

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

COMMONWEALTH OF MASSACHUSETTS )

v. )

TAMIK KIRKLAND )

SJC-11667 )

MOTION FOR RECONSIDERATION OR MODIFICATION OF  
DECISION

Defendant Tamik Kirkland moves the Court pursuant to Mass. R. A. P. 27 to reconsider or modify its February 22, 2023 decision in the above-captioned matter. Undersigned counsel presents these arguments pursuant to the principles set forth in *Commonwealth v. Moffett*, 383 Mass. 201 (1981).

1. Kirkland Was Denied the Right to Choose His Defense and of Compulsory Process for that Purpose

Before and during trial Kirkland unequivocally asserted his wish to defend the barbershop charges by showing it was impossible for him to have cornrows at the time, and to call ██████████ Blake to authenticate an April 22, 2011 photograph for that purpose. Kirkland's wishes were ignored by his counsel, the court, and Commonwealth. This was a denial of Kirkland's Sixth Amendment rights to compulsory process and to choose his own defense.

A defendant has a personal right to choose his own defense, even to his detriment, out of respect for his autonomy. *Jones v. Barnes*, 463 U.S. 745 (1983); *Faretta v. California*, 422 U.S. 806 (1975). This right cannot yield to counsel's strategic determination that honoring a defendant's wishes would

harm the case. Though courts generally give attorneys authority over how to meet a defendant's objectives, including which witnesses to call, Kirkland directly challenges the constitutionality of this rule. Allowing counsel to overrule a defendant's wish to call a witness essential to his chosen defense violates the defendant's compulsory process right.

Trial counsel's overruling of Kirkland and refusal to call Blake interfered with rights and powers personal to him. "Under th[e Sixth] Amendment, it is the accused, not counsel, who...must be accorded compulsory process for obtaining witnesses in his favor. The Counsel Clause itself...implies a right in the defendant to conduct his own defense, with *assistance* at what, after all, is his, not counsel's trial." *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984). "Because these rights are basic to our adversary system of criminal justice, they are part of the 'due process of law' that is guaranteed by the Fourteenth Amendment[, which] constitutionalizes the right in an adversary criminal trial to make a defense as we know it." *Faretta*, 422 U.S. at 818; see also *U.S. v. Filippi*, 918 F.2d 244, 246-48 (1<sup>st</sup> Cir. 1990). The rights to compulsory process and the assistance of counsel are distinct, and the Sixth Amendment does not allocate power over compulsory process to counsel, who is supposed to "assist" in effectuating the defendant's personal right to a defense of his choice. *Id.* at 819 ("The right to defend is given directly to the accused...who suffers the consequences if the defense fails"). "The choice is not all or nothing: To gain assistance, a defendant need

not surrender control entirely to counsel. For the Sixth Amendment, in grant[ing] to the accused personally the right to make his defense, speaks of the ‘assistance’ of counsel, and an assistant, however expert, is still an assistant.” *McCoy v. Louisiana*, 138 S.Ct. 1500, 1508 (2018).

“Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called ‘structural,’ [and] such an error is not subject to harmless-error review.” *Id.* at 1511. Because Kirkland was denied his autonomous right to choose his defense, including by exercising his right to call Blake as a witness, his trial was infected with structural error. The Court should reconsider its decision and reverse his convictions.

2. Kirkland Was Denied the Assistance of Counsel Without Conflict at a Critical Stage of the Proceedings

When the question of whether to call Blake to authenticate the April 22 photograph was decided outside Kirkland’s presence, Defendant was ‘represented’ only by counsel with a conflict of interest—protecting themselves against a later claim of ineffective assistance based on failure to speak with Blake to assess the pros and cons of calling her by asserting they had made a strategic decision not to. Because of this conflict, Kirkland was denied the effective assistance of counsel.

When Kirkland spoke up and disagreed with counsel’s decision to rest without calling Blake, his interest and theirs diverged. See IX:14:9; X:7. Counsel told the court they had already presented sufficient evidence ‘on the issue of braids,’ but that was untrue: the photo Kirkland wanted to admit

predated the incident, clearly showing the height of his hair, whereas counsel chose only to admit photos taken after. Nor was this reasonable because it avoided showing Kirkland in prison: his previous incarceration and escape was a key aspect of the defense. Even if counsel (and the Court) believed it was foolish to introduce evidence of incarceration and escape, this was the defense Kirkland chose, as was his constitutional right.

Trial counsel's decision not to interview Blake before trial was premised on personal opinion her testimony would harm the case. This decision impermissibly superseded Kirkland's right to control his case, and rose to the level of conflict because counsel had an interest in hiding the fact that, as explained in Kirkland's letter to the judge, counsel ignored Kirkland's directions and did not interview the witness. See X:6-8. The judge asked, "So I'm sure that all attempts were made to find this young woman who was in the picture, correct?" X:9-10. Counsel did not answer that question until the evidentiary hearing on Defendant's new trial motion, where he was asked about any attempt to reach Blake. Counsel answered, "I don't remember that, no. We pretty much made a decision that we weren't going to do that." See MNT.1/28:67-68.

