No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Lawrence Alfred Landrum,

Petitioner,

-v-

State of Ohio,

Respondent.

On Petition for Writ of Certiorari to
the Ohio Fourth Appellate District, Ross County Court of Appeals

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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State v. Landrum

Court of Appeals of Ohio, Fourth Appellate District, Ross County

March 29, 2018, Decided

Case No. 17CA3607

Reporter
2018-Ohio-1280 *; 2018 Ohio App. LEXIS 1404 **; 2018 WL 1611764

STATE OF OHIO, Plaintiff-Appellee, vs. LAWRENCE ALFRED LANDRUM, Defendant-Appellant.

Subsequent History: Discretionary appeal not allowed by State v. Landrum, 2018-Ohio-3258, 2018 Ohio LEXIS 2012 (Ohio, Aug. 15, 2018)

Prior History: State v. Landrum, 1989 Ohio App. LEXIS 143 (Ohio Ct. App., Ross County, Jan. 12, 1989)

Disposition: JUDGMENT AFFIRMED.

Core Terms

sentencing, trial court, motion for a new trial, aggravated, appellate court, death sentence, untimely, cases, death penalty statute, motion for leave, death penalty, mitigation, new trial, unavoidably, overruling, murder, grounds, post-conviction, recommendation, ineffective, convicted, eligible, reasons, courts, days

Case Summary

Overview

HOLDINGS: [1]-The trial court did not abuse its discretion in overruling defendant's Crim.R. 33 motion for leave to file a motion for a new mitigation trial because it was not timely filed, filed 31 years after his conviction and the imposition of the death penalty and one year after Hurst; [2]-There was no Apprendi violation because, in Ohio, capital cases did not proceed to the sentencing phase until after the fact-finder found the defendant guilty of one or more aggravating circumstances, pursuant to R.C. 2929.03(D) and R.C. 2929.04(B) and (C). Hurst simply applied the principles laid down many years ago in Apprendi—that other than the fact of a prior conviction, any fact that increased the penalty for a crime beyond the prescribed statutory maximum had to be submitted to a jury and proved beyond a reasonable doubt.

Outcome
Judgment affirmed.

Counsel: [**1] Gerald W. Simmons, Cincinnati, Ohio, Timothy Young, Ohio State Public.

Defender, and Randall L. Porter, Assistant Ohio State Public Defender, Columbus, Ohio, for Appellant.

Matthew S. Schmidt, Ross County Prosecuting Attorney, and Pamela C. Wells, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for Appellee.

Judges: Matthew W. McFarland, Judge. Harsha, J.: Concurs with Concurring Opinion. Hoover, P.J.: Concurs in Judgment Only.

Opinion by: Matthew W. McFarland

Opinion

DECISION AND JUDGMENT ENTRY

McFarland, J.

[*P1] Lawrence A. Landrum appeals the trial court's June 14, 2017 Decision & Order which overruled his motion for new trial and new sentencing hearing pursuant to Crim.R. 33. Having reviewed the record, we find the trial court did not abuse its discretion in overruling Appellant's motion as it was untimely filed pursuant to Crim.R. 33. Although the trial court addressed the merits of Appellant's constitutional argument, we affirm the trial court's judgment overruling his motion for new trial on different grounds. Accordingly, we overrule his sole assignment of error and affirm the judgment of the trial court.

FACTS

[*P2] A jury convicted Appellant in February 1986 of aggravated murder and aggravated burglary of Harold White, an **[**2]** 84 year-old victim. The jury found two death penalty specifications: (1) aggravated murder to escape detection for burglary; and, (2) being the principal offender in the aggravated murder while committing or attempting aggravated burglary. Following a sentencing hearing, the jury recommended death, and the trial court sentenced Appellant to death. Appellant pursued a direct appeal with this court. *State v. Landrum*, 4th Dist. Ross No. 1330, 1989 Ohio App. LEXIS 143, 1989 WL 4244 (Jan. 12, 1989) (*Landrum I*). In *Landrum I*, he set forth 29 assignments of error; however, we found no merit to his arguments and affirmed the judgment of the trial court.

[*P3] On direct appeal to the Supreme Court of Ohio, *State v. Landrum*, 53 Ohio St.3d 107, 559 N.E.2d 710 (1990) (*Landrum II*), Appellant raised 31 propositions of law. *Landrum II* contains a complete recitation of the facts adduced as evidence at his jury trial at 53 Ohio St.3d at 108-109. The Supreme Court of Ohio affirmed Appellant's convictions with Justice Brown and Wright concurring in part, and dissenting in part.[1]

[*P4] In May 1991, the Supreme Court of Ohio granted a stay of execution to enable Appellant to file a petition for post-conviction relief. *State v. Landrum*, 60 Ohio St.3d 706, 573 N.E.2d 668. In May 1996, Appellant filed his petition pursuant to R.C. 2953.21, setting forth 45 claims for relief. *See State v. Landrum*, 4th Dist. Ross No. 98CA2401, 1999 Ohio App. LEXIS 71, 1999 WL 22626, (Jan. 11, 1999), (*Landrum III*). Appellant requested an evidentiary hearing. The State of **[**3]** Ohio filed a motion for judgment, alleging that no evidentiary hearing was required and addressing each of Appellant's claims for relief. On December 30, 1997, the trial court entered findings of fact and conclusions of law addressing and rejecting each of Appellant's claims for relief. The trial court dismissed Appellant's petition for post-conviction relief without a hearing. In *Landrum III* we found no merit to his assertion that the trial court erred by dismissing his claims and by denying his petition without an evidentiary hearing. We affirmed the trial court's judgment.

[*P5] In September 1998, Appellant filed an App.R. 26(B) application to reopen his appeal in the court of appeals, asserting that he had received ineffective assistance of counsel in his original appeal. In April 1999, this court rejected his application as untimely. In *State v. Landrum*, 87 Ohio St.3d 315, 1999-Ohio-71, 720 N.E.2d 524, (*Landrum IV*), the Supreme Court of Ohio agreed with this court's decision that Appellant's application to reopen his appeal was untimely under App.R. 26 (B) and that Appellant had failed to show "good cause" for the untimely filing.

[*P6] Appellant next filed a petition for a writ of habeas corpus in May 1996, and an amended petition in May 1999, and a second amended petition in **[**4]** August 2000. Appellant moved to expand the record to include an affidavit in support of his position that he did not procedurally default on his claim of ineffective assistance of appellate counsel. The magistrate judge ultimately ruled in part that Ohio App.R. 26(B) was not so firmly established in Ohio's capital cases as to prevent a merits review of Appellant's ineffective assistance of counsel claims. *See Landrum v. Anderson*, 185 F. Supp.2d 868, 873 (S.D. Ohio 2002) (*Landrum V*).

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[1] Justice Brown wrote: "I agree with the majority that appellant's convictions should be affirmed. However, I must respectfully dissent from the judgment so far as it upholds the sentence of death." Justice Brown disagreed that the Court's independent reweighing of the aggravating circumstances against the mitigating factors in consideration of the appropriateness of the death penalty determination cured any prejudice to appellant, given the exclusion of testimony "critical to appellant's mitigation effort." *Id.* at 53 Ohio St.3d 107, 126-127, 559 N.E.2d 710.

