ORIGINAL

In the

Supreme Court of the United States

WILLIE LEE BELL,

Petitioner,

--VS--

THE STATE OF OHIO,

Respondent.

No. 76-6513

C. 4

Washington, D. C.
January 17, 1978

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WILLIE LEE BELL, Petitioner,	:	
v.	:	No. 76-6513
THE STATE OF OHIO, Respondent.	:	

Washington, D. C.,

Tuesday, January 17, 1978.

The above-entitled matter came on for argument at 11:02 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

H. FRED HOEFLE, ESQ., 400 Second National Building, 830 Main Street, Cincinnati, Ohio 45202; on behalf of the Petitioner.

LEONARD KIRSCHNER, ESQ., Chief Assistant Prosecuting Attorney, Appellate Division, Hamilton County, 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202; on behalf of the Respondent.

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C O N T E N T S

[Afternoon Session - pg. 45]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-6513, Bell against Ohio.

Mr. Hoefle, you may proceed whenever you're ready.

ORAL ARGUMENT OF H. FRED HOEFLE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HOEFLE: Mr. Chief Justice, and may it please the Court:

Before commencing with the more formal part of the argument, I think it would be helpful to delineate the issues briefly and to go into the Ohio statute, both as the legislative history has developed it and as it is operational at the present time.

The basic issues that we see in the challenge of the constitutionality of the statute are, first, does the Ohio statute place unconstitutional limitations upon the meaningful consideration of mitigating factors?

Secondly, whether the Ohio capital mitigation, set forth in the statute, is so narrowly circumscribed by the statutes and further by the judicial gloss put on it by the Ohio Supreme Court that it precludes consideration of these important factors and therefore is virtually a mandatory and therefore unconstitutional capital system?

Finally, does the Ohio statute permit a sentence or even require a death sentence which is grossly dispropor-

tionate to -- such as to violate the Constitution?

And we claim that the answer to those issues is affirmative in all three instances.

The Ohio capital statute presently in effect had its genesis before the decision of this Court in Furman, as part of an over-all of all of Ohio's criminal statutes. When it was first introduced and passed by the Ohio House, it was a model of constitutionality as we have come to see from the Gregg cases. It had open-ended, broad mitigating factors included. It had jury participation in the sentencing process guaranteed. It had a broad roster of aggravating circumstances and the statutes provided for a bifurcated proceeding.

While that bill had passed the House and was presently -- or was at that time in the Senate of Ohio, this Court decided the Furman case. And the Ohio Senate felt required by Furman, due its own legislative service committee's recommendations which are cited in the amicus brief, that to permit discretion even though there were specific mitigating factors enumerated, to permit any discretion might be to result in the statute's being declared unconstitutional under Furman.

So the final bill, as it was passed, retains the bifurcated proceedings, retains all of the, I believe, eight aggravating circumstances. The mitigating circumstances which were open-ended were eliminated and but three narrow mitigating

circumstances were put into the statute.

Also omitted from the final version was jury participation in sentencing.

We feel that the Ohio Legislature, as did the Legislatures in Louisiana and North Carolina, misconstrued Furman. They felt, I think, that Furman was -- stood for the position that any discretion on the part of sentencing would be unconstitutional.

In the present statutes, two statutes within the same group specifically remove discretion from the trial court in sentencing. 2929.03(E), which is cited on page 5 of our brief, indicates that if the court finds that "none of the mitigating circumstances listed in division (B) of 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender."

Now, it's fairly clear in itself, but they go on, on page 6 of our brief it is cited, they repeat this; and this is in 2929.04(B) down at the bottom of the page, where the three mitigating circumstances which we will discuss in a moment are listed. Again it states the death penalty is precluded when, "considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a

preponderance of the evidence," "Is precluded". So the sentencer really has no discretion at all under the Ohio statutes. If the facts are as found to constitute a mitigating circumstances, then the offender will live. If the facts do not constitute one of the three statutory mitigating factors, he will die.

So there is no sentencing discretion whatsoever.

An even more significant change that the Ohio Senate made in the statute, in response to Furman, was the narrowing of the mitigating factors. The broad, open-ended mitigating factor was eliminated and but three remained. I would distinguish that from, I believe, eight in Florida and the open-ended statutes in the Texas and Georgia statutes.

The most important of the mitigating circumstances, because it is the only mitigating circumstance that has anything at all to do with the personality and the individual offender, is the third. And that provides that the death penalty is precluded if "the offiense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

Well, psychosis has been defined as a major, severe form of mental disorder or disease. That's Random House Dictionary's definition; and Webster adds the adjective, "profound mental disease".

So either a person who is --

QUESTION: How does that compare with the American Psychiatric Association definition?

MR. HOEFLE: On psychosis, I believe it's close, Your Honor. I frankly haven't seen the American Psychiatric definition of psychosis. I believe that is fairly close.

At any rate, I think it is severe -- in my college psychology course it said the way to distinguish a psychotic is he has to go to the hospital, and a neurotic need not.

That may be a lay definition or a distinction.

[Laughter.]

MR. HOEFLE: But the mental deficiency is the key, because that is not defined in the statute, but the Ohio Supreme Court has construed it. And they have construed it as being equivalent to mental retardation. This was in their first post-Furman capital case, State vs. Bayless. They cited two medical dictionaries, case law, and the court psychiatrist in that particular case. The medical dictionaries they cite indicate, to further characterize what retardation is, is that a moron is the highest retard in intelligence and an idiot is the lowest, and an imbecile is in between.

The authorities, the psychiatric authorities cited in our brief, indicate that a moron is someone with an I.Q. of 70 or less, a mental age of 12 or less, and the other two are below that.

Therefore, under the Ohio statute, under this third

mitigating circumstance, the only one dealing with the offender himself, only a psychotic, a moron, an imbecile or an idiot has a reasonable chance of surviving the sentencing process. And then only if that condition, that mental condition caused the offense.

