No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Charles Lorraine,

Petitioner,

-v-

State of Ohio,

Respondent.

On Petition for Writ of Certiorari to
the Ohio Eleventh Appellate District, Trumbull County Court of Appeals

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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State v. Lorraine

Court of Appeals of Ohio, Eleventh Appellate District, Trumbull County

August 20, 2018, Decided

CASE NO. 2017-T-0028

Reporter
2018-Ohio-3325 *; 2018 Ohio App. LEXIS 3596 **

STATE OF OHIO, Plaintiff-Appellee, - vs - ***CHARLES*** L. ***LORRAINE***, Defendant-Appellant.

Prior History: [1]** Criminal Appeal from the Trumbull County Court of Common Pleas. Case No. 86 CR 182.

State v. ***Lorraine***, 2007-Ohio-6724, 2007 Ohio App. LEXIS 5905 (Ohio Ct. App., Trumbull County, Dec. 14, 2007)

Disposition: Affirmed.

Core Terms

trial court, sentencing, post conviction relief, motion for a new trial, death sentence, retroactively, sentencing hearing, Mitigation, aggravated, death penalty, murder, days, motion for leave, unavoidably, cases, appeals, Counts

Case Summary

Overview

HOLDINGS: [1]-Defendant could not escape the fact that Crim.R. 33 was not the proper vehicle to obtain the relief he seeks by captioning his motion, "Motion for New Mitigation Trial," when it was, in fact, a motion for a new sentencing hearing; [2]-Even if Crim.R. 33 was the proper vehicle, defendant did not file his motion for leave until one year after the Hurst decision was issued; [3]-The United States Supreme Court did not expressly hold that Hurst v. Florida was to be applied retroactively to cases on collateral review; [4]-Ohio's death penalty scheme did not violate U.S. Const. amend. VI.

Outcome
Judgment affirmed.

Counsel: Dennis Watkins, Trumbull County Prosecutor; ***Charles*** L. Morrow, LuWayne Annos, and Ashleigh Musick, Assistant Prosecutors, Warren, OH (For Plaintiff-Appellee).

Timothy Young, Ohio Public Defender; Randall L. Porter and Adrienne M. Larimer, Assistant Ohio Public Defenders, Columbus, OH; and Marc S. Triplett, Bellefontaine, OH (For Defendant-Appellant).

Judges: TIMOTHY P. CANNON, J. COLLEEN MARY O'TOOLE, J., concurs in judgment only, DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

Opinion by: TIMOTHY P. CANNON

Opinion

TIMOTHY P. CANNON, J.

[*P1] Appellant, ***Charles*** L. ***Lorraine***, appeals from the March 2, 2017 judgment entry of the Trumbull County Court of Common Pleas, denying his "Motion for Leave to File a Motion for New Mitigation Trial." The trial court's judgment is affirmed.

[*P2] Appellant was charged with various crimes, including aggravated murder, in 1986. The charges stemmed from the stabbing deaths of Raymond and Doris Montgomery. Appellant had befriended the Montgomerys, who hired him to do small tasks at their home. At the time of the murders, Mr. Montgomery was 77 years of age; Mrs. Montgomery was 80 **[**2]** years of age and bedridden.

[*P3] On the evening of May 5, 1986, appellant went to the Montgomery home and told Mr. Montgomery he had left an item in an upstairs room. When they reached the room, appellant attacked Mr. Montgomery from behind and stabbed him five times, killing him. Appellant then went to Mrs. Montgomery's room and stabbed her nine times, killing her. Appellant burglarized the home before he retired to a local tavern, where he bragged to friends about the killings. He and one of the friends then broke into a nearby house, stealing money and a car, before returning to the Montgomery home for further looting.

[*P4] The following day, while at the police station on other business, appellant confessed the murders to the police.

[*P5] On May 9, 1986, the Trumbull County Grand Jury returned a multi-count indictment against appellant. Relevant to this appeal are Counts One through Four. Counts One and

Three were for the aggravated murder of Mrs. Montgomery; Counts Two and Four were for the aggravated murder of Mr. Montgomery. All four counts carried two death penalty specifications pursuant to former R.C. 2929.04(A)(5) & (7): that the aggravated murders were committed while committing aggravated robbery and in **[**3]** a course of conduct involving the purposeful killing of two or more people.

[*P6] The case came on for trial in the fall of 1986. The jury returned its verdict on November 19, 1986, finding appellant guilty on each count of aggravated murder and each death penalty specification. The sentencing phase ensued. The trial court removed Counts Three and Four from the jury's consideration. On December 4, 1986, a unanimous jury found the aggravating circumstances of the murders outweighed any mitigating factors by proof beyond a reasonable doubt and recommended the death sentence be imposed. After independently weighing the aggravating circumstances and mitigating factors, the trial court imposed the death sentence upon appellant. On December 9, 1986, the trial court issued its sentencing opinion.

[*P7] This court affirmed appellant's convictions and death sentence on August 10, 1990. *State v.* ***Lorraine***, 11th Dist. Trumbull No. 3838, 1990 Ohio App. LEXIS 3324, 1990 WL 116921 (Aug. 10, 1990). The Ohio Supreme Court affirmed our decision in *State v.* ***Lorraine***, 66 Ohio St.3d 414, 613 N.E.2d 212 (1993), and the United States Supreme Court denied certiorari in ***Lorraine*** *v. Ohio*, 510 U.S. 1054, 114 S. Ct. 715, 126 L. Ed. 2d 679 (1994).

[*P8] On September 30, 1994, appellant filed a postconviction relief petition, pursuant to former R.C. 2953.21, which the trial court denied. This court affirmed the trial court's decision in *State v.* ***Lorraine***, 11th Dist. Trumbull No. 95-T-5196, 1996 Ohio App. LEXIS 642, 1996 WL 207676 (Feb. 23, 1996) **[**4]** , and appellant appealed our decision to the Ohio Supreme Court.

[*P9] On April 10, 1996, while the foregoing appeal was still pending before the Ohio Supreme Court, appellant filed a motion for relief from the trial court's judgment that denied his petition for postconviction relief, pursuant to Civ.R. 60(B). The trial court overruled appellant's Civ.R. 60(B) motion. This court reversed that decision because the trial court was without jurisdiction while the appeal was pending. *State v.* ***Lorraine***, 11th Dist. Trumbull No. 96-T-5494, 1997 Ohio App. LEXIS 5564, 1997 WL 799551 (Dec. 12, 1997).

