – which permit appellate reweighing. Even as recently as last month, after *Hurst* was decided, this

Court has relied on *Clemons* as valid authority for appellate reweighing. See *State v. Obermiller*, -- Ohio St.3d --, 2016-Ohio-1594, -- N.E.3d --, at ¶116 (“ ‘whatever errors the trial court may have committed in weighing the aggravating circumstance[s] against any mitigating factors’ will be remedied by this court’s ‘careful independent reweighing’ ”).

Also after the United States Supreme Court decided *Hurst*, this Court flatly rejected a Sixth Amendment attack on Ohio’s capital sentencing procedure in *State v. Belton*, -- Ohio St.3d --, 2016-Ohio-1581, -- N.E.3d --, at ¶59-60. The reasons this Court gave for its decision leave no doubt that appellate reweighing does not implicate a defendant’s right to have a jury determine any fact that increases the penalty for a crime beyond the prescribed statutory maximum. Specifically, this Court explained:

Ohio’s capital-sentencing scheme is unlike the laws at issue in *Ring* and *Hurst*. In Ohio, a capital case does not proceed to the sentencing phase until *after* the fact-finder has found a defendant guilty of one or more aggravating circumstances. Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment. Moreover, in Ohio, if a defendant is tried by a jury, then the judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence.

Federal and state courts have upheld laws similar to Ohio’s, explaining that if a defendant has already been found to be death-penalty eligible, then subsequent weighing processes for sentencing purposes do not implicate *Apprendi* [*v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)] and *Ring*.

Weighing is *not* a fact-finding process subject to the Sixth Amendment, because “[t]hese determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination.” Instead, the weighing process amounts to “a complex moral judgment” about what penalty to impose upon a defendant who is already death-penalty eligible.

(Emphasis *sic.*)(Internal citations omitted.) *Belton*, at ¶59-60.

If a trial court’s reweighing the aggravating circumstances against the mitigating factors is not a fact-finding process subject to the Sixth Amendment, then neither is this Court’s reweighing during direct appeal. The fact that made Gapen death-penalty eligible was the finding of guilt of each of the aggravating circumstances specifications, which was done by a jury. The jury found him guilty of five aggravating circumstances specifications for each count of aggravated murder. (Tr. 3893-3930) The dismissal of the breaking detention aggravating circumstances specifications did not render Gapen ineligible for the death penalty. To the contrary, he was still eligible to receive a death sentence by virtue of the jury’s finding of guilt on the remaining four aggravating circumstances specifications. This Court’s reweighing of the remaining aggravating circumstances against the mitigating factors had no effect on that process and did not deprive Gapen of the right to have a jury determine any fact that increased the penalty for his crime beyond the statutory life maximum. Because there is no Sixth Amendment violation, Gapen is not entitled to an order vacating his death sentence and remanding his case

for a new sentencing hearing. The State asks this Court to deny his Motion for Order or Relief.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Appellee's Memorandum in Opposition to Defendant's Motion for Order of Relief was sent by regular U.S. mail on this 13<sup>th</sup> day of May, 2016, to Defendant's counsel: Sharon A. Hicks, Carol A. Wright, and Allen L. Bohnert, Assistant Federal Public Defenders, Office of the Federal Public Defender for the Southern District of Ohio, 10 West Broad Street, Suite 1020, Columbus, OH 43215.

A handwritten signature in black ink, appearing to read "Kirsten A. Brandt", written over a horizontal line.

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