IN THE COURT OF COMMON PLEAS FOR MARION COUNTY, OHIO
GENERAL DIVISION

STATE OF OHIO,	:	**Case No. 93CR0153**
Plaintiff,	:	**Judge William R. Finnegan**
-vs-	:	**RULING ON DEFENDANT'S MOTION TO DISMISS CAPITAL COMPONENTS PURUSANT TO HURST vs. FLORIDA**
MAURICE MASON,	:	
Defendant.	:	

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This day this case came on before the Court upon the Defendant's Motion to Dismiss Capital Components Pursuant to Hurst v. Florida. The State of Ohio has filed an Opposition to said Motion.

PROCEDURAL STATUS OF THIS CASE

On September 30, 1993, an indictment was filed charging Defendant Maurice A. Mason with aggravated felony murder, rape, and having a weapon while under disability. The indictment also contained a death-penalty specification of committing murder in the course of a rape and further specifications that involved firearms, prior felony, and prior offense of violence.

On July 15, 1994, a judgment entry was filed whereby Judge William Wiedemann accepted a jury's recommendation and sentenced Mason to death for aggravated murder. Due to counsel's ineffective assistance for the sentencing

phase, on October 3, 2008, the United States Court of Appeals for the Sixth Circuit granted Mason a conditional writ of habeas corpus. *Mason v. Mitchell,* 543 F 3d 766, 785 (6th Cir. 2008). Based on the Sixth Circuit's ruling, the matter was remanded to this Court of a new penalty phase hearing, which was scheduled to commence on February 16, 2010.

On February 4, 2010, Mason moved to prohibit the new penalty-phase hearing. Mason argued the time to hold the new penalty phase hearing had expired. On December 13, 2010, Judge Robert Davidson denied the motion. However, on September 4, 2013, the Sixth Circuit agreed with Mason that the State did not comply with its conditional writ by failing to commence a new penalty-phase trial within 180 days of its judgment becoming final. *Mason v. Mitchell,* 729 F 3d 545, 500-51 (6th Cir. 2013). Nevertheless, the panel held that the State could still seek the death penalty at a new penalty-phase trial. *Id.* At 551-52. The United States Supreme Court denied certiorari from the Sixth Circuit's decision on April 28, 2014.

On October 16, 2014, Mason filed an application for DNA testing. As a result of the application, testing of evidentiary items in this case is still pending. Further, the penalty-phase trial is currently scheduled for November 7, 2016.

HURST V. FLORIDA ACCORDING TO THE DEFENDANT

While this matter was awaiting the new penalty-phase trial, on January 12, 2016, the United States Supreme Court issued *Hurst v. Florida*, ___ U.S. , 136 S. Ct. 616 (2016), which held that Florida's capital sentencing laws violated the Sixth Amendment right to trial by jury because it required the judge, not a jury, to make the factual determinations necessary to support a sentence of death. Due to the similarities between Florida's capital sentencing laws and Ohio's, Mason submits that pursuant to *Hurst*, this Court should find Ohio's capital sentencing unconstitutional and therefore dismiss the capital components of this case.

In *Hurst*, a Florida jury had convicted Timothy Hurst of first-degree murder, but did not identify which of the presented theories - premediated murder or felony murder - buttressed their funding. *Hurst*, 136 S. Ct. at 619-20. In Florida, first-degree murder is a capital felony, but the maximum sentence a capital defendant may receive based solely on the conviction is life imprisonment. Fla. State Section 775.082(1). The defendant will receive the death penalty only after an additional sentencing proceeding "results in findings by the court that such person shall be punished by death." *Id.* Otherwise, the defendant is punished by life imprisonment without parole. *Id.*

Accordingly, after Hurst was found guilty of first-degree murder, the judge conducted an evidentiary hearing before the jury. *Hurst*, 136 S. Ct. at 620. At the conclusion of the evidentiary hearing, the jury rendered an "advisory sentence" of death without specifying the factual basis of its recommendation. *Id.* Under Florida law, the trial court must give the jury's recommendation "great weight," but must independently weigh the aggravated and mitigating circumstances before entering a sentence of life imprisonment or death. *Id.* The trial court in Hurst did this, and imposed a death sentence. *Id.*

On post-conviction review, the Florida Supreme Court vacated the sentence for reasons that are not relevant here. *Id.* At Hurst's re-sentencing hearing, a jury again recommended death and the judge so sentenced, basing its decision on the independent findings of aggravating circumstances as well as the jury's recommendation. *Id.*

The United States Supreme Court accepted certiorari of Hurst's appeal to resolve the tension between *Ring v. Arizona*, 536 U.S. 584 (2002) and its earlier decisions, *Hildwin v. Florida*, 490 U.S. 638 (1989) and *Spaziano v. Florida*, 468 U.S. 447 (1984). In *Ring*, the Supreme Court held that the Sixth Amendment requires a jury to find any fact necessary to qualify a capital defendant for a death sentence. *Hurst*, 136 S. Ct. at 621. Although *Ring* had not expressly overruled *Hildwin* and *Spaziano*, cases which approved the constitutionality of Florida's capital sentencing

scheme, *Ring*'s holding seemed to compel such an outcome. *Hurst* laid the confusion to rest, holding that Florida's law "violates the Sixth Amendment in light of *Ring*." *Id.* at 620.