The other statutory factors --

QUESTION: That's a fact finding, isn't it?

MR. HOEFLE: That is, it is strictly fact finding, yes, sir. And that is fact finding by the trial judge or the three, if it went to a three-judge panel as we did, then the three judges decide, and they must unanimously find that none of the circumstances are present before they can sentence a man to death. If one of the judges finds a circumstance present, then the sentence is life, even though the other two may feel that the death penalty is warranted.

The first of these three mitigating circumstances, as it appears in the statute, is victim inducement. That the victim induced or facilitated his own death. If this can be shown to a preponderance, then the offender will escape with his life.

However, we must remember that we're talking about an aggravated murder situation, not all taking of life is aggravated murder. One of the aggravating circumstances must be present.

The only one that I could conceive would be murder for

hire. But that would involve the victim hiring his own killer. And I suppose if a case like that ever comes along, perhaps the victim inducement mitigation will have some significance. But we feel that it's basically illusory. Although there was one Northern Ohio appellate case where the court did find victim inducement, where the victim was armed and involved in a narcotics purchase.

However, that unreported appellate case added another element. They said that the only time you can even consider using victim inducement as mitigation is if the victim himself is acting unlawfully. And that condition is not even in the statute.

The final mitigating circumstance is that it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation. Duress and coercion, though, has been interpreted in Ohio's capital context by the Ohio Supreme Court; is such compulsion that will overcome the mind or volition of the defendant so that he acted other than he would ordinarily have acted in those circumstances.

Which we feel, at least, blows the distinction, if any, between mitigating duress and coercion and the duress and coercion which is a defense to any crime.

And in our own case they have further blown that distinction by applying the doctrine of withdrawal. On page 142

of the Appendix, the Court said: "Even if it were believed that appellant" -- that's Bell -- "was apprehensive of Hall and was 'forced' to go along with the crimes, the hard fact remains that appellant could very easily have quit the scheme while following in another car."

And in the other case, the Woods case, that we have referred to in our brief, the Ohio Supreme Court has, in discussing the doctrine of withdrawal, withdrawal as applied to the defense of duress, really blowed the distinction between the two. There really is no distinction. If a defendant isn't acting of his own free mind or will, then he is under such duress or coercion that it makes him not guilty of the offense at all, and he won't even have to worry about getting to a penalty trial, because he'll be found not guilty at the close of the trial.

Now, it's important to note here, extremely important, that these are three exclusive mitigating factors. There are no other mitigating factors in Ohio, either in the statute or in the interpretation. There's a lot of talk about some other factors in some of the cases. But there are no other mitigating factors.

And in our particular case, where we have alleged several mitigating factors which this Court has held to be constitutionally significant, which we will discuss in a moment, but basically they are the youth of the offender, his non-

participation in the offense, his cooperation with the police, his drug involvement, his emotional disturbance, his domination by someone else. None of these factors were considered, at least independently.

The Ohio Supreme Court said -- this is at page 141 of the Appendix -- "We will examine each of the three mitigating circumstances provided for in the statute to determine if the evidence established that such a mitigating factor existed."

That is the scope of the inquiry in an Ohio penalty trial. And that is the only scope.

QUESTION: Well, if you place very much rest on this domination of the one by the other, you must also -- we must also, I suppose -- consider that at the time he was arrested, he was engaged in the same kind of an enterprise again; so you have to make out a case of continuing domination of the one by the other, do you not?

MR. HOEFLE: That's correct, Your Honor. And we would point out to the Court in that connection that at the time of the second event the next day, the -- Hall still had the sthogun, he was still ordering Bell around, as the testimony of the witness indicated, Bell was 16 years old, 50-some miles away from home, having been driven there by Hall, he didn't know where he was.

QUESTION: No opportunity in that interval of 48 hours to separate himself?

MR. HOEFLE: I would think that the Court might reasonably conclude there would have been an opportunity before the killing of Graber, but afterwards I would say definitely not. Bell was still under the influence of drugs. Hall drove the two to Dayton, and, as far as we know, Bell had never been there. Hall still had the shotgun.

The fact is, I think, that if we're talking about strong domination, that's the kind of -- if it's not particularly strong domination, maybe he would have broken away. But it's strong domination which I think has been recognized as mitigating, is the type of thing which will more or less coerce someone into going along.

The fact remains further, in discussing the mental deficiency aspect, as defined by the Ohio Supreme Court, that the Court has had many cases before it where mental problems have been alleged, and in not one has it reversed the sentence of death. In fact, it --

QUESTION: Hadn't the Court, the Ohio Courts of Appeals, reversed a number of them?

MR. HOEFLE: Not on mental deficiency to my knowledge. There may have been. We don't get the unreported decisions. I can't say that the one case cited by the respondent, Hines and Lucas, which I referred to before in victim inducement, that was reversed.

QUESTION: All right. Are you saying that the Courts

of Appeals in Ohio have not reversed or set aside the death penalty?

MR. HOEFLE: They have reversed cases in which the death penalty was involved. In our experience, in Hamilton County, those cases were reversed on the weight of the evidence --

QUESTION: I'm speaking of the State, not Hamilton County.

MR. HOEFLE: I see. Other Courts of Appeals throughout the State?

QUESTION: Yes.

MR. HOEFLE: I am not aware of any except in our own jurisdiction, and the ones I'm --

QUESTION: Well, I should think you would be when you make the statement that the Supreme Court of Ohio has never set aside the death penalty, and you have another appellate court there. I should think you'd know what the facts are before you make that kind of a statement.

MR. HOEFLE: I see. Well, I would like to stand corrected. The Ohio Supreme Court just recently did reverse a death penalty because of a procedural irregularity in the penalty trial, but not because the death penalty mitigation factors were too narrow, or because the factor was met by the evidence. I am certain that there may be some, but I don't want to tell you that I believe that there are and not be able to tell youwhat they are. Hines and Lucas I am aware of,

in the Fifth Appellate District.

