Supreme Court of Ohio Clerk of Court - Filed May 20, 2016 - Case No. 2001-1518

IN THE SUPREME COURT OF OHIO
2016

STATE OF OHIO, Case No. 01-1518

Plaintiff-Appellee,

-vs-

LARRY JAMES GAPEN,

DEATH PENALTY CASE

Defendant-Appellant

**MEMORANDUM OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTOR RON O'BRIEN IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO'S OPPOSITION TO "MOTION FOR ORDER OR RELIEF'**

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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 plaintiff-appellee State of Ohio's opposition to defendant's May 11th "motion for order or relief."

Respectfully submitted,

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/s Steven L. Taylor
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**MEMORANDUM IN SUPPORT**

This Court affirmed defendant Gapen's death sentence in December 2004. Defendant's motion for reconsideration was denied in February 2005. Defendant's untimely application for reopening was denied in June 2009.

On May 11, 2016, defendant filed a "motion for order or relief," seeking the vacating of his death sentence and a remand to the trial court for a new sentencing hearing. Defendant relies on the decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016), contending that this Court erred in affirming the death sentence after invalidating the breaking-detention aggravating circumstance. Defendant argues that the affirmance of the death sentence for killing 13-year-old Jesica Young was erroneously based on this Court using its independent sentence review to cure the penalty-phase error in

considering the breaking-detention aggravating circumstance. Defendant argues that the concept of such independent sentence review curing penalty-phase error, which is a concept traced to *Clemons v. Mississippi*, 494 U.S. 738 (1990), is incorrect in light of *Hurst* and that *Clemons* is undermined by *Hurst*.

Defendant also relies on this Court's recent 4-3 summary ruling in *State v. Kirkland*, ___ Ohio St.3d ___, 2016-Ohio-2807, which sustained a similar "motion for order or relief" challenging the viability of using independent sentence review to cure asserted penalty-phase error in closing argument. In *Kirkland*, the majority granted the motion, vacated the death sentences in that case, and remanded for a new sentencing hearing.

In the present case, the State has rightly opposed defendant Gapen's "motion for order or relief," pointing out that the motion conflicts with this Court's decision in *State v. Belton*, ___ Ohio St.3d ___, 2016-Ohio-1581, which held that *Hurst* did not recognize any right to jury trial as to the weighing process in the penalty phase. The present amicus memorandum is offered in support of the State's position that the "motion for order or relief" should be denied.

A.

There is an initial question of whether defendant's May 11th "motion for order or relief" is 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 motion for reconsideration was already denied in 2005,

over eleven years ago. Reopening was also denied almost six years ago.

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" is merely a motion for reconsideration by another name, asking this Court to rethink its original decision to affirm the death sentence. As a de facto motion for reconsideration, the May 11th motion is extremely untimely, missing the ten-day deadline for seeking reconsideration by over eleven years.

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."

In addition, there is no provision allowing multiple motions for reconsideration of the same decision or order. This Court has held in the context of applications for reopening that successive applications are not allowed, see *State v. Twyford*, 106 Ohio St.3d 176, 2005-Ohio-4380, ¶ 6, and there is no reason to think successive motions for reconsideration would be allowed.

Amicus respectfully submits that defendant's motion violates this Court's Rules and that the strict limits on seeking reconsideration should not be obviated through the mere expedient of retitling the document as a "motion for order or relief." Entertaining this motion will effectively leave this Court's judgments perpetually

open to de facto reconsideration under general motion practice.

B.

In *State v. Belton*, ___ Ohio St.3d ___, 2016-Ohio-1581, this Court held that *Hurst* has no effect on the penalty phase under 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 that *Hurst* overrules *Clemons*. As *Belton* emphasizes, "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." Id. "[S]ubsequent weighing processes for sentencing purposes do not implicate *Apprendi* and *Ring*. Weighing is *not* a fact-finding process subject to the Sixth Amendment * * *." Because defendant's claim of penalty-phase error only implicates the weighing process in the penalty phase, the use of independent appellate sentence review to uphold the death sentence resulting from that penalty phase simply does not implicate the right to a jury trial on which *Ring* and *Hurst* are based.

Even if *Hurst* did extend *Ring* to the penalty-phase weighing process as it is conducted in Ohio, *Hurst* would not be applicable to cases that have already become final on direct review. Since the *Ring* decision itself was not retroactive, see *Schriro v. Summerlin*, 542 U.S. 348 (2004), then likewise *Hurst* would not be retroactive to already-final cases like this case.

In addition, de facto reconsideration is unwarranted on this point. In the

untimely application for reopening, defendant sought to raise this issue and that application was denied. The main premise of the reopening application was that the issue was not sufficiently presented to this Court by the defense in the original appellate briefing or in the original motion for reconsideration. With the defense having failed to sufficiently present the issue before, it would be too late to do so now over eleven years late.

Moreover, independent sentence review would not have been the only means of affirming the death sentence. Harmless error also applies. Although this Court found the evidence insufficient on the breaking-detention aggravating circumstance, this Court still left in place a triple-murder course-of-conduct aggravating circumstance and three other aggravating circumstances. This Court recognized in its 2004 decision that "overwhelming evidence properly admitted during the penalty phase supports the jury's findings that the aggravating circumstances outweighed the mitigating factors as to the aggravated murder of Young." *Gapen*, ¶ 109. "Gapen brutally murdered Jesica Young, an innocent 13-year-old girl, while she was asleep in her bedroom. Jesica's murder was part of a course of conduct during which Gapen murdered two other people in the house. Moreover, Jesica's murder occurred after Gapen committed burglary, robbery, and attempted rape." Id. ¶ 174. "Gapen's murder of Jesica 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. ¶ 181.

Regardless of independent sentence review, the death sentence would have been upheld under harmless-error analysis, even if the defense had sufficiently raised this issue in the original briefing or in the original motion for reconsideration. This differentiates the present case from *Kirkland*, where this Court indicated that the penalty-phase error in closing argument was substantially prejudicial, thereby leaving independent sentencing review as the sole basis to affirm the death sentences in that case. In addition, it should be noted that the prosecution is seeking reconsideration of the May 4th order in *Kirkland*, and so that order could still be reconsidered and overturned based on its conflict with *Belton*.

In light of the foregoing, the issue raised by defendant is insufficient to warrant untimely de facto reconsideration over a decade late. Defendant's May 11th "motion for order or relief" should be denied.

Respectfully submitted,

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/s Steven L. Taylor
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(Counsel of Record)
Chief Counsel, Appellate Division
Counsel for Amicus Curiae Franklin
County Prosecutor Ron O'Brien

## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by e-mail on May 20, 2016, to Kirsten A. Brandt, brandtk@mcohio.org , counsel for State of Ohio, and to Sharon A. Hicks, Sharon_Hicks@fd.org, counsel for defendant.

/s Steven L. Taylor
STEVEN L. TAYLOR