

In The Supreme Court Of Ohio

State Of Ohio, :
Appellee, :
-vs- : Case No. **2010-0854**
Anthony Kirkland :
Appellant. : **Death Penalty Case**

Appellant Anthony Kirkland's Motion for Reconsideration

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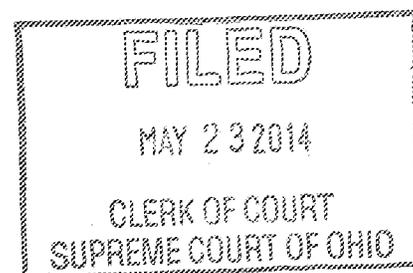
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Appellant Anthony Kirkland requests that this Court reconsider its merits ruling of May 13, 2014, affirming both his convictions and death sentence. This request is made under Rule 18.02 of the Supreme Court Rules of Practice. The reasons for this Motion are more fully set forth in the attached memorandum in support.

Respectfully submitted,

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Memorandum In Support

This Court should reconsider its remedy for Anthony Kirkland’s Third Proposition of Law, regarding prosecutorial misconduct. It found not only that the prosecutor’s comments were improper but that they were so prejudicial that they affected Kirkland’s substantial rights to a fair trial. *State v. Kirkland*, 2014 Ohio 1966, P83 (May 13, 2014). Still, this Court found it could cure the error by its own independent review under R.C. 2929.05(A). To the contrary, a new sentencing hearing is required to remedy this error.

Stare Decisis

Stare decisis requires that this Court vacate Kirkland’s sentence and remand for a new sentencing procedure. In *State v. Thompson*, 33 Ohio St. 3d 1 (1987), this Court held that it was “constrained to hold that any egregious error in the penalty phase of a death penalty proceeding, including prosecutorial misconduct, will be cause to vacate the sentence of death with a subsequent remand to the trial court for a new sentencing procedure pursuant to R.C. 2929.06.” *Id.* at 15. Although the Court disfavored that result, the remand was “mandated by the persistent efforts of the prosecutor which resulted in the appellant’s not being given a fair trial in accordance with previous decisions of the United States Supreme Court and decisions of this court.” *Id.*

Kirkland's case is no different. As this Court recognized in its analysis of Kirkland's case, "Allegations of prosecutorial misconduct implicate due-process concerns." *Kirkland*, 2014-Ohio-1966 at P79 (citing *State v. Newton*, 108 Ohio St.3d 13(2006), quoting *Smith v. Phillips*, 455 U.S. 209, 219 (1982)). This Court used the "previous decisions of the United States Supreme Court and decisions of this court" and determined that prosecutorial misconduct existed in Kirkland's case. *Thompson*, 33 Ohio St. 3d at 15. It found that the misconduct "prejudicially affected Kirkland's substantial rights." *Kirkland*, 2014-Ohio-1966 at P83. But then this Court failed to follow its own case law and "vacate the sentence of death with a subsequent remand to the trial court for a new sentencing procedure pursuant to R.C. 2929.06." *Thompson*, 33 Ohio St. 3d at 15.

This Court has emphasized the importance of stare decisis in its decisions. "[D]eference to an established majority opinion, despite a jurist's disagreement with the opinion, is part of the court's rich tradition of adherence to stare decisis." *Shay v. Shay*, 113 Ohio St. 3d 172 (2007). In fact, when this Court has ignored stare decisis, it has done so to bring about a constitutional result. *See State v. Bodyke*, 126 Ohio St. 3d 266 (2010), ("stare decisis 'does not apply with the same force and effect when constitutional interpretation is at issue.'"). For example, in *Bodyke*, 126 Ohio St. 3d 266 (2010), this Court set aside stare decisis because it found that R.C. 2950.031 and 2950.032 violated the separation-of-powers doctrine.

Again, this Court must follow its own law, in which it held that "any egregious error in the penalty phase of a death penalty proceeding, including prosecutorial misconduct, will be cause to vacate the sentence of death with a subsequent remand to the trial court for a new sentencing procedure pursuant to R.C. 2929.06." *Thompson*, 33 Ohio St. 3d at 15. There is no question that the error here was egregious. In order to make such a finding that prosecutorial

misconduct did, in fact, occur, this Court had to find that “the remarks were improper and, if so, whether they prejudicially affected the accused’s substantial rights.” *State v. Diar*, 120 Ohio St. 3d 460 (2008). And it did so find. This Court found that “the state's closing remarks in the penalty phase were improper and **substantially prejudicial.**” *Kirkland*, 2014-Ohio-1966 at P96 (emphasis added).

