

IN THE SUPREME COURT OF THE UNITED STATES

October term, 2018

No. \_\_\_\_\_

JOHN DRUMMOND,  
Petitioner,

-vs-

STATE OF OHIO,  
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF OHIO

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**PETITION FOR WRIT OF CERTIORARI  
CAPITAL CASE**

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## **QUESTIONS PRESENTED FOR REVIEW**

- I. Is the state required to provide a defendant a forum to litigate a due process claim that can only be effectively presented by combining the records of both the direct appeal and the collateral appeals because the prejudice of the direct appeal error was contained in the collateral appeal and not part of the direct appeal record?
- II. If a state supreme court releases an opinion which, if rendered before rather than after a defendant's appeal, would have mandated the ordering of a new trial for that defendant and did not constitute new law, must that state allow the defendant the ability to present his case under the more recent precedent?

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner, John Drummond, respectfully prays that a writ of certiorari issue to review the judgment below of the Supreme Court of Ohio entered in this case.

### **OPINIONS BELOW**

The order of the Supreme Court of Ohio refusing to accept jurisdiction of the issues appears at Appendix page A-1 to the Petition.

### **JURISDICTION**

Jurisdiction of this Court is conferred pursuant to 28 U.S.C. §§ 1257 and 1651.

## **RELEVANT STATUTORY PROVISIONS**

### **SUPREME COURT OF OHIO PRACTICE RULE 4.01**

Supreme Court of Ohio Rule of Practice 4.01:

#### **(A) Motion for Order or Relief**

(1) Unless otherwise addressed by these rules, an application for an order or other relief shall be made by filing a motion for the order or relief. The motion shall state with particularity the grounds on which it is based.

## **RELEVANT CONSTITUTIONAL PROVISIONS**

### EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

### FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## **STATEMENT OF THE CASE**

Petitioner John Drummond has been capitally convicted in Mahoning County, Ohio. His aggravated murder conviction grew out of charges that he fired a weapon into the house of the victim as he and another drove by that residence. One of the shots struck and killed an infant being carried by another in the house.

The challenge here is that Ohio has no procedure that would allow its courts to review a conviction and sentence of death of a defendant based upon consideration of developments in the case subsequent to the direct appeal opinion. In Ohio, a defendant's postconviction appeal, in which a defendant may supplement the record with evidence outside the record, proceeds simultaneously with the direct appeal. The postconviction or collateral appeal is considered independently of the direct appeal. Thus, if there is evidence developed in the postconviction appeal which may be relevant to the strength of a direct appeal issue, this evidence may not be considered by the direct appeal court. And there is no procedure in Ohio that would permit review of the combination of the records of the two simultaneous appeals by any court.

Thus, if the direct appeal record arguably supports a harmless error finding, but evidence developed in a collateral appeal establishes that the error was unfairly prejudicial, the defendant has no forum to address the due process violation or that the error contributed to the conviction in a case with less than overwhelming evidence. In other words, the error was not harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

Petitioner Drummond's case adds yet a third prong to the above scenario. The Supreme Court of Ohio established a rule after Drummond's opinion which established that evidence admitted and argued in Drummond's trial should have been excluded. This was not "new" law,

but simply clarified an evidence rule that had previously been in dispute. Thus, if Drummond were to appeal today with the full record and under the current law the Supreme Court of Ohio would necessarily follow its own precedent and grant him a new trial.

However, there is no procedure under Ohio law which allows Drummond to seek relief. Moreover, he may not seek relief under 28 U.S.C. §2254 because comity does not allow a federal habeas court to consider this issue as the relevant Supreme Court of opinion was not decided until after Drummond filed and litigated his habeas petition. Thus, there is no forum to address his Fourteenth Amendment or Eighth Amendment issue.

The specific Supreme Court of Ohio case that should afford Drummond relief is State of Ohio v. Thomas, 152 Ohio St.3d 15 (2017). There, the Supreme Court of Ohio reversed the defendant's aggravated murder conviction and death sentence based on the admission of unrelated weapons during trial. The murder weapon in the case was a knife. Despite being unrelated to the crime, the trial court permitted the state to introduce the knives found at the defendant's home into evidence. Additionally, two of Thomas's former girlfriends testified that Thomas routinely carried a blue pocket knife. Because none of these knives could have been the murder weapon, the Supreme Court of Ohio ordered a new trial on a plain error standard.

