

No. 18-9579

IN THE SUPREME COURT OF THE UNITED STATES

JAMES TENCH,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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STATE OF OHIO**

Capital Case

QUESTIONS PRESENTED

- I. Whether the “other acts” evidence admitted at Tench’s trial violated Tench’s constitutional right to due process.**
- II. Whether the Supreme Court of Ohio’s reweighing of aggravated circumstances against mitigating factors violates a defendant’s Sixth Amendment rights as defined in *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616 (2016).**

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent, the State of Ohio, by and through the Office of the Medina County Prosecuting Attorney, respectfully requests that this Honorable Court deny Petitioner Tench a Writ of Certiorari to review the judgment of the Supreme Court of Ohio affirming his conviction.

OPINIONS BELOW

The Supreme Court of Ohio's decision affirming Petitioner Tench's conviction in *State v. Tench* is available at Slip Opinion No. 2018-Ohio-5205 (Dec. 26, 2018). Tench filed a Motion for Reconsideration in the Supreme Court of Ohio on January 7, 2019, which the Court denied on March 6, 2019.

CONSTITUTIONAL PROVISIONS AT ISSUE

Petitioner Tench argues that this case involves the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, which provide as follows:

AMENDMENT V, UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI, UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VIII, UNITED STATES CONSTITUTION

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV, § 1, UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On August 14, 2014, the Medina County, Ohio Grand Jury issued an eight-count indictment against Petitioner James Tench (“Tench”) as follows: Count I – Aggravated Murder, in violation of R.C. 2903.01(A), with three enhancement specifications; Count II – Aggravated Murder, in violation of R.C. 2903.01(B), with three enhancement specifications; Count III – Aggravated Murder, in violation of R.C. 2903.01(A), with three enhancement specifications; Count IV – Murder, in violation of R.C. 2903.02(A); Count V – Murder, in violation of R.C. 2903.02(B); Count VI – Aggravated Robbery, in violation R.C. 2911.01(A)(3), a felony of the first degree, with a repeat violent offender specification under R.C. 2941.149; Count VII – Kidnapping, in violation of R.C. 2905.01(A)(2), a felony of the first degree, with a repeat violent offender specification under R.C. 2941.149; and Count VIII – Tampering with Evidence, in violation of R.C. 2921.12(A)(1), a felony of the third degree.

The death penalty specifications to Counts I, II, and III were as follows: Specification One to Counts I, II, and III - Under R.C. 2929.04(A)(7) and R.C. 2941.14, the offense was committed while Tench was committing, attempting to commit, or fleeing immediately after committing or attempting to commit Aggravated Robbery, and Tench was either 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; Specification Two to Counts I, II, and III - Under R.C. 2929.04(A)(7) and R.C. 2941.14, the offense was committed while Tench was committing, attempting to commit, or fleeing immediately after committing or attempting to commit Kidnapping, and Tench was either 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; Specification Three to Counts I, II, and II – Under R.C. 2929.04(A)(8) and R.C.

2941.14, the victim of the Aggravated Murder was a witness to an offense who was purposely killed to prevent her 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.

On August 19, 2014, the trial court set Tench's bond at ten million dollars (\$10,000,000.00) cash. On September 4, 2014, Tench was arraigned and entered a plea of not guilty. The trial court appointed attorneys Kerry O'Brien and Ronda Kotnik to represent Tench. On October 10, 2014, the trial court appointed Dave Rodgers as Private Investigator for Tench. On October 14, 2014, the trial court authorized defense counsel to hire Dr. John Fabian as psychologist for Tench. On October 14, 2014, the trial court also authorized defense counsel to hire Tom Hrdy as a mitigation specialist for the defense.

On January 15, 2015, Tench filed a motion to suppress evidence. The trial court issued a comprehensive case scheduling order on June 23, 2015. After an oral hearing, on August 18, 2015 the trial court overruled Tench's motion to suppress evidence. On November 19, 2015, the trial court authorized defense counsel to hire forensic medical examiner Dr. Germaniuk.

A jury trial commenced on February 22, 2016. Jury selection began on February 22, 2016 and continued until March 2, 2016. A jury of twelve and four alternates were seated and sworn on March 4, 2016. On March 4, 2016, the trial court issued its ruling on the State of Ohio's ability to use evidence of Tench's other crimes, wrongs, or acts. The trial continued until March 9, 2016, at which time the trial was recessed until March 14, 2016. The State of Ohio continued its case from March 14, 2016 through March 16, 2016, with the State resting on March 16, 2016. Thereafter, the Court ruled upon admission of the State's exhibits and denied Tench's Crim.R. 29 motion for acquittal. On March 21, 2016, Tench presented testimony and evidence and rested after offering

his exhibits. Tench renewed his Crim.R. 29 motion for acquittal and the trial court denied the motion. The trial then recessed until March 22, 2016, when the parties made their closing arguments. The jury received instructions and retired to deliberate.