[*P7] In 2005, a magistrate judge recommended granting Appellant a conditional writ on the basis of one of his ineffective assistance of counsel claims. *Landrum v. Anderson*, No. 1:96-CV-641, 2005 U.S. Dist. LEXIS 41846, 2005 WL 3965399 (S.D. Ohio Nov. 1, 2005) (*Landrum VI*). In 2006, the district court adopted the magistrate judge's report and recommendation over the Warden's objections. *Landrum v. Anderson*, No. 1:96-CV-641, 2006 U.S. Dist. LEXIS 27510, 2006 WL 1027738 (S.D. Ohio Apr. 17, 2006) (*Landrum VII*). In *Landrum v. Mitchell*, 625 F.3d 905 (6th Circuit, 2010), (*Landrum VIII*), the circuit appeals judge reversed the district court's grant of habeas corpus on the basis of ineffective assistance of counsel.

[*P8] On January 12, 2017, Appellant filed a motion for leave to file a motion for a new mitigation trial and motion for new mitigation trial. Based on the United States Supreme Court decision in *Hurst v. Florida*, 136 S.Ct. 616, 193 L. Ed. 2d 504, 84 USLW 4032 (2016). Appellant's motion requested leave to file his motion for new mitigation trial **[**5]** because, under Crim.R. 33(A)(1)(4), and (5), there was an irregularity in the proceedings; the verdict was contrary to law; and an error of law occurred at Appellant's trial. Appellant cited *Hurst* as controlling authority that the Ohio death penalty statutes under which he was sentenced in 1986 were unconstitutional. On February 16, 2017, the State filed a response to Appellant's motion for leave and motion for new trial. On March 3, 2017, Appellant filed a reply in support of his motion for leave.

[*P9] On June 14, 2017, the trial court found that Appellant had failed to provide any evidence that the sentencing recommendation was conducted in a manner inconsistent with the Ohio death penalty statutes. Appellant's motion for a new trial was found not well taken and overruled. This timely appeal followed.

ASSIGNMENT OF ERROR

"I. THE TRIAL ERRED WHEN IT DENIED LANDRUM'S MOTION FOR A NEW TRIAL."

STANDARD OF REVIEW

[*P10] Trial courts ordinarily possess broad discretion when ruling on a defendant's motion for leave to file a new trial motion. *State v. Bennett*, 4th Dist. Scioto No. 16CA3765, 2017-Ohio-574, ¶ 9; *State v. Waddy*, 10th Dist. Franklin No. 15AP-397, 2016-Ohio-4911, ¶ 20, 68 N.E.3d 381; *State v. Hill*, 8th Dist. Cuyahoga No. 102083, 2015-Ohio-1652, ¶ 16, citing *State v. McConnell*, 170 Ohio App.3d 800, 2007-Ohio-1181, 869 N.E.2d 77, ¶ 19 (2nd Dist.); *State v. Clumm*, 4th Dist. Athens No. 08CA32, 2010-Ohio-342, ¶ 14; *State v. Pinkerman*, 88 Ohio App.3d 158, 160, 623 N.E.2d 643 (4th Dist.1993). An "abuse of discretion" means that the court acted in an "'unreasonable, arbitrary, or unconscionable'" manner or **[**6]** employed "'a view or action that no conscientious judge could honestly have taken.'" *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15

N.E.3d 818, ¶ 67, quoting *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23. A trial court generally abuses its discretion when it fails to engage in a "'sound reasoning process.'" *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). Additionally, "[a]buse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court." *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34. We are mindful, however, that no court has the authority, within its discretion, to commit an error of law. *State v. Boone*, 2017-Ohio-843, 85 N.E.3d 1227, (10th Dist.), ¶ 9, citing *State v. Moncrief*, 10th Dist. No. 13AP-391, 2013-Ohio-4571, ¶ 7. *See also 2-J Supply Co. Inc. V. Garrett & Parker, LLC*, 4th Dist. Highland No. 13CA29, 2015-Ohio-2757, ¶ 9.

LEGAL ANALYSIS

[*P11] Appellant frames his issue presented for review as follows: Is Ohio's death penalty scheme unconstitutional under *Hurst v. Florida*, 136 S.Ct. 616, 193 L. Ed. 2d 504, 84 USLW 4032 (2016). In *Hurst*, the United States Supreme Court, Justice Sotomayor, held that Florida's capital sentencing scheme, under which an advisory jury makes a recommendation to a judge, and the judge makes the critical findings needed for imposition of a death sentence, violates the Sixth Amendment right to trial. Appellant argues Ohio's capital sentencing statute, R.C. 2929.03, like the unconstitutional Florida statute, vests sentencing authority in the trial judge who makes specific, independent findings that are required to sentence a defendant to death. Appellant concludes that Ohio's sentencing **[**7]** scheme is "remarkably similar" to the pre-*Hurst* Florida statute and suffers the same constitutional deficiencies. For these reasons, Appellant requests that the decision of the trial court be reversed, his sentence be vacated, and the matter be remanded for a new mitigation trial.

[*P12] However, in response, Appellee begins by pointing out Appellant's motion for leave to file a motion for new trial was filed on January 12, 2017. Appellee asserts Appellant's motion is untimely pursuant to Crim.R.33 (B). Appellee directs our attention to the Seventh District's decision in *State v. Mundt*, 7th Dist. Noble No. 17NO0446, 2017-Ohio-7771.

[*P13] In *Mundt*, the appellate court found that despite the *Hurst* decision, Mundt was capable of raising the same argument prior to *Hurst* relying on other cases for support, such as *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). The appellate court found Mundt's motion for leave to file a motion for new trial was untimely. Appellee argues Appellant, like Mundt, filed his motion a year after *Hurst* was decided and that a year was not a reasonable time to evaluate *Hurst* and seek relief pursuant to its

holding. Appellee concludes that Appellant has failed to show he was unavoidably prevented from filing his motion prior to January 2017. **[**8]**

[*P14] We begin by reviewing the applicable rule. Crim.R. 33, new trial, provides in pertinent part:

> "(A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
> (1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;
> * * *
> (4) That the verdict is not sustained by sufficient evidence or is contrary to law * * *
> (5) Error of law occurring at the trial * * *.
>
> (B) Motion for New Trial; Form, Time. 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 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." (Emphasis added.)

Appellant **[**9]** has argued that his motion was not untimely in that:

> 1. The trial court sentenced him to death in April 1986 and given that *Apprendi* was not decided until 2000 and *Ring* in 2002, Appellant could not have filed his motion for a new sentencing trial encompassing the *Hurst* decision within fourteen days of the jury's verdicts or the trial court's imposition of sentence;
>
> 2. Prior to *Hurst*, the Ohio Supreme Court repeatedly held that the Ohio Supreme Court's sentencing procedure was identical to Florida's and not until *Hurst* would the Supreme Court of Ohio have given meaningful reconsideration to the *Hurst* issue; and,
>
> 3. He could not have filed a motion based on *Hurst* prior to January 12, 2017 because *Hurst* is a complex decision which takes time to digest and understand.

