No. 21-5378

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2022

ANTHONY KIRKLAND

Petitioner

vs.

STATE OF OHIO

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO OHIO SUPREME COURT

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QUESTION PRESENTED

IT IS NOT PROSECUTORIAL MISCONDUCT FOR A PROSECUTOR TO INFORM A JURY IN CLOSING ARGUMENT THAT IT SHOULD EXPECT A VERDICT RECOMMENDING THE DEATH PENALTY WILL BE CARRIED OUT.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

There are no parties to the proceeding other than those listed in the caption. Under Rule 29.6, Respondent states that no parties are corporations.

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OPINIONS BELOW

The opinion for the Oho Supreme Court is reported at *State v. Kirkland*, 161 Ohio St.3d 1473, 2021-Ohio-717, 164 N.E.3d 476.

JURISDICTIONAL STATEMENT

Petitioner Kirkland claims jurisdiction under 28 U.S.C. ' 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the Fifth Amendment to the United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless upon presentment or indictment of a grand jury….; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in

> any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law [.]

This case also implicates the Sixth Amendment, which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy he right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This case implicates the Eighth Amendment, which provides in pertinent part:

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

Finally this case also implicates the Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> 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 law.

STATEMENT OF THE CASE AND FACTS

Petitioner Kirkland was charged by the Hamilton County Grand Jury in two indictments, numbered B-0901629 and B-0904028. The indictments were consolidated for trial under the earlier number, B-0901629. The twelve counts charged involved four murder victims as follows:

(1.) **Casonya Crawford**: Attempted Rape, Aggravated Murder during an Attempted Rape with death specification (course of conduct, attempted rape), Aggravated Murder during an Aggravated Robbery with death specification (course of conduct, aggravated robbery), Aggravated Robbery, and Abuse of a Corpse. All offenses occurred on May 4, 2006.

(2.) **Esme Kenney**: Attempted Rape, Aggravated Murder during an Attempted Rape with two death specifications (course of conduct, attempted rape), Aggravated Robbery, Aggravated Murder during an Aggravated Robbery, with two death specifications (course of conduct, aggravated robbery) and Abuse of a Corpse. All offenses occurred on March 7, 2009.

(3.) **Mary Jo Newton**: Murder and Abuse of a Corpse. Both offenses occurred on June 14, 2006.

(4.) **Kimya Rolison**: Murder and Abuse of a Corpse. Both offenses occurred on December 22, 2006.

On March 4, 2010, after a jury was impaneled, the defendant entered a guilty plea to Counts 6 and 7 in Case B-0901629, and Counts 1 and 2 in case B-0904028. These were the murder and abuse of a corpse counts involving victims Mary Jo Newton and Kimya Rolison. (See T.p. 825-845) Sentencing was deferred.

Petitioner was found guilty as charged on the remaining counts in a jury trial. At the

conclusion of the sentencing hearing on March 17, 2010, the jury recommended death on all the capital counts. On March 31, 2010, the trial court did impose the death penalty as recommended by the jury and maximum consecutive sentences on the remaining counts.

The Ohio Supreme Court affirmed Kirkland's convictions and death sentence. *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818. The Ohio Supreme Court, however, granted Kirkland's motion for relief and remanded the case to the trial court for resentencing, in accordance with R.C. 2929.06(B), on the aggravated-murder convictions related to Casonya and Esme. *State v. Kirkland,* 147 Ohio St.3d 1440. 2016-Ohio-768, 63 N.E.3d 158.

In July, 2018, upon remand a second jury recommended a death sentence for the aggravated murders of Casonya and Esme and the trial court again sentenced Kirkland to death. On August 18, 2020, the Ohio Supreme Court, in a unanimous decision, affirmed Kirkland's death sentence. *State v. Kirkland*, 160 Ohio St.3d 389, 2020-Ohio-4079, 157 N.E.3d 716. Kirkland's writ of certiorari from this decision was denied by this Court on May 17, 2021. *Kirkland v. Ohio,* __ S.Ct. __, 209 L. Ed.2d 763, 2021 WL 1951932.

