

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

BRETT HARTMAN,

Defendant-Appellant.

Case Number 1998-1475

On appeal from Summit County
Court of Common Pleas Case No.
CR 97-09-1987

THIS IS A CAPITAL CASE

APPELLANT BRETT HARTMAN'S MOTION TO VACATE EXECUTION DATE

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FILED
FEB 25 2011
CLERK OF COURT
SUPREME COURT OF OHIO

APPELLANT BRETT HARTMAN'S MOTION TO VACATE EXECUTION ORDER

Appellant Brett Hartman respectfully requests that the Court vacate the order of execution entered on February 8, 2011. The order was signed by Chief Justice Maureen O'Connor. (Ex. A) Chief Justice O'Connor apparently participated in the vote on the Order as there was no announcement that she did not participate (Ex. B), as there had been in earlier rulings in this case when she did not participate as an Associate Justice. (Ex. C, D, E).

Chief Justice Maureen O'Connor served as the elected Summit County Prosecuting Attorney from 1995 until 1999. During that time, Brett Hartman was charged and tried for aggravated murder with specifications and sentenced to death. Hartman was indicted on October 16, 1997. The indictment was signed by Maureen O'Connor as the Prosecutor. (Ex. F). Chief Justice O'Connor did not try the case. Her name as Prosecuting Attorney, however, appears on pleadings throughout this prosecution, in addition to the indictment.

Brett Hartman was sentenced to death on May 18, 1998. Hartman's appeal to this Court was initiated on July 23, 1998. Chief Justice O'Connor was still the Prosecuting Attorney of Summit County when this appeal was initiated. Accordingly, Chief Justice O'Connor's participation in this case is barred by Ohio Code of Judicial Conduct Rule 2.11(A)(7)(b) and her recusal from the case is necessitated to avoid any appearance of partiality or the denial of due process to Brett Hartman.

Chief Justice O'Connor, then Justice O'Connor, previously removed herself from participation in this litigation involving execution dates: December 3, 2008 Order setting execution date (Ex. C); March 18, 2009 Order denying stay of execution (Ex. D); March 30, 2009 Order denying stay of execution (Ex. E). Chief Justice O'Connor, however, did not remove herself from participation in the Court's most recent order setting an execution date for Brett

Hartman: February 8, 2011 Order (Ex. B), as is required under Rule 2.11(A)(7)(b). Chief Justice O'Connor, in fact, signed the Order setting the execution date. (Ex. A). It is that action that prompts this Motion to Vacate.

Chief Justice O'Connor was serving as the elected Prosecuting Attorney for Summit County when Brett Hartman was prosecuted for capital murder and when his appeal to this Court was initiated. Because this was a sensational case with community-wide interest, the elected Prosecuting Attorney necessarily would have been involved in the decision to pursue this as a capital case and would necessarily have actively participated in the actual prosecution of this case, even though not actively involved in the trial. It is unlikely that a sensational capital case such as this would be indicted, prosecuted, and appealed without the involvement of the elected prosecutor at every stage of the litigation. Therefore, this is not a case where the prosecuting attorney had no familiarity with the case prosecuted by one of his assistants. *In re Disqualification of Knece*, 81 Ohio St. 3d 1212, 688 N.E. 2d 515 (1997). Likewise, this is not a case where the former prosecutor (now judge) had prosecuted the defendant in a separate prosecution. *In re Disqualification of Hedrick*, 127 Ohio St.3d 1227, 2009-Ohio-7208, 937 N.E.2d 1016. Hartman's case more closely resembles the circumstances in *Patterson v. State*, 926 N.E.2d 90, (Ind. App. 2010), where the sentencing judge had previously been involved as a prosecutor in the defendant's case. *Id.* at 92. The Indiana Court of Appeals found that disqualification was required under the comparable provision of the Indiana Code of Judicial Conduct, and further concluded that the defendant had been denied the effective assistance of counsel because his attorney had failed to seek the judge's recusal. *Id.* at 93-95.¹

¹ Rule 2.11(A)(6)(b) of the Indiana Code of Judicial Conduct is materially indistinguishable from Rule 2.11(A)(7)(b) of the Ohio Code of Judicial Conduct.

Here, Chief Justice O'Connor was serving as the elected Summit County Prosecuting Attorney when Hartman was charged, convicted and sentenced to death in a high publicity capital murder case. Chief Justice O'Connor has also previously recognized the need to remove herself from participation in any rulings in this case. Chief Justice O'Connor should have recused herself from any participation in any case involving Brett Hartman's death sentence under Rule 2.11(A)(7)(b) of the Ohio Code of Judicial Conduct and to avoid any appearance of impropriety and to insure that all parties view that they are being treated fairly.

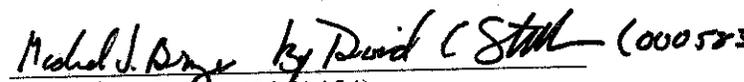
The participation of Chief Justice O'Connor in any part of Hartman's capital case denies Hartman the most basic concept of due process, under Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. It is a fundamental concept of our system of justice that a prosecutor cannot act as judge in the same matter she had acted as a prosecutor because it deprives the defendant of the right to due process and a fair adjudication before a fair tribunal, under the standards set by the Supreme Court of the United States:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice."

Offutt v. United States, 348 U.S. 11, 14 (1954). Because Ohio has afforded Hartman an appeal to this Court, all proceedings related to that appeal must also afford Hartman due process and a fair adjudication. *Evitts v. Lucey*, 469 U.S. 387 (1985).

Because Chief Justice O'Connor's involvement in the approval and signing of the warrant for execution is tainted by her prior role as the elected Prosecuting Attorney in Hartman's capital trial and appeal, the execution order she authorized and signed is void. *Offutt*, 348 U.S. at 14-17; *Cooke v. United States*, 267 U.S. 517, 539 (1925). The setting of an execution date for Brett Hartman is a part of the appellate process and as such must be made in accord with basic tenets of due process. The decision to set an execution date or to grant or deny a stay of execution must be made by the Court untainted by Chief Justice O'Connor's participation, as the Chief Justice earlier recognized while serving as Associate Justice. *Offutt*, 348 U.S. at 14; *Cooke*, 267 U.S. at 539 Therefore, this Court must vacate the Order of February 8, 2011 setting an execution date for Brett Hartman.

Respectfully submitted,


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Brett Hartman

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion To Vacate Execution Date was served by regular United States Mail upon Richard S. Kasay, Assistant Prosecuting Attorney, Office of the Summit County Prosecutor, 53 University Avenue, Sixth Floor, Akron, Ohio 44308, this 25th day of February, 2011.

Michael J. Benza by David C. Stebbins
Michael J. Benza (0061454) (0005839)
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Brett Hartman

EXHIBIT A

The Supreme Court of Ohio

FILED

FEB 08 2011

CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

Case No. 1998-1475

v.

ENTRY

Brett Xavier Hartman

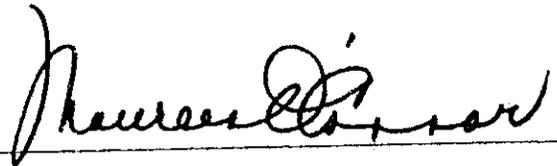
This cause came on for further consideration upon appellee's motion to set execution date. Upon consideration thereof,

It is ordered by the Court that the motion is granted.

It is further ordered that appellant's sentence be carried into execution by the Warden of the Southern Ohio Correctional Facility, or in his absence, by the Deputy Warden on Tuesday, the 16th day of August, 2011, in accordance with the statutes so provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Warden of the Southern Ohio Correctional Facility and that said Warden shall make due return thereof to the Clerk of the Court of Common Pleas of Summit County.

(Summit County Court of Common Pleas; No. CR97091987)



Maureen O'Connor
Chief Justice

EXHIBIT B

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

February 8, 2011

[Cite as *02/08/2011 Case Announcements*, 2011-Ohio-542.]

MOTION AND PROCEDURAL RULINGS

1986-1976. State v. Bedford.

Hamilton App. No. C-840850. This cause came on for further consideration upon appellee's motion to set execution date. Upon consideration thereof, it is ordered by the court that the motion to set execution date is granted.

It is further ordered that appellant's sentence be carried into execution by the warden of the Southern Ohio Correctional Facility or in his absence by the deputy warden on Tuesday, May 17, 2011, in accordance with the statutes so provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this court be duly certified to the warden of the Southern Ohio Correctional Facility and that said warden shall make due return thereof to the clerk of the Court of Common Pleas of Hamilton County.

