

IN THE SUPREME COURT OF OHIO
2016

STATE OF OHIO,

Case No. 10-854

Plaintiff-Appellee,

-vs-

ANTHONY KIRKLAND,

DEATH PENALTY CASE

Defendant-Appellant

**MEMORANDUM OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTOR
RON O'BRIEN IN SUPPORT OF STATE OF OHIO'S MOTION FOR
RECONSIDERATION**

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**MEMORANDUM OF AMICUS CURIAE FRANKLIN COUNTY
PROSECUTOR RON O'BRIEN IN SUPPORT OF STATE OF OHIO'S
MOTION FOR RECONSIDERATION**

Pursuant to S.Ct.Prac.R. 18.02(C), and for the reasons stated in the attached memorandum in support, amicus curiae Franklin County Prosecutor Ron O'Brien respectfully submits the following amicus memorandum in support of the motion for reconsideration filed by the State of Ohio on May 12, 2016.

Respectfully submitted,

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/s Steven L. Taylor
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MEMORANDUM IN SUPPORT

This Court affirmed defendant Kirkland's convictions and death sentences in May 2014. Defendant's motion for reconsideration was denied in September 2014.

On March 3, 2016, defendant filed a "motion for order or relief," seeking the vacating of his death sentences and a remand to the trial court for a new sentencing hearing. Defendant relied on the decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016), contending that this Court had erred in affirming the death sentences after finding that there was prejudicial prosecutorial misconduct in closing argument in the penalty phase. In affirming the death sentences, this Court had relied on a number of cases recognizing that penalty-phase error can be cured by this Court's independent sentencing review. Such case law can be traced to *Clemons v. Mississippi*, 494 U.S.

738 (1990), which recognized the propriety of such independent review obviating reversal for penalty-phase error. But defendant argued in his latest motion that reliance on such independent sentence review is incorrect in light of *Hurst* and that *Clemons* is undermined by *Hurst*.

The State rightly opposed the March 3rd motion, but this Court on May 4, 2016, issued a summary 4-3 ruling granting the motion and remanding for a new mitigation and sentencing hearing.

The State has filed a timely motion for reconsideration on May 12th, and this amicus memorandum is offered in support of such reconsideration.

A.

There is an initial question of whether defendant's March 3rd "motion for order or relief" was appropriate to begin with. This Court's Rules allow only two forms of attack by a defendant on a decision and judgment in a capital appeal: (1) motion for reconsideration, S.Ct.Prac.R. 18.02; (2) application for reopening, S.Ct.Prac.R. 11.06. But a timely motion for reconsideration had already been denied in 2014, and reopening has been denied as well.

Moreover, motion practice is allowed under the general motion provisions of S.Ct.Prac.R. 4.01(A) only if the relief being sought is not "otherwise addressed by these rules." Defendant's "motion for relief or order" was merely a motion for reconsideration by another name, asking this Court to rethink its original reliance on independent sentence review as a basis to cure the asserted error in the prosecutor's closing argument and further asking this Court to change its original decision to

affirm the death sentences. As a de facto motion for reconsideration, the March 3rd motion was extremely untimely, missing the ten-day deadline for seeking reconsideration by over 21 months. This Court's Rules bar the consideration of untimely motions for reconsideration, since those Rules order the Clerk to refuse to accept untimely motions for reconsideration. S.Ct.Prac.R. 18.02(D). This bar on untimely reconsideration would go for naught if a losing party can engage in an end-run around it by retitling its motion as a "motion for order or relief."

Amicus respectfully submits that this Court's granting of defendant's motion violated this Court's Rules and will amount to an invitation to losing litigants to retitle their filing to avoid the strict limits on seeking reconsideration. This casts significant doubts on the finality of this Court's rulings and effectively leaves this Court's judgments perpetually open to de facto reconsideration under general motion practice.

B.

This Court's May 4th ruling also warrants reconsideration for another reason. After defendant filed his motion on March 3rd, and after the State filed its response on March 9th, this Court issued its decision on April 20, 2016, in *State v. Belton*, ___ Ohio St.3d ___, 2016-Ohio-1581. *Belton* holds that *Hurst* has no effect on Ohio's capital sentencing scheme because the jury in Ohio determines the existence of aggravating circumstances in the guilt phase. As stated in *Belton*:

{¶ 59} 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. See R.C. 2929.03(D); R.C.

2929.04(B) and (C); *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 147. 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. R.C. 2929.03(D)(2).

{¶ 60} 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* 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." *State v. Gales*, 265 Neb. 598, 628, 658 N.W.2d 604 (2003); *see, e.g., State v. Fry*, 138 N.M. 700, 718, 126 P.3d 516 (2005); *Ortiz v. State*, 869 A.2d 285, 303-305 (Del.2005); *Ritchie v. State*, 809 N.E.2d 258, 268 (Ind.2004). Instead, the weighing process amounts to "a complex moral judgment" about what penalty to impose upon a defendant who is already death-penalty eligible. *United States v. Runyon*, 707 F.3d 475, 515-516 (4th Cir.2013) (citing cases from other federal appeals courts).