On January 8, 2021, Kirkland filed an Application for Reopening of his direct appeal, pursuant to S.Ct. Prac. R. 11.06. In his application, Kirkland raised several allegations of ineffective assistance of direct appellate counsel for their failure to raise issues on direct appeal. These issues included: (1) prosecutorial misconduct; (2) the admission of "other acts" evidence, specifically Kirkland's 1987 murder conviction of Leola Douglas; (3) inadequate voir dire; and, (4) failure to preserve claims Kirkland suffered a severe mental illness at the time of the murders.

On March 16, 2021, the Ohio Supreme Court denied Kirkland's application to re-open his

direct appeal. *State v. Kirkland*, 161 Ohio St.3d 1473, 2021-Ohio-717, 164 N.E.3d 476.

In his current petition, Kirkland argues that this Court should grant review on the allegations raised and rejected by the Ohio Supreme Court relating to appellate counsel's failure to raise certain claims of prosecutorial misconduct.

REASON FOR DENYING THE WRIT

IT IS NOT PROSECUTORIAL MISCONDUCT FOR A PROSECUTOR TO INFORM A JURY IN CLOSING ARGUMENT THAT IT SHOULD EXPECT A VERDICT RECOMMENDING THE DEATH PENALTY WILL BE CARRIED OUT.

Petitioner Kirkland's claim of prosecutorial misconduct is easily denied. The substance of Kirkland's claim is that his direct appellate counsel should have raised an issue of prosecutorial misconduct when the prosecutor informed the jury in closing argument that if it returns a death verdict, the trial judge is going to sentence Kirkland to death, emphasizing "that (a death sentence) is going to happen." (T.p. 1574-1575)

Kirkland has twisted the prosecutor's statement to mean the prosecutor and the trial judge had some type of ex parte communication wherein the trial judge informed the prosecutor that he was going to impose death if the jury recommended it. There is not a scintilla of record evidence to support such a serious allegation. Moreover, Kirkland is making an unreasonable interpretation of the prosecutor's argument.

Kirkland relies heavily on this Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed. 231, (1985). *Caldwell* stands for the proposition that prosecutorial closing arguments in a death penalty case should not minimize the jury's sense of importance in its role. *Id.* The prosecutor in *Caldwell* suggested defense counsel misled the jury to think its decision was a

matter of life and death, and then said, "Now they (defense counsel) would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision." *Id*.

Kirkland's reliance on *Caldwell* is curious, since the prosecutor's closing remarks at bar, informing the jury that it should expect that its decision to recommend a death sentence will absolutely be followed *emphasized* rather than diminished the jury's role in a capital verdict.

Perhaps Kirkland, realizing the prosecutor meticulously followed *Caldwell's* ruling that prosecutors should not make closing statements that shift the responsibility of a death sentence away from the jury and place it on a reviewing court, had no choice but to "spin" the facts and accuse the prosecutor and the judge of engaging in some kind of ex parte communication. There is simply no evidence to support such an egregious allegation.

The reasonable interpretation of the prosecutor's statements emphasizing the jury should expect a verdict recommending death *will* be carried out is that the prosecutor wanted to make sure, especially in a case involving a serial killer having a second penalty-phase trial, that he was following this Court's decision in *Caldwell*. *Id.*

Indeed, there is record evidence to support this interpretation. The prosecutor was on guard to make sure it emphasized the jury's important role when deliberating on a possible verdict to recommend death. The prosecutor's referenced remarks can be traced to what occurred in opening statements where the prosecutor informed the jury that if the aggravating factors outweigh mitigating circumstances, it "shall *recommend* the death penalty for Anthony Kirkland (emphasis added)." Though this is a proper statement of Ohio law, the prosecutor's use of the word "recommend" drew

an immediate objection from Kirkland. Kirkland's counsel at side bar pointed out the prosecutor had to be admonished during voir dire not to inform the jury its decision was only a "recommendation" of death. In fact, the prosecutor's use of the word "recommend" prompted defense counsel to move for mistrial in that circumstance. (T.p. 819, 840)

It is not improper in Ohio for the prosecutor to inform the jury that returning a death sentence is a recommendation either in voir dire or closing argument, though the Ohio Supreme Court cautions against it. *State v. Rogers*, 28 Ohio St.3d 427, 432-433, 504 N.E.2d 52, 56-58 (1986) Thus the prosecutor informed the jury it *should* expect a verdict recommending death *will* be adopted was based upon defense counsel's earlier objections and the Ohio Supreme Court's cautionary concerns about such argument. It was not due to an unsubstantiated highly unethical ex parte communication with the trial judge. Kirkland's suggestion that the prosecutor and the judge conspired on the outcome is an outrageous mischaracterization of the record evidence.