QUESTION: Unlike some States, unless the situation has changed in Ohio, the Courts of Appeals have territorial jurisdiction, and the only Statewide law in Ohio is pronounced by the Supreme Court of Ohio; is that --

MR. HOEFLE: That's absolutely correct.

QUESTION: -- is that still true?

MR. HOEFLE: Yes, sir, that is still true.

QUESTION: And that the law of the -- as enunciated by the Court of Appeals for the Fifth Appellate District is not binding at all, for example, in the First Appellate District of Ohio.

MR. HOEFLE: I agree with that, and I would like to point out some --

QUESTION: Unless it's changed. Has it changed?

MR. HOEFLE: No, it has not changed, it is still that way, Your Honor. And the appellate decisions on aggravated murder cases are not being reported in Ohio. Those -- if a death penalty -- by and large. If a death penalty is affirmed, there's an automatic right of appeal to the Ohio Supreme Court, and those cases, I don't know what the reasoning is, apparently because the Ohio Supreme Court, all of its opinions are published; they don't bother to publish most of the intermediate appellate decisions --

QUESTION: Is it still true in Ohio that unpublished

opinions cannot be considered to be the law even in the circuit -- even in that district?

MR. HOEFLE: Well, there's a statute, and we recited that in our reply brief. I will admit that it's not always observed; that there is a --

QUESTION: But there is a statute that says so; right?

MR. HOEFLE: There is a statute that says so, but I would have to admit that I cite unreported cases myself, --

QUESTION: Yes.

MR. HOEFLE: -- when it suits my purpose, --

QUESTION: If you happen to know about it.

MR. HOEFLE: -- in that Court of Appeals. If I know about it.

QUESTION: And the published opinions aren't any good, either; it's only the syllabus.

QUESTION: No, that's not true in the Court of Appeals.

QUESTION: I'm talking about the Supreme Court.

MR. HOEFLE: I see. Is that a question or a comment, Your Honor?

QUESTION: Either.

QUESTION: Both.

[Laughter.]

MR. HOEFLE: I see.

QUESTION: Is it still true?

MR. HOEFLE: I think so. At least in this case.

QUESTION: Except in per curiam opinions.

MR. HOEFLE: Yes. Per curiam opinions of the Ohio Supreme Court are all the law, in that it's only the syllabus.

QUESTION: Well, if some of the districts, the District Courts of Appeals, had in the aggregate reversed a dozen death penalties last year, there wouldn't be any great difficulty in finding out that ultimate fact, would there be?

MR. HOEFLE: I wouldn't think so. I wouldn't think so.

The point is that the Ohio Supreme Court has not. And again they are the -- that court is the court which says what the law of Ohio is, and we are here on the Ohio statute, and what that means.

QUESTION: Do you know whether, in any case where the Court of Appeals allowed the death penalty to stand, that there was an absence of an appeal to the State Supreme Court?

MR. HOEFLE: I don't know of any such case, Your Honor.

QUESTION: They all went to the Supreme Court, in other words?

MR. HOEFLE: They all do.

QUESTION: Under automatic appeal.

MR. HOEFLE: It is -- it's not strictly automatic,

but they --

QUESTION: Well, it's mandatory, it's --

MR. HOEFLE: It's mandatory that they take it if the lawyer files the paper, yes, sir. I assume all the lawyers are filing papers in death penalty cases.

There are several relevant facts in our case which were not given meaningful consideration as the Constitution requires. Mr. Bell was 16 years of age when the offense was committed, and in our reply brief we have cited statistics that only three individuals in our country since 1955 of over 350 who were executed, were under the age of 18.

So, whether it's cruel or not to execute a child, it's at least unusual.

QUESTION: Well, how old is he now?

MR. HOEFLE: He's 20 at the present time. I would submit --

QUESTION: Well, I don't see how those figures are going to help you.

MR. HOEFLE: Perhaps not. It depends on whether the States in those cases sentenced a child and then waited until he grew up before they executed him; I don't know. That would be, I would submit, if not unusual it's certainly cruel.

QUESTION: Well, isn't it unusual for a capital case to be decided in less than two years?

MR. HOEFLE: I would say it's unusual.

QUESTION: So those that were 18 were 16 when they committed the crime.

MR. HOEFLE: That the statistics didn't tell us, Your Honor.

The --

QUESTION: In any other Ohio capital case under this present and rather new statute, has death sentence been affirmed with respect to anybody who was as young as Bell at the time of the commission of the offense?

MR. HOEFLE: I don't believe so. There was -- Bates, I believe he was 18 or 19, I'm not certain, --

QUESTION: At the time of --

MR. HOEFLE: -- he was young at the time of the offense. I don't think he was a juvenile.

Now, Bayless was a juvenile, the first case that the Ohio Supreme Court came out with, I believe he was 17 at the time. He, however, had a prior capital conviction on his record, even at that time.

QUESTION: There's a -- this proceeding began in the juvenile court, didn't it, as required by law?

MR. HOEFLE: Yes, sir.

QUESTION: Because of Bell's age. And then there was a waiver or surrender of juvenile court jurisdiction to the Common Pleas Court, is that right?

MR. HOEFLE: Yes, sir, there's a finding, it's on page

1 in the Appendix, setting forth -- and it does comply with the statute that indicated the court did have to look into all these factors, before it could bind him over, and one of which is whether he will be -- they will be able to help him with whatever facilities they have.

I'm advised also that in the Harris case the defendant was 17 at the time of the offense, and his --

Handley .. Hailey

QUESTION: Well, the old Haley ? case was about 16, wasn't he?

MR. HOEFLE: I'm sorry?

..

QUESTION: Handy ? v. Ohio.

MR. HOEFLE: Oh, yes, sir. I believe he was. But that wasn't --

QUESTION: Yes, under this present statute.

QUESTION: That went way back in the Forties.

MR. HOEFLE: Yes, sir.

QUESTION: Under this present statute, Harris was 17?