[*P15] For the reasons which follow, we find Appellant's arguments are without merit. After extensive review of the Ohio case law discussing the *Hurst* decision, we are guided by the well-reasoned Mundt decision as persuasive authority for us to find that Appellant's motion was not timely filed. Mundt conceded that his motion was filed well outside the time requirements set forth in the criminal rule and, as such, was required to obtain **[**10]** leave of court to file his motion for new trial. The appellate court therefore construed the

narrow issue before the trial court as whether Mundt was "unavoidably prevented in filing a timely motion for a new trial." *Id.* at P6. In *Bennett, supra*, at ¶ 7, we observed:

> "[A] party is unavoidably prevented from filing a motion for a new trial if the party had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence." *State v. Walden*, 19 Ohio App.3d 141, 146, 19 Ohio B. 230, 483 N.E.2d 859 (10th Dist.1984); *State v. Wilson*, 2nd Dist. Montgomery No. 23247, 2009-Ohio-7035, ¶ 8."

[*P16] Whether or not Appellant was unavoidably prevented from filing a motion for new mitigation trial, based upon the constitutional argument he is now making, is the precise issue before this court. Appellant was sentenced to death in 1986. Mundt was sentenced to death subsequent to a crime committed in 2004. Mundt claimed he was unavoidably prevented from filing a motion because *Hurst* was decided by the United States Supreme Court over 11 years after he was sentenced to death. However, the Seventh District Court disagreed. The *Mundt* court cited *State v. Roberts*, 150 Ohio St. 3d 47, 2017-Ohio-2998, 78 N.E.3d 851, in support of the conclusion that Mundt, like Roberts, could have made **[**11]** his argument regarding the constitutionality of Ohio's death penalty sentencing scheme prior to the release of the *Hurst* decision.

[*P17] Roberts was convicted and sentenced to death for the 2001 aggravated murder of her ex-husband. After her sentence was vacated a second time, she was again sentenced to death. In reviewing her assignments of error, the Supreme Court of Ohio declined to consider her constitutional claim, raised for the first time at oral argument, that the Ohio sentencing procedure violated *Hurst*. In doing so, the Supreme Court observed at ¶ 84:

> "We recognize that the United States Supreme Court decided *Hurst* after the submission of briefs in this case, but Roberts could have made essentially the same Sixth Amendment argument 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)."

[*P18] The *Mundt* court also cited *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, ¶ 59-60, for the Supreme Court of Ohio's recognition, even prior to the *Roberts* decision, that Ohio's death penalty statute is fundamentally different from those in Florida, pre-*Hurst*.[2]

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[2] Appellant and others have repeatedly characterized the pre-*Hurst* Florida death penalty statute and the current Ohio death penalty statute as "remarkably similar." However, the recent decision in *Gapen v. Robinson*, No. 3:08-CV-280, 2017 U.S. Dist. LEXIS 130755, 2017 WL 3524688, (S.D. Ohio), *3, observed: "*[State v.] Rogers* held that the statutes were similar in that neither Florida nor Ohio has a 'sentencing jury:' instead the imposition of the sentence is imposed by the trial judge. *Rogers*, 28 Ohio St.3d at 430. *[State v.]Rogers* did not hold that Ohio's statute was 'remarkably similar' to Florida's in terms of the judge's ability to impose the death penalty independent of crucial factual

Belton was convicted pursuant to a no-contest plea of capital murder and aggravated robbery and was sentenced to death. In his appeal of right, Ohio's highest court held that the statutory scheme governing hearing before a three-judge panel on **[**12]** plea of no contest to a capital offense did not implicate Belton's right to jury trial under *Apprendi* and *Ring*. The *Belton* court wrote at paragraphs 56 and 57:

> "In support of his constitutional claim, Belton cites two United States Supreme Court decisions: *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). In *Apprendi*, the Supreme Court held that "the Sixth Amendment does not permit a defendant to be 'expose[d] * * * to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" (Emphasis and brackets sic.) *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 189, quoting *Apprendi* at 483, 120 S.Ct. 2348. Thus, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* at 490, 120 S.Ct. 2348."
>
> "Two years later, in *Ring*, the Supreme Court applied the *Apprendi* rule to invalidate Arizona's capital-sentencing scheme. Under Arizona's former scheme, "following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determine[d] the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty." (Brackets sic.) *Ring* at 588, 122 S.Ct. 2428. *Ring* declared this system unconstitutional, because the **[**13]** aggravating factors operated as "'the functional equivalent of an element of a greater offense.'" Id. at 609, 122 S.Ct. 2428, quoting *Apprendi* at 494, fn. 19, 120 S.Ct. 2348. The Supreme Court explained that because the finding of an aggravating circumstance made a defendant eligible to receive the death penalty, the jury must also determine whether the state met its burden of proof as to that element. *Id.*, overruling *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L. Ed. 2d 511 (1990)."

[*P19] The *Belton* decision continued at paragraphs 59 and 60:

> "Ohio's capital-sentencing scheme is unlike the laws at issue in *Ring* and *Hurst*. In Ohio, a capital case does not proceed to the sentencing phase until after the fact-finder has found a defendant guilty of one or more aggravating circumstances. *See* R.C. 2929.03(D); R.C. 2929.04(B) and (C); **337 *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 147. Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not

findings by the jury." The opinion further stated 2017 U.S. Dist. LEXIS 130755, [WL] at *3: "[The Magistrate] properly chastised Gapen for 'ripping language out of context and using it to prove a proposition not intended by the author.'"

possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment. Moreover, in Ohio, if a defendant is tried by a jury, then the judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence. R.C. 2929.03(D)(2).

Federal and state courts have upheld laws similar to Ohio's, **[**14]** explaining that if a defendant has already been found to be death-penalty eligible, then subsequent weighing processes for sentencing purposes do not implicate *Apprendi* and *Ring*. Weighing is not a fact-finding process subject to the Sixth Amendment, because "[t]hese determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination." *State v. Gales*, 265 Neb. 598, 628, 658 N.W.2d 604 (2003); *see, e.g., State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 718, 126 P.3d 516 (2005); *Ortiz v. State*, 869 A.2d 285, 303-305 (Del.2005); *Ritchie v. State*, 809 N.E.2d 258, 268 (Ind.2004). Instead, the weighing process amounts to "a complex moral judgment" about what penalty to impose upon a defendant who is already death-penalty eligible. United *States v. Runyon*, 707 F.3d 475, 515-516 (4th Cir.2013) (citing cases from other federal appeals courts)."

[*P20] Further support for Appellee's position that, based on the *Apprendi* and *Ring* decisions, Appellant's motion was untimely is provided in *Campbell v. Jenkins*, No. 2:15-CV-1702, 2017 U.S. Dist. LEXIS 130803, 2017 WL 3524686, (S.D. Ohio). There, the district judge observed 2017 U.S. Dist. LEXIS 130803, [WL] at *8:

"As several courts have pointed out, *Hurst* simply applied the principles laid down many years ago in *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)—that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348. *See Hutton v. Mitchell*, 839 F.3d 486, 499 (6th Cir.2016) (explaining that *Hurst* "reiterated" *Apprendi's* holding, **[**15]** and "rel[ied] on *Ring*."); *Sneed v. Jenkins*, No. 5:17-cv-83, 2017 U.S. Dist. LEXIS 19931, 2017 WL 564821, at *4 (N.D. Ohio Feb. 13, 2017) ("The Supreme Court in *Hurst* plainly and expressly applied the standard it first set forth in *Apprendi* ... and later applied to capital cases in *Ring* ... to Florida's capital-sentencing scheme; it neither expanded the *Apprendi/Ring* rule nor announced a new rule."); *State v. Mason*, ___ N.E.3d ___, 2016-Ohio-8400, ¶ 42 ("Hurst did not expand *Apprendi* and *Ring*.")."