{¶ 61} For these reasons, we hold that when a capital defendant in Ohio elects to waive his or her right to have a jury determine guilt, the Sixth Amendment does not guarantee the defendant a jury at the sentencing phase of trial.

This analysis completely undercuts the defense argument here that *Hurst* overrules *Clemons*. This Court was used independent sentence review to cure penalty-phase error, and so it does not implicate the right to a jury trial because, as *Belton*

recognizes, there is no right to jury trial at the penalty phase in making the decision as to whether the aggravating circumstances outweigh mitigating factors.

The parties did not have the opportunity to brief the effect of *Belton* on the pending “motion for order or relief” when *Belton* was issued. Reconsideration would be warranted now, including on the question of whether *Hurst* would even be applicable to already-final cases like the present case.

C.

Amicus also wishes to bring to this Court’s attention the question of whether prosecutorial misconduct actually occurred when the prosecutor referred to the life sentences defendant was already facing on two murders and argued against imposing life sentences on the two aggravated murders because such sentences would amount to “freebies.” The prosecution has rightly sought to defend this argument in the original merit brief and in the memo opposing reconsideration, and amicus incorporates those arguments by reference here, including the fact that the defense opened the door to the prosecutor’s argument.

Amicus wishes to point out that in *State v. Campbell*, 90 Ohio St.3d 320, 738 N.E.2d 1178 (2000), the prosecutor had elicited evidence that Campbell would not be eligible for parole until 2085, and this Court rejected Campbell’s challenge to that evidence.

Finally, Campbell complains that the state elicited that Campbell was currently ineligible for parole (that is, on his life sentence for the prior murder) until 2085. Campbell argues that this was improper because it suggested that a life sentence would not be any additional punishment in this case. Campbell does not explain why that is improper, however.

Campbell, 90 Ohio St.3d at 335.

After a remand to give the defendant an opportunity for allocution, the *Campbell* case returned to this Court, and the defense argued that a life sentence would be a sufficient punishment. This Court found that argument “unpersuasive.”

Conceding that he “can never be released from prison” and “should not be allowed to live in society,” Campbell asks for a sentence of life without possibility of parole. Campbell argues that, because life imprisonment without possibility of parole is a “stern” and “very serious” punishment, it is an adequate one, and the state need not execute him in order to achieve retribution.

We do not doubt that life imprisonment without possibility of parole is a stern punishment. Yet we must also observe that Campbell was already under a life sentence when he escaped from Deputy Harrison and killed Charles Dials. Since no one can serve more than one life sentence, we have no authority to lengthen the term of imprisonment Campbell faced before the murder of Dials. If we reduce Campbell’s sentence in the instant case to life imprisonment without possibility of parole, the only additional penalty he will incur for murdering Dials will be that he will no longer be eligible for parole. Thus, the severity of life imprisonment as a penalty is an unpersuasive reason against imposing a death sentence in this case and is entitled to little weight in mitigation.

State v. Campbell, 95 Ohio St.3d 48, 57-58, 765 N.E.2d 334 (2002).

When the capital defendant is already facing a life sentence for other crime(s), and when the defense inevitably argues for the imposition of a life sentence in a penalty-phase proceeding, the prosecutor should be allowed to argue against the lack of severity of a life sentence in that case. This Court agreed in *Campbell* that such a

life sentence amounts to hardly anything in that context (“little weight”) and that such a life sentence “is an unpersuasive reason against imposing a death sentence”.

In effect, imposing one life sentence on top of other life sentence(s) amounts to mere concurrent sentencing, and “making sentences for different crimes run concurrently is in the nature of a reward to the convict * * *.” *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, 887 N.E.2d 328, ¶ 13.

As this Court confirmed in *Belton*, the sentencing decision being made in the penalty phase represents a “complex moral judgment” as to what penalty to impose. Both sides are allowed to argue the relative merits or demerits of a life sentence as opposed to a death sentence; this is the very purpose of the proceeding. If certain circumstances deprive a life sentence of any meaningful value as punishment, the prosecutor should be able to argue the point and dispute any defense claim that a life sentence would be enough. In light of *Campbell*, the prosecutor’s “freebie” argument properly made this point.

It appears from the briefing in this case that the “freebie” argument was the only argument objected to and that the remainder of the arguments mentioned in this Court’s discussion only would have been reviewed under a plain-error standard. Given the involvement of mass-murder specifications in this case, the defendant would have been unable to show clear outcome-determinative plain error.

In light of the foregoing, the issues involving the penalty-phase closing argument were insufficient to warrant untimely de facto reconsideration over 21 months late.

The State's May 12th motion for reconsideration should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by e-mail on May 16, 2016, to Rachel Troutman, Rachel.Troutman@opd.ohio., counsel for defendant, and to Ronald W. Springman, Jr., Ron.Springman@hcpros.org, counsel for State of Ohio.

/s Steven L. Taylor
STEVEN L. TAYLOR