Kirkland's letter explained the photograph was central to his chosen defense: "[t]he reason that this witness and evidence is important to proving my innocence...In looking at those photos, anyone with 'eyesight' can see what the hairstyle I was wearing on April 22nd. There was no way I could

have had braids on April 30th.” See X:7. Expert Joy Talbot confirmed this: when asked if Kirkland’s hair in the April 10 photograph was long enough to be cornrowed, she answered “I would say by looking at them, ‘No,’” and then emphasized that the hair shown in the April 22 photograph would have been even “more difficult” to braid. MNT.1/28:27-28. This was exactly what Kirkland wanted to have the jury do: ‘look at’ the photographs that could prove his innocence.

The Sixth Amendment right to effective assistance includes representation by counsel “free from conflict of interest.” *Wood v. Georgia*, 450 U.S. 261, 271 (1981). Pursuant to Mass. R.P.C. 1.7, a conflict arises when attorney and client interests diverge. Once the judge became aware of the conflict—as she was once Kirkland spoke out against resting the defense case and then wrote a letter to the court—she had a “duty to inquire” into the dispute. *Wood*, 450 U.S. at 272. By the time counsel went to sidebar to tell the judge they decided not to call Blake based on experience and strategic considerations, this conflict, which “adversely affected his lawyer’s performance,” had become so acute that Kirkland was deprived of the effective assistance of counsel. See *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980); see also *United States v. Cronin*, 466 U.S. 648, 653-654 (1984) (assistance of counsel is “essential because they are the means through which the other rights of the person on trial are secured”). This actual conflict constituted another deprivation of Kirkland’s Sixth Amendment rights that

requires reconsideration of the Court's decision and reversal of his convictions.

3. Kirkland Was Denied the Right to Be Present at a Critical Side Bar

When judge and counsel discussed whether to rest the case, and then whether Blake would be called to authenticate the April 22 photograph, they did so at sidebar, even though the jury was not in the courtroom. The necessary inference is that the purpose of the sidebar was to exclude Kirkland (and the public) despite his request to be heard. See IX:14-16;X:7. Kirkland was denied his right to be present at this critical stage of the proceeding.

Criminal defendants have a right "to be present at any stage of a criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). This Court has recognized that sidebars can be a 'critical stage' of trial. *Commonwealth v. Mitchell*, 438 Mass. 535, 545 (2003).

The denial of Kirkland's right to be present during this critical sidebar prejudiced him by preventing him from arguing for calling Blake as a witness—something he wished to do pursuant to his personal right to compulsory process. Counsel reading Kirkland's letter into the record could not undo this prejudice, where counsel had already rested (over his objection). See X:6-8. The text of Kirkland's letter shows that, rather than arising at the last minute in response to the trial evidence, as suggested by counsel,

Kirkland had been pushing counsel to call “further witnesses” on the key question of whether he could have had cornrows for “several months.”

As discussed above, Kirkland’s counsel had a conflict of interest that prevented them from effectively representing him at this sidebar. Even without such a conflict, however, counsel’s presence does not make up for the right Kirkland was denied. See *Commonwealth v. Francis*, 485 Mass. 86, 99 (2020) (“Counsel’s presence at sidebar and intention to relay information to a defendant does not substitute for the defendant’s presence,” especially where counsel had no “incentive to relay full or accurate information to the defendant”). The impact of this denial on Kirkland’s right to control his own defense was demonstrated when the Court asked counsel to “instruct Mr. Kirkland not to speak out during the court proceedings,” even though Kirkland was attempting to explain that counsel were denying him his chosen defense. IX:15. See *Snyder v. Massachusetts*, 291 U.S. 97, 116 (1934) (“A defendant who has been denied an opportunity to be heard in his defense has lost something indispensable”); see also *id.* at 106-07 (recognizing “it will be in [a defendant’s] power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself”).

The denial of Kirkland’s right to be present at sidebar when counsel refused to call an essential witness deprived him of something ‘indispensable’—the right to control his own defense. This violation of his

Sixth Amendment rights requires reconsideration of the Court's decision and reversal of his convictions.

4. The Trial Court Denied Kirkland a Public Trial When It Partially Closed The Courtroom with Unnecessary Sidebars

During four of the five sidebar conferences at which the trial judge and counsel discussed Kirkland's wish to call Blake and his objections to counsel's refusal to do so, the jury was not present in the courtroom. These unnecessary sidebars constituted a partial courtroom closure and thus a denial of Kirkland's public trial right.

"The purpose of a sidebar conference is for counsel and the judge to confer without the jury being privy to what is said." *United States v. Day*, 956 F.2d 124, 125 (6th Cir. 1992) (Kennedy, J., concurring). An unnecessary sidebar that prevents the public from observing what occurs in court can be the "functional equivalent" of a partial courtroom closure. See *Dyer v. Roden*, 2017 U.S. Dist. LEXIS 107536, at \*5-6; *Wilder v. U.S.*, 806 F.3d 653, 657-660 (1st Cir. 2015). Such a closure must be justified by "substantial reasons." *Commonwealth v. Cohen*, 456 Mass. 94, 112-113 (2010); *Waller v. Georgia*, 467 U.S. 39 (1984).

Here, there was no reason to prevent the public from observing the conflict between Kirkland and counsel and understanding that Kirkland's counsel was overriding his choice of defense. Exposing this denial of rights would have served the purpose of public trials by allowing the courtroom audience to understand what was happening. This partial courtroom closure



was a structural error in violation of Kirkland's Sixth Amendment rights that requires reconsideration of the Court's decision and reversal of his convictions.

5. Conclusion

For the foregoing reasons, the Court should reconsider its decision and reverse Defendant's convictions.

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Respectfully Submitted,

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