[*P21] Appellant, however, contends that the *Mundt* case, as well as *Campbell*, directed to our attention by Appellee, are easily distinguishable. Appellant contends that the *Campbell* decision came before the court on a successive federal habeas petition. The first

one was filed in 1996 and as such, there was no way he could have included a *Hurst*-like claim. As for Mundt, he was sentenced to death for a crime committed in 2004. Mundt, unlike Appellant, could have raised the *Hurst* issue in his direct appeal, application for reopening, and post-conviction petition. Appellant points out *Apprendi* and *Ring* were decided after he filed his direct appeal, post-conviction petition and habeas petition.

[*P22] While Appellant is correct in distinguishing the cases in this manner, he overlooks the fact that Appellant's appeal comes before **[**16]** us on the overruling of a motion for new trial. In reaching its decision, the *Mundt* court emphasized that Mundt filed his motion for leave over eight months after *Belton* and a year after *Hurst*. The appellate court wrote: "Contrary to the assertions in counsel's affidavit, this was not a reasonable time after *Hurst* was decided to evaluate its import and seek relief pursuant to that holding." *Mundt, supra*, at ¶ 11. In Appellant's case, Appellee has emphasized that Appellant's motion for leave was filed approximately one year after *Hurst* and almost a full nine months after *Belton*.

[*P23] Appellant also criticizes the holding in *Belton* as dicta, given that *Belton* involved a defendant who waived his right to jury trial and was sentenced by a three-judge panel, and the *Hurst* issue had not definitively analyzed by the Supreme Court of Ohio. However, we are similarly guided, as was the appellate court in *State v. Mason*, 3rd Dist. Marion No. 9-16-34, 2016-Ohio-8400, to acknowledge Belton as persuasive authority.

[*P24] In *Mason*, the appellate court reversed the trial court's grant of a motion to dismiss the death penalty certification from Mason's indictment for murder on the grounds that the death penalty statute was unconstitutional. **[**17]** The appellate court held that the death-penalty statute in effect at the time of defendant's crimes did not violate the Sixth Amendment.[3]

The appellate court observed at ¶ 35:

> "Even if we are to accept as true the trial court's conclusion that the Supreme Court of Ohio's application of *Hurst* in *Belton* is merely dicta, *Belton* is highly persuasive. At the very least, the Supreme Court of Ohio's discussion of *Hurst* in *Belton* "sheds some light on how the majority of our highest court might rule on" the specific issue presented by this case." *Mason, supra*, quoting *State v. Blankenburg*, 197 Ohio App. 3d 201, 2012-Ohio-1289, 966 N.E. 2d 958 (12th Dist.) at P143."[4]

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[3] The *Mason* court observed that "Although Ohio's death penalty statute was amended * * * between the time that Mason committed his crimes, and 2008, the time that Belton committed his crimes, those amendments do not impact the applications of *Hurst* to Ohio's death penalty statute. *Compare* R.C. 2929.03 (1981) with R.C. 2929.03 (2008). *Compare* R.C. 2929.04 (19810) with R.C. 2929.04 (2002)." *Mason, supra*, at Fn. 11. Similarly, although 2929.03 was again amended, effective April 6, 2017, and 2929.04 was again amended effective October 12, 2016, those amendments have no impact as to the applications of *Hurst* in Appellant's case.

[4] Appellant has urged that the Supreme Court of Ohio has the *Hurst* issue before it in *Mason, supra*; ***State v. Ford*, 148 Ohio St.3d 1419, 2017-Ohio-826, 70 N.E.3d 602; *State v. Jackson*, 151 Ohio St.3d 1422, 2017-Ohio-8371, 84 N.E.3d 1061; *State v. Kirkland*, 145 Ohio**

[*P25] Finally, Appellant argues that because the trial court reached the merits of his motion for new sentencing trial, Appellee is asking this court to substitute its judgment for that of the trial court. We do not find this argument persuasive. "The affirmance of a judgment by a reviewing court is not an affirmance of the reasons given by the lower court for its rulings," and "[r]eviewing courts affirm and reverse judgments, not reasons." *State v. Rubes*, 2012-Ohio-4100, 32, 975 N.E.2d 1054, quoting *State v. Eschenauer*, 11th Dist. No. 12-237, 1988 Ohio App. LEXIS 4479, 1988 WL 121296, *4 (Nov. 10, 1988). An appellate court may affirm a trial court's decision to deny a motion for leave to file a motion for new trial for different reasons other **[**18]** than those expressed by the trial court. *State v. Boone*, 2017-Ohio-843, 85 N.E.3d 1227 (10th Dist.), ¶ 5. Given that Appellant's motion was untimely filed, the trial court did not abuse its discretion in overruling it.

[*P26] Based upon the foregoing, we find no merit to Appellant's sole assignment of argument and we find no abuse of discretion. Accordingly, we overrule the assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure **[**19]** of the Appellant to file a notice of appeal with the

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St.3d 1455, 2016-Ohio-2807, 49 N.E.3d 318; and ***State ex rel. O'Malley v. Collier-Williams*, 150 Ohio St.3d 1405, 2017-Ohio-6964, 78 N.E.3d 907**. Appellant suggests in the interest of judicial economy, we hold our decision until after these cases have been decided, and possible additional briefing has occurred. As of the drafting of this opinion, Jackson's application for reopening has been denied. In ***Kirkland*, 145 Ohio St.3d 1455, 2016-Ohio-2807, 49 N.E.3d 318 (Table)** the Supreme Court briefly held: "On motion for order or relief. Motion granted. Cause remanded for new mitigation and sentencing hearing." Regarding *Kirkland*, the recent *Gapen* decision, *supra*, commented 2017 U.S. Dist. LEXIS 130755, [WL] at *6: "In the view of this Court, *Kirkland* does not necessarily give rise to an inference that the Ohio Supreme Court would find that Hurst applies retroactively. In any event, even if the Ohio Supreme Court did find that *Hurst* applies retroactively, it appears that the decision in *Belton*, noting the critical differences between the capital sentencing schemes in Ohio and Florida, would foreclose the relief that Gapen seeks." As of the drafting of this opinion, the other cases remain pending before the Supreme Court.

Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J.: Concurs with Concurring Opinion.

Hoover, P.J.: Concurs in Judgment Only.

For the Court,

BY:

Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

Concur by: Harsha

Concur

Harsha, J., concurs with concurring opinion:

[*P27] Initially, I find it doubtful that Crim.R. 33(A) is the appropriate mechanism for Landrum's effort to obtain a new trial/sentencing hearing. Crim.R. 33 governs motions for new trial and sets forth the grounds for obtaining that relief. As the Tenth District pointed out in *State v. Ingram*, 10th Dist. Franklin No. 08AP-937, 2009-Ohio-2755, none of the grounds in Crim.R. 33(A) specifically refer to a subsequent Supreme Court of the United States decision recognizing a new state or federal right that changes the law in effect at the **[**20]** time of the movant's conviction. *Id.* at ¶ 15. As both *Ingram* and *State v. Jackson*, 2018-Ohio-276, ___ N.E.3d ___, ¶ 17 (8th Dist.) indicate, cases applying Crim.R. 33(A) more appropriately involve rulings that were erroneous at the time the case was being tried; they do not deal with subsequent changes in the law. As the court in *Jackson* observed, "[i]ndeed, an error based on changes in the law that occurred after trial obviously could not have occurred during trial." *Id.* at ¶ 17. And as *Jackson* also pointed out, claims

based upon newly recognized federal or state rights are appropriate under Ohio's statute for post-conviction relief, R.C. 2953.23(A). *Id.* at ¶ 19.