Here, the prosecutor placed the ultimate determination as to the death sentence squarely on the jury.

The state points out that the issue raised herein was raised by Kirkland in an application to reopen his direct appeal under Ohio state law. As such, the standard of review on ineffective assistance of counsel is more stringent.

In Ohio, Appellate Rule 26(B) allows a defendant to argue claims of ineffective assistance of direct appellate counsel. In *State v. Murnahan* and its progeny, the Ohio Supreme Court ruled that a defendant moving to reopen his direct appeal must (1) set forth a colorable claim of ineffective assistance of appellate counsel; (2) show that, when res judicata would bar these claims, applying the

doctrine would be unjust; and (3) show that there was a reasonable probability that the new assignments of error would have been successful if they had been raised in the direct appeal. *State v. Murnahan*, 63 Ohio St. 3d 60, 66, 584 N.E.2d 1204 (1992); *State v. Dillon*, 74 Ohio St. 3d 166, 171, 1995-Ohio-169, 657 N.E.2d 273; *State v. Spivey*, 84 Ohio St. 3d 24, 25, 1998-Ohio-704, 701 N.E.2d 696.

In order to demonstrate ineffective assistance of direct appellate counsel, the defendant must prove that his counsel was deficient for failing to raise the issues on direct appeal and that there was a reasonable probability of success had counsel presented those claims on direct appeal. *State v. Goff*, 98 Ohio St.3d 327, 2003-Ohio-1017, 784 N.E.2d 700, syllabus; See also *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Johnson*, 24 Ohio St.3d 87, 494 N.E. 2d 1061(1986). Furthermore, appellate counsel need not raise every non-frivolous issue. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983).

In *Strickland v. Washington***,** this Court stated:

> "Judicial scrutiny of counsel's performance must be highly deferential...a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"

Id, at 689

A finding that prejudice is lacking precludes inquiries as to whether an essential duty was breached.

Defendant must show counsel failed to raise a genuine issue as to whether he had a colorable claim of ineffective assistance of appellate counsel. *State v. Goff*, supra.

On the basis of the record evidence, it would have been outrageous for appellate counsel to make the prosecutor's comments at issue a basis for a prosecutorial misconduct claim on direct appeal. In fact, it would have seriously called into question appellate counsel's credibility on the appellate issues it did raise.

It is also instructive that on direct appeal, direct appellate counsel raised issues of prosecutorial misconduct related to closing argument in the seventh proposition of law. *Kirkland*, 160 Ohio St.3d 389, 2020-Ohio-4079, 157 N.E.2d 716, at ¶ 115-124. Thus, the Ohio Supreme Court had reviewed both portions of the prosecution's closing argument for prejudicial error on direct appeal. One would think that if the Ohio Supreme Court reviewed record evidence of collusion between the prosecutor and trial judge, it would have taken the appropriate action at that time.

The argument herein takes the cliché of "grasping at straws" to a new level. Direct appellate counsel agreed with Kirkland's trial counsel that it was *beneficial* to Kirkland that the prosecutor emphasized the gravity of a death verdict to the jury. Hypothesizing to a jury that it should expect the return of a death recommendation to absolutely result in the defendant's death does not equate to evidence that the prosecutor and judge engaged in a highly unethical ex parte communication that death was the preordained outcome, should the jury recommend death.

Direct appellate counsel's failure to raise this claim did not warrant a reopening of Kirkland's direct appeal. The state requests this court to deny certiorari.

CONCLUSION

This case does not raise a federal constitutional issue or a compelling reason sufficient to invoke this Court's jurisdiction. The Ohio Supreme Court properly denied Kirkland's state application to reopen his direct appeal to state court.

Respectfully submitted,

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