[*P10] Upon remand, the trial court granted appellant's Civ.R. 60(B) motion for relief from judgment and reactivated the case for disposition of appellant's petition for postconviction relief. The trial court subsequently denied, for a second time, the petition for postconviction relief. This court affirmed that decision in *State v.* ***Lorraine***, 11th Dist. Trumbull No. 99-T-0060, 2000 Ohio App. LEXIS 3982, 2000 WL 1262447 (Sept. 1, 2000).

[*P11] Appellant then raised his postconviction issues in the United States District Court for the Northern District of Ohio in a petition for writ of habeas corpus. The district court granted habeas relief and set aside appellant's death sentence; the Sixth Circuit Court of Appeals reversed that ruling and reinstated **[**5]** the death sentence. ***Lorraine*** *v. Coyle*, 291 F.3d 416 (6th Cir.2002). The United States Supreme Court denied certiorari. ***Lorraine*** *v. Coyle*, 538 U.S. 947, 123 S. Ct. 1621, 155 L. Ed. 2d 489 (2003).

[*P12] On June 9, 2003, appellant filed a second petition for postconviction relief in the trial court, alleging a claim of mental retardation under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), which the trial court denied. This court reversed the trial court's ruling and ordered the trial court to conduct a full evidentiary hearing on remand and to appoint experts to evaluate whether appellant is, in fact, mentally retarded. *State v.* ***Lorraine***, 11th Dist. Trumbull No. 2003-T-0159, 2005-Ohio-2529.

[*P13] Upon remand, the trial court ordered that appellant's institutional mental health records be unsealed. This court affirmed that decision in *State v.* ***Lorraine***, 11th Dist. Trumbull No. 2006-T-0100, 2007-Ohio-6724. The matter was set for an evidentiary hearing. Appellant appeared in court, with counsel, and informed the trial court that he wished to waive his right to the hearing; the trial court accepted appellant's written waiver. The trial court subsequently found that appellant was not mentally retarded under *Atkins* and denied appellant's second petition for postconviction relief on March 1, 2010. Appellant did not file a notice of appeal from that entry.

[*P14] On January 11, 2017, appellant filed **[**6]** a "Motion for Leave to File a Motion for New Mitigation Trial," which is the subject of the instant appeal. The arguments raised in this motion are based on a recent opinion of the United States Supreme Court, *Hurst v. Florida*, U.S. , 136 S.Ct. 616, 193 L. Ed. 2d 504 (2016).[1] The *Hurst* Court held Florida's death penalty sentencing scheme violated the Sixth Amendment right to have a jury, not a judge, find the facts that support the decision to sentence a defendant to death. *Id.* at 622, applying *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) and citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Appellant argues Ohio's death penalty sentencing scheme similarly violates the Sixth Amendment.

[*P15] Appellant asserted the trial court should grant him leave to file a delayed motion for a "new mitigation trial," under Crim.R. 33(A)(1), (4), and (5), because he "could not have anticipated" the holding in *Hurst* and, thus, "could not have filed his motion for new trial within fourteen days of the imposition of sentence." Appellee responded, in part, that Crim.R. 33 is not designed for the relief sought by appellant, i.e. a "new mitigation trial,"

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[1] On January 12, 2017, appellant brought the same arguments before the Ohio Supreme Court in a "Motion for Relief Pursuant to Supreme Court Rule of Practice 4.01." The motion was summarily denied on March 15, 2017. *See 03/15/2017 Case Announcements*, 2017-Ohio-905.

and that the trial court should construe the motion as a petition for postconviction relief under R.C. 2953.21.

[*P16] The trial court denied the motion on March 2, 2017. The trial court found the motion was time barred, whether considered pursuant to Crim.R. 33 or R.C. 2953.21. The trial court further found **[**7]** the motion was substantively meritless and that Ohio's death penalty scheme is sufficiently different from what was invalidated in *Hurst* to survive constitutional scrutiny.

[*P17] Appellant filed a timely appeal and raises one assignment of error for our review:

[*P18] "The trial court erred when it denied ***Lorraine***'s motion for leave to file his motion for a new trial."

[*P19] Appellant first argues the trial court misconstrued the applicable law concerning whether his motion was timely filed. This argument raises an issue of law we review de novo. *See, e.g.*, *State v. Fortune*, 11th Dist. Lake No. 2014-L-117, 2015-Ohio-4019, ¶16, 42 N.E.3d 1224 (citation omitted).

[*P20] Appellant asserts his proposed "Motion for a New Mitigation Trial" is based on the provisions in Crim.R. 33(A), which governs motions for new trial. The timeliness of motions for new trial is governed by Crim.R. 33(B), which states:

> Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a **[**8]** new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

[*P21] The jury verdict in appellant's case was rendered in 1986; thus, the trial court was required to determine whether appellant was "unavoidably prevented" from filing his motion within fourteen days of the verdict. The trial court did not engage in this analysis. It instead stated: "[T]he Court finds the motion is untimely. Pursuant to Crim.R. 33(B), motions such as this must be filed within fourteen days after the verdict was rendered. ***Lorraine*** is entirely outside this time frame. Therefore, the Court finds no basis on which to grant leave to file a request under Crim.R. 33."

[*P22] We agree with appellant that the trial court did not engage in the proper analysis regarding the timeliness of a delayed motion for new trial, pursuant to Crim.R. 33(B). *See State v. Trimble*, 11th Dist. Trumbull No. 2013-P-0088, 2015-Ohio-942, ¶18, 30 N.E.3d 222

(without a determination of whether appellant was "unavoidably prevented," this court is left with an insufficient record to review).

[*P23] We conclude, however, that this error was harmless, as the basis for appellant's motion—to **[**9]** wit, an alleged constitutional violation that occurred during the sentencing proceedings—is not appropriately raised in a Crim.R. 33 motion for new trial.

[*P24] In *Davie*, this court held "there is no provision in the Ohio Criminal Rules that provides for a new sentencing hearing." *State v. Davie*, 11th Dist. Trumbull No. 2007-T-0069, 2007-Ohio-6940, ¶8. Appellant argues this court subsequently ruled otherwise, with respect to the propriety of seeking sentencing relief in a motion for new trial, in *State v. Jackson*, 190 Ohio App.3d 319, 2010-Ohio-5054, 941 N.E.2d 1221 (11th Dist.).