Justice Sotomayor explained in her 8-1 majority opinion that like Arizona, the state whose sentencing scheme was at issue in *Ring*, "Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts." *Id.* at 622. Justice Sotomayor continued: "Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial." *Id.* Because "the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole," and because "a judge increased Hurst's authorized punishment based on her own factfinding," the Court held that "Hurst's sentence violates the Sixth Amendment." *Id.*

In so holding, the Court rejected Florida's argument that the jury's recommendation necessitated the finding of an aggravating circumstance, noting "the Florida sentencing statute does not make a defendant eligible for death until 'findings *by the court* that such person shall be punished by death.'" *Id.* (quoting Fla. Stat. Section 775.082(1)) (emphasis in opinion). Because "[t]he trial court *alone* must find 'the facts. . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating

circumstances,'" the Court found that a Florida jury's function is solely advisory and does not satisfy the constitutional standard outlined by *Ring. Id.* (quoting Section 921.141(3)) (emphasis in original).

OHIO DEATH PENALTY STATUTE IN FEBRUARY, 1993

The controlling law before this Court is the law which was applicable on the date of the murder, February 8, 1993. The applicable law is found in former R.C. 2929.03 which reads as follows:

> "(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.
>
> "(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

"(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

"(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

"(a) By the panel of three judges that tried the offender upon his waiver of the right to trial by jury;

"(b) By the trial jury and the trial judge if the offender was tried by jury.

"(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a decedent in

a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factor in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for thedefense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation.

"The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the' imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

"(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of

counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing arc sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

"If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

"(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(l) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judgesunanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

"(a) Life imprisonment with parole eligibility after serving twenty full years

"(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

"(E) If the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

"(1) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

"(2) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

"(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant

to this section is not final until the opinion is filed.

"(G) Whenever the court or a panel of three judges imposes sentence of death, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court."

Also applicable is former R.C. Section 2929.04, which is as follows:

"(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

"(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

"(2) The offense was committed for hire.

"(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

"(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

"(5) Prior to the offense at bar, the of fender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

"(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

"(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

"(8) The victims of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

"(B) If one or more of the aggravating circumstances listed in division (a) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

"(1) Whether the victim of the offense induced or facilitated it;

"(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

"(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

"(4) The youth of the offender;

"(5) The offender's lack of a significant history of prior criminal convictions and

"(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

"(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

"(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

"The existence of any of the mitigating factors listed on division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing."

Laws of Ohio Volume 139, Senate Bill 1 (1980); State v. Hudson, 93-LW-2905 (Jefferson Ct. of App. 1993).

THE CLAIMS OF THE DEFENDANT

The Defendant in his Motion states that the Ohio death penalty law is similar to the unconstitutional Florida death penalty statute in that under the Ohio statute the recommendation for a death sentence by the jury is not required to be rendered in writing and does not set forth the factual findings underlying the jury's recommendation. He claims that the Ohio statute is also similar in that the trial court must independently consider consider the criteria listed in former R.C. Section 2929.03(D)(3), and then sentence a defendant to death if the trial court finds by proof beyond a reasonable doubt that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors. The Ohio statute, as with the Florida statute, requires a trial court state its specific findings as to the existence of any of the mitigating factors of former R.C. section 2929.04 (B), as well as the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. Former R.C. section 2929.03 (F).

As a result of this procedure, the Defendant claims that Ohio's death penalty statute, which provides for a jury recommendation as to a death sentence, is like the Florida procedure of a death advisory verdict from the jury to the judge, which was held to be not in accord with the Sixth Amendment

right to trial by jury. The Defendant further states that the failure to require a jury to make specific findings about their balancing of the mitigating and aggravating factors leaves the trial judge with having to implement a sentence without the critical findings of the jury. The defendant concludes that absent the factual findings of the jury, and given the advisory nature of the jury's sentencing determination, the Ohio death penalty scheme suffers from the same constitutional deficiencies as the scheme in Florida, and should be held unconstitutional.

THE POSITION OF THE STATE OF OHIO

The State of Ohio maintains that a jury recommendation as to a capital sentence is constitutional. The State also maintains that the holding in Hurst vs. Florida is that the factors, circumstances, and elements that would render the death sentence as an available penalty must be presented to a jury and determined beyond a reasonable doubt, just like an element of the crime itself. The State also argues that the Ohio capital sentencing scheme is well within constitutional bounds, where the aggravating circumstances are enumerated in the indictment and presented to the jury as part of the guilt phase adjudication of the State's case-in-chief. It is sufficient for constitutional purposes, where the jury, not the

judge, determines whether the death penalty is an available sentencing option through a finding of guilt beyond a reasonable doubt on one or more aggravating circumstances.