[*P28] Nonetheless, I agree that Landrum's motion for leave was untimely as he clearly could have made the same motion much earlier by simply relying upon the principles established in *Apprendi*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, and *Ring*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556.

[*P29] Likewise, I conclude the trial court correctly denied Landrum's motion for a new trial/sentencing on the merits after implicitly granting the motion for leave. As both state and federal courts have recently indicated, the Ohio procedure and Florida's are not the same, with the result that Ohio's passes muster under the Apprendi, Ring, and *Hurst*, ___ U.S. ___, 136 S. Ct. 616, 193 L. Ed. 2d 504, chain of cases. *See State v. Belton*, 149 Ohio St.3d. 165, 2016-Ohio-1581, 74 N.E.3d. 319, ¶ 59-60 (dicta), *State v. Carter*, 1st Dist. Hamilton No. C-170231, 2018-Ohio-645, ¶ 8, 95 N.E.3d 443; *Gapen v. Robinson*, S.D. Ohio No. 3:08-CV-280, 2017 U.S. Dist. LEXIS 130755, 2017 WL 3524688 (Aug. 14, 2017).

[*P30] And as *Gapen* proclaims, *Hurst* does not announce **[**21]** a new rule of rule, nor is it entitled to retroactive application to cases on collateral review.

End of Document

State v. Landrum

Supreme Court of Ohio

August 15, 2018, Decided

2018-0679.

Reporter
2018 Ohio LEXIS 2012 *; 153 Ohio St. 3d 1461; 2018-Ohio-3258; 104 N.E.3d 792; 2018 WL 3869419

State v. Landrum.

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: Ross App. No. 17CA3607, 2018-Ohio-1280 **[*1]** .

State v. Landrum, 2018-Ohio-1280, 2018 Ohio App. LEXIS 1404 (Ohio Ct. App., Ross County, Mar. 29, 2018)

Opinion

APPEAL NOT ACCEPTED FOR REVIEW

End of Document

THE STATE OF OHIO	)	IN THE COMMON PLEAS COURT
	)SS:	
COUNTY OF ROSS	)	CASE NO. 85 CR 107

THE STATE OF OHIO,
Plaintiff,

vs.

LAWRENCE ALFRED LANDRUM
Defendant.

OPINION OF THE TRIAL JUDGE
IN CAPITAL CASE

Ohio Revised Code Section 2929.03(F)

The Honorable Val B. Mowrey, Jr.
Judge, Court of Common Pleas
Ross County, Ohio

BACKGROUND

This case was commenced with the filing of an indictment on September 27th, 1985, against the defendant, Lawrence Alfred Landrum, charging him with one count of Aggravated Murder with two specifications and one count of Aggravated Burglary.

The State of Ohio from the commencement of this action was represented by the Prosecuting Attorney, Richard G. Ward, and the defendant was represented by Thomas E. Phillips and William Allyn, Jr. The defendant was arraigned before this Court on September 27th, 1985, at which time the defendant entered pleas of not guilty as to each count and specification contained in the indictment.

Subsequent to the date of arraignment on several separate court days and on the record, pre-trial motions were heard and the Court granted the defense motion to retain an expert for a pre-trial psychiatric or psychological evaluation.

The guilt/non-guilt trial of the defendant, Lawrence Alfred Landrum, commenced on the 10th day of February, 1986, before a jury of 12 composed of seven women and five men and two alternate jurors on the charge of Aggravated Murder with two specifications of aggravating circumstances and one count of Aggravated Burglary.

The trial terminated on February 21st, 1986. During the trial the State of Ohio presented 20 witnesses who

underwent both vigorous direct and cross examination. The defense presented five witnesses including the defendant who although denying the actual commission of the murder admitted to the actual planning and execution of the Aggravated Burglary.

After receiving the instructions of the Court as to the law applicable to the guilt/non-guilt trial and after deliberating approximately five and one-half hours, the trial jury, on February 21st, 1986, returned its verdict and found the defendant guilty of Aggravated Murder together with two specifications of aggravating circumstances and guilty of Aggravated Burglary.

The aggravating circumstances the defendant, Lawrence Alfred Landrum, was found guilty of committing were set forth in the specifications contained in the first count of the Indictment as to Aggravated Murder and were set forth in the guilty verdict form signed by the jurors as follows:

(1) That the defendant, Lawrence Alfred Landrum, was guilty of the commission of the offense of Aggravated Murder for the purpose of escaping detection, apprehension, trial or punishment for another crime committed by him, i.e., Aggravated Burglary;

(2) That the defendant as the principal offender committed the offense of Aggravated Murder of Harold White, Sr., while the defendant was committing or attempting to commit Aggravated Burglary.

Thereupon, the trial jury was dismissed with proper admonitions concerning their conduct until March 17, 1986, at which time the sentencing trial commenced. Subsequent to the return of the verdict by the trial jury on February 21st, and the commencement of the sentencing trial, the defendant, through counsel, filed his motion with this Court requesting a mental evaluation, which said motion was sustained by this Court. Prior to the commencement of the sentencing trial however, the defendant withdrew his motion for a mental evaluation and the sentencing phase began on March 17th, 1986. The defendant presented the testimony of 12 witnesses in mitigation of imposition of the death penalty and on March 19th, 1986, the trial jury after deliberating eleven and one-half hours, returned a verdict finding beyond a reasonable doubt that the aggravating circumstances which the defendant, Lawrence Alfred Landrum, was found guilty of committing were sufficient to outweigh the mitigating factors present in this case and recommended that the sentence of death be imposed on the defendant, Lawrence Alfred Landrum. Prior to deliberating on the sentence, the jury received the instructions of the Court as to the law applicable to the sentencing proceedings as well as arguments of counsel.

OPINION

Pursuant to the provisions of Section 2929.03(F) the trial jury having recommended that the sentence of death be imposed upon Lawrence Alfred Landrum, it is the requirement and obligation of the trial judge to determine whether the State has proved, beyond a reasonable doubt, that the aggravating circumstances that the defendant, Lawrence Alfred Landrum, was found guilty of committing outweigh the mitigating factors presented by him.

Based upon the relevant evidence raised at trial, the testimony, other evidence, the statement and testimony of the defendant, Lawrence Alfred Landrum, and the arguments of respective counsel, this Court finds that the following concepts were presented to the Court and jury and considered as being in the nature of mitigating factors:

(1) The childhood and adult background, history, and character of the defendant, Lawrence Landrum.

(2) The youth of the offender at the time of the offense, that is, his 23 years of age;

(3) The lack of a significant history of prior criminal convictions and delinquency adjudications involving Lawrence Landrum;

(4) The proposition that although the defendant, Lawrence Landrum, was a participant in the offense involved, but was not the principal offender and the degree of his participation in the offense and the degree of his

participation in the acts that led to the death of the victim;

(5) Any other factors which the jury or Court may find to exist from the evidence in mitigation of the sentence of death.

Although considered to be factors which fall within this last category of mitigation circumstances, the defendant and defense counsel nevertheless urge the jury and the Court to consider as separate factors in mitigation the following circumstances:

(1) "Youthfulness of Larry Landrum."

