

1958

## State of Utah v. Barton Kay Kirkham : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Wayne L. Black; Lamar Duncan; Counsel for Defendant;

---

### Recommended Citation

Petition for Rehearing, *State v. Kirkham*, No. 8684 (Utah Supreme Court, 1958).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/2843](https://digitalcommons.law.byu.edu/uofu_sc1/2843)

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

**LAW LIBRARY**

STATE OF UTAH,

**Plaintiff and Respondent,**

-VS-

**BARTON KAY KIRKHAM,** 114 N. 1st St.,

**Defendant and Appellant.**

PETITION FOR REHEARING  
and  
BRIEF IN SUPPORT THEREOF

WAYNE L. BLACK  
LAMAR DUNCAN

Counsel for Defendant  
530 Judge Building  
Salt Lake City, Utah

## TABLE OF CONTENTS

	Page
PETITION FOR REHEARING-----	1
CERTIFICATE-----	3
BRIEF IN SUPPORT OF PETITION FOR REHEARING-----	3
POINT I -----	3
POINT II -----	10
CONCLUSION-----	18

## AUTHORITIES CITED

People v. Schmidt, 216 N.Y. 324, 110 N.E. 945-----	4
Utah Code Annotated, 1953, 64-7-36-----	15

IN THE SUPREME COURT OF THE  
STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

-vs-

BARTON KAY KIRKHAM,

Defendant and Appellant.

)  
) PETITION  
) FOR  
) REHEARING  
) AND  
) BRIEF IN  
) SUPPORT  
) THEREOF.  
) Case 8684

- - - - -

PETITION FOR REHEARING

COMES NOW the defendant and appellant herein and respectfully petitions this Honorable Court for a rehearing in the above entitled case and for an order reversing this Court's decision and granting to your petitioner a new trial.

This Court has rendered a decision which creates issues heretofore never briefed or argued by the parties. These issues if resolved in favor of the defendant would require the granting of a new trial.

This petition is based upon the following grounds.

POINT I.

THIS COURT HAS BASED ITS OPINION SUSTAINING A CONVICTION WHICH WOULD SEND THE DEFENDANT TO HIS DEATH ON THE MISINTERPRETATION OF A WORD.

POINT II.

THIS COURT HAS ERRONEOUSLY HELD THAT A NOT GUILTY VERDICT IN A MURDER CASE WOULD GIVE AN ACCUSED HIS UNQUALIFIED FREEDOM REGARDLESS OF THE REASON FOR HIS ACQUITTAL AND WOULD DIVEST THE COURTS OF JURISDICTION TO LATER DETERMINE WHETHER ACCUSED IS MENTALLY ILL AND LIKELY TO INJURE HIMSELF OR OTHERS IF ALLOWED TO REMAIN AT LIBERTY.

Accompanying this Petition and filed herewith is a brief in support hereof.

---

WAYNE L. BLACK

---

LAMAR DUNCAN  
Counsel for Defendant

STATE OF UTAH                      }  
COUNTY OF SALT LAKE            } ss.

I hereby certify that I am one of the attorneys for the defendant, Barton Kay Kirkham, who is Petitioner herein, and that in my opinion, there is good cause to believe that this Court's opinion is erroneous and that the case should be re-examined as prayed for in said Petition.

Dated this 14th day of February, 1958.

---

WAYNE L. BLACK

---

**BRIEF IN SUPPORT OF PETITION  
FOR REHEARING**

---

**POINT I.**

**THIS COURT HAS BASED ITS OPINION  
SUSTAINING A CONVICTION WHICH WOULD SEND  
THE DEFENDANT TO HIS DEATH ON THE MIS-  
INTERPRETATION OF A WORD.**



This Court has approved of Justice Cordozo's decision in People v. Schmidt, 216 N.Y. 324, 110 N.E. 945, and has decided that before an accused can be found criminally responsible for an act he must have had sufficient mentality not only to know that the act was illegal but also to know that it was wrong morally.

We quote from the majority opinion:

"In our opinion, the subject instruction, approved in State v. Green, strictly from the standpoint of what is most favorable for the accused in a criminal case, is one of the most liberal that can be found in the country. Reading it as we do, without indulging fine distinctions between legal and medical terminology, - frequently misunderstood or not understood by laymen, - and without espousing the philosophy advanced by some that the question of insanity should be taken from the jury and vested in professional people, we believe such instruction to be the embodiment of almost all of the approved instructions on the subject which have been cited by McNaghten's Case (the so-called responsibility if the act is the product of mental disease), People v. Schmidt (no legal responsibility if the accused did not know the act was wrong morally, Durham v. United States (no legal responsibility

Quincy: Public Library, 2014. Digitized by the University of Utah Libraries and Archives. Library Services and Technology Act, administered by the Utah State Library. Machine-generated OCR, may contain errors.

if the act is the product of mental disease or mental defect), and what we believe to be the most recent case on the subject, State v. Collins (right and wrong test representing the great weight of authority)."

Although this Court has agreed as to the applicable and controlling rule with regard to the test of insanity, it has slipped away from the issue raised by Point I of appellant's brief by holding that Instruction No. 9 does not say what counsel for defendant claim it says. It is our contention that the issue of word meaning has never been briefed and argued by the parties and that it is a new issue created by this Court's opinion. The brief of appellant, at Page 10, has stated:

"Where the trial court used the term 'in the sense that such act was condemned by morals or law,' it clearly instructed the jury that even though the defendant's sense of morals was so perverted and distorted that he felt justified in doing the act which he did and had no remorse for doing said act, nevertheless if he had sufficient intellect to know that the law forbid said act, he was legally sane."



In the brief of respondent, the answer to the foregoing contention, at Page 8, was as follows:

"\* \* \* If a defendant be so insane that he does not know his act to be against law, then he cannot be criminally responsible and his moral outlook becomes as nothing.\* \* \*"

Now, for the first time, this Court interpreting the language of Instruction No. 9, states as follows:

"Neither uncertainty nor confusion appears in such language. It tells the veniremen they cannot convict if they believe defendant was insane to such extent that he did not know his act was condemned morally;  
\* \* \*"

We would understand even though disagreeing with a refusal of this Court to follow the moral responsibility test pronounced by Justice Cordozo in the Schmidt case, but we cannot abide a holding which, while agreeing that moral responsibility should be incorporated in the test of criminal insanity, erroneously holds that such test was, in fact, submitted to the jury.

Let us consider whether this Court is

correct in holding that the test of moral responsibility was submitted to the jury. The portion of Instruction No. 9 involved reads as follows:

"The defendant cannot be convicted of a crime, if, at the time of the act, he was insane to such an extent that. . .when he fired the shot, he did not know it was wrong in the sense that such act was condemned by morals or law. . ."

The instruction advises the jury that they cannot convict the defendant if at the time of the act he was insane to such an extent that he did not know his act was wrong. However, the jury is further advised that they must know something more about the word 'wrong' than just its generic meaning and that by the word 'wrong' the Court means 'wrong in the sense that such act was condemned by morals or law'. If the act was wrong in the sense that it was condemