

ORIGINAL

IN THE SUPREME COURT OF OHIO
2011

STATE OF OHIO,

Case No. 09-1661

Plaintiff-Appellee,

On Appeal from the
Ashland County Court of
Appeals, Fifth Appellate
District

-vs-

MAXWELL WHITE,

Court of Appeals Nos.
07-COA-037 & -038

Defendant-Appellant.

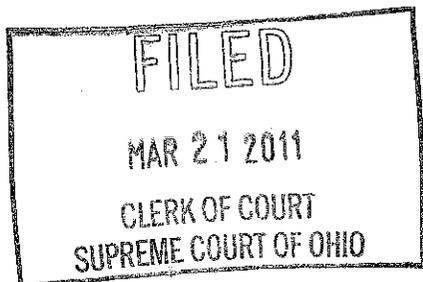
**MEMORANDUM OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS
ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO'S
MOTION FOR RECUSAL OF JUSTICE PAUL PFEIFER**

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Plaintiff-Appellee State of Ohio has filed a motion requesting that Justice Paul Pfeifer recuse himself from the present case. On behalf of the Ohio Prosecuting Attorneys Association as amicus curiae, the present memorandum is being submitted in support of that motion.

Justice Pfeifer's public comments on the subject of the death penalty, and particularly his column published in the *Cleveland Plain Dealer* on January 26, 2011, raise grave concerns about his ability to impartially rule on death-penalty cases in this Court.

Canon 2.11(A)(5) of the Code of Judicial Conduct requires disqualification when a judge's public extrajudicial statement "commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy."

Canon 2.10(A) provides that a judge "shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court * * *."

Canon 2.10(B) provides that a judge "shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office."

Canon 3.1(C) provides that a judge shall not participate in extrajudicial activities "that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality."

Several of Justice Pfeifer's public criticisms of the death penalty raise grave concerns under these provisions and, in toto, warrant his recusal in the *White* case.

Justice Pfeifer states in the *Plain Dealer* column that Ohio is "not well served by our ongoing attachment to capital punishment." He contends that the death-penalty law is "not being applied as we originally intended." He complains that the Supreme Court has not engaged in the kind of proportionality review he intended when he participated in the drafting of the 1981 law. He contends that the Ohio death-penalty system "amounts to a death lottery," and he calls for its abolition.

With Justice Pfeifer committing himself to the abolition of the death penalty altogether, and with his view that the death penalty amounts to a "lottery," it appears to the OPAA that under Canon 3.1(C) Justice Pfeifer should not participate because reasonable persons will conclude his "independence, integrity or impartiality" has been undermined. Jurors having such views would be subject to exclusion as a matter of law on the ground that their personal views would prevent or substantially impair their ability to perform their duties as a juror. The same conclusion applies to Justice Pfeifer's pejorative criticisms.

An analysis of Justice Pfeifer's arguments reveals further reasons to be concerned about his impartiality in such matters. A centerpiece of his argument in the *Plain Dealer* is that life without parole ("LWOP") is an adequate "viable" punishment and that prosecutors, juries, and judges did not have that option before 2005. He contends that the relatively smaller number of death sentences imposed since 2005 shows that prosecutors and juries find the LWOP option "more desirable" and that those receiving death

sentences before 2005 might not have received those sentences if LWOP had been available. But these arguments are incorrect on several levels.

Justice Pfeifer touts his “unique perspective” on the death penalty, given his involvement in the drafting the 1981 law reinstating the death penalty and given his review of such cases as a member of the Court. He does not recall, however, that the LWOP option was added for capital aggravated murderers in 1996, not 2005.

This is one of the reasons why judges should withhold comment on such matters until such matters can be fully briefed by the parties. The law is complicated, and Justice Pfeifer misunderstands it in this respect. Having committed himself to this incorrect view of the law’s history, it is doubtful that he would be open-minded to correction when that issue would come up in death-penalty litigation before him.

Justice Pfeifer’s complaint about the absence of the LWOP option for aggravated murders is directly implicated in the present case. At issue here is whether defendant White will be subject to another penalty-phase hearing in which the death penalty will be an option. White’s aggravated murder of State Trooper James Gross occurred before the 1996 amendment adding LWOP went into effect, and that amendment is not applicable to defendant White. *State v. Warren*, 118 Ohio St.3d 200, 2008-Ohio-2011, ¶ 3 n. 1; *State v. Madrigal* (2000), 87 Ohio St.3d 378, 399. Again, given Justice Pfeifer’s belief that a death-penalty system without an LWOP option is a “lottery,” his impartiality has been undermined in the present case. His mind is closed on that matter, but it is a circumstance present in this very case.