On March 23, 2016, the jury reached a verdict, which was as follows:

- Count I, Aggravated Murder, R.C. 2903.01(A) – Guilty Beyond a Reasonable Doubt
 - Specification One to Count I – Guilty Beyond a Reasonable Doubt
 - Specification Two to Count I – Guilty Beyond a Reasonable Doubt
 - Specification Three to Count I – Guilty Beyond a Reasonable Doubt
- Count II, Aggravated Murder, R.C. 2903.01(B) – Guilty Beyond a Reasonable Doubt
 - Specification One to Count II – Guilty Beyond a Reasonable Doubt
 - Specification Two to Count II – Guilty Beyond a Reasonable Doubt
 - Specification Three to Count II – Guilty Beyond a Reasonable Doubt
- Count III, Aggravated Murder, R.C. 2903.01(A) – Guilty Beyond a Reasonable Doubt
 - Specification One to Count III – Guilty Beyond a Reasonable Doubt
 - Specification Two to Count III – Guilty Beyond a Reasonable Doubt
 - Specification Three to Count III – Guilty Beyond a Reasonable Doubt
- Count IV, Murder, R.C. 2903.02(A) – Guilty Beyond a Reasonable Doubt
- Count V, Murder, R.C. 2903.02(B) – Guilty Beyond a Reasonable Doubt
- Count VI, Aggravated Robbery, R.C. 2911.01(A)(3) – Guilty Beyond a Reasonable Doubt
- Count VII, Kidnapping, R.C. 2905.01(A)(2) – Guilty Beyond a Reasonable Doubt
- Count VIII, Tampering with Evidence, R.C. 2921.12(A)(1) – Guilty Beyond a Reasonable Doubt

On March 30, 2016, out of the presence of the jury, Tench executed a written waiver of his right to a jury trial and entered a stipulation on the issue of the Repeat Violent Offender Specifications, R.C. 2941.149 to Counts VI and VII. Tench stipulated that he is the James D. Tench named in the journal entry from Cuyahoga County Case Number CR-13-580157 showing

that he was previously convicted of Robbery.

The penalty phase of the trial commenced on April 4, 2016. On April 25, 2016, a sentencing hearing was held. Prior to imposing sentence, the trial court denied Tench's motion for a mistrial or new trial and denied Tench's motion to continue sentencing. The State of Ohio requested that Count II and its three specifications and Count III and its three specifications merge into Count I and its three specifications. The trial court granted the motion and ordered that the offenses be merged. The State also moved that the counts of Aggravated Murder and Murder should merge because they pertain to the same victim. The trial court also granted that motion and ordered that the offenses be merged. As Counts II, III, IV, and V merged into Count I, the State of Ohio elected to have sentence imposed on Count I and its three specifications. The trial court determined that Counts VI and VII did not merge for sentencing purposes.

The trial court imposed the following sentence:

- Count I, Aggravated Murder with death penalty specifications – Death
- On the remainder of the counts, to be served consecutively and not concurrently:
 - Count VI, Aggravated Robbery – 11 years
 - Repeat Violent Offender Specification to Count VI – 10 years
 - Count VII, Kidnapping – 11 years
 - Repeat Violent Offender Specification to Count VII – 10 years
 - Count VIII, Tampering with Evidence – 24 months

The trial court also found that the sentence in this case should be served consecutively to the six-year prison sentence Tench was serving in Cuyahoga County case number CR-13-580157. The trial court's sentencing entry was filed on May 5, 2016.

On June 16, 2016, Tench filed his notice of appeal to the Supreme Court of Ohio. On

December 26, 2018, the Supreme Court of Ohio affirmed the judgment of the trial court. On January 7, 2019, Tench filed a motion for reconsideration in the Supreme Court of Ohio. The Supreme Court of Ohio denied Tench's motion for reconsideration on March 6, 2019.

On June 7, 2019, Tench filed a Petition for Writ of Certiorari to this Court. The State of Ohio hereby responds in opposition.