MR. HOEFLE: Yes, sir, I believe --

QUESTION: And his death sentence has been affirmed by the Supreme Court of Ohio, has it?

MR. HOEFLE: Yes, sir. Bayless was 17; I believe Royster was -- was 17.

So there are --

QUESTION: And juvenile court has, what, compulsory jurisdiction up to a certain age, and then -- at least prelimin-

ary jurisdiction which it can waive to the Common Pleas Court between certain ages -- between what, 16 and 18, is it?

MR. HOEFLE: That's correct. And I think we're finding that almost any juvenile charged with a serious felony over the age of 16 is -- it's an almost automatic --

QUESTION: But under 16 he cannot be bound over to the Common Pleas Court, is that still the law?

MR. HOEFLE: That's my understanding. That's my understanding.

There are other mitigating circumstances exhibited by Bell. He was cooperative with the police. And I expect the respondent to quote some language, as he already has in his brief, about how the -- some of the factors we're talking about, youth, et cetera, can be shoehorned in or funneled into one of the Ohio mitigating circumstances.

But there are some that are important that can't be and cooperation with the police is one of them. The man was arrested. An hour or two later he was advised of his rights. He was not beaten, not abused. He told them what happened. And he gave the first full, complete story of -- version of what happened. He cooperated. That has no place, even though in the Gregg and the Harry Roberts cases the court indicated it was important, and in the Ohio scheme it cannot have any mitigating effect.

QUESTION: Well, would you -- are you suggesting that

we could review that factor here after the Ohio Supreme Court has weighed it and rejected it?

MR. HOEFLE: Yes, sir, because I don't think they -- in the context of the constitutionality of the statute, it wasn't considered; I don't think they weighed it or rejected. They just looked at whatever facts were put in there and decided if the man was shown to be psychotic, mentally deficient, under duress, coercion, --

QUESTION: Well, how do we know that on this record? That they did not give any consideration to his cooperation with the police and his re-confession?

MR. HOEFLE: I don't see how it could have been relevant to the -- it may be an assumption on my part -- how it could be relevant to the existence of --

QUESTION: Well, that's all I'm probing, was that your assumption? You assert it, so I'm wondering what the relevance is.

MR. HOEFLE: Yes, sir, I assume it, and I think it will hold up, because --

QUESTION: Well, you're saying that the Court just isn't permitted to consider that.

MR. HOEFLE: No, it's exclusive.

QUESTION: And if you assume they evade their own statute, they didn't consider --

QUESTION: That's right.

MR. HOEFLE: That's correct.

QUESTION: They also didn't say anything about it in their opinion, did they?

MR. HOEFLE: They just stated that, "We have reviewed everything and found that none of the mitigating circumstances provided by the statute have been proved to a preponderance, therefore the defendant dies."

And the trial court's words, language, it's almost the same language, perhaps they were consciously just stating what the statute said, to make sure that they complied with it. In fact, I think that language indicates how closely they wished to comply with the statute. These factors certainly were brought forward by them. Further, his mental and emotional state, and we emphasize that it's at the time of the crime, the mental and emotional state.

QUESTION: Your point, then, is purely an attack on the statute itself, not on what the Ohio Supreme Court did under the statute?

MR. HOEFLE: Well, the statute itself doesn't permit them to do anything more, and they didn't; even if they would have the power to, they didn't exercise that power.

QUESTION: Well, that's what --

MR. HOEFLE: That's my point.

QUESTION: -- I'm trying to do is sort out your argument.

MR. HOEFLE: Yes, sir.

QUESTION: Your argument must be directed only at the deficiency in the statute for failing to allow the court to take that into account; is that not so?

MR. HOEFLE: That is so.

I'd like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Kirschner.

ORAL ARGUMENT OF LEONARD KIRSCHNER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. KIRSCHNER: Mr. Chief Justice, and may it please the Court:

I feel that the basic matter that is currently before this Court in so far as the Bell case is concerned, and as I reflected in my brief, is a centerpoint between this Court's decisions in Furman, and this Court's decisions in Woodson.

In Furman, we have unbridled discretion; in Woodson, we have no discretion.

Now, if we take the pronouncements of this Court in which it is reflected that there should be some discretion in that there the sentence should be tempered and adjusted as to the individual defendant, or party charged with an offense.

The Supreme Court, or this Court, I should say, has reflected that the Court should set forth with some

specificity the grounds of the aggravating circumstances and the grounds for the mitigating circumstances.

I don't believe that there is any question that the aggravating circumstances under Ohio law clearly follows the decisions of this Court in which the death penalty is precluded, except in certain specific instances. In other words, you do not get the death penalty in Ohio for every murder. It is only where it is a calculated, preconceived thought of murder, the perpetration of murder, and relative to certain specific instances, such as the assassination of the President, a person who is incarcerated, where there are two or more persons who are supposed to be killed in an over-all plot; and they are specifically enumerated.

I don't believe that the petitioners in this Court have contested that aspect, and I think that there should be no question whatsoever with regard to the first part of the statute, at least delineating and eliminating the passing of the death penalty as to -- or the imposition of the death penalty relative to all murders in the State of Ohio.

The second point is the one that I think is the basic point before this Court, and that is the one as to whether or not a State has the authority to specify what mitigating circumstances will or will not be used, so that they can temper the imposition of the sentence with regard to the individual who is standing before them for the purpose of being sentenced.

And I think that Ohio takes and follows the pronouncements of this Court, as set forth in the group of cases set forth by Gregg and those that followed it, in which the Ohio Legislature has set forth a statute whereby they specifically open the statute with the pronouncement,"regardless of whether one or more of the aggravating circumstances listed in Division (A)", which is the specific types of murder for which the death penalty can be imposed. Regardless; that is the first word.

"The death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the" items are reflected in the mitigating circumstances.

Now, I submit that --

QUESTION: Mr. Kirschner, just so I follow -- what did you just read?