**Independent evaluation cannot cure infringement
on defendant’s right to fair trial**

The Court was right to find that the prosecutor engaged in misconduct. The prosecution violated Kirkland’s rights in a variety of ways. Specifically, the prosecutor argued a sentence less than death would be meaningless and would not hold Kirkland accountable the deaths of the victims; repeatedly made references to the subjective experiences of the victims; inserted numerous facts outside the record; and graphically argued the nature and circumstances of the murders as aggravating factors. *Id.* at P80, 86-95. “[W]e have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential.” *Berger v. United States*, 295 U.S. 78, 89 (1935).

Prosecutorial misconduct affects the defendant’s right to a fair trial. The “materiality requirement” in this analysis is about the “misconduct’s effect on the trial.” *Phillips*, 455 U.S. at 220 fn. 10. *See also id.* at 219 (“The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.”). A defendant whose rights have been substantially, prejudicially affected, cannot have his rights to a fair trial restored by the independent review of an appellate court.

Four Justices cannot take the place of 12 jurors

Kirkland exercised his ability to have his fate determined by twelve jurors—a right under Ohio statute, even if not recognized as a constitutional right. And it would have only taken one juror for Kirkland to have ended up with a life sentence, as opposed to death. *State v. Brooks*, 75 Ohio St. 3d 148, 161 (1996) (“In Ohio, a solitary juror may prevent a death penalty recommendation by finding that the aggravating circumstances in the case do not outweigh the mitigating factors.”) But the prosecutor’s misconduct so affected that jury that it rendered “the jury’s decision a product solely of passion and prejudice.” *Kirkland*, 2014-Ohio-1966 at P84.

This Court’s independent evaluation did not give Kirkland what he needs to be whole. He still stands convicted and sentenced to death without having received his constitutional right to fair trial, and to a **jury** trial. He has been deprived of having twelve, individual jurors decide whether to spare his life. Even this Court’s seven justices are not unanimous as to his fate.

The cases cited by the majority in support of curing the error by independent review are distinguishable

The Court cited to several cases in support of its ability to cure the error by its independent reweighing. *Kirkland*, 2014-Ohio-1966 at P97. But all of the cases it cited are distinguishable by one significant fact: in each of the cited cases, this Court had first found that the error did not, or would not have, affected the outcome. That is the opposite of what the Court found in *Kirkland*.

This Court cited to *State v. Hale*, 119 Ohio St. 3d 118 (2008), as an example of curing an error. But in *Hale*, this Court determined:

Raising the issue of parole on cross-examination may have been improper, **but it was not clearly outcome-determinative**. We therefore find that no plain error occurred. Moreover, our independent review of the death sentence will cure the error, as the possibility of parole will play no part in our analysis.

Id. at 139 (emphasis added).

State v. Sanders, 92 Ohio St. 3d 245 (2001), was another case to which this Court cited.

But in *Sanders*, the Court stated this:

Sanders proffered testimony that the prison administration inflicted "psychological brutality" on the prisoners and hence bore some responsibility for the riot. We regard that factor as potentially mitigating and have considered the proffered testimony. **However, we find that it deserves no weight.** Vallandingham's murder was not a response to any "psychological brutality" that may have existed at SOCF. It was a calculated act, undertaken to bend the DRC to Sanders's will.

Id. at 281.

Finally, this Court cited *State v. Mills*, 62 Ohio St. 3d 357 (1992), as a further example.

But in *Mills*, this Court found:

Any impropriety in the prosecutor's argument **did not materially prejudice Mills**. Mills presented little or no convincing evidence of any mitigating factors save residual doubt. See discussion, *infra*, at Part VI. Thus, the jury could only reasonably conclude that the aggravating circumstance outweighed mitigating factors. No plain error occurred, and our independent review of the sentence will also cure the effect of any error.

Id. at 373-374. Moreover, as stated in the dissent, *Mills* contained far fewer instances of prosecutorial misconduct, and the defendant failed to object to those instances. *Kirkland*, 2014-Ohio-1966 at P196 (Lanzinger, J., dissenting).

In comparison, this Court found that the prosecutorial misconduct in *Kirkland* "prejudicially affected Kirkland's substantial rights" (*Id.* at P83); was "improper and substantially prejudicial" (*Id.* at P96); and "violated Kirkland's rights to due process" (*Id.* at P192) (Lanzinger, J. dissenting).

Conclusion

This Court should reconsider its remedy for Anthony Kirkland's Third Proposition of Law, regarding prosecutorial misconduct. Stare decisis dictates that a new sentencing hearing be held. The Court's independent evaluation cannot cure infringement on defendant's right to fair trial, and four Justices cannot take the place of twelve jurors. Moreover, the cases cited by the majority in support of curing the error by independent review are distinguishable. "With a human life at stake, a prosecutor should not play on the passions of the jury." *State v. Keenan*, 66 Ohio St. 3d 402, 407 (1993).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of **Appellant Kirkland's Motion to Reconsider** was forwarded by regular U.S. First Class Mail to William E. Breyer, Chief Assisting Prosecuting Attorney, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, on the 23rd day of May, 2014.



Rachel Troutman - 0076741