Years earlier, Drummond had raised a similar issue in his direct appeal to the same court. Police collected bullet shells and fragments at the crime scene. Despite the fact that the bullets seized from Drummond's home were of a different manufacture and therefore could not have been used to commit the offense, the trial court allowed the introduction of this ammunition into evidence.

In the state's closing argument, the prosecutor recounted in painstaking detail the

ammunition found in Drummond's home, including comment:

Drummond's house was searched. You saw what was retrieved. And you'll have this in the back. A drum containing 47 – excuse me – 75 AK-47 rounds. An empty – a single AK rounds, an AK magazine, a Taurus 9 millimeter handgun, two magazines, a live 9 millimeter rounds. . . A box of AK ammo with 11 rounds. A box of AK ammo with 10 rounds. You'll have all of this back there to go through. A brown paper bag containing M-1—explosives. A baggy with 357 ammo. Another baggy with .9 millimeter ammo. The judge is going to explain to you that this may not all be in the boxes like they were when they were originally retrieved. Listen to her explanation. *That's a lot of fire power.* (Emphasis added)

Although defense counsel explained in closing remarks that none of the ammunition found at the crime scene matched that found in Drummond's home, the argument could not realistically unring that bell. Clearly under Thomas, such evidence would have been precluded.

In addition, during the state postconviction proceedings, Drummond procured two affidavits of jurors who sat on his jury. Both individually attested that a significant factor in their decision to convict was the ammunition evidence the state introduced. The jurors signed affidavits clearly demonstrates the prejudice that inured to Drummond because of the introduction of unrelated ammunition evidence at his trial. The jurors formed an opinion of Drummond based on the ammunition and weapons seized at his residence. Not only did it plainly and directly impact these jurors' decision to convict Drummond, but the introduction of this evidence and the opinions these jurors formed of Drummond as a result must have impacted their sentencing decision of death.

On direct appeal, as noted, Drummond raised the identical issue as Thomas. The Supreme Court of Ohio in Drummond opinion held that the evidence was relevant because it "tended to prove that he had access to the means to commit the murder. In addition, Drummond's possession of 7.62 x 39 mm rounds of ammunition tended to prove that he had

access to a weapon of *the type* used to kill [the victim].” Drummond, 111 Ohio St.3d at 28 (emphasis added). It concluded its review of the other weapons evidence claim by observing that the introduction of a bulletproof vest was indeed irrelevant, but summarily decided that it was not prejudicial in light of the evidence presented. Id.

The Court omitted any analysis regarding the prejudicial effect of introducing unrelated weapons evidence, even though Drummond raised this argument on direct appeal. This opinion was strongly contradicted by Thomas.

Petitioner Drummond thus has meritorious Eighth and Fourteenth Amendment claims with no forum in which to litigate it. It is firmly established that a state must have process to review and, if needed, correct due process violations that resulted in a manifest injustice. This Court recognized this requirement in Young v. Ragen, 337 U.S. 235 (1949). In that case, which led to states enacting habeas or postconviction proceeding legislation, this Court determined that a criminal defendant must have some state court forum in which to exhaust his postconviction claims of a federal constitutional violation. The petitioner there attempted to litigate a Fourteenth Amendment due process claim in a 28 U.S.C. §2254 petition. The attorney general for the state of Illinois argued that the petition could not be heard as it had not been exhausted in state court.

This Court found that Young’s due process claim had not been procedurally defaulted because Illinois had not provided him a forum to exhaust his claim. While the Ragen Court acknowledged that states have the right and ability to dictate what procedures to provide post-conviction litigants to raise their federal constitutional claims, it found that “it is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration

of a claim of denial of a federal right.” Id. at 238.

It is the failure of Ohio to provide a forum for *any* consideration of the claim that is applicable here. Based on the Ragen holding, it is clear that federal due process concerns arise when a state court denies a litigant an avenue to raise a federal claim. If a state does not have in place a procedure that allows for review of the claim, it must create the procedure, via the court rule or state legislative action.

Drummond sought to have the Supreme Court of Ohio utilize its own rules of court to allow such a review but was turned down. The rule in question, Supreme Court of Ohio Rule of Practice 4.01, states in pertinent part:

(A) Motion for Order or Relief

- (1) Unless otherwise addressed by these rules, an application for an order or other relief shall be made by filing a motion for the order or relief. The motion shall state with particularity the grounds on which it is based.