MR. KIRSCHNER: I read from the -- it's reflected on page 7 in my brief; it's from the Ohio Revised Code. This is the section relative to the mitigating --

QUESTION: And which number is all I'm asking. Which number is it, the --

MR. KIRSCHNER: (B). Page 7, (B). That is the quotation from Ohio Revised Code relative to the mitigating circumstances in which the death penalty --

QUESTION: 2929.04 (B).

MR. KIRSCHNER: Yes, Your Honor.

QUESTION: All right, that's all I wanted.

MR. KIRSCHNER: Now, the -- I find it unusual that in reading the briefs and the response -- I apologize for this expression -- you're damned if you do, and you're damned if you don't. But basically it would appear that that is what the proponents, the petitioners -- the abolition of the death penalty so far as the Ohio statute is concerned -- are presenting to this Court.

With one hand they tell us that I am citing unreported decisions, which are not the law of the State; and with the other hand they are saying that I am citing quotations right out of the cases of Ohio, the Supreme Court of Ohio, which the Supreme Court shouldn't be saying, in effect.

Now, I believe that this Court is bound to give the interpretation of the State statutes as reflected by the highest court of that State. This Court still has the final determination as to whether that State court's interpretation of its statutes still pass constitutional muster; but I think this Court, based on a long line of decisions, is supposed to recognize that the highest court of a State has the right to interpret its statutes and to include that in the totality of the picture as to what the statute means or does not mean.

And without going through each of the items as set

forth in my brief, I believe that the Ohio Supreme Court has clearly reflected what the meaning of the statute is, and broadened the condition so as to determine and make a prerequisite and take into consideration the nature and circumstances of the offense. Is he an aider and abettor? Not an aider and abettor? Was he coerced? Not coerced? How does this total thing, the history, his background, his character, and the condition of the offender -- this is all part of the total picture upon which the court can interpret and reflect and individualize the penalty and the imposition of the penalty where the mitigating circumstances are not reflected.

QUESTION: But, Mr. Kirschner, I just want to be sure I was following your statutory argument.

MR. KIRSCHNER: Yes, sir.

QUESTION: Is it not correct that those factors that you read are only relevant to the determination of whether or not one of the three mitigating circumstances is present. Isn't that what the statute says?

MR. KIRSCHNER: If Your Honor please, it is my interpretation that that is so. But I also would like to, if I may, and as a prelude to this, in response to Mr. Justice Stewart's question, there is a statute in Ohio that does reflect that unreported decisions are not the law in the State. However, that is the -- the statute is not mandatory, and it's not followed even by the Supreme Court of Ohio.

And I would like to quote, if I may, and I apologize for not reflecting this is an opinion, but the case of Blackman -- or Beumiller vs. Walker, 95 Ohio State 344, at page 351, 160 N.E. 797, at page 800. In which the Ohio Supreme Court said: Ordinarily this Court does not regard its unreported cases as judicial authority for the reason that it is generally impossible to ascertain the concrete legal propositions involved and decided; but where a single question was involved and that succinctly stated" -- I'm trying to read this small print -- "and decided it cannot be said that such unreported case is wholly without influence. The above rule as to unreported cases has never been modified nor limited." And I might point out that this general opinion of the Ohio Supreme Court was reflected in the opinion of Guston vs. Sun Life --

QUESTION: Did I hear you correctly, you said it hadn't been?

MR. KIRSCHNER: That rule has never been modified. Now, this referral to the --

QUESTION: Well, I thought you said they weren't followed here.

MR. KIRSCHNER: No, Your Honor, I am saying that unreported cases, although they may not require that they be mandatorily followed, they do have a substantial influence on the law and interpretation of the law.

QUESTION: You want us to ignore the statute?

MR. KIRSCHNER: Well, I'm saying the Ohio --

QUESTION: Do you want us to ignore the statute?

MR. KIRSCHNER: Yes, Your Honor. Because the Ohio Supreme Court ignores it.

QUESTION: Now, how in the world -- oh, I didn't see that they had ignored it there, they said it had never been amended, or changed.

MR. KIRSCHNER: No, they said that the Ohio Supreme Court has never modified this position and pronounced it. In other words, I am speaking -- the Sixth Circuit Court of Appeals, in the case of Guston vs. Sun Life Insurance.

QUESTION: Well, do we have to follow the Sixth Circuit Court of Appeals' interpretation of Ohio laws too, while we're at it?

MR. KIRSCHNER: No, Your Honor. What I am trying to present to this Court is the fact that Ohio has a statute which says: unreported decisions are not binding on the courts.

Now, in interpreting that statute, the Ohio Supreme Court has said that although it is not binding on the courts, it does have an influence in interpretation of the law, as pronounced by a court for other courts to follow. And I submit that in Ohio there are numerous occasions in which the Ohio Supreme Court, where there has been a contrary opinion coming up from two different districts, unreported cases are

accepted, and this rule is followed more in its breach than in its actual quotations by the Ohio Supreme Court.

QUESTION: We would agree, wouldn't we, Mr. Kirschner, that a decision or opinion of an Ohio Court of Appeals, whether or not reported, even though fully reported, --

MR. KIRSCHNER: Yes, sir.

QUESTION: -- is certainly not binding on the Supreme Court of Ohio?

MR. KIRSCHNER: The opinion of a Court of Appeals of Ohio is definitely not binding on the Supreme Court of Ohio, and I would go one step further, it is not binding on any other, as you mentioned previously, Ohio is divided up into districts, --

QUESTION: Right.

MR. KIRSCHNER: -- but it does have, in so far as --

QUESTION: It may have -- may be an influence.

MR. KIRSCHNER: -- other courts, a great amount of influence, and it does have some influence in presenting an issue never previously decided by the Supreme Court of Ohio, for which that court has not modified by some other decision.

So that it does have influence, although it may not be binding on that court.

QUESTION: Ohio's judicial system, in short -- and I'm now advised it hasn't been changed --

MR. KIRSCHNER: No, sir.

QUESTION: -- it's almost an exact analog of the federal judicial system.

MR. KIRSCHNER: Yes, sir.

Now, in the case of Weind vs. State, which subsequently appears in the Ohio Supreme Court, that Court of Appeals -- and, as I say, it is not binding on the court, but I would like to just give this interpretation, if I may. Referring to the mitigating circumstances involved, the Court held, and this is Judge McCormack of that district who, counsel in their brief reflected, said that the Ohio statute is mandatory, in considering this mitigating circumstance relative to the offender's psychosis or mental deficiency, they said, and I quote, "In considering this mitigating the circumstances, the court is instructed to consider the nature and circumstances of the offense and the history, character, and condition of the offender. This permits, if not instructs, the court to consider such factors as prior history of criminal activity, the amount of participation by the defendant when accomplished by another person, the youth of the defendant at the time of the crime, as well as the mental and physical condition of the defendant."

Now, I say that the Ohio courts are giving a broad range of interpretation to this statute, and they are following the Supreme Court pronouncement.

QUESTION: Excuse me for interrupting, but may I ask you a question along the line of your argument? State v. Bayless, the opinion of the Supreme Court of Ohio undertook to define mental deficiency.

Has there been any more recent definition of mental deficiency by your court, or is that the definition that you consider binding?

MR. KIRSCHNER: I would say that the interpretation, reading all of the cases and putting them all together, mental deficiency reflects the connotation of the entire background, not arising to that criteria or weight, it would be a defense to the crime itself.

QUESTION: Is there a more recent case than Bayless? That specifically undertakes to define mental deficiency?

I have in mind the case --

MR. KIRSCHNER: At the moment, to be quite honest with Your Honor, I do not know, I think there is, but I cannot specifically quote the expanded version of that definition.

QUESTION: In Bayless, as I read it, mental deficiency is defined to mean, normal or subnormal, whether it's normal or subnormal intelligence. And I ask you now, does Ohio have laws that limit the age at which minors may marry?

MR. KIRSCHNER: Yes, Your Honor.

QUESTION: What age is that?

MR. KIRSCHNER: I believe it's 18 now, except that

they may get permission of the juvenile court or the probate court, I think it's either 14 or 16; but I do not know. The -- 18 is the age of consent in Ohio, though.

QUESTION: Does Ohio have a law that invalidates contracts made by minors; if so, at what age?

MR. KIRSCHNER: Ohio has a law that invalidates certain contractual relations -- certain ones -- contractual relationships of minors. However, Ohio has several laws that require that minors be responsible for some of their tortious actions civilly.

QUESTION: Are these laws I've been talking about based on the intelligence of the minor or on the assumption that the experience of mankind suggests that up until certain ages there may be a lack of maturity or lack of judgment, or some other deficiency that may affect the conduct of the minor?

MR. KIRSCHNER: I would say that this is a legislative determination, in which they have set the cutoff date at age 18. They could just as easily have, based on their legislative determination, set it at 17 or age 21, which it was up until a few years ago. So that I would say that this is a determination by the Legislature which, absent a basis of discrimination in choosing that age, is for the Legislature to determine, and that was the age that they picked, was 18.

QUESTION: Well, granted there's a certain amount of arbitrariness in selecting these ages, the point I am making,

or asking you about is whether or not they relate to the I.Q. of the individual at the time of the act in question?

MR. KIRSCHNER: I would say this here, that the Legislature has picked an age, considering many factors. There are many people above that capability who are substantially below that age group; there are many people who are below it, who are, age-wise, above that age group the Legislature has picked.

QUESTION: Do you think it is too high?

MR. KIRSCHNER: I am trying to respond to your answer, that I don't think that there is a definite fixed thing by the Legislature saying age 18, I don't think that means that if you're under 18 you don't have the sense to do anything and you're not bound by anything you do, and if you're over 18 you have got all the sense that you need and we're not going to consider any mental deficiencies. I think each individual case must be taken in its entirety, and I think that the Ohio statute reflects that it is being taken in its entirety, and the Supreme Court in this case so reflected in considering age, as to whether the age in effect affects the person's mental ability, mental psychosis, mental deficiency. In some people it does, in some people it doesn't.

QUESTION: But no consideration of maturity or judgment or perceptibility to the influence of others?

MR. KIRSCHNER: Well, --

QUESTION: That's what your court has said in effect, as I read Bayless, which ends up defining mental deficiency as subnormal intelligence.

MR. KIRSCHNER: No, I --

QUESTION: You know, you can be 15 years old and have an I.Q. of 140. But your judgment might not be very mature.

MR. KIRSCHNER: I don't think that the Ohio courts have gone to that extent. I think that they have reflected this in this Bell case. For one, they're saying that you take the nature and circumstance of the offense; the character, history of the defendant himself, in going into that total picture. And I don't think that the courts in Ohio are restricting the matter to the fine legal definitions, because if it was restricted to the fine legal definitions, then, under those circumstances you would have the defense to the crime itself; and Ohio specifically held that they are not going to hold the person to the same weight or totality of the evidence as they would in a defense to the basic crime itself.

And this has been pronounced several times in their opinion. And the --

QUESTION: That is the defense of insanity? Or --

MR. KIRSCHNER: Defense of insanity, defense of duress, --

QUESTION: -- or duress.

MR. KIRSCHNER: -- coercion. Duress, coercion was in State vs. Woods, I believe, in which they specifically held that we're not going to hold you to the same degree of proof and weight of the evidence in the proof of the mitigating factors, as we would as a defense to the basic crime itself.

QUESTION: Well, that's self-evident, isn't it, if there were --

MR. KIRSCHNER: Well, this was --

QUESTION: -- if there were a case in which there could be no conviction because, either of duress or insanity, the insanity of the defendant or the duress upon the defendant, then there would be no death sentence for this statute to apply to or for the Ohio Supreme Court to consider.

MR. KIRSCHNER: That is correct, except that is one of the arguments which counsel for the petitioners have raised in their brief, by saying that there is no basic difference between the basic defense itself and the mitigating factors.