1990-1815. State v. Slagle.

Cuyahoga App. No. 55759. This cause came on for further consideration upon appellee's motion to set execution date. Upon consideration thereof, it is ordered by the court that the motion is granted.

It is further ordered by this court that appellant's sentence be carried into execution by the warden of the Southern Ohio Correctional Facility or in his absence by the deputy warden on Tuesday, September 20, 2011, in accordance with the statutes so provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this court be duly certified to the warden of the Southern Ohio Correctional Facility and that said warden shall make due return thereof to the clerk of the Court of Common Pleas of Cuyahoga County.

1991-0963. State v. Carter.

Hamilton App. No. C-890513. This cause came on for further consideration upon appellee's motion to set execution date. Upon consideration thereof, it is ordered by the court that the motion is granted.

It is further ordered that appellant's sentence be carried into execution by the warden of the Southern Ohio Correctional Facility or in his absence by the deputy warden on Tuesday, April 12, 2011, in accordance with the statutes so provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this court be duly certified to the warden of the Southern Ohio Correctional Facility and that said warden shall make due return thereof to the clerk of the Court of Common Pleas of Hamilton County.

1991-1675. State v. Murphy.

Marion App. No. 9-87-35. This cause came on for further consideration upon appellee's motion to set execution date. Upon consideration thereof, it is ordered by the court that the motion is granted.

It is further ordered that appellant's sentence be carried into execution by the warden of the Southern Ohio Correctional Facility or in his absence by the deputy warden on Tuesday, October 18, 2011, in accordance with the statutes so provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this court be duly certified to the warden of the Southern Ohio Correctional Facility and that said warden shall make due return thereof to the clerk of the Court of Common Pleas of Marion County.

1992-0405. State v. Hawkins.

Hamilton App. No. C-910017. This cause came on for further consideration upon appellee's motion to set execution date. Upon consideration thereof, it is ordered by the court that the motion is granted.

It is further ordered that appellant's sentence be carried into execution by the warden of the Southern Ohio Correctional Facility or in his absence by the deputy warden on Tuesday, June 14, 2011, in accordance with the statutes so provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this court be duly certified to the warden of the Southern Ohio Correctional Facility and that said warden shall make due return thereof to the clerk of the Court of Common Pleas of Hamilton County.

1996-0677. State v. Smith.

Butler App. No. CR95050471. This cause came on for further consideration upon appellee/cross-appellant's motion to set execution date and appellant/cross-appellee's motion to stay setting of execution date. Upon consideration thereof, it

is ordered by the court that the motion to set execution date is granted and the motion to stay setting of execution date is denied.

It is further ordered that appellant/cross-appellee's sentence be carried into execution by the warden of the Southern Ohio Correctional Facility or in his absence by the deputy warden on Tuesday, July 19, 2011, in accordance with the statutes so provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this court be duly certified to the warden of the Southern Ohio Correctional Facility and that said warden shall make due return thereof to the clerk of the Court of Common Pleas of Butler County.

1996-0678. State v. Smith.

Butler App. No. CA96-02-024. This cause came on for further consideration upon appellee's motion to set execution date and appellant's motion to stay setting of execution date. Upon consideration thereof, it is ordered by the court that the motion to set execution date is granted and the motion to stay setting of execution date is denied.

It is further ordered that appellant's sentence be carried into execution by the warden of the Southern Ohio Correctional Facility or in his absence by the deputy warden on Tuesday, July 19, 2011, in accordance with the statutes so provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this court be duly certified to the warden of the Southern Ohio Correctional Facility and that said warden shall make due return thereof to the clerk of the Court of Common Pleas of Butler County.

1998-1475. State v. Hartman.

Summit C.P. No. CR97091987. This cause came on for further consideration upon appellee's motion to set execution date. Upon consideration thereof, it is ordered by the court that the motion is granted.

It is further ordered that appellant's sentence be carried into execution by the warden of the Southern Ohio Correctional Facility or in his absence by the deputy warden on Tuesday, August 16, 2011, in accordance with the statutes so provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this court be duly certified to the warden of the Southern Ohio Correctional Facility and that said warden shall make due return thereof to the clerk of the Court of Common Pleas of Summit County.