[*P25] In *Jackson*, the defendant filed a "Motion for New Trial and/or Sentencing Hearing." The trial court denied this motion because the motion for new trial was untimely under Crim.R. 33(B) and because there is no provision in the Ohio Criminal Rules for a new sentencing hearing. On appeal, this court reversed the trial court's judgment and remanded the case for the trial judge to "personally review and evaluate the appropriateness of the death penalty, prepare an entirely new sentencing entry as required by R.C. 2929.03(F), and conduct whatever other proceedings are required by law and consistent with this opinion." *Id.* at ¶29, citing *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶167, 850 N.E.2d 1168.

[*P26] However, this court neither relied on nor overruled *Davie* in that decision because the cases were distinguishable: our **[**10]** holding in Jackson was not based on the applicability of Crim.R. 33, but on the Ohio Supreme Court's holding in *Roberts*. *Id.* at ¶28-29. In *Roberts*, the Ohio Supreme Court had vacated the defendant's death sentence due to improper ex parte communication between the prosecution and the trial court judge. Because the trial court judge had admitted in an affidavit that the same drafting procedures and ex parte communication involving the sentencing entry that had occurred in *Roberts* also took place in *Jackson*, that defendant was entitled to the same relief the Ohio Supreme Court had afforded the defendant in *Roberts*. *Id.* at ¶29; *see also id.* at ¶43 (Cannon, Trapp, JJ., concurring) ("Based on the holding in *Roberts* as well as the trial judge's affidavit opposing disqualification filed in this case, * * * the only proper disposition of this matter is for the trial court to proceed with resentencing.").

[*P27] Appellant's argument is not well taken; our holding in *Davie* was not compromised by our holding in *Jackson*. There is no provision in Crim.R. 33, or in any Ohio Criminal Rule, that provides for a new sentencing hearing. *Davie, supra, at ¶8*. Appellant cannot escape the fact that Crim.R. 33 is not the proper vehicle to obtain the relief **[**11]** he seeks by captioning his motion, "Motion for New Mitigation Trial," when it is, in fact, a motion for a new sentencing hearing.

[*P28] We further note that, even if Crim.R. 33 was the proper vehicle, appellant could not succeed on his motion for leave to file a delayed motion for new trial. Appellant argues he was "unavoidably prevented" from filing a timely motion because the basis for his motion, *Hurst v. Florida*, was decided 30 years after he was sentenced to death. Appellant, however, was also required to file his motion for leave within a "reasonable time" after discovering the basis for his motion. *See* *State v. Elersic*, 11th Dist. Lake No. 2007-L-104, 2008-Ohio-2121, ¶25-29, quoting *State v. York*, 2d Dist. Greene No. 2000 CA 70, 2001-Ohio-1528, 2001 WL 332019, *3-4 (Apr. 6, 2001) (emphasis sic) ("'Although Crim.R. 33(B) is silent regarding a time limit for the filing of a motion for leave to file a delayed motion for new trial * * * a trial court may require a defendant to file his motion for leave to file a motion for new trial *within a reasonable time*.'"). Appellant did not meet this requirement, as he did not file his motion for leave until one year after the *Hurst* decision was issued.

[*P29] After finding appellant's motion untimely under Crim.R. 33, the trial court construed the motion **[**12]** as a petition for postconviction relief, pursuant to R.C. 2953.21. "[W]here a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21." *State v. Reynolds*, 79 Ohio St.3d 158, 160, 1997- Ohio 304, 679 N.E.2d 1131 (1997); *see also* *Davie, supra, at ¶9*, quoting *State v. Foti*, 11th Dist. Lake No. 2006-L-138, 2007-Ohio-887, ¶12 ("'a criminal defendant who files a motion to vacate or correct his or her sentence on the ground that his or her constitutional rights have been violated necessarily embraces the postconviction relief statutes'").

[*P30] The postconviction relief statutes provide, in relevant part:

> Any person who has been convicted of a criminal offense * * * and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States * * * may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief.

R.C. 2953.21(A)(1)(a); *see also* R.C. 2953.21(A)(3) ("a person who has been sentenced **[**13]** to death may ask the court to render void or voidable * * * the sentence of death").

[*P31] At the time appellant was convicted and sentenced to death, the postconviction relief statute did not contain any time limitation for filing. Effective September 21, 1995, R.C. 2953.21 was amended to provide that a petition "shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication," or, if no appeal is taken, "no later than one hundred eighty days after the expiration of the time for filing the appeal."

Former R.C. 2953.21(A)(2).[2] Petitioners who were sentenced prior to the amendment were required to file their petition within one year from September 21, 1995, the effective date of the amendment. *State v. Moore*, 4th Dist. Pike No. 01CA674, 2002-Ohio-5748, ¶10; *State v. McDonald*, 6th Dist. Erie No. E-04-009, 2005-Ohio-798, ¶15; *State v. Burke*, 10th Dist. Franklin No. 02AP-677, 2002-Ohio-6840, ¶6-8 (all citing Section 3, Am.Sub.S.B. No. 4; 146 Ohio Laws, Part IV, 7826); *see also State v. Mitchell*, 11th Dist. Portage Nos. 2017-P-0007 & 2017-P-0009, 2017-Ohio-8440, ¶27.

[*P32] A convicted offender may file an untimely or a successive petition for postconviction relief when, as is relevant here, both of the following apply:

> (a) * **[**14]** * * [T]he United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.
> (b) The petitioner shows by clear and convincing evidence that, * * * but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

R.C. 2953.23(A)(1) (formerly R.C. 2953.23(A)(1)(b) & (A)(2)).

[*P33] Here, the trial court stated: "In addition, if the Court were to construe ***Lorraine***'s motion as a post-conviction relief request pursuant to R.C. 2953.21, the Court finds no basis on which to grant such a request. The Court finds such a post-conviction request would be time barred as the request was filed well beyond the 180-day statutory period."

[*P34] Again, the trial court did not engage in the proper analysis regarding the timeliness of the motion, even when construed as a petition for postconviction relief, because it applied the wrong time limitation for filing and it did not review the exceptions to timeliness outlined in R.C. 2953.23(A). We again conclude, however, that this error was harmless.