SUMMARY OF THE ARGUMENT

Petitioner Tench first argues that the admission of certain "other acts" evidence at trial violated his right to due process. However, the Supreme Court of Ohio found the admission of this evidence to be harmless error and described in detail the overwhelming evidence of Tench's guilt presented by the State of Ohio in this case. Tench claims that jurors asking certain questions relating to the other acts evidence during the trial indicates that they relied upon that evidence in rendering their guilty verdict and in recommending a sentence of death. In reality, the record does not in any way indicate that the jury relied upon this evidence in making its decisions. This is nothing more than self-serving speculation on Tench's part. Jurors simply asking a few questions relating to some of this evidence does not in any way tend to prove that the jury "relied upon that evidence in rendering its guilty verdict and in recommending a sentence of death," nor is there any authority to that effect. As the Supreme Court of Ohio noted: "Tench's bloodstained boots, his strong motive, his unusual behavior on the night of the murder, his anger toward his mother, his lies and shifting stories, the trail of footprints leading back to his neighborhood – these are the facts that prove that he killed Mary, and they would inevitably have done so even if drugs, robbery, embezzlement, and deletions from cell phones had never been mentioned at trial."

Tench next argues that when a reviewing court independently reweighs the aggravating circumstances against the mitigating factors, that reweighing violates a capital defendant's Sixth

Amendment rights as defined by this Court in *Hurst v Florida*, ___ U.S. ___, 136 S. Ct. 616 (2016). Shortly after *Hurst* the Supreme Court of Ohio explained that Ohio's capital sentencing scheme is unlike the Florida scheme at issue in *Hurst*. The Supreme Court of Ohio explained that in Ohio, a capital case does not proceed to the sentencing phase until after the factfinder has found a defendant guilty of one or more aggravating circumstances. Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment. Furthermore, in Ohio if a defendant is tried by a jury, the judge cannot impose a death sentence unless the jury has first entered a unanimous verdict for a death sentence. The Supreme Court of Ohio noted that federal and state courts have upheld capital sentencing schemes similar to Ohio's because if a defendant has already been found to be death penalty eligible, then subsequent weighing processes for sentencing purposes do not implicate *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). Weighing is not a fact-finding process subject to the Sixth Amendment because that determination cannot increase the potential punishment to which a defendant is exposed.

The Supreme Court of Ohio's decision left two of Tench's aggravating circumstances intact, when only one was necessary to make Tench death penalty eligible. In its sentence evaluation, the Supreme Court of Ohio correctly found that the two valid aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. The Supreme Court of Ohio was statutorily required to reweigh Tench's two aggravating circumstances against the mitigating factors even after eliminating one of the aggravating circumstances. Neither *Hurst* nor any other authority required the Court to remand the matter for a new penalty phase.

For these reasons, this Court should deny Tench a writ of certiorari to the Supreme Court of Ohio.

REASONS FOR DENYING THE WRIT

I. THE SUPREME COURT OF OHIO CORRECTLY HELD THAT EVEN IF CERTAIN “OTHER ACTS” EVIDENCE WAS IMPROPERLY ADMITTED AT TENCH’S TRIAL, GIVEN THE OVERWHELMING EVIDENCE OF TENCH’S GUILT, THAT ERROR WAS HARMLESS AND DID NOT PREJUDICE TENCH TO THE POINT OF AFFECTING THE OUTCOME OF HIS TRIAL.

A. Standard of Review

Ohio Evid.R. 404(B) closely resembles Federal Evid.R. 404(B) and provides, in relevant part, as follows:

(B) Other crimes, wrongs or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . .

Ohio Crim.R. 52(A) closely resembles Federal Crim.R. 52(A) and provides as follows:

(A) Harmless error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

The Supreme Court of Ohio has held that “an improper evidentiary admission under Evid.R. 404(B) may be deemed harmless error on review when, after the tainted evidence is removed, the remaining evidence is overwhelming.” *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, ¶ 32, citing *State v. Williams* (1983), 6 Ohio St.3d 281, 290, 452 N.E.2d 1323, itself citing *Harrington v. California*, 395 U.S. 250, 254, 89 S. Ct. 1726 (1969).

This Court has defined “affecting substantial rights” as having a “substantial and injurious effect or influence in determining the jury’s verdict.” *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239 (1946).

B. Analysis

Tench argues that the admission of certain “other acts” evidence violated his right to due process. The Supreme Court of Ohio found the admission of this evidence to be harmless error. In doing so, the Court described in great detail the overwhelming evidence of Tench’s guilt that the State of Ohio presented in this case. First, the Court noted that Tench’s boots were stained with his mother’s blood and noted the testimony that the boots must have been present at a spatter-producing event. Footprints in the snow also led from the SUV containing Tench’s mother’s body to the area of Tench house. The Court noted that although Tench called his girlfriend at 1:22 a.m. and told her he was worried about his mother’s whereabouts, he did not try to call his mother until 2:03 a.m. and never tried to contact her workplace.