A review of the *Plain Dealer* column also shows that Justice Pfeifer presents his abolitionist opinion with a high degree of certitude about his arguments, even though

those arguments are at best debatable and, in some instances, plainly incorrect.

Justice Pfeifer fails to note in the *Plain Dealer* column that some probably viewed the omission of the LWOP option from the 1981 law as a *benefit* to most of the defendants. Omission of LWOP meant that those receiving a life sentence would be eligible for parole at some point. As is the case now, a jury could only recommend a death sentence if the specified aggravating circumstances outweighed beyond a reasonable doubt all mitigating factors proffered by the defense. This high standard probably caused some to conclude that only those deserving the death penalty would receive it and that those not receiving death would be eligible for parole, a benefit to the latter group.

Whatever the reasons for the omission of the LWOP option from 1981 to 1996, juries who recommended death sentences at that time applied the same “outweigh” standard as they do now. Prosecutors can make a strong argument that there is no reason to cut the 1981-1996 murderers a break merely because LWOP is now an option, but Justice Pfeifer’s certitude would prevent a fair hearing of such argument.

Justice Pfeifer also erred in the *Plain Dealer* column in arguing that the relatively small number of death sentences now being imposed shows that prosecutors and juries view the LWOP option as “more desirable.” This argument is far overstated.

The 1981 law hampers the imposition of the death penalty in a several respects. It requires jury unanimity to make a death-sentence recommendation, but, according to the Supreme Court, a hung jury of even 11-1 in favor of death still results in a life sentence. Justice Pfeifer’s assumption that juries have repeatedly desired to impose the LWOP option becomes exceedingly weak in light of the fact that a LWOP sentence in any

particular case today can be the result of just one juror being in favor of that sentence. If the law allowed the jury to recommend a death sentence on a 10-2 or 11-1 vote, or if the law allowed a retrial of the penalty phase when the first jury deadlocks on sentence, we would see more death-sentence recommendations.

The 1981 law hampers prosecutors and juries in other ways. It prevents prosecutors from proving the killer's violent past or dangerousness, from using victim-impact evidence, and from presenting other evidence of the defendant's background and bad character that would be highly relevant to such a sentencing decision. At the same time, the defendant is largely unfettered in the "mitigating" evidence he can introduce.

So when any Ohio jury arrives at even a unanimous life-sentence recommendation, this cannot be taken as some bellwether development. The jurors likely did not have all of the information that could have been helpful to them if the law did not so hamstring their review. The current statute's one-sided approach is not constitutionally required, and some other states allow juries to consider and weigh *all* evidence relevant to their sentencing decision in deciding whether to impose death.

Accordingly, prosecutors can make a strong argument that there is no real trend or bellwether rejection of the death penalty in favor of LWOP. But Justice Pfeifer with great certitude has already rejected the argument before it even can be made, based in large measure on his mistaken belief that LWOP went into effect in 2005 rather than 1996.

Justice Pfeifer also fails to take into account the fact that LWOP might not have been imposed in many cases unless the death penalty had been available for the offense to begin with. His belief in the adequacy of LWOP as a sentence simply fails to

acknowledge that it is the continued existence of the death penalty that makes LWOP an effective sentence in certain cases. Justice Pfeifer fails to make the case for depriving juries of the ability to decide whether the killer should receive death or the much-vaunted LWOP option.

In the end, Justice Pfeifer's fixed belief in LWOP as a sentencing option, and the certitude of that belief, makes him partial in favor of those arguing for the abolition of the death penalty and for those arguing for its limitation. His arguments "appear to commit" him to reach a particular result. Canon 2.11(A)(5). His arguments constitute public statements that "might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court * * *." Canon 2.10(A). His comments commit him to a particular view of the law's history and to the abolitionist view of debatable legal developments, and such commitments "are inconsistent with the impartial performance of the adjudicative duties of judicial office." Canon 2.10(B). Such extrajudicial comments/arguments/commitments "would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality." Canon 3.1(C).

The Ohio Prosecuting Attorneys Association as amicus curiae therefore supports the State's motion requesting that Justice Pfeifer recuse himself from the present case.

The following county prosecutors also approve of the filing of this amicus memorandum: Lucas County Prosecuting Attorney Julia R. Bates, Hamilton County Prosecuting Attorney Joseph T. Deters, and Stark County Prosecuting Attorney John D. Ferrero.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed by regular U.S. mail on this 2/1st day of Mar., 2011, to the following known counsel of record:

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