MISCELLANEOUS ORDERS

In re Continuing Legal Education Suspension :

Lisa May Evans
Respondent.

ORDER OF
REINSTATEMENT

(0064083)

Lisa May Evans
500 Goodall Building
324 West Ninth Street
Cincinnati OH 45202

February 4, 2011

On December 17, 2010, respondent was suspended from the practice of law pursuant to Gov.Bar R. X(5). On February 2, 2011, respondent applied for reinstatement to the practice of law and complied with the requirements for reinstatement set forth in Gov.Bar R. X(7).

Upon consideration thereof and pursuant to Gov.Bar R. X(7), respondent is reinstated to the practice of law.

EXHIBIT C

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

December 3, 2008

[Cite as *12/03/2008 Case Announcements*, 2008-Ohio-6166.]

MERIT DECISIONS WITH OPINIONS

2007-1901. State ex rel. Jordan v. Indus. Comm., Slip Opinion No. 2008-Ohio-6137.

Franklin App. No. 06AP-908, 2007-Ohio-5157. Judgment affirmed.

Moyer, C.J., and Pfeifer, Lundberg Stratton, O'Connor, O'Donnell, Lanzinger, and Cupp, JJ., concur.

2008-0760 and 2008-0763. Cleveland Bar Assn. v. Smith, Slip Opinion No. 2008-Ohio-6138.

On Certified Report by the Board of Commissioners on Grievances and Discipline, Nos. 07-051 and 07-083. Rene' Darlene Smith, Attorney Registration No. 0061284, is indefinitely suspended from the practice of law in Ohio in 2008-0760 and is suspended for two years, with one year stayed on conditions, in 2008-0763, with the sanctions to be served concurrently.

Pfeifer, O'Donnell, Lanzinger, and Cupp, JJ., concur.

Moyer, C.J., and Lundberg Stratton and O'Connor, JJ., concur in the sanctions but would require that they be served consecutively.

2008-0771. Cuyahoga Cty. Bar Assn. v. Drain, Slip Opinion No. 2008-Ohio-6141.

On Certified Report by the Board of Commissioners on Grievances and Discipline, No. 07-052. John Michael Drain Jr., Attorney Registration No. 0003656, is suspended from the practice of law in Ohio for six months, stayed on conditions.

Moyer, C.J., and Pfeifer, Lundberg Stratton, O'Connor, O'Donnell, Lanzinger, and Cupp, JJ., concur.

Hamilton App. No. C-920497. On motion to set execution date. Motion granted. It is further ordered that appellant's sentence be carried into execution by the Warden of the Southern Ohio Correctional Facility or, in his absence, by the Deputy Warden on Tuesday, March 3, 2009, in accordance with the statutes so provided.

It is further ordered that a certified copy of this order and a warrant under the seal of this court be duly certified to the Warden of the Southern Ohio Correctional Facility and that said Warden shall make due return thereof to the Clerk of the Court of Common Pleas of Hamilton County.

1998-1475. State v. Hartman.

Summit C.P. No. CR97-09-1987. On motion to set execution date. Motion granted. It is further ordered that appellant's sentence be carried into execution by the Warden of the Southern Ohio Correctional Facility or, in his absence, by the Deputy Warden on Tuesday, April 7, 2009, in accordance with the statutes so provided.

It is further ordered that a certified copy of this order and a warrant under the seal of this court be duly certified to the Warden of the Southern Ohio Correctional Facility and that said Warden shall make due return thereof to the Clerk of the Court of Common Pleas of Summit County.

O'Connor, J., not participating.

2008-0697. State ex rel. Weaver v. Bd. of Commrs. of Lake Cty.

In Mandamus. On request for oral argument. Request granted.

Pfeifer and O'Donnell, JJ., dissent.

2008-0703. Kelly v. May Assoc. Fed. Credit Union.

Summit App. No. 23423, 2008-Ohio-1507. On motion to dissolve stay. Motion granted.

2008-0780. Sheet Metal Workers' Internatl. Assn., Local Union No. 33 v. Gene's Refrig., Heating & Air Conditioning, Inc.

Medina App. No. 06CA0104-M, 2008-Ohio-1005. On motion for admission pro hac vice of Terry R. Yellig by Mark D. Tucker. Motion granted.