(2) "A lack of a substantial history of prior juvenile adjudications and criminal adjudications."

(3) "His degree of participation in the offense."

(4) "His grade zone, his history, his background."

(5) "Lack of history of violent behavior."

(6) "Excessively showered with love. A person that was brought up thinking that he could do no wrong."

(7) "His environment was totally, abruptly changed when he came back to Chillicothe at age of five years old."

(8) "Inconsistent discipline at home."

(9) "Ineffectiveness of Juvenile Court."

(10) "Ineffectiveness of the Naval System."

(11) "Problem with Drugs and Alcohol."

(12) "His remorse, sorriness, repentance, concern for what he's put everyone through."

(13) "Love of his family for Larry."

(14) "Adaptability to prison life."

(15) "His ability to contribute to society."

As previously noted, the provisions of Section 2929.03(F) require this Court to state in a separate opinion the Court's specific findings as to the existence of the aggravating circumstances which the defendant is found guilty of committing beyond a reasonable doubt and the existence of mitigating factors present in the case.

Based upon all relevant evidence presented at trial, the testimony, other evidence, the testimony of the defendant, Lawrence Alfred Landrum, and the arguments of counsel, this Court finds that the following circumstances were presented to this Court and considered as being in the nature of mitigating factors;

> The nature and circumstances of the offense, the history, character and background of the defendant, Lawrence Alfred Landrum, the youth of Lawrence Landrum, the degree and nature of participation in the offense by Lawrence Landrum; the defendant's family upbringing; the nature and circumstances of his family, school, and social and military environment; the nature and extent of any drug and alcohol problems which he may have had; any and all other factors relevant to the issue of whether the offender should be sentenced to death as presented by the defense and argued by defense counsel in this case.

The trial jury found beyond a reasonable doubt that the defendant was guilty beyond a reasonable doubt of committing the offense of Aggravated Murder for the purpose of escaping detention, apprehension, trial or punishment for another crime committed by him, that is, Aggravated Burglary, and that the defendant as the principal offender committed the offense of Aggravated Murder while he was committing or attempting to commit Aggravated Burglary.

By motion of the defendant, this Court merged the two aggravating specifications into one and so instructed the jury that they were to consider the specifications as one and as involving one indivisible course of conduct by the defendant. The findings by this Court in this opinion are made and presented herein consistent with that charge to the jury requiring the merger of the two aggravating specifications.

It should be further pointed out that the principles and issues of law upon which this Court has been guided in arriving at its decision and opinion herein are those provided in the written jury instructions to the trial jury during these proceedings. Accordingly, such principles of law are made a part hereof as if they were rewritten in full within this opinion.

Pursuant to those principles of law, this Court will then set forth in this opinion its findings as required pursuant to Section 2929.03(F).

A brief description of the crime involved herein is appropriate and was established as follows:

During the middle part of September, 1985, the defendant, Lowrence Landrum, had attempted to contact Kameal Coffenberger for the purpose of assisting him in committing a burglary. The defendant had also spoken with one Carolyn Brown who rented an apartment from the deceased, Harold White, Sr., on at least one occasion prior to the commission of this murder. On at least one occasion prior to the date of this offense of September 19th, 1985, the defendant and his accomplice, Grant Swackhammer, a minor, contacted Mr. White at his apartment, ostensibly for the purpose of obtaining an apartment from Mr. White. In fact the defendant's purpose was to observe the apartment and ascertain whether a burglary was feasible. On the occasion either the day before the 19th or two days before when the defendant was with Carolyn Brown, her testimony clearly indicated that the defendant had formulated a plan to rob Mr. White, to use rubber surgical gloves and to kill him should he come into the home during the burglary.

On the next day the defendant made a trip to the Ross County Medical Center where his girlfriend had just given birth to the defendant's son. At this time the defendant explained that he had a pair of rubber surgical gloves and that they might well make some money for him.

On the date of the burglary and murder, the defendant and Grant Swackhammer came to the White residence for the purpose of committing a burglary and committing the crime. They had with them a large railroad bolt which ultimately

was used to strike Mr. White down during the burglary when in fact he did discover the burglary in progress. Entrance was gained to the White home through an upstairs window which was broken and entrance was made into the home by Grant Swackhammer. He then opened the door for the defendant to enter into the home and the burglary commenced. Both the defendant and Grant Swackhammer had observed on earlier occasions that Mr. White left his home in the evening hours to dine out and at about 8:30 in the evening entrance was made.

While in the White home both the defendant and Grant Swackhammer commenced to ransack the home looking for items to steal. When they were discovered unexpectedly by Mr. White, Mr. White was struck on the head with the railroad bolt several times and knocked to the floor. A kitchen knife from Mr. White's drawer was obtained and Mr. White's death was caused by severing his throat with the knife. Both the defendant and Grant Swackhammer remained in the apartment for a considerable period of time thereafter and completed their ransacking of the apartment by stealing approximately seventy dollars and some pills.

Although the exact events that occurred after this murder are not complete, the defendant, Lawrence Landrum, admitted to Mike Drew, Rick Perry, and Larry Perry that he had in fact committed murder and killed Mr. White. The defendant further admitted his crime of murder to Cary Leasure.

Later the defendant brought Karen Hughes Brown to the apartment of Carolyn Brown and at that time admitted to her the details of the murder and asked her if she wished to see Mr. White's body.

The evidence clearly established that although Mr. White was struck on several occasions about his head, none of these blows themselves would have necessarily caused his death. The Coroner established that the cause of death was directly due to and caused by the knife wounds to the neck of Mr. White.

After the murder of Mr. White, the knife, gloves, and other items involving this crime were discovered by the police officers in a wooded area on the outskirts of Chillicothe.

As a result of an anonymous tip, the police investigation began to focus on the defendant who was subsequently arrested and charged with this offense along with Grant Swackhamer, whose case was adjudicated in the Common Pleas Court of Ross County, Juvenile Division.

The defendant denied any involvement in either the murder or burglary and subsequently entered pleas of not guilty to the Indictment.

The defendant testified in his own behalf and although denied committing the murder, readily admitted the planning of the burglary, the commission of the burglary, and the disposal of the murder weapon, gloves, and other items located by the police department and admitted into evidence during this trial.

ISSUE

The issue then presented to this Court pursuant to Section 2929.03(F), Revised Code of Ohio, are as follows: Did the State of Ohio prove beyond a reasonable doubt that the aggravating circumstance which the defendant, Lawrence Alfred Landrum, was found guilty of committing is sufficient to outweigh the factors in mitigation of imposition of the sentence of death.

This Court first considered and evaluated the age of the defendant which this Court determines to be a mitigating factor. It is true that the defendant was 23 years of age when this crime was committed and that, relatively speaking, this is or can be considered to be a youthful age. Nevertheless there is nothing to suggest that the age of the defendant had anything whatsoever to do with his ability or inability to determine right and wrong or to adjust and co-exist in the society in which he chose to live. It is clear that the hand of a youthful offender can be as deadly as an older individual and the youthful age of the defendant cannot be considered qualitatively as outweighing the aggravating circumstance in this case.