As there is no specific rule allowing for a case review of the combined direct appeal and postconviction appellate records, Drummond attempted to utilize this rule. Drummond filed a motion asking the Supreme Court of Ohio to review the issue in light of the Thomas decision and the postconviction evidence. If allowed or so interpreted by that court, the rule’s use for the cumulative appeal would have permitted Ohio to comport to Due Process requirements. However, the court did not agree with Drummond’s interpretation of the law and turned down the motion on December 19, 2018.

## **REASONS FOR GRANTING THE WRIT**

**I. If a state supreme court releases an opinion which, if rendered before rather than after a defendant's appeal, would have mandated the ordering of a new trial for that defendant and did not constitute new law, must that state allow the defendant the ability to present his case under the more recent precedent?**

Over ten years ago on direct appeal, the Supreme Court of Ohio was presented with errors the trial court committed by admitting prejudicial evidence that Drummond possessed ammunition and weapons unrelated to the crime for which he was tried. At that time, the Supreme Court of Ohio concluded that the unrelated evidence was relevant to demonstrate Drummond had access to that particular type of weapons and ammunition, and that he was familiar with their use. State v. Drummond, 111 Ohio St.3d 14, 28 (2006). Additionally, that Court found that the admission of a bulletproof vest was “of questionable relevance” but did not result in prejudicial error. Id.

The Supreme Court of Ohio thereafter released its opinion in State v. Thomas, 152 Ohio St.3d 15 (2017), that is diametrically opposed its finding on the issue in Drummond’s first direct appeal. The Thomas decision held that the admission of weapons unrelated to the crime charged constitutes *plain error*, contrary to its Drummond analysis. In reviewing Thomas’s irrelevant weapons evidence claim, the Court, adopted the stance that, “the fact that a person collects knives or other weapons does not tend to make it more probable that the person is experienced with the use of knives and intends to use a knife to cause serious injury to others \* \* \* Possession and use are not equivalent.” Thomas, 152 Ohio St.3d at 22.

Although the Drummond Court reviewed the trial court’s decision to admit the evidence for relevance, it failed to perform the essential Ohio Rule of Evidence 404(B) test, that the Thomas Court now requires.

As noted above, the postconviction/collateral appeal procedures produced two affidavits from jurors acknowledging that the introduction of the unrelated firearms evidence did contribute to the verdict. This undoubtedly carried over to their sentencing consideration. The complete record clearly establishes, particularly in light of the subsequent Thomas holding, that Drummond would be granted a new trial if his direct appeal could be litigated post-Thomas. But Ohio has no forum to do so; nor does 28 U.S.C. §2254 afford him a forum to litigate the issue in light of the clarified Ohio law.

Drummond is under a sentence of death. The Fourteenth Amendment provides that no State shall “deprive any person of life, liberty or property, without due process of law.” The Court has long recognized that the Amendment’s Due Process Clause, like its Fifth Amendment counterpart, “guarantees more than fair process.” Washington v. Glucksberg, 521 U.S. 702, 719 (1997). The clause also includes a substantive component that “provides heightened protection against government interference with certain fundamental rights and liberty interests.” Id., 702. *See also* Troxel v. Granville, 530 U.S. 57 (2000).

Drummond was denied his due process right to a fair trial. The Supreme Court of Ohio in Thomas did not create new law, it simply followed existing law that it had failed to apply in Drummond’s direct appeal. If it addressed Drummond’s claim subsequent to Thomas, the court would be bound to order a new trial based on the Thomas precedent. The lack of a procedure to allow him the ability to litigate his case in view of a clearly established precedent deprives Drummond his Due Process and Equal Protection rights as guaranteed by the Fourteenth Amendment.

**II. Is the state required to provide a defendant a forum to litigate a due process claim that can only be effectively presented by combining the records of both the direct appeal and the collateral appeals because the prejudice of the direct appeal error was contained in the collateral appeal and not part of the direct appeal record?**

The State charged Drummond with aggravated murder for the drive-by shooting into the residence that caused the death of a person living in that residence. During trial, law enforcement witnesses testified about ammunition found at the crime scene. Police found a 9 mm slug at the house and 7.62x39 mm assault rifle casings near the house. Drummond, 111 Ohio St.3d at 16-17. A ballistics expert testified that an assault rifle such as an AK-47 semiautomatic rifle would have fired those bullets. He also identified one 9 mm Luger bullet and 7.62 mm bullets and bullet fragments at the scene that he determined were fired from the same weapon. Id. at 17.