2008-1234. Rogers v. Planned Parenthood Cincinnati Region.

Certified Questions of State Law, United States Court of Appeals for the Sixth Circuit, Nos. 06-4422 and 06-4423. On motion for admission pro hac vice of Mailee R. Smith by Joel J. Kirkpatrick and motion for admission pro hac vice of Elisabeth A. Long by Benjamin C. Mizer. Motions granted.

EXHIBIT D

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

March 18, 2009

[Cite as *03/18/2009 Case Announcements #2, 2009-Ohio-1225.*]

MOTION AND PROCEDURAL RULINGS

1998-1475. State v. Hartman.

Summit C.P. No. CR97-09-1987. This cause came on for further consideration upon appellant's motion for stay of execution scheduled for April 7, 2009.

It is ordered by the court that the motion is denied.

Pfeifer and O'Donnell, JJ., dissent.

O'Connor, J., not participating.

EXHIBIT E

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

March 30, 2009

[Cite as *03/30/2009 Case Announcements #2, 2009-Ohio-1483.*]

MOTION AND PROCEDURAL RULINGS

1998-1475. State v. Hartman.

Summit C.P. No. CR97-09-1987. This cause came on for further consideration upon appellant's second motion for stay of execution scheduled for April 7, 2009,

It is ordered by the court that the motion is denied.

Pfeifer, J., dissents as to the lethal injection challenge.

O'Connor, J., not participating.

EXHIBIT F

DIANA ZALFSEK

OCT 16 12 40 PM '97

SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO

INDICTMENT TYPE: SUPPLEMENT ONE CR. CASE NO. 97-09-1987

INDICTMENT FOR: AGGRAVATED MURDER (1) 2903.01(B) WITH AN AGGRAVATED
CIRCUMSTANCE SPECIFICATION 2929.04(A)(7);
KIDNAPPING (1) 2905.01(A)(2)/(A)(3)/(A)(4)

In the Common Pleas Court of Summit County, Ohio, of the term of SEPTEMBER,
in the year of our Lord, One Thousand Nine Hundred and NINETY-SEVEN.

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,

COUNT THREE

DO FIND AND PRESENT that BRETT XAVIER HARTMAN on or about the 9th day of
September, 1997, in the County of Summit, aforesaid, did commit the crime
of AGGRAVATED MURDER in that he, did, purposely cause the death of Winda
Snipes, while committing or attempting to commit, or while fleeing
immediately after committing or attempting to commit kidnapping, in
violation of Section 2903.01(B) of the Revised Code, A SPECIAL FELONY,
contrary to the form of the statute in such case made and provided and
against the peace and dignity of the State of Ohio.

SPECIFICATION ONE TO COUNT THREE 2929.04(A)(7)
SPECIFICATION FOR IMPOSING DEATH OR IMPRISONMENT FOR A CAPITAL
OFFENSE

The Grand Jurors further find and specify that the Aggravated Murder was
committed while BRETT XAVIER HARTMAN was committing, attempting to commit,
or fleeing immediately after committing or attempting to commit Kidnapping
and BRETT XAVIER HARTMAN was the principal offender in the commission of
the Aggravated Murder or if not the principal offender, committed the
Aggravated Murder with prior calculation and design.

COUNT TWO

And the Grand Jurors of the State of Ohio, within and for the body of the County of Summit aforesaid, on their oaths in the name and by the authority of the State of Ohio, DO FURTHER FIND AND PRESENT, that BRETT XAVIER HARTMAN on or about the 9th day of September, 1997, in the County of Summit aforesaid, did commit the crime of KIDNAPPING in that he, did, by force, threat, or deception, remove Winda Snipes from the place where found and/or restrain the liberty of such person to facilitate the commission of any felony or flight thereafter and/or to terrorize, or to inflict serious physical harm on the victim or another and/or to engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will, in violation of Section 2905.01(A)(2)/(A)(3)/(A)(4) of the Revised Code, A FELONY OF THE FIRST DEGREE, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

s/ Maureen O'Connor

MAUREEN O'CONNOR, Prosecutor/rjm
County of Summit, Ohio

by Bandy

Prosecutor, County of Summit, by

Judith A Bandy

Assistant Prosecuting Attorney

A TRUE BILL

Grand Jury Foreperson/Deputy Foreperson