The defendant has further asserted his innocence in this crime and has attempted to place the blame for the commission of this murder on his accomplice and partner in crime, Grant Swackhammer. Yet it is clear in this case that the defendant was the one who planned this crime, the one who arranged to "case" the White home, the one who acquired the surgical gloves,

the one who was responsible for selecting the White home as the target of the burglary and the one who confessed that he would kill Mr. White should he discover the burglary prior to the murder and the one who confessed the murder after it occurred to five people, most of whom were very close friends with the defendant.

This Court has very carefully tested and considered the credibility and relevancy of the testimony of the defendant as well as the testimony of those to whom the defendant has confessed his crime and finds that the defendant's plea of innocence of this murder cannot withstand such close scrutiny. It is the conclusion of this Court that the plea of innocence asserted by the defendant involving his participation in this offense cannot and does not outweigh the aggravating circumstance and specification established by the State.

The defendant has further offered as a mitigating factor or circumstance in this case his lack of a significant history of prior criminal convictions and delinquency adjudications.

It is clear that the minor altercations which the defendant has had with his parents and the Ross County Juvenile Court system are insignificant and of a very minor nature. It is apparent that the defendant began to experience some difficulty in coping upon his transfer from his parochial school to the public schools and that on at least two occasions he committed theft offenses and suffered the consequences of being caught thereafter. It is also apparent that the defendant became less interested in school and again suffered the consequences of juvenile proceedings because of his behavior. This Court

determines that these in fact are insignificant especially in evaluating the entire and overall criminal record and background of the defendant. The defendant has never been convicted of a felony and according to his own admission has only been convicted of a misdemeanor involving bad checks since he attained the age of majority.

Although such minor or insignificant record of defendant is certainly a mitigating factor, this Court finds that it does not outweigh or overbalance the aggravating circumstance in this case.

The defense has offered a substantial amount of information, testimony, and evidence regarding the defendant's history, his character, and his background. The defense has shown that the defendant has no history of violent behavior, that he was born in the state of Michigan to a large family, that for the first five years of his life he lived in an extremely large household with his grandparents, aunts, uncles, and cousins and that his family life was very stable and loving.

The defendant has shown that at the age of five years his mother married and moved to Chillicothe, Ohio, and eventually a brother and sister were born and were reared in the same household. The defendant has shown that he may have experienced some difficulty with this abrupt change in his life style and according to him, his discipline at home became somewhat inconsistent which he feels caused his subsequent appearances before the Ross County Juvenile Court system.

The defendant further asserted that the juvenile court system was not sufficiently harsh or firm and that this ineffectiveness of the court system and his parents led to his subsequent behavioral problems with drinking and alcohol. The defendant further established that he served a brief tour of duty with the United States Navy and again asserts that the naval discipline system was ineffective and in some way contributed to his problems. The defendant has further shown that his family life consisted of a very stable and loving family, the members of whom expressed during his youth and adolescence a love and concern for him. The defendant has asserted what this Court considers to be mitigating factors concerning his background history and character 15 separate and identifiable matters. Although separately identifiable, it is clear that these 15 mitigating factors as set forth by defense counsel in its closing argument are all matters which are part of or concern the defendant's character and background, but which do not outweigh the mitigating circumstance which the defendant was found guilty of committing.

In addition to those which have been discussed above, the defendant has attempted to show that his use of alcohol and drugs is a mitigating factor and one which outweighs the aggravating circumstances in this case. This Court specifically finds that the defendant's voluntary use of drugs and alcohol cannot be a factor which begins to outweigh the specification involved in this cause. While it may be true that the defendant had consumed alcohol and taken drugs prior to this offense,

it is clear that the defendant was totally aware of what he was doing, while he was doing it, and what he intended to accomplish. Self-reliance upon drugs or alcohol in this case can in no way justify the conduct of the defendant or excuse the defendant from the consequences of his actions. For these reasons it is the opinion of this Court that these circumstances involving the defendant's use of alcohol and drugs do not outweigh the aggravating specifications in this case.

The defendant has further asserted his repentance and remorsefulness for taking the life of Mr. White and has pledged himself to his responsibility to contribute to society and perhaps aid other youthful offenders in an effort to dissuade them from pursuing a criminal life. While this is highly commendable and clearly illustrates some degree of adult responsibility on the defendant's part, these factors cannot be weighed more heavily in this case than the other factors in mitigation espoused by the defense and for that reason, do not outweigh the aggravating circumstances and specification involved.

At the time of this murder, the defendant was a 23 year old high school graduate who had been trained in the martial arts, who had fathered two children, who had come from a stable family background, and who at the time of this offense was planning another aggravated burglary with Romeal Coffenberger, realizing that someone might get killed. It is clear in this case that this aggravated burglary was formulated with careful planning and prior design and with the intention of the defendant

to kill Mr. White should he discover him during the burglary. Even though the defendant chose to consume alcohol and drugs, there is nothing whatsoever in this case to establish that the defendant did not appreciate the criminal nature of his conduct or that he did not have a very grave concern and awareness for the outcome of his actions, or that he was not in complete control of his mental and physical faculties.

Although this Court finds that the defense has offered mitigation factors and circumstances on behalf of the defendant, it is the duty and obligation of this Court to weigh not only the quantity of such circumstances against the aggravating specification herein, but to evaluate those factors qualitatively. This Court is not unmindful that the death sentence must not be capriciously or arbitrarily imposed and that the awesome responsibility of this trial court is to carefully evaluate and weigh the mitigating circumstances against the aggravating specification without bias, sympathy, or prejudice and according to the principles of law heretofore enumerated by this Court.

Therefore, upon full consideration of all relevant evidence raised at the trial, the testimony, other evidence, the testimony of the defendant, and the arguments of counsel, this Court is compelled to conclude that the mitigating circumstances offered by the defendant in this cause do not outweigh the aggravating specification. Based thereon this Court specifically finds by proof beyond a reasonable doubt that the aggravating circumstances which the defendant, Lawrence Alfred Landrum, was found guilty of committing did outweigh the mitigating

factors in this case beyond a reasonable doubt. For these reasons then, this Court is compelled to impose the sentence of death upon the defendant, Lawrence Alfred Landrum.

Pursuant therefore to Section 2949.23, Revised Code of Ohio, execution of the penalty of death shall be imposed on Lawrence Alfred Landrum on August 15, 1986.

VAL B. MOWREY, JR.
JUDGE, COMMON PLEAS COURT
ROSS COUNTY, OHIO

IN THE COURT OF COMMON PLEAS, ROSS COUNTY, OHIO

State of Ohio,

Plaintiff

v.

Lawrence Alfred Landrum

Case No. 85CR107

Decision & Order

This matter came before the Court upon the motion of defendant Lawrence Alfred Landrum for a new trial pursuant to Crim. R. 33. The State of Ohio filed its memoranda contra. The Court considers the matter fully briefed.

Defendant was convicted of aggravated murder in 1986 and was sentence to death. Defendant is challenging the sentencing phase of his conviction based upon Hurst v. Florida, 136 S. Ct. 616 (2016). In Hurst, the state of Florida's procedure for sentencing in a capital murder case was challenged. Florida's procedure is for the jury to determine the guilt or innocence of the defendant but does not make a finding on the aggravating circumstances as an element of the offense. The finding of guilt alone makes the defendant eligible for the death penalty. The Florida jury then hears aggravating and mitigating evidence and renders an advisory recommendation as to penalty. This recommendation is not made by a finding of beyond a reasonable doubt. Additionally, the judge is not bound by the recommendation. The Florida judge then makes the aggravating versus mitigating factors and may render a penalty more severe than the jury recommendation, i.e., the Court could impose a death penalty even though the jury recommended a life sentence.