In short, the State maintains that since the jury in Ohio determines the guilt of enumerated capital specifications beyond a reasonable doubt during the guilt phase of the case, and that the jury determines whether the death penalty is an available sentencing option through a finding of guilt beyond a reasonable doubt on one or more aggravating circumstances, that the Ohio death penalty statute is well within constitutional bounds.

THE OHIO SUPREME COURT COMMENTS ON HURST vs FLORIDA

This Court is aware that the Ohio Supreme Court has made comment in reference to the case of Hurst v. Florida, in the case of State v. Belton, 2016-Ohio-1581 (Ohio 2016). These comments read as follows:

> **{¶ 58}** More recently, the Supreme Court applied *Apprendi* and *Ring* to invalidate Florida's capital-sentencing scheme in *Hurst v. Florida,* 577 U.S., 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). The Florida law at issue in *Hurst* limited the jury's role in capital sentencing to making an advisory recommendation; a trial court was then free to impose a death sentence even if the jury recommended against it. *Id.* at 620. And even when a jury did recommend a death sentence, a trial court was not permitted to follow that recommendation until *the judge* found the existence of an aggravating circumstance. *Id.* at 620, 622. Thus, "Florida [did]

not require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 622. Instead, the trial judge in *Hurst* "increased [the defendant's] authorized punishment based on her own factfinding" when she sentenced him to death. *Id.* The Supreme Court held that Florida's capital-sentencing law, like the Arizona law in *Ring,* violated the Sixth Amendment. *Id*

{¶ 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).

In Belton, the Ohio Supreme Court was faced with the issue that when a capital defendant Ohio elects to waive his or her rights to have a jury determine guilt, if the Sixth Amendment guarantees the defendant a jury at the sentencing phase of the trial. The Ohio Supreme Court was not faced with the issue this court faces, whether the Ohio death penalty statute in effect at the time of this incident is unconstitutional for not being in compliance with the requirements of Hurst v. Florida. This Court notes that Hurst v. Florida was issued by the United States Supreme Court on January 12, 2016, and that State v. Belton was submitted to the Ohio Supreme Court on January 26, 2016, only two weeks later. Given this close time proximity, this Court reviewed the filings in the Belton case on the Ohio Supreme Court online docket website.

A review of the website reveals that Hurst vs. Florida was not mentioned in any filings in the Belton case until January 21, 2016, when Belton filed Supplemental Authorities. The filing did not contain any comments relating to the Hurst case.

At oral argument in the Belton case on January 26, 2016, counsel for Belton mentioned the Hurst case but stated that he was not at oral argument to argue that case.

Counsel for the State of Ohio at oral argument did discuss the Hurst case, and a discussion of approximately eight minutes ensued. However, it is clear that the issue before this court, whether the Ohio death penalty statute in effect in February, 1993, is constitutional in light of the decision of the United States Supreme Court in Hurst vs Florida, was not the issue under consideration in the State vs Belton case. As such, the statements of the Ohio Supreme Court concerning Hurst vs Florida in Belton are dicta.

Nevertheless, this Court shall consider the statements made by the Ohio Supreme Court in the Belton case.

ANALYSIS

In considering the issues raised by the Defendant, this Court finds it helpful to examine the approaches various states have taken in their death penalty statutes. The Court will examine the death penalty statutes of four states.

ARIZONA AND RING VS ARIZONA, 536 U.S. 584 (2002)

In the Ring case, Ring was convicted of felony murder by a jury. Under the Arizona statute, Ring could not be sentenced to death, the maximum statutory penalty for first-degree murder, unless further findings were made. Arizona's first-degree murder statute directed the judge who presided at the trial to conduct a separate sentencing hearing to determine the existence or nonexistence of certain enumerated circumstances for the purpose of determining the sentence to be imposed. The statute further stated that the hearing was to be conducted by the court alone. At the conclusion of the sentencing hearing, the judge was to determine the presence or absence of the enumerated aggravating circumstances and any mitigating circumstances. The Arizona law authorized the judge to sentence the defendant to death only if there was at least one aggravating circumstance and that there are no mitigating circumstances sufficiently substantial to call for leniency. Ring vs. Arizona, Id. at 592.

The United States Supreme Court held the Arizona statute to be unconstitutional, ruling that the Sixth Amendment's jury trial guarantee, made applicable to the states by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury.

FLORIDA AND HURST vs. FLORIDA, ____U.S._____, 136 S. Ct 616 (2016)

Under the Florida statute in Hurst, the maximum sentence a capital felon could receive on the basis of a conviction alone is life imprisonment. The defendant could be sentenced to death, but only if an additional sentence proceeding resulted in findings by the court that such person shall be punished by death. In that proceeding, the judge first conducts an evidentiary hearing before a jury. Next, the jury, by majority vote, renders an "advisory sentence". Notwithstanding that recommendation, the court had to independently find and weigh the aggravating and mitigating circumstances before entering a sentence of life or death.

In the Hurst case, the United States Supreme Court held the Florida statute to be unconstitutional because the Florida statute required not the jury but the judge to make the critical findings necessary to impose the death penalty. The fact that Florida provided an advisory jury was immaterial. The court found that the maximum penalty that could be imposed was unconstitutionally increased by the judge's own fact-finding. Hurst vs Florida, Id., at 619.