Police also seized “a drum containing AK-47 rounds . . . One single AK round or 7.62 round. . . an empty AK magazine . . . a Taurus 9 mm handgun which had no barrel. . . one live 9 mm round . . . [and] one white bullet proof vest.” They also found empty boxes of what “would have contained 45 automatic ammunition . . . and an empty box that would have contained 7.62 or AK-47 ammunition.” Id. at 3329.

On cross-examination, the detective explained that bullet manufacturers stamp their name on the back of their bullets and conceded that none of the bullets found at Drummond’s home were of the same manufacture as those at the crime scene. Thus, none of the ammunition found at Drummond’s home could have been used in the drive-by shooting. Police also did not recover the murder weapon.

Because there was no physical evidence linking Drummond to the crime, the prosecution

conceded at closing argument that “this is a one issue case, identity.” The prosecutor attempted to depict Drummond as someone with bad character and a propensity to commit violence who, in accordance with that character, participated in the drive-by shooting. The prosecutor recounted in painstaking detail the ammunition found in Drummond’s home, including comment:

Drummond’s house was searched. You saw what was retrieved. And you’ll have this in the back. A drum containing 47 – excuse me – 75 AK-47 rounds. An empty – a single AK rounds, an AK magazine, a Taurus 9 millimeter handgun, two magazines, a live 9 millimeter rounds. . . A box of AK ammo with 11 rounds. A box of AK ammo with 10 rounds. You’ll have all of this back there to go through. A brown paper bag containing M-1—explosives. A baggy with 357 ammo. Another baggy with .9 millimeter ammo.

The judge is going to explain to you that this may not all be in the boxes like they were when they were originally retrieved. Listen to her explanation. *That’s a lot of fire power.* (emphasis added)

Although defense counsel explained in closing remarks that none of the ammunition found at the crime scene matched that found in Drummond’s home, the damage could not be undone. The result of introducing such evidence was “highly prejudicial.” Thomas, 162 Ohio St.3d at 25.

During state postconviction proceedings, counsel procured the affidavits of two jurors who sat on Drummond’s jury. Both individually attested that a significant factor in their decision to convict was the ammunition evidence the state introduced. One juror averred that, “one of the key pieces of evidence for me showing Drummond’s guilt was the AK ammo found in his residence.” A second juror stated it more pithily:

The key evidence for me was the evidence found during the search of [Drummond’s] residence, specifically the ammunition and the gang book. In my view, if it looks like a duck and acts like a duck, it’s a duck.

These affidavits clearly demonstrate the prejudice that inured to Drummond because of

the introduction of unrelated ammunition evidence at his trial. The jurors formed an opinion of Drummond based upon the ammunition and weapons seized at his residence. Not only did it plainly and directly impact these jurors' decision to convict Drummond, but the introduction of this evidence and the opinions these jurors formed of Drummond as a result of it certainly must have impacted their sentencing decision.

On direct appeal, Drummond raised the identical issue as Thomas, arguing that the ammunition and weapons found in his home were unrelated to the crime scene evidence and therefore its admission was prejudicial error. The Drummond Court held that the evidence was relevant. The court held that the admission of the unrelated ammunition evidence was relevant because it "tended to prove that *he had access* to the means to commit the murder. In addition, Drummond's possession of 7.62 x 39 mm rounds of ammunition tended to prove that he had access to a weapon of the *type* used to kill Jiyen." Drummond, 111 Ohio St.3d at 28 (emphasis added). The Court then incongruously held that "Drummond's possession of a 9 mm handgun and 9 mm ammunition was relevant because a 9 mm weapon was fired at the Dent home on the evening of March 24." *Id.*

Thus, the Court found that the unrelated weapon was relevant despite the fact that it had no connection whatsoever to the crime. It concluded its review of the other weapons evidence claim by observing that the introduction of a bulletproof vest was indeed irrelevant, but summarily decided that it was not prejudicial in light of the evidence presented. Id. The Court omitted any analysis regarding the prejudicial effect of introducing unrelated weapons evidence, even though Drummond raised this argument on direct appeal.

As argued above, Drummond is in the untenable situation of having a not only

meritorious issue, but a winning issue, and has forum, state or federal, in which to litigate that issue. Acceptance of this claim would allow this Court to address the application of its principals of Young v. Ragen, 337 U.S. 235 (1949) to Drummond's case and re-establish the principle that state's must afford defendants and especially capital defendant's, the ability to litigate meritorious federal claims, here Eighth and Fourteenth Amendment claims.

### **CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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