And as I said at the outset, you're damned if you do and you're damned if you don't. And I submit further proof of that, and I quote from the brief of the respondent in this matter, at page 11.

There was recently another aggravated murder case in Hamilton County, in which a person was charged with the crime, he was an accomplice, he was not the basic perpetrator,

they were claiming duress, they were claiming youth, they were claiming undue influence.

Counsel, I am certain, is better able to tell you everything they were claiming, because it so happens the same counsel that is sitting before this Court today was counsel in that case.

QUESTION: That's the Ervin case?

MR. KIRSCHNER: That's the Ervin case, Your Honor. And in the Ervin case, which was in Common Pleas Court, and which is not, shall we say, binding on any other court than that court, but it is of some advisory. The Common Pleas Court went beyond what we believe the statute reflects, and they held that all of these matters are taken into consideration -- referring to accomplice, referring to age, referring to duress, referring to coercion, and everything else -- and I quote:

"All of these matters were taken into consideration and once you take all of these into consideration, the death penalty is precluded if these three things are there. But still the trial court has discretion as to whether or not the death penalty should be pronounced."

And I think that's what the Legislature intended when they used the word "regardless" as the prelude to Section (B) of the death penalty sentence.

And he went on to make his determination based (1)

on the fact that this was an accomplice and the fact that the person might have been influenced, his age, his cooperation with the police, et cetera, et cetera, which are not specifically reflected in the three items, but are in the totality of nature and consideration.

And then we have this statement, with a judge who is doing exactly what defense counsel is asking, or petitioner is asking this Court to do, and I quote his statement, page 11 of his brief:

"The Ervin decision, to the extent that it represents the law of Ohio, incurably infects Ohio capital procedure with the arbitrary and capricious discretion to impose the death penalty condemned in Furman vs. Georgia."

And I think that is exactly what we are trying to say here. Absent some specific considerations as to what an appellate court can determine, was there sufficient evidence or non-sufficiency of the evidence to prove a specific mitigating factor? How can an appellate court make a determination if there are no guidelines upon which the appellate court can apply the evidence to the guidelines set by the statute?

Now, counsel is asking this Court to say, let's have a broad open field, let's take everything under consideration for the purpose of mitigation, and yet, in the same time, he is coming before this Court in his own brief and saying such a procedure is unconstitutional.

QUESTION: You don't show a date of the Ervin case.

MR. KIRSCHNER: The Ervin case was decided just about two weeks ago -- [after consulting with co-counsel] -- 12/21. With the Court's permission, if you are desirous, I can furnish you with a copy of the opinion.

QUESTION: Is that a decision of the Court of Common Pleas of Hamilton County?

MR. KIRSCHNER: It's strictly the trial court, yes, Your Honor.

QUESTION: And, as I understand it, Mr. --

MR. KIRSCHNER: I do not --

QUESTION: -- you think it's wrong, don't you?

MR. KIRSCHNER: I think it's wrong; yes, Your Honor.

QUESTION: Right.

MR. KIRSCHNER: And I submit further that there is a --

QUESTION: You don't want us to be influenced by it, do you?

MR. KIRSCHNER: Well, I am saying this here: counsel for the petitioner is asking this Court with one hand to say Ohio, you can't specify the things, you've got to put a lot more things in there; and with the other hand he is saying, when a judge does this and takes into consideration the nature and circumstances of the offense, the fact, the heights of the two parties involved, the character of the defendant,

the history of the defendant, the age of the defendant, when a judge does that he's wrong, because it's unconstitutional. Because it's too broad.

We're back to Furman vs. Georgia.

QUESTION: Mr. Kirschner, first of all, in that case the judge did find a statutory mitigating circumstance.

MR. KIRSCHNER: Secondarily. And I --

QUESTION: Well, but if he found it, that was the answer to the whole lawsuit.

MR. KIRSCHNER: He says, "Primarily I find for the reasons" --

QUESTION: But he did find a statutory mitigating circumstance?

MR. KIRSCHNER: He did have a -- yes, Your Honor.

QUESTION: So he was required by your statute not to impose the death sentence if he made that finding.

MR. KIRSCHNER: He did find that, but he said that was secondarily to the other aspects of the nature and circumstances.

QUESTION: Is it your submission that if the Ohio statute permitted the judge to give consideration independently of the three statutory mitigating circumstances, to give independent consideration to the youth of the offender, the fact that he didn't pull the trigger himself, and that fact that he cooperated with the police; just add those three. Would

the statute then be unconstitutional in your judgment?

MR. KIRSCHNER: No, sir.

QUESTION: Then you're really not in this terrible dilemma that you can't figure out the answer.

MR. KIRSCHNER: No, what I am saying is this: that counsel says where a judge uses this --

QUESTION: Well, maybe counsel is inconsistent, but we're not going to necessarily do what counsel says.

MR. KIRSCHNER: Yes, all right. Well, I think that this goes beyond counsel, though; that I think that we are at a point, I think this Court reflected that they were not going to say specifically what has to be and does not have to be in a -- the mitigating circumstances, to individualize the penalty.

Now, this Court may say that youth, in and of itself, is a bar to any death penalty; and, if it does, Ohio's doesn't pass, I'll tell you that now. But if the Court takes that to be taken into consideration, then I think it does pass constitutional muster, and the Supreme Court of Ohio has reflected that it is taken into consideration.

QUESTION: Well, taken into consideration only as to --

MR. KIRSCHNER: As to the fine distinction --

QUESTION: -- whether or not there was duress, not legal duress but coercion, undue influence on the one hand, or

mental deficiency on the other. Only for those two purposes; isn't that what the Ohio Supreme Court said?

MR. KIRSCHNER: Well, the mental deficiency, in my opinion, is -- and in interpreting and reading all of the cases, in their interpretation of the language -- goes beyond the mental deficiency as specifically defined.