STATE OF OHIO vs. MAURICE MASON, THE CASE AT BAR.

Under the law applicable in this case under the Ohio death penalty statute, the maximum sentence the Defendant can receive based on a conviction of aggravated murder alone is life imprisonment with parole eligibility after serving twenty years of imprisonment, former R.C. 2929.03 (A) and (C)(1). If the jury finds the Defendant guilty of any of the aggravating circumstances alleged in the indictment beyond a reasonable doubt, the case proceeds to a sentencing hearing before the jury. As is stated in former R.C. Section 2929.03 (D) (2):

> Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing arc sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

It can be seen that the maximum sentence the Defendant is facing at this point of the proceedings without additional findings would be life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the jury would make a recommendation of a death sentence in the sentencing hearing, this Court would then follow the procedure as stated in former R.C. 2929.03(D)(3):

> Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(l) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:
> "(a) Life imprisonment with parole eligibility after serving twenty full years
> "(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

KANSAS AND KANSAS vs. CARR ___ U.S. ___ 136 S.Ct. 633 (2016)

Kansas vs. Carr was decided by the United States Supreme Court just one week after its Hurst vs. Florida decision.

Although the issue in the Carr case involved an Eighth Amendment issue, as opposed to the Sixth Amendment issue now before this Court, Carr contains a helpful discussion concerning how evidence regarding aggravating and mitigating factors in a capital murder case should be considered by a jury and judge.

For purposes of this Motion, a review of the Kansas death penalty statute is appropriate.

In the Carr case each of the three appealing defendants were convicted of four counts of capital murder, as well as several other felonies. Pursuant to K.S.A. Statute Section 21-6617(b), the State moved the court to conduct a separate hearing to determine whether the defendants should be put to death.

After hearing the evidence, the jury issued verdicts of death on each of the four counts of capital murder, finding unanimously

that the state proved the existence of four aggravating factors beyond a reasonable doubt, and that those aggravating factors outweighed the mitigating circumstances beyond a reasonable doubt. Kansas vs Carr, Id., at 640.

K.S.A. Statute Section 21-6617(f) allows the court to review any jury verdict imposing a sentence of death to ascertain whether the imposition of the death sentence is supported by the evidence. If the court determines that the imposition of the death sentence is not supported by the evidence it shall modify the sentence and sentence the defendant to life without the possibility of parole. When the court enters a judgment modifying the sentencing verdict of the jury, the court shall state its reasons for doing so in a written memorandum which shall become part of the record.

In the Carr case, the trial court did not modify the sentencing verdict of death of the jury.

WHAT HAPPENS IN THE CAPITAL DECISION-MAKING PROCESS?

A good summary of what occurs in the capital decision-making process of a capital murder trial is found in Tuilaepa vs California, 512 U.S. 967 (1994), at 971-973:

> Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision. To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. *Coker* v. *Georgia*, 433 U.S. 584 (1977). To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one "aggravating circumstance" (or its equivalent) at either the guilt or penalty phase. See, *e.g.*, *Lowenfield* v. *Phelps*, 484 U.S. 231, 244-246 (1988); *Zant* v. *Stephens*, 462 U.S. 862, 878 (1983). The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both). *Lowenfield*, *supra*, at 244-246. As we have explained, the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. See *Arave* v. *Creech*, 507 U. S. ___, ___ (1993) (slip op., at 10) ("If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm"). Second, the aggravating circumstance may not be unconstitutionally vague. *Godfrey* v. *Georgia*, 446 U.S. 420, 428 (1980); see *Arave*, *supra*, at ___ (slip op., at 7) (court "`must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer'") (quoting *Walton* v. *Arizona*, 497 U.S. 639, 654 (1990)).
>
> We have imposed a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence. "What is important at the selection stage is an *individualized* determination on the basis of the

character of the individual and the circumstances of the crime." *Zant*, *supra*, at 879; see also *Woodson* v. *North Carolina*, 428 U.S. 280, 303-304 (1976) (plurality opinion). That requirement is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime. *Blystone* v. *Pennsylvania*, 494 U.S. 299, 307 (1990) ("requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence"); see *Johnson* v. *Texas*, 509 U. S. ___, ___ (1993) (slip op., at 11).

The eligibility decision fits the crime within a defined classification. Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to "make rationally reviewable the process for imposing a sentence of death." *Arave*, *supra*, at ___ (slip op., at 7) (internal quotation marks omitted). The selection decision, on the other hand, requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability. The objectives of these two inquiries can be in some tension, at least when the inquiries occur at the same time. See *Romano* v. *Oklahoma*, 512 U. S. ___, ___ (1994) (slip op., at 4) (referring to "two somewhat contradictory tasks"). There is one principle common to both decisions, however: The State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision. See *Gregg* v. *Georgia*, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (procedures must "minimize the risk of wholly arbitrary and capricious action"). That is the controlling objective when we examine eligibility and selection factors for vagueness. Indeed, it is the reason that eligibility and selection factors (at least in some sentencing schemes) may not be "too vague." *Walton*, *supra*, at 654; see *Maynard* v. *Cartwright*, 486 U.S. 356, 361-364 (1988).