[*P35] First, appellant has not raised this error on appeal, instead insisting his motion was not **[**15]** a petition for postconviction relief and should not be construed as such. Because he has repeatedly emphasized before the trial court and on appeal that his motion was only intended to be considered as a Crim.R. 33 motion for new trial, we agree to proceed on that basis. *See State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522.

[*P36] We further recognize, however, that appellant's insistence in this regard appears to be an effort to avoid the retroactivity requirement found in R.C. 2953.23(A)(1)(a). In other words, appellant's motion could only be successful, when construed as a petition for postconviction relief, if *Hurst v. Florida* recognized a new federal right that applies retroactively to persons in appellant's situation.

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[2] The statute currently provides for three hundred sixty-five days.

[*P37] A new rule issued by the United States Supreme Court is not retroactively applicable to cases on collateral review unless the United States Supreme Court expressly holds it to be retroactive. *Tyler v. Cain*, 533 U.S. 656, 663, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001). "In *Tyler*, the Court acknowledged that, 'with the right combination of holdings,' it could 'make a rule retroactive over the course of two cases.'" *In re Zambrano*, 433 F.3d 886, 888, 369 U.S. App. D.C. 119 (D.C.Cir.2006), quoting *Tyler, supra*, at 666. This is only possible, however, "if the holdings in those cases necessarily dictate retroactivity of the new rule." *Tyler, supra*, at 666.

[*P38] Here, the United States Supreme Court did not expressly hold that *Hurst v. Florida* ***[**16]*** was to be applied retroactively to cases on collateral review. Additionally, the holding in *Hurst* was an application of *Ring*, which held that capital defendants "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring, supra*, at 589; *see Hurst, supra*, at 622 ("In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment.)." And the United States Supreme Court has expressly held that *Ring* does *not* apply retroactively to cases on collateral review:

> The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review.

Schriro v. Summerlin, 542 U.S. 348, 358, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004); *see also Holmes v. Neal*, 816 F.3d 949, 954 (7th Cir.2016). Thus, the possibility of a "*Tyler* two-step" does not assist appellant in his attempt to retroactively apply the holding in *Hurst* to a **[**17]** collateral review of his sentence. *See Zambrano, supra*, at 888.

[*P39] Appellant's final issue presented for our review is whether the trial court erred in holding that Ohio's death penalty scheme does not violate a defendant's right to a jury trial, as presented in *Hurst*. In that regard, the trial court stated:

> Even if the Court did not find the requests were time barred as explained herein, the Court finds the reliance of ***Lorraine*** upon the *Hurst v. Florida*, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), decision is misplaced. '*Hurst*, *** does not invalidate Ohio's capital sentencing scheme because Ohio's scheme is materially different from Florida's.' *McKnight v. Bobby*, S.D.Ohio No. 2:09-CV-059, 2017 U.S. Dist. LEXIS 21946, 2017 WL 631411, *3-4. In fact, the Ohio mechanism provides an additional layer of protection not present in *Hurst*. Id. Indeed, 'Ohio's capital-sentencing scheme is unlike the laws at

issue in *Ring* and *Hurst*.' *State v. Belton*, 2016-Ohio-1581, ¶59, 149 Ohio St. 3d 165, 74 N.E.3d 319.

[*P40] Appellant asserts the trial court's reliance on *McKnight* and *Belton* is misplaced. It is well settled, however, that a reviewing "'court will not reach constitutional issues unless absolutely necessary.'" *State v. Ferry*, 11th Dist. Lake No. 2007-L-217, 2008-Ohio-2616, ¶19, quoting *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, ¶9, 814 N.E.2d 1201, citing *In re Miller*, 63 Ohio St.3d 99, 110, 585 N.E.2d 396 (1992) and *Hall China Co. v. Public Utilities Com.*, 50 Ohio St. 2d 206, 210, 364 N.E.2d 852 (1977). Based on our determinations above, it is not absolutely necessary to address this constitutional issue, and we therefore **[**18]** decline to do so. We further note, however, that the Ohio Supreme Court recently rejected this argument in *State v. Mason*, Slip Opn. No. 2018-Ohio-1462: "Ohio law requires the critical jury findings that were not required by the laws at issue in *Ring* and *Hurst*. *See* R.C. 2929.03(C)(2). Ohio's death-penalty scheme, therefore, does not violate the Sixth Amendment." *Id.* at ¶21.

[*P41] Appellant's sole assignment of error is without merit.

[*P42] The judgment of the Trumbull County Court of Common Pleas is hereby affirmed.

COLLEEN MARY O'TOOLE, J., concurs in judgment only,

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

Concur by: DIANE V. GRENDELL

Concur

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

[*P43] I concur in the writing judge's conclusion and analysis that ***Lorraine*** could not prevail on a postconviction petition and that his Crim.R. 33 motion for a new trial must be denied. I write separately, however, to clarify the grounds on which denial of the Crim.R. 33 motion was proper in this case.

[*P44] The writing judge concludes that the motion for a new trial was not a proper mechanism for relief because Crim.R. 33 does not provide a provision for seeking a new sentencing hearing, relying on this court's decision in *State v. Davie*, 11th Dist. Trumbull No. 2007-T-0069, 2007-Ohio-6940. In *Davie* ***[**19]*** , this court held that a Crim.R. 33 motion was not the appropriate mechanism to seek a new sentencing hearing in a death penalty matter where there was an alleged irregularity in the trial court's sentencing entry. In the present case, ***Lorraine*** is not seeking a new "sentencing hearing." Rather, he is seeking a new hearing of the penalty portion of the trial, which is of a different character than a

typical sentencing hearing, since it involves a jury's weighing of mitigating and aggravating factors and making only a *recommendation* of a death sentence to the trial court. R.C. 2929.03(D)(2).

[*P45] The foregoing procedure has been referred to as the "penalty phase[] of the [defendant's] trial" and it has been noted that reversal based on a sentencing error on the part of the trial judge when issuing a sentence "does not invalidate the jury's *verdict* recommending a death sentence." (Emphasis added.) *State v. Roberts*, 150 Ohio St.3d 47, 2017-Ohio-2998, 78 N.E.3d 851, ¶ 25 and 48. Courts have allowed a defendant to be granted a new penalty phase hearing under Crim.R. 33. *See State ex rel. Steffen v. Court of Appeals, First Appellate Dist.*, 126 Ohio St.3d 405, 2010-Ohio-2430, 934 N.E.2d 906, ¶ 8-9.