The Court noted the testimony of all four Kyker family witnesses who stated that Tench did not act like his usual self on the night of the murder and left their house much earlier than usual. The Court noted that on the morning after the murder, Tench stated to Raymond Hall, “I’ve done something that I need to talk to you about.” The Court noted that two days before the murder, Tench bought Nashua No. 394 duct tape and a tarpaulin and unwrapped both items. The Court noted that expert testimony established that the duct tape around Mary’s neck was Nashua brand and noted that the tarpaulin was wet when police discovered it.

The Court noted that the computers in the Tench house yielded further compelling evidence of Tench’s guilt. The phrase “kill someone without getting caught” was Googled on a computer in the Tench home that was registered to Tench. Just hours before Mary went missing and while Mary was at work someone also used the computer in Mary’s room to access Google images of the exact location where Mary’s body was later found. The evidence showed that Tench was the only person home at this time.

The Court noted that the next morning, Tench lied to Officer Scafidi about what he was doing the night before. Tench stated that he was in bed with his girlfriend Christina Kyker when he fell asleep at 11:51 p.m., but Christina and her family testified that Christina slept at home that night after Tench left. Tench called Christina at 1:22 a.m. and during that phone call, Tench told Christina that he had driven twice from Brunswick to Lakewood and back that night. This Court noted that all of the evidence in the case belied that statement. Tench ultimately changed his story several times with respect to his whereabouts on the evening in question. Tench told several other lies that the Court described as “notably clumsy.” Tench falsely told both Officer Scafidi and Detective Weinhardt that his mother had left Ennis Court at 11:45 p.m. Despite there being snow on the ground in the middle of November, Tench explained the mud on his boots by claiming he had been cutting the grass in the boots. Tench had a bruise on his arm that he said he might have received in a mock fight with Christina, but Christina denied that she had ever hit Tench or bruised his arm.

The Court noted that when the detectives first visited Tench’s home on November 12, 2013 Tench was running the dryer and a basket of wet towels was sitting on top of the dryer. When the house was searched the next day, police found blood stains on a bleach bottle, on the washing machine, on a sponge in the kitchen trash, and in the kitchen sink, all of which indicated that Tench had been cleaning up blood. Tench also walked over the footprints in his back yard in what appeared to detectives to be a deliberate attempt to obscure them. After the detectives left the Tench house the first time on November 12, 2013, Tench moved his bloodstained boots upstairs to his bedroom.

The Court noted that there was also strong evidence of Tench’s motive. The Court noted the “Leave/Tell police” notation in Mary’s handwriting that was found in Tench’s bedroom,

demonstrating that Tench had known about it. Tench also admitted in his own trial testimony that he knew about his mother's notation. The Court noted that the State of Ohio also introduced abundant evidence of Tench's ill feelings toward his mother. During the month before the murder, Tench told various people that his mother was driving him crazy, that he hated her, and that she might as well be dead. During an argument that same month, Tench grabbed his mother's arm hard enough to make her cry.

After citing this mountain of evidence, the Supreme Court of Ohio correctly held that "these are the facts that prove that [Tench] killed Mary, and they would inevitably have done so even if drugs, robbery, embezzlement, and deletions from cell phones had never been mentioned at his trial." *Tench*, 2018-Ohio-5205, ¶ 191. Jurors merely asking a few questions relating to some of this evidence does not in any way prove that the jury "relied upon that evidence in rendering its guilty verdict and in recommending a sentence of death," and Tench cites no authority in which this was found to be the case. The record does not in any way indicate that the jury relied upon this evidence in making its decisions. This is nothing more than self-serving speculation on Tench's part.

Therefore, Tench's first reason for granting the writ of certiorari is without merit and this Court should deny a writ of certiorari to the Supreme Court of Ohio on this basis.

II. THIS COURT'S DECISION IN *HURST V. FLORIDA* HAS NO BEARING ON THE SUPREME COURT OF OHIO'S ABILITY TO INDEPENDENTLY REWEIGH THE AGGRAVATING CIRCUMSTANCES AGAINST THE MITIGATING FACTORS IN A CAPITAL CASE.

A. Standard of Review

In *Apprendi v. New Jersey*, this Court held 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. 530 U.S. 466, 483, 120 S. Ct. 2348 (2000).