OHIO HAS A HYBRID SYSTEM OF SENTENCING IN CAPITAL CASES

The great majority of states with the death penalty commit sentencing decisions as to the imposition of the death penalty to juries. Ohio is one of the minority states that have a hybrid system in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations. See footnote 6 of Ring vs Arizona. In this regard, this Court notes that footnote 6 in Ring incorrectly lists Ohio as a state where the imposition of the death penalty is decided by a jury. Clearly, Ohio is a hybrid system state. Florida is another state that uses the hybrid system.

With the above background, this Court will consider the arguments raised by the parties to this Case.

A KEY ISSUE: WHAT ARE "CRITICAL FINDINGS"?

Critical findings are those findings which are necessary to impose the death penalty. Hurst vs Florida, 136 S. Ct., at 622.

Looking at the Ohio death penalty statutes applicable to this Case, in order to render an accused subject to a penalty of life imprisonment with parole eligibility after serving twenty years of imprisonment, if the indictment contains no death penalty specifications, the critical finding is:

1) the finding by the jury that the defendant is guilty of aggravated murder beyond a reasonable doubt, see former R.C. 2929.03(A);

or, if the indictment contains one or more death penalty specifications, the critical findings by the jury are:

that the accused is guilty of aggravated murder beyond a reasonable doubt;

2) but is not guilty beyond a reasonable doubt of any of the death penalty specifications in the indictment, see former R.C. 2929.03(C)(1).

In order to render an accused subject to a penalty of life imprisonment with parole eligibility after serving twenty full years of imprisonment, if the indictment contains one or more death penalty specifications, the critical findings by the jury are:

1) that the accused is guilty of aggravated murder beyond a reasonable doubt;

2) that the accused is guilty beyond a reasonable doubt of one or more of the death penalty specifications in the indictment;

3) that, after considering the enumerated factors in former R.C. 2929.03(D)(2), the jury does not unanimously find beyond a reasonable doubt that the aggravating factors the accused was found guilty of committing outweigh the mitigating factors; and

4) the jury makes a recommendation to the trial court that the accused be sentenced to a term of life imprisonment with parole eligibility after serving twenty full years of imprisonment, see former R.C. 2929.03(D)(2);

or

1) the finding of the jury that the accused is guilty of aggravated murder beyond a reasonable doubt;

2) the finding of the jury that the accused is guilty of one or more of the death penalty specifications beyond a reasonable doubt;

3) the jury unanimously finds beyond a reasonable doubt that the aggravating factors the accused was found guilty of committing outweigh the mitigating factors;

4) the jury unanimously recommends to the court that the death penalty be imposed; and,

5) the trial judge, after considering the factors enumerated in former R.C. 2929.03(D)(3), does not find by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, see former R.C. 2929.03(D)(3)(a).

In order to render an accused subject to a penalty of life imprisonment with parole eligibility after serving thirty full years of imprisonment, if the indictment contains one or more death penalty specifications, the critical findings by the jury are:

1) that the accused is guilty of aggravated murder beyond a reasonable doubt;

2) that the accused is guilty beyond a reasonable doubt of one or more of the death penalty specifications in the indictment;

3) after considering the enumerated factors in former R.C. 2929.03(D)(2), the jury does not unanimously find beyond a reasonable doubt that the aggravating factors the accused was found guilty of committing outweigh the mitigating factors; and

4) the jury makes a recommendation to the trial court that the accused be sentenced to a term of life imprisonment with parole eligibility after serving thirty full years of imprisonment, see former R.C. 2929.03(D)(2);

or

1) the finding of the jury that the accused is guilty of aggravated murder beyond a reasonable doubt;

2) the finding of the jury that the accused is guilty of one or more of the death penalty specifications beyond a reasonable doubt;

3) the jury unanimously finds beyond a reasonable doubt that the aggravating factors the accused was found guilty of committing outweigh the mitigating factors;

4) the jury unanimously recommends to the court that the death penalty be imposed; and,

5) the trial judge, after considering the factors enumerated in former R.C. 2929.03(D)(3), does not find by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, see former R.C. 2929.03(D)(3)(b).

In order to render an accused subject to the death penalty, if the indictment contains one or more death penalty specifications, the critical findings are:

1) the finding of the jury that the accused is guilty of aggravated murder beyond a reasonable doubt;

2) the finding of the jury that the accused is guilty of one or more of the death penalty specifications beyond a reasonable doubt;

3) the jury unanimously finds beyond a reasonable doubt that the aggravating factors the accused was found guilty of committing outweigh the mitigating factors;

4) the jury unanimously recommends to the court that the death penalty be imposed; and,

5) the trial judge, after considering the factors enumerated in former R.C. 2929.03(D)(3) finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, see former R.C. 2929.03(D)(3).

Each and every one of these five critical findings must be made for an accused to become death penalty eligible in Ohio. If any one of these critical findings are lacking, imposition of the death penalty is impossible.