[*P46] Regardless, denial of the motion for a new trial was proper since it is evident that ***Lorraine*** was not "unavoidably prevented" from filing his motion until January 11, 2017. ***Lorraine***'s argument in favor of granting a new mitigation **[**20]** trial was that he was entitled to a hearing following the procedures described in the recent United States Supreme Court decision in *Hurst v. Florida*, U.S. , 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and that judicial fact-finding cannot be the sole basis for imposing a death sentence. It has been held, however, that a defendant could have raised the same arguments years prior to the decision in *Hurst* by relying on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). *State v. Mundt*, 7th Dist. Noble No. 17 NO 0446, 2017-Ohio-7771, ¶ 9. It is worth noting as well that ***Lorraine*** did not file his motion until a year after the *Hurst* decision was issued. Thus, there was no evidence of unavoidable delay, from a legal standpoint, for the failure to raise the arguments ***Lorraine*** now sets forth.

[*P47] For the foregoing reasons, I concur in judgment only.

End of Document

The Supreme Court of Ohio

State of Ohio

v.

Charles Lorraine

Case No. 2018-1405

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Trumbull County Court of Appeals; No. 2017-T-0028)

Maureen O'Connor
Chief Justice

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IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

STATE OF OHIO,	)	CASE NO. 86-CR-182
	)	(Counts 1, 2, 5 & 6)
Plaintiff	)	
	)	DEATH PENALTY
-vs-	)	(Multiple Counts)
	)	
CHARLES L. LORRAINE,	)	SENTENCES TO CHILLICOTHE
	)	CORRECTIONAL FACILITY
Defendant	)	ENTRY ON SENTENCES

The Defendant herein having been indicted by the January 1986 Term of the Grand Jury of Trumbull County, Ohio for Count 1 Aggravated Murder (Doris Montgomery) with Specifications of Aggravating Circumstances (ORC § 2903.01(A); Count 2 Aggravated Murder (Raymond Montgomery) with Specifications of Aggravating Circumstances (ORC § 2903.01(A); Count 3 Aggravated Murder (Doris Montgomery) with Specifications of Aggravating Circumstances (ORC § 2903.01(B); Count 4 Aggravated Murder (Raymond Montgomery) with Specifications of Aggravating Circumstances (ORC § 2903.01(B); Count 5 Aggravated Burglary (ORC § 2911.11); and Count 6 Aggravated Burglary (ORC § 2911.11), and on the 4th day of November, 1986, having been brought into Court for jury trial and being represented by counsel, Atty. Michael Gleespen, Atty. Ken Murray and Atty. Scott Kenney, and after due deliberation was found guilty on November 19, 1986 of Count 1 Aggravated Murder (Doris Montgomery) with Specifications of Aggravating Circumstances (ORC § 2903.01(A); Count 2 Aggravated Murder (Raymond Montgomery) with Specifications of Aggravating Circumstances (ORC § 2903.01(A); Count 3 Aggravated Murder (Doris Montgomery) with Specifications of Aggravating Circumstances (ORC § 2903.01(B); Count 4 Aggravated Murder (Raymond Montgomery) with

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Specifications of Aggravating Circumstances (ORC § 2903.01(B); Count 5 Aggravated Burglary (ORC § 2911.11) and Count 6 Aggravated Burglary (ORC § 2911.11). Thereafter, Counts 3 and 4 were removed from the jury by the Court.

On December 1, 1986, the Defendant having been brought into Court to give evidence in mitigation on Counts 1 and 2 of the indictment, and after rebuttal by the State, arguments of counsel and instructions of law, on December 4, 1986, after due deliberation, it was the finding and recommendation of the jury that two sentences of death be imposed on the Defendant.

Pursuant to law, the Trial Court this day, December 9, 1986 having determined in a separate opinion of specific findings that the aggravating circumstances outweigh the mitigating factors, then made inquiry as to whether the Defendant had anything to say why judgment should not be pronounced against him, and the Defendant in answer showed no good cause or sufficient reason why sentence should not be pronounced.

It is therefore ORDERED, ADJUDGED and DECREED that the Defendant, CHARLES L. LORRAINE, be taken from the courtroom to the Trumbull County Jail and from thence to the Chillicothe Correctional Institute at Chillicothe, Ohio, and thereafter be sentenced to death on December 9, 1987 on Count 1 of the indictment for the Aggravated Murder of Doris Montgomery; and sentenced to death on December 9, 1987 on Count 2 of the indictment for the Aggravated Murder of Raymond Montgomery; and imprisoned therein for the indeterminate period of ten (10) to twenty-five (25) years on Count 5; and imprisoned therein for the

indeterminate period of ten (10) to twenty-five (25) years on Count 6; and that he pay the cost of prosecution taxed in the amount of $_____ for which execution is awarded.

It is further ORDERED that the Superintendent of the Chillicothe Correctional Institute shall take note that the Defendant herein has been incarcerated in the Trumbull County Jail pursuant to these charges since May 6, 1986.

HONORABLE MITCHELL F. SHAKER
Judge of the Court of Common Pleas
Trumbull County, Ohio

DEC. 9, 1986 Opinion of the Court filed

STATE OF OHIO,	)	IN THE COURT OF COMMON PLEAS
	)	TRUMBULL COUNTY, OHIO
PLAINTIFF	)	
	)	CASE NUMBER 86-CR-182
VS.	)	
	)	
CHARLES L. LORRAINE,	)	OPINION OF THE COURT
	)	
DEFENDANT	)	

With reference to Count One of the indictment concerning the death of Doris Montgomery, the following matters were considered by the Court as part of the aggravating circumstances:

A) The manner in which the aggravated burglary and murder were committed, including;

1. The fact that the victim was known to the Defendant as an invalid lady, age 80, and bedridden.

2. The fact that her murder occurred in a separate area of the home.

3. The relative size of the victim and the Defendant and the difference in age and physical makeup.

4. The number of penetrations (nine) of the victim's body by the knife used by the Defendant. There was evidence of repeated violent thrusting of the butcher knife into the body of the victim.

5. The fact that the Defendant could have bypassed the killing of a second victim.

6. The fact that the Defendant planned to kill his second victim.

7. The planning of the break in and trespass into the Montgomery home by the Defendant.

8. The fact that the Montgomeries were kind to the Defendant and had been generous to him in the past.

9. The securing of rubber gloves and the use thereof by the Defendant.

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10. The obtaining of a butcher knife of a large size from another home.