In Ohio, for a defendant to proceed to the death penalty phase, a jury must find the defendant guilty of the offense beyond a reasonable doubt and also find the defendant guilty of the aggravating circumstances beyond a reasonable doubt. If the jury makes these findings

beyond a reasonable doubt then the case proceeds to the penalty phase of the trial. At the penalty phase the jury and the Court hears evidence in mitigation in favor of the defendant. The jury then proceeds to deliberate and must make a determination of whether the aggravating circumstances outweigh the the mitigating circumstances or vice versa. If the jury finds beyond a reasonable doubt the aggravating circumstances outweigh the mitigating circumstances it must make a sentence recommendation of death. If the jury finds the mitigating outweighs the aggravating circumstances then the recommendation must be a life sentence. If the sentence recommendation of death is made the judge must do an independent review of the aggravating versus mitigating factors. If the judge finds aggravating factors outweigh mitigating factors then the judge must impose the death penalty. If the judge disagrees with the jury on the death recommendation the judge must impose a life sentence. In Ohio, unlike Florida, the judge cannot impose a death penalty if the jury has not so found. In Ohio, all facts must be determined beyond a reasonable doubt by a jury. In Florida only the finding of guilt is made by the jury, not the aggravating versus mitigating circumstances.

The Ohio Supreme Court has addressed this issue and has considered Hurst v. Florida. In State v. Belton, 149 Ohio St. 3d 165, 2016-Ohio-1581, the Supreme Court upheld Ohio's statutory procedure for imposing the death penalty and found Ohio's scheme meets the test set forth in Hurst. In addition, the Third District Court of Appeals in State v. Mason, 2016-Ohio-8400, found Ohio's death penalty statute to be constitutional based on Hurst and Belton.

The defendant has failed to provide any evidence that the sentencing recommendation was conducted in a manner inconsistent with the Ohio death penalty statutes.

Based upon the foregoing, the Court finds the Defendant's motion for a new trial pursuant to Crim. R. 33 is not well taken. It is therefore Ordered that defendant's motion for a new sentencing hearing be and hereby is overruled.

Leonard F. Holzapfel, Judge
By Assignment

The Clerk of this Court is hereby directed to serve a copy of this Judgement Order, and its date of Entry upon the Journal, upon all counsel of record and all parties not represented by counsel, by personal service or by U.S. Mail, and to note service on the Docket.

Judge

COURT OF COMMON PLEAS
ROSS COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

-vs-

LAWRENCE ALFRED LANDRUM

Defendant.

CASE NO. Secret

INDICTMENT FOR:
Count One: Aggravated Murder
[R.C. 2903.01 (B)]
Count Two: Aggravated Burglary
[R.C. 2911.11 (A) (3)]

INDICTMENT
(Criminal Rule 6, 7; Section 2941.060, O.R.C.)

In the Common Pleas Court of Ross County, Ohio, of the 1985 term, Final Third Part, in the year of our Lord One Thousand Nine Hundred and Eighty-Five.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, being duly impanelled and sworn and charged to inquire of and present all offenses whatever committed within the limits of said County, on their oaths, in the name and by the authority of the State of Ohio, do find and present:

COUNT ONE

That Lawrence Alfred Landrum on or about the 19th day of September, 1985, at the County of Ross aforesaid, did purposely cause the death of another person, to-wit: Harold White, Sr., while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit Aggravated Burglary in violation of Section 2903.01 (B) of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

Specification One to the First Count:

The Grand Jurors further find and specify that the offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by Lawrence Alfred Landrum, as provided in Section 2929.04 (A) (3) and Section 2941.14 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

RICHARD G. WARD
PROSECUTING ATTORNEY
ROSS COUNTY, OHIO

Specification Two to the First Count:

The Grand Jurors further find and specify that the offense was committed by Lawrence Alfred Landrum, while the said Lawrence Alfred Landrum was committing, attempting to commit, or fleeing immediately after committing or attempting to commit Aggravated Burglary and the said Lawrence Alfred Landrum was the principal offender in the commission of the Aggravated Murder, as provided in Section 2929.04 (A) (7) and Section 2941.14 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

COUNT TWO

That Lawrence Alfred Landrum, on or about the 19th day of September, 1985, at the County of Ross aforesaid did by force, stealth or deception, trespass in an occupied structure, or in a separately secured or separately occupied portion thereof, with purpose to commit therein a theft offense, or a felony, and the occupied structure was the permanent or temporary habitation of Harold White, Sr., in which, at the time, Harold White, Sr., was present or likely to be present, in violation of Section 2911.11 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

Richard G. Ward
RICHARD G. WARD
Prosecuting Attorney
Ross County, Ohio

A TRUE BILL

Laura R. Mauch
FOREMAN OF THE GRAND JURY
Ross County, Ohio

RICHARD G. WARD
PROSECUTING ATTORNEY
ROSS COUNTY, OHIO

2929.04 of the Revised Code. If the panel of judges or the trial judge does not determine that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge shall terminate the sentencing hearing and impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

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

Cross-References to Related Sections

Aggravated murder, RC § 2903.01.
Reasonable doubt defined, RC § 2901.05.

Forms

Sentencing hearing. 4 OJI § 503.01
Specifications of aggravating circumstances. 4 OJI § 413.45

Law Review

Capital punishment in Ohio: aggravating circumstances. Note. 31 ClevStLRev 495 (1983).
Capital punishment, psychiatric experts and predictions of dangerousness. William Green. 13 CapitalULRev 533 (1984).
Fact or fiction: mitigating the death penalty in Ohio. Note. 32 ClevStLRev 263 (1983).
S.B. 1: Ohio enacts death penalty statute. Note. 7 UDayLRev 531 (1982).

[§ 2929.02.3] § 2929.023 [Defendant may raise matter of age.]

A person charged 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.

Cross-References to Related Sections

Aggravated murder, RC § 2903.01.
Reasonable doubt, RC § 2901.05.

Law Review

Eddings v. Oklahoma [50 USLW 4161 (1982)]: no blanket exemption under the eighth amendment for juveniles on death row. Note. 11 CapitalLRev 785 (1982).
"Unusual" punishment: the domestic effects of international norms restricting the application of the death penalty. Joan F. Hartman. 52 CinLRev 655 (1983).

CASE NOTES AND OAG

1. (1985) The word "age" as used in RC §§ 2929.02(A), 2929.02.3, 2929.03 and 2929.04 refers to a defendant's chronological age: State v. Rogers, 17 OS3d 174, 17 OBR 414, 478 NE2d 984.

[§ 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.

Cross-References to Related Sections

Aggravated murder, RC § 2903.01.

CASE NOTES AND OAG

1. (1984) Revised Code § 2929.02.4 requires the court to provide an indigent defendant with expert assistance whenever, in the sound discretion of the court, the services are reasonably necessary for the proper representation of a defendant charged with aggravated murder. The factors to consider are (1) the value of the expert assistance to the defendant's proper representation at either the guilt or sentencing phase of an aggravated murder trial; and (2) the availability of alternative devices that would fulfill the same functions as the expert assistance sought: State v. Jenkins, 15 OS3d 164, 15 OBR 311, 473 NE2d 264.

§ 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 retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other 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 divi-

sion (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