The totality of all of the cases, and I think there are approximately 28 or 29 of them in Ohio at the present time, goes well beyond the limited confines that you're a moron or an imbecile or something of that nature.

I think the -- and the Supreme Court has pronounced this. They have held that where you take the person's history, his background, his nature, circumstances, you take the total picture, and a person may have a high I.Q. and conceivably he would have a mental deficiency or quirk which a trial court could, based on the evidence presented to it, find a mitigating circumstance. And in duress, in a decision which I have cited in my brief at page 38, which was even before any matters concerning the death penalty, in the case of Tallmadge vs. Robinson, I cite it on page 38. "In determining whether a course of conduct results in duress, the question is not what effect such conduct would have upon the ordinary man but rather the effect upon the particular person toward whom such conduct is directed, and in determining such effect, the age, sex, health and mental condition of the person affected, the

relationship of the parties and all the surrounding circumstances may be considered."

Now, if we take that definition and we hold -- and that's the definition as to the legal standard -- and we take Ohio's interpretation that we can go beyond that when we have a situation of Willie Bell who says that he was so cooperative, but forgot to tell the police about the fact that the week before he had sawed off the shotgun along with Samuel Hall. If we take the case of Willie Bell who forgot to specifically set forth in his brief -- now, I submit that these are not matters reflected in the record, and the reason was a witness disappeared on us -- but if we take the fact that Willie Bell says that he went to Dayton, Ohio, long after any drug effect which he might have had was still working on him, and he went there and he participated in the crime of putting a second person into the trunk of a car, assisted in that preparation in putting that second person in; and in response to, I believe, Mr. Chief Justice's question to counsel, yes, he could have left, counsel replied, he could only have left Samuel Hall at the time prior to the actual murder itself.

But if I recall the facts as reflected in the record, Willie Bell was riding in one care, Samuel Hall was riding in the other as they were leaving, and Willie Bell only took off on his own after he observed a police car stop Samuel Hall's car, in which he had the second victim in the trunk.

So that there was a period of time when Willie Bell could have cut bait and left Samuel Hall, and was not under the influence or duress.

And when we take Willie Bell's reflection, he admired Samuel Hall's style -- now, is that duress? I don't think so. And we take all these other things --

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock.

MR. KIRSCHNER: I'm sorry.

MR. CHIEF JUSTICE BURGER: I believe your time has expired, in any event, counsel.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:02 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Hoefle, you have about four minutes left.

REBUTTAL ARGUMENT OF H. FRED HOEFLE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HOEFLE: Yes, Your Honor; thank you.

Mr. Chief Justice, may it please the Court:

In Mr. Kirschner's argument, Justice Powell asked a question regarding the definition of mental deficiency and whether or not that had been changed.

On pages 23 and 24 of our brief, we cite all of the Ohio Supreme Court cases to date involving allegations of mental deficiency. The Bayless case explicitly limited mental deficiency to retardation or low intelligence, and excluded emotional, curtural or behavioral abnormalities.

QUESTION: What page did you say?

MR. HOEFLE: Pages 23 and 24.

The Harris case explicitly holds that a 17-year-old sociopath is not considered psychotic or mentally deficient under the statute.

The Roystar case refused to equate I.Q. with mental deficiency, and held that there was no mental deficiency in the case of a defendant whose I.Q. was 75 in 1962, 61 in 1966, and 54 in 1968.

The Edwards case explicitly holds that educational deficiency does not equal a mental deficiency; and finally, in our case the court found no mental deficiency, even though the defendant was 16. At that time considered emotionally immature, not only as an adult by adult standards, but on a peer group standard he was less mature than the average 16-year-old. He was on drugs for a daily basis, on a daily basis for three years, up until the day he was arrested. That his I.Q. tested in 1972 at 81.

QUESTION: Do you think the Ohio courts are warranted under the statute in taking age into consideration in determining a person's mentality?

MR. HOEFLE: Not under the definition of mental deficiency as I've given it, Your Honor, because --

QUESTION: Well, I didn't -- you might not even -- if someone wants to argue that because a person is young it's more likely that he isn't mentally competent; is that kind of an argument just out of bounds under the statute?

MR. HOEFLE: Well, we argue here that because he was 16 he was, per se, mentally deficient under the statute; and they said no. They said age can be considered.

QUESTION: They said -- but you agree with that; age may be considered?

MR. HOEFLE: No, I don't agree with that, because I don't think age --

QUESTION: Well, the court said it could be considered.

QUESTION: But the court linked it with senility, indicating something in addition to that.

QUESTION: Over age.

MR. HOEFLE: Over age or under age --

QUESTION: Well, senility means more than old age, it means impairment of your mental or emotional faculties because of old age.

MR. HOEFLE: I see. And that might correspondingly relate to I.Q. But our point is they they only discuss youth, that we shouldn't execute children; we're talking about -- in mental deficiency we're talking about two different things. You can be a genius, with an I.Q. of --

QUESTION: Well, I understand that. My question, though, is whether the evidence was relevant to the determination of mentality.

MR. HOEFLE: I don't think that -- I don't think the evidence itself was --

QUESTION: The court said they could consider it.

MR. HOEFLE: So they did, but I don't see how you could meaningfully give it consideration in determining whether the man, the defendant was mentally deficient.

QUESTION: Well, under Ohio law it's not excludable evidence; I mean, it's the kind of evidence they make in --

MR. HOEFLE: Well, under the statute you can put in

anything you want, the only thing is none of it has any meaning.

QUESTION: Except the court said they would consider it.

MR. HOEFLE: Yes, they did say that.

QUESTION: Yes.

MR. HOEFLE: In closing, I would like to again quote the statute very briefly, is that the 2929.04(B) were: "Regardless of whether one or more of the aggravating circumstances listed ... is specified ... and proved beyond a reasonable doubt, the death penalty ... is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence", and then it lists the three narrow mitigating factors.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:05 o'clock, p.m., the case in the above-entitled matter was submitted.]

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