11. The distance of travel of the Defendant from the other home to the victims' house with ample opportunity to withdraw from his plan of murder and mayhem.

12. The infliction of serious physical harm upon the victim by continuous stabbing of her, the nature of which would have caused extreme pain.

13. The commission of theft offenses and the designed plan to commit the same by the Defendant.

14. The commission of an aggravated burglary of the most extreme type.

15. The complete lack of remorse or apology by the Defendant as viewed by his lackadaisical and jovial attitude subsequent to the burglary and murder.

16. The vicious manner in which the Defendant caused the death of the victim.

17. The total lack of remorse indicated by the Defendant's behavior and cover-up immediately following the murder and continuing thereafter, including his conduct and behavior when making the videotaped statement and other statements at the police station.

18. The totality of circumstances indicating that the victim suffered excruciating pain and the conduct of the Defendant evidenced a vicious state of mind.

B) The second aggravating circumstance, that of multiple killing, is obviously present by reason of the fact that the murders of Mr. and Mrs. Montgomery by the Defendant occurred at or about the same time and place; that is, the Defendant could have avoided killing Mrs. Montgomery but elected in a planned

situation to eliminate her either as a possible witness to the murder of Mr. Montgomery or as a planned killing of both of the elderly people; that their deaths were planned as the Defendant admitted in his videotaped confession, and the Court also considered the eighteen factors listed above as relevant to the second aggravated circumstance.

The following factors were considered in possible mitigation:

1. The age of the Defendant.
2. The below average intelligence of the Defendant.
3. The poor family environment.
4. The Defendant's anti-social behavior.
5. Whether or not he was a leader or follower.
6. The nature and circumstances of the offense.
7. The history, background and character of the Defendant.
8. Whether at the time of committing the offense the Defendant, 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 law.
9. Other factors, if any, relevant to the issue of whether the Defendant should be sentenced to death.
10. The Defendant's unsworn statement.

Neither low intelligence, age or impaired judgment are given significant weight since no high degree of intelligence is necessary to comprehend and understand the events leading to and surrounding the crime. Further, from the Defendant's confession

it is plainly shown that he was rational and in full control of his faculties when he killed and robbed the victims.

The Court finds that the Defendant had sufficient intelligence to know right from wrong, and the planning surrounding the crime indicates clearly that the crime was not committed as a result of low intelligence or impaired judgment. There were six children raised by the parents of the Defendant, and while the environment surrounding the rearing of said children was not the most desirable, evidence was clear that a number of the children, other than the Defendant, have become satisfactory members of society. Further, his father was employed for twenty-one years with no criminal difficulties, and his mother has been a law-abiding citizen.

The evidence was clear that the Defendant was a leader and not a follower and was the sole and principal offender in the commission of the murder of Doris Montgomery.

Accordingly, little weight is given to the history, background and character of the Defendant, his age and the relevant factors set forth above.

As to the question of mental disease or defect and the lack of substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the Court found little credible evidence to give much weight to this factor. The Defendant's psychologist, Doctor Jackson, testified that he had an anti-social personality disorder which,

in his opinion, evidenced some presence of a mental defect. Doctor Jackson stated the Defendant suffered no mental disease. The State's expert witness, Doctor Bertschinger, a clinical psychiatrist who has been called upon to testify in cases by both the State and the defense, testified that the Defendant had no mental disease or defect and did not lack substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. In plain words, the Court agrees with the latter opinion and finds that the Defendant, while having an anti-social personality, knew right from wrong and appreciated the criminality of his conduct, all of which is substantiated by the planning before, execution of the crime and the devious attempt to avoid discovery by disposing of his trousers and his conduct in attempting to mislead the police authorities upon examination instituted by his own call to the station to request an interview.

The Court found that neither the use of drugs nor alcohol affected the conduct of the Defendant either prior to, during or subsequent to the murders; that the Defendant was lucid and knew what he was doing the Court finds by proof beyond a reasonable doubt.

The Court further finds that much of the testimony given by the defense at the mitigation hearing was not relevant to mitigating the sentence; for example, the testimony of the Defendant's brother, Steven Lorraine, was not credible for the

most part, excepting for the portion which showed that the Defendant had repeatedly stolen money from persons including his own grandmother. The evidence of defense witness Anita Carroll showed that the Defendant may have planned the murders sooner than what the State proved.

A large part of Doctor Jackson's testimony (the Defendant's expert) dealt with Defendant's significant history of prior criminal convictions and delinquency adjudications. Ohio Revised Code §2929.04(B)(5) states that "the offender's lack of a significant history" is a mitigating factor. The Court finds that this evidence did not mitigate; rather it showed that the Defendant, for his age (now twenty years of age) was a well-experienced law breaker who has been given ample opportunity by society to change and correct his way.

Finally, the Defendant's unsworn statement was brief and from the manner given; abruptly standing, his demeanor and his voice tone, lacked sincerity. The Court finds from the evidence and trial that the Defendant never appeared sorry or showed any remorse about killing the Montgomerys. In a nutshell the Court finds that the lack of credible mitigating factors was remarkable and noteworthy.

In conclusion as to the death of Doris Montgomery and upon consideration of the relevant evidence raised at the trial, the testimony, the other evidence, the statement of the Defendant and the arguments of counsel, it is the judgment of the Court

that the aggravating circumstances in Count Number 1 of this case outweigh the mitigating factors beyond a reasonable doubt.

With reference to Count Two of the indictment concerning the death of Raymond Montgomery, the following matters were considered by the Court as part of the aggravating circumstances:

A) The manner in which the aggravated burglary and murder were committed, including:

1. The fact that the victim was an elderly gentleman and probably not able to defend himself.
2. The fact that the Defendant lured the victim to the second floor of the home.
3. The difference in age and physical condition of the victim and the Defendant.
4. The number of penetrations of the victim's body by the knife used by the Defendant and the depth of the penetrations as evidenced in the exhibits and the Defendant's description in his confession statement. One wound went through the victim's back and throat.
5. The Defendant attacked the seventy-seven year old male victim from behind not giving him a chance to defend himself.
6. The planning of the break in and trespass into the Montgomery home by the Defendant.
7. The securing of rubber gloves and the use thereof by the Defendant.
8. The obtaining of a butcher knife of a large size from another home.
9. The infliction of serious physical harm upon the victim by continuous stabbing of him, the nature of which would have caused extreme pain.
10. The commission of the theft offense and the designed plan to commit the same by the Defendant.