ANOTHER KEY ISSUE: WHAT IS MEANT BY "DEATH PENALTY ELIGIBLE"?

As stated before, the State of Ohio maintains that Ohio's capital sentencing statutes are well within constitutional bounds, because the death penalty is not an available sentencing option unless the jury first determines guilt beyond a reasonable doubt of aggravating circumstances that have been enumerated in the indictment. The State takes the position that when an accused is convicted by the jury in this manner, the defendant becomes death penalty eligible. The State is using the definition of death penalty eligible as the situation of when an accused faces the potential of a death sentence. Using this definition, according to the State, being death penalty eligible would mean that this Court could not subsequently and unconstitutionally increase the maximum possible penalty on the defendant thereafter in the sentencing portion of the hearing.

The Ohio Supreme Court, in its comments on Hurst vs. Florida, appears to consider the term death penalty eligible in the same manner as is advocated by the State in this Case. See State vs Benton, supra, Paragraph 59.

However, in Hurst vs Florida, United States Supreme Court clearly uses the concept of death penalty eligible in a narrower context than that advocated by the State in this Case. As was stated in Hurst, the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death". Hurst vs Florida, 136 S. Ct., at 622. This can only happen in the selection portion of the sentencing hearing.

The United States Supreme Court was using the concept of death penalty eligible in the sense of being applicable when there are findings which actually authorize the imposition of the death penalty on the accused, in the selection phase of the sentencing hearing, and not in the sense that an accused is only potentially facing a death penalty if certain subsequent conditions are met, as in the eligibility phase of the sentencing hearing.

This can be seen from the language in the Hurst opinion where the Supreme Court refuted the argument of the State of Florida that the jury recommendation of a death sentence necessarily included a finding of an aggravated circumstance, qualifying the defendant for the death penalty under Florida law. In its refutation of this argument, the Supreme Court not only commented that the Florida death penalty statute required the trial court alone to find that sufficient aggravating circumstances exist (which occurs during the eligibility portion of the sentencing hearing), but also, that the trial court alone must find that there are insufficient mitigating circumstances to outweigh the aggravating circumstances (something that only occurs in the selection portion of the sentencing hearing.) Hurst vs Florida, Id., at 622.

If the position taken by the State of Ohio in this Case was correct, that the inquiry of eligibility of the death penalty being the maximum penalty is ended once the jury makes a finding of an aggravating circumstance beyond a reasonable doubt, there would be no reason for the United States Supreme Court in Hurst to criticize the Florida statute requiring the court alone to find that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. If the argument of the State of Ohio in this Case was correct, it would make no difference that the trial court alone makes the determination

and weighing of mitigating and aggravating factors to impose the death penalty, since the potential maximum penalty was already fixed once the jury found the Defendant guilty of aggravated murder and an aggravated circumstance.

Clearly this is not the case. The determination of maximum sentence continues into the selection phase of the sentencing hearing.

This court must apply the concept of death penalty eligible as it is used in Hurst vs. Florida.

WHEN DOES THE DEFENDANT IN THIS CASE BECOME DEATH PENALTY ELIGIBLE?

Considering the four state death penalty statutes discussed above, and applying the Hurst concept of death penalty eligible, the defendant in the Ring case in Arizona did not become death penalty eligible until the trial court made the aggravated findings and increased Ring's maximum sentence to a death sentence. This was unconstitutional.

The defendant in the Hurst case in Florida did not become death penalty eligible until the trial court independently found the existence of aggravating factors and made independent findings as to aggravated and mitigating factors,

which increased Hurst's maximum sentence to a death sentence. This was held unconstitutional.

The defendants in the Carr case in Kansas did not become death penalty eligible until the jury returned death verdicts on each of the four capital counts against each defendant. As of the time of the death verdicts of the jury were returned, the maximum sentence the defendants will receive is the death sentence. There was no way the Kansas trial judge could increase the sentence over the death verdicts issued by the jury; the trial judge could only reduce the sentence to life imprisonment if the judge found the jury death verdicts to be unsupported by the evidence. This is constitutional.

Using the concept of death penalty eligible as in the Hurst case, the Defendant in the case at bar would not become death penalty eligible unless the jury, at the sentencing hearing, recommends a death sentence to this Court, and this Court, after considering the mitigating factors and comparing them to the aggravated factors found by the jury in this case, finds beyond a reasonable doubt that the mitigating factors do not outweigh the aggravating factors found by the jury in this case. Only at that point would this Defendant be death penalty eligible. Former R.C. 2929.03(D)(3).

This procedure would allow this Court to increase the maximum penalty on the Defendant from the maximum potential sentence of life imprisonment with the possibility of parole after thirty full years in prison, at the time the jury makes its death penalty recommendation to the Court, to a death sentence. This is an increase of the maximum sentence that cannot be imposed on the defendant, similar to those which were forbidden in Ring vs Arizona and Hurst vs Florida. This procedure is unconstitutional because "the Sixth Amendment requires the jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Hurst vs Florida, 136 S Ct., at 619.