In *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616 (2016), this Court applied *Apprendi* to invalidate Florida’s capital sentencing scheme. 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. *Hurst*, 136 S. Ct. at 620. 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.* Therefore, “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.* Therefore, the United States Supreme Court held that Florida’s capital sentencing law violated the Sixth Amendment. *Id.*

B. Analysis

Tench argues that when a reviewing court independently reweighs the aggravating circumstances against the mitigating factors, that reweighing violates a capital defendant’s Sixth Amendment rights as defined by this Court in *Hurst*. Shortly after *Hurst*, the Supreme Court of Ohio correctly explained that Ohio’s capital sentencing scheme is unlike the Florida scheme at issue in *Hurst*. *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, ¶ 59. The Supreme Court of Ohio explained that in Ohio, a capital case does not proceed to the sentencing phase until *after* the factfinder has found a defendant guilty of one or more aggravating circumstances. *Id.*, citing R.C. 2929.03(D); R.C. 2929.04(B) and (C); *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, ¶ 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. *Id.* Moreover, in Ohio if a

defendant is tried by a jury, the judge cannot impose a death sentence unless the jury has entered a unanimous verdict for a death sentence. *Id.*, citing R.C. 2929.03(D)(2).

The Supreme Court of Ohio noted that federal and state courts have upheld capital sentencing schemes similar to Ohio's because if a defendant has already been found to be death penalty eligible, then subsequent weighing processes for sentencing purposes do not implicate *Apprendi*. *Id.* at ¶ 60. 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." *Id.*, citing *State v. Gales*, 265 Neb. 598, 628, 658 N.W.2d 604 (2003). Instead, the weighing process amounts to "a complex moral judgment" about what penalty to impose upon a defendant who is already death penalty eligible. *Id.*, quoting *United States v. Runyon*, 707 F.3d 475, 515-16 (4th Cir. 2013). In *State v. Mason*, the Supreme Court of Ohio recently reaffirmed its holding that in light of *Hurst* Ohio's death penalty scheme does *not* violate a defendant's Sixth Amendment right to a trial by jury. 2018-Ohio-1462.

In short, a jury's finding of even *one* aggravating circumstance renders a defendant eligible for the death penalty. That is where the factfinding ends. The jury must then render a unanimous verdict for a death sentence after unanimously finding that the aggravating circumstances outweigh the mitigating factors, which occurred in this case. Weighing is not a fact-finding process subject to the Sixth Amendment and therefore does not implicate *Hurst*. The Supreme Court of Ohio's decision left two aggravating circumstances still intact, when only one was necessary to make Tench death penalty eligible.

In its sentence evaluation, the Supreme Court of Ohio correctly found that the two valid aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. The Supreme Court of Ohio specifically noted that "the R.C. 2929.04(A)(8) witness-murder

specification is entitled to great weight, for it ‘strikes at the heart of the criminal justice system.’” *Tench*, 2018-Ohio-5205, ¶ 309, citing *State v. Turner*, 105 Ohio St.3d 331, 2005-Ohio-1938, ¶ 100, itself quoting *State v. Jalowiec* (2001), 91 Ohio St.3d 220, 239, 744 N.E.2d 163. The Supreme Court of Ohio noted that it has approved death sentences in cases involving only a kidnapping-murder specification and has approved death sentences “in cases where the witness-murder specification was present alone or in combination with one other specification, even when substantial mitigation existed.” *Id.* at ¶ 101. In this case both specifications existed, which is why it was not surprising that the Court found that the aggravating circumstances outweighed the mitigating factors.

Under R.C. 2929.05 the Supreme Court of Ohio was required to reweigh *Tench*’s two aggravating circumstances against the mitigating factors even after it eliminated one of the aggravating circumstances. Neither *Hurst* nor any other authority required the Court to remand the matter to the trial court for a new penalty phase.

Therefore, *Tench*’s second reason for granting the writ of certiorari is without merit and this Court should deny a writ of certiorari to the Supreme Court of Ohio on this basis.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Respondent State of Ohio respectfully prays that this Honorable Court deny *Tench*’s Petition for a Writ of Certiorari to the Supreme Court of Ohio.

Respectfully submitted,

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Dated: 7/2/2019

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Respondent State of Ohio's Brief in Opposition to Tench's Petition for a Writ of Certiorari has been sent via regular U.S. Mail to Erika LaHote and Kimberly Rigby, Counsel for Petitioner, at The Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215-2998, this 2nd day of July, 2019.

/s/ Vincent V. Vigluicci

VINCENT V. VIGLUICCI (#301487)

Assistant Prosecuting Attorney
Member of the Bar of this Court