11. The commission of an aggravated burglary of the most extreme type.

12. The complete lack of remorse or apology by the Defendant as viewed by his lackadaisical and jovial attitude subsequent to the burglary and murder.

13. The vicious manner in which the Defendant caused the death of the victim.

14. The total lack of remorse indicated by the Defendant's behavior immediately following the murder and continuing thereafter, including his conduct and behavior when making the videotaped statement and other statements at the police station.

15. The totality of circumstances indicating that the victim suffered excruciating pain and the conduct of the Defendant evidenced a vicious state of mind.

B) The second aggravating circumstance, that of multiple killing, the Court finds by proof beyond a reasonable doubt is present from the fact that two homicides were committed at or about the same time by the Defendant involving the deaths of Raymond Montgomery and Doris Montgomery; that their deaths were planned by the Defendant who stated such in his confession. The Court also considered the fifteen factors listed above as relevant to the second aggravated circumstance.

The following factors were considered in possible mitigation:

1. The age of the Defendant.
2. The below average intelligence of the Defendant.
3. The poor family environment.
4. The Defendant's anti-social behavior.
5. Whether or not he was a leader or follower.
6. The nature and circumstances of the offense.

7. The history, background and character of the Defendant.

8. Whether at the time of committing the offense the Defendant, 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 law.

9. Other factors, if any, relevant to the issue of whether the Defendant should be sentenced to death.

10. The Defendant's unsworn statement.

Neither low intelligence, age or impaired judgment are given significant weight since no high degree of intelligence is necessary to comprehend and understand the events leading to and surrounding the crime. Further, from the Defendant's confession it is plainly shown that he was rational and in full control of his faculties when he killed and robbed the victims.

The Court finds that the Defendant had sufficient intelligence to know right from wrong, and the planning surrounding the crime indicates clearly that the crime was not committed as a result of low intelligence or impaired judgment. There were six children raised by the parents of the Defendant, and while the environment surrounding the rearing of said children was not the most desirable, evidence was clear that a number of the children, other than the Defendant, have become satisfactory members of society. Further, his father was employed for twenty-one years with no criminal difficulties, and his mother has been a law-abiding citizen.

The evidence was clear that the Defendant was a leader and not a follower and was the sole and principal offender in the commission of the murder of Raymond Montgomery.

Accordingly, little weight is given to the history, background and character of the Defendant, his age and the relevant factors set forth above.

As to the question of mental disease or defect and the lack of substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the Court found little credible evidence to give much weight to this factor. The Defendant's psychologist, Doctor Jackson, testified that he had an anti-social personality disorder which, in his opinion, evidenced some presence of a mental defect. Doctor Jackson stated the Defendant suffered no mental disease. The State's expert witness, Doctor Bertschinger, a clinical psychiatrist who has been called upon to testify in cases by both the State and the defense, testified that the Defendant had no mental disease or defect and did not lack substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. In plain words, the Court agrees with the latter opinion and finds that the Defendant, while having an anti-social personality, knew right from wrong and appreciated the criminality of his conduct, all of which is substantiated by the planning before, execution of the crime and the devious attempt to avoid discovery by disposing

of his trousers and his conduct in attempting to mislead the police authorities upon examination instituted by his own call to the station to request an interview.

The Court found that neither the use of drugs nor alcohol affected the conduct of the Defendant either prior to, during or subsequent to the murders; that the Defendant was lucid and knew what he was doing the Court finds by proof beyond a reasonable doubt.

The Court further finds that much of the testimony given by the defense at the mitigation hearing was not relevant to mitigating the sentence; for example, the testimony of the Defendant's brother, Steven Lorraine, was not credible for the most part, excepting for the portion which showed that the Defendant had repeatedly stolen money from persons including his own grandmother. The evidence of defense witness Anita Carroll showed that the Defendant may have planned the murders sooner than what the State proved.

A large part of Doctor Jackson's testimony (the Defendant's expert) dealt with Defendant's significant history of prior criminal convictions and delinquency adjudications. Ohio Revised Code §2929.04(B)(5) states that "the offender's lack of a significant history" is a mitigating factor. The Court finds that this evidence did not mitigate; rather it showed that the Defendant, for his age (now twenty years of age) was a well-experienced law breaker who has been given ample opportunity by

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society to change and correct his way.

Finally, the Defendant's unsworn statement was brief and from the manner given; abruptly standing, his demeanor and his voice tone, lacked sincerity. The Court finds from the evidence and trial that the Defendant never appeared sorry or showed any remorse about killing the Montgomerys. In a nutshell the Court finds that the lack of credible mitigating factors was remarkable and noteworthy.

In conclusion as to the death of Doris Montgomery and upon consideration of the relevant evidence raised at the trial, the testimony, the other evidence, the statement of the Defendant and the arguments of counsel, it is the judgment of the Court that the aggravating circumstances in Count Number 2 of this case outweigh the mitigating factors beyond a reasonable doubt.

December 9, 1986

MITCHELL F. SHAKER, JUDGE

cc: Attorney Dennis Watkins
Attorney Donald Hill
Attorney Kenneth Murray
Attorney Michael Gleespen

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IN THE COURT OF COMMON PLEAS
- GENERAL DIVISION-
TRUMBULL COUNTY, OHIO

CASE NUMBER: 1986 CR 00182

STATE OF OHIO
PLAINTIFF

VS.
CHARLES LORRAINE
DEFENDANT

JUDGE ANDREW D LOGAN

JUDGMENT ENTRY

This matter is before the Court on the Motion for Leave to File a Motion for New Mitigation Trial filed by Defendant, Charles Lorraine. The Court has reviewed the motion and memoranda, opposition in response, reply, pleadings and the relevant applicable law.

The Court finds there are procedural as well as substantive deficiencies in Lorraine's request. Initially, the Court finds the motion for leave to file motion for a new mitigation trial is akin to seeking leave to file a request for a new trial pursuant to Crim.R. 33. Lorraine claims irregularity in the sentencing proceedings as the basis for the motion. However, the Court finds the motion is untimely. Pursuant to Crim.R. 33(B), motions such as this must be filed within fourteen days after the verdict was rendered. Lorraine is entirely outside this time frame. Therefore, the Court finds no basis on which to grant leave to file a request under Crim.R. 33.