UNDER HURST VERSUS FLORIDA, THE SIXTH AMENDMENT REQUIRES THAT THE SPECIFIC FINDINGS AUTHORIZING THE IMPOSITION OF THE SENTENCE OF DEATH BE MUST BE MADE BY THE JURY

In Spaziano vs Florida, 468 U.S. 447 (1984) and Hildwin vs Florida, 490 U.S. 638 (1989), the United States Supreme Court held that the Sixth Amendment did not require that the specific findings authorizing the imposition of the sentence of death be made by the jury. The Ohio Supreme Court cited these cases for this proposition as partial support for upholding the constitutionality of the Ohio death penalty statute, in State vs Davis, 139 Ohio

St. 3d 122, 2014-Ohio-1615 and State vs Dunlap, 73 Ohio St. 3d 308, 1995-Ohio-243.

In Hurst vs Florida, United States Supreme Court stated that the above-stated proposition of law in the Hildwin and Spaziano cases was wrong and irreconcilable with Apprendi vs New Jersey, 530 U.S. 466 (2000). Hurst vs Florida, 136 S. Ct., at 623. As a result, the Sixth Amendment does require that the specific findings authorizing the imposition of the death penalty must be made by the jury.

The Ohio death penalty statutes in effect at the time of the murder in this case had no provision for the jury making specific findings which would authorize the imposition of the death penalty. Rather, the trial court, and not the jury, is required to make the specific findings, under former Ohio R.C. 2929.03 (F). Also, the jury's recommendation for a death penalty does not authorize the death penalty; only the trial judge's weighing of the mitigating and aggravating factors, and the trial judge's specific findings, authorize the imposition of the death penalty. For this reason also, the Ohio death penalty statute in effect in February, 1993 is unconstitutional.

THE OHIO SURPEME COURT COMMENTS ON

HURST V. FLORIDA

The Ohio Supreme Court in its comments on the Hurst vs. Florida case, pointed out that the Ohio death penalty statute, in contrast to the statutes held unconstitutional in Arizona and Florida, does not proceed to the sentencing phase until after the fact-finder has found a defendant guilty of one or more aggravating circumstances.

This court notes that whether the jury finds a defendant guilty of one or more aggravating circumstances in the sentencing phase of the trial, rather than the guilt phase, is an insignificant difference for constitutional analysis purposes. Tuilaepa vs California, supra, makes clear that this determination may be made either in the guilt phase or sentencing phase of the trial. In the Kansas death penalty statute in Carr, even the possibility of a death penalty being imposed is not possible until the prosecuting attorney makes a motion for the court to conduct a separate hearing to determine whether the defendant will be sentenced to death. The motion is not filed until after the defendant has

already been convicted of capital murder. See K.S.A. 21-6617(b). Likewise, the Florida Legislature, presumably in response to the Hurst vs Florida case, has amended its death penalty statutes. It should be noted that in the revised statute, Florida still has the finding of aggravating factors by the jury being made in the sentencing portion of the trial, and not during the guilt phase. See Fla. Stat. 921.141, effective October 1, 2016.

It is true, as stated by the Ohio Supreme Court in State v. Belton, that the determination of guilt of an aggravating circumstance renders the defendant potentially eligible for a capital sentence.

The Ohio Supreme Court also stated in Belton that 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. However, this Court respectfully disagrees that the determination of guilt of an aggravated circumstance alone is what renders a defendant eligible for the imposition of a capital sentence. The ultimate eligibility for a capital sentence in Ohio does not occur until the trial judge makes his or her own determination based on the factors contained in former R.C. Section 2929.03(D)(3), that a death sentence is appropriate. Even the jury recommendation for a death

sentence, pursuant to former R.C. Section 2929.03(D)(2), does not by itself make a defendant eligible for imosition of a capital sentence. Again, the jury's determination of guilt of an aggravating circumstance, by itself, only renders the defendant eligible for a maximum sentence of life imprisonment with parole eligibility after serving thirty years of imprisonment on the offender, former R.C. 2929.03(D)(2)(b).

The Ohio Supreme Court also noted that the trial judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence. To this statement this Court agrees that the Ohio statute is different from the Florida statute in Hurst in this regard; however, this fact does not save the Ohio death penalty statute from being unconstitutional under the Sixth Amendment of the United States Constitution as interpreted in Apprendi vs New Jersey, Ring vs Arizona and Hurst vs Florida.

As to the case law cited by the Ohio Supreme Court in Paragraph 60 of the Belton decision, the continued viability of those cases is doubtful given the statements of the United States Supreme Court in Hurst vs Florida.

It is clear that the determination of factors by the trial court under the Ohio death penalty statute involves factual determinations. The United States Supreme Court in Kansas vs Carr stated that the finding of aggravated factors is a purely factual matter, and that the determination of mitigating factors has both a factual component and a judgmental component. The Supreme Court went on to state that the determination that mitigation exists is largely a judgment call, in that what one juror may consider as mitigating another might not, and that the ultimate question of whether mitigating circumstances outweigh the aggravating circumstances is largely a question of mercy. Kansas vs Carr, 136 S. Ct., at 642.

Because the determination of guilt of an aggravated circumstance, by itself, only renders the defendant eligible for a maximum sentence of life imprisonment with eligibility of parole after thirty full years of imprisonment under former R.C. 2929.03(D)(2), it is not only possible, but is a requirement that the trial court make additional factual determinations in weighing the mitigating and aggravating factors during the sentencing phase that will expose a defendant to the greater punishment of death. As Ohio's death penalty statute in effect at the time of this incident, unlike the Kansas death penalty statute, requires the judge, and not the jury, to independently make the

determination for the death sentence, and the trial judge to independently weigh the factors necessary to impose a sentence of death, with the jury recommendation for death being only advisory, this Court finds the death penalty statute provisions in former R.C. Section 2929.03(D) and (E) to be unconstitutional under the Sixth Amendment of the United States Constitution, as interpreted by the United States Supreme Court in the cases of Apprendi vs New Jersey, Ring vs Arizona and Hurst v. Florida.

Having determined that the death penalty statute is unconstitutional, this Court must next determine whether the Defendant is eligible for the sentence of life imprisonment with eligibility of parole after twenty or thirty full years of imprisonment.

BECAUSE DEATH MAY NOT BE IMPOSED IN THIS MATTER, THE SENTENCING PROCEDURE IN FORMER R.C. 2929.03(D) IS NOT APPLICABLE.

Former R.C. 2929.03(D)(1) provided that the sentencing procedure contained in R.C. 2929.03(D) was applicable when death may be imposed as a penalty for aggravated murder.

As this Court has found the death penalty statute provisions in former R.C. 2929.03(D) and (E) to be unconstitutional, the death penalty may not be imposed in this Case, and the sentencing procedure in former R.C. 2929.03(D) is no longer applicable in this Case.

SUMMARY

The United States Supreme Court in Tuileapa vs California made clear that there are two aspects of the capital decision-making process. The first determination, called the eligibility determination, requires the jury to find the defendant guilty of murder, and at least one aggravating circumstance at either the guilt or penalty phase of the trial. There is a second determination of death penalty eligibility by the sentencer to determine whether a defendant eligible for the death penalty should in fact receive that sentence. This is called the selection determination.

Ohio's death penalty statutes, like the Florida statute struck down in Hurst vs Florida, does not make a defendant eligible for death until findings by the court that such person shall be put to death, former R.C. 2929.03(D)(3). The trial court in Ohio, similar to the Florida court in Hurst, must weigh by itself, the aggravating and mitigating factors before it in determining whether the death sentence should

be imposed, former R.C. 2929.03(D)(3). Also like the struck down Florida death penalty statute, the death penalty recommendation of the jury is only advisory, and is not binding on the court. Former R.C. 2929.03(D)(2).

Hurst vs Florida requires the jury to make the critical findings necessary to impose the death penalty. Under the Ohio death penalty statute, the critical findings necessary to impose the death penalty, involving the weighing of aggravating and mitigating factors, is done by the trial court, and not the jury. The recommendation for imposition of the death penalty by the jury is not constitutionally sufficient, according to Hurst vs Florida.

Apprendi vs New Jersey holds that the Sixth Amendment does not permit a defendant to be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.

Kansas vs Carr makes clear that in the selection portion of a capital sentencing case, that there is a factual component in the decision as to whether the defendant should actually receive the death penalty.

The maximum penalty the Defendant faces, should the jury recommend to this Court that the death penalty be imposed, and without any additional fact-finding required by this Court pursuant to former R.C. 2929.03(D)(3), is life imprisonment with possibility of parole after having served thirty full years

imprisonment. The maximum penalty against the Defendant can be raised to a death sentence only if this Court, independent of the jury, weighs the required factors in former R.C. 2929.03(D)(3) and finds that the aggravating factors the defendant was found guilty of committing outweigh the mitigating factors.

The additional fact-finding required by this Court independent of the jury under former R.C. 2929.03(D)(3), which raises the maximum penalty which can be imposed upon the Defendant to death, violates the Sixth Amendment requirement that a jury, not a judge, find each fact necessary to impose a sentence of death, as interpreted by Apprendi vs New Jersey, Ring vs Arizona and Hurst vs Florida.

Hurst vs Florida makes clear that the Sixth Amendment requires that the specific findings authorizing the imposition of the death penalty be made by the jury. The Ohio death penalty statute applicable to this case has no provision for the jury to make specific findings relating to the weighing of aggravating and mitigating factors. As a result, the Ohio death penalty statute applicable in this case violates the Sixth Amendment as interpreted in Hurst vs Florida.

As the Ohio death penalty statute applicable in this Case is unconstitutional for purposes of imposing the death penalty, death may not be imposed as a penalty in this case, and pursuant to former R.C. 2929.03(D)(1), the provisions for the hearing provided under former R.C. 2929.03 (D) are no longer applicable.

The Motion of the Defendant to Dismiss Capital Components Pursuant to Hurst vs Florida is sustained.

William R. Finnegan

Judge William R. Finnegan

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