In addition, if the Court were to construe Lorraine's motion as a post-conviction relief request pursuant to R.C. 2953.21, the Court finds no basis on which to grant such

a request. The Court finds such a post-conviction request would be time barred as the request was filed well beyond the 180-day statutory period.

Even if the Court did not find the requests were time barred as explained herein, the Court finds the reliance of Lorraine upon the *Hurst v. Florida*, 136 S. Ct. 616 (2016), decision is misplaced. "*Hurst*, *** does not invalidate Ohio's capital sentencing scheme because Ohio's scheme is materially different from Florida's." *McKnight v. Bobby*, S.D.Ohio No. 2:09-CV-059, 2017 WL 631411, *3–4. In fact, the Ohio mechanism provides an additional layer of protection not present in *Hurst*. Id. Indeed, "Ohio's capital-sentencing scheme is unlike the laws at issue in *Ring* and *Hurst*." *State v. Belton*, 2016-Ohio-1581, ¶59.

Therefore, the Court finds there is no applicable law, criminal rule or case precedent on which to base Lorraine's recent filing for leave to file a motion for new mitigation trial. Accordingly, the Court finds the request for leave is not well taken and the same is hereby denied.

IT IS SO ORDERED.

Date: March 2, 2017

JUDGE ANDREW D LOGAN

Copies to:
LUIGIA TENUTA MARC TRIPLETT RANDALL L PORTER
PROSECUTOR

TO THE CLERK OF COURTS: You Are Ordered to Serve Copies of this Judgment on all Counsel of Record or Upon the Parties who are Unrepresented Forthwith by Ordinary Mail.

JUDGE ANDREW D LOGAN

FILED
COURT OF COMMON PLEAS
MAR 0 2 2017
TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

THE OHIO CRIMINAL LAW HANDBOOK

SIXTH ANNUAL EDITION

Covering Title 29, the Ohio Criminal Code, as amended by the Ohio General Assembly through September 1, 1986

Also including:

Miscellaneous Related Statutes (through September 1, 1986)
United States Constitution
Ohio Constitution (Selected Provisions)
Table of Penalties and Index of Offenses
Elements of Offenses
Time Table in Criminal Cases
Ohio Rules of Procedure (through July 1, 1986)
Criminal / Evidence / Juvenile / Traffic

ınd is not found at trial to have been
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a prior conviction listed in division
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jury shall impose sentence on the of-
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cial judge shall terminate the sentenc-
d impose a sentence of life imprison-
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)onment on the offender.
v S 1. Eff 10-19-81.

).02.3] § 2929.023 [Defen-
e matter of age.]

ıarged with aggravated murder and one or more specifications of an aggravating circumstance may, at trial, raise the matter of his age at the time of the alleged commission of the offense and may present evidence at trial that he was not eighteen years of age or older at the time of the alleged commission of the offense. The burdens of raising the matter of age, and of going forward with the evidence relating to the matter of age, are upon the defendant. After a defendant has raised the matter of age at trial, the prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the defendant was eighteen years of age or older at the time of the alleged commission of the offense.

HISTORY: 139 v S 1. Eff 10-19-81.

[§ 2929.02.4] § 2929.024 [Investigation services and experts for indigent.]

If the court determines that the defendant is indigent and that investigation services, experts, or other services are reasonably necessary for the proper representation of a defendant charged with aggravated murder at trial or at the sentencing hearing, the court shall authorize the defendant's counsel to obtain the necessary services for the defendant, and shall order that payment of the fees and expenses for the necessary services be made in the same manner that payment for appointed counsel is made pursuant to Chapter 120. of the Revised Code. If the court determines that the necessary services had to be obtained prior to court authorization for payment of the fees and expenses for the necessary services, the court may, after the services have been obtained, authorize the defendant's counsel to obtain the necessary services and order that payment of the fees and expenses for the necessary services be made as provided in this section.

HISTORY: 139 v S 1. Eff 10-19-81.

§ 2929.03 Imposing sentence for a capital offense.

(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 [2929.02.3] 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 [2929.02.3] 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 [2929.02.3] 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 defendant 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 re trial. 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 factors 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 the defense 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 are 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)(1) 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 of imprisonment;

(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 [2929.02.3] 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.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1. Eff 10-19-81.

Committee Comment to H 511

This section specifies the procedure to be followed in determining whether the sentence for aggravated murder is to be life imprisonment or death.

The death penalty is precluded unless the indictment contains a specification of one or more of the aggravating circumstances listed in section 2929.04. In the absence of such specifications, life imprisonment must be imposed. If the indictment specifies an aggravating circumstance, it must be proved beyond a reasonable doubt, and the jury must return separate verdicts on the charge and specification. If the verdict is guilty of the charge but not guilty of the specification, the penalty is life imprisonment.

If the verdict is guilty of both the charge and the specification, the jury is discharged and the trial begins a second phase designed to determine the presence or absence of one or more mitigating circumstances. If one of the three mitigating factors listed in section 2929.04 is established by a preponderance of the evidence, the penalty is life imprisonment. If none of such factors is established, the penalty is death. The procedure is essentially the same in the first phase of an aggravated murder trial whether the case is tried by a jury or by a three-judge panel on a waiver of a jury. The burden of proof still rests on the state, the same rules of evidence apply, the specification must be proved beyond a reasonable doubt, and the panel's verdict must be unanimous.

With respect to the mitigation phase of the trial, the procedure is somewhat different depending on whether the case is tried by a jury or a three-judge panel. A jury tries only the charge and specification, and the judge in a jury trial determines mitigation. If a jury is waived, the same three-judge panel tries not only the charge and specification, but also determines the presence or absence of mitigation. Also, the statute expressly provides that the panel's finding that no mitigating circumstance is established must be unanimous, or the death penalty is precluded. In other respects, the procedure for determining mitigation is similar whether the trial judge or a three-judge panel tries the issue. Mitigation must be established by a preponderance of the evidence, and the rules of evidence also apply in this

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Charles Lorraine,

Petitioner,

-v-

State of Ohio,

Respondent.

On Petition for Writ of Certiorari to
the Ohio Eleventh Appellate District, Trumbull County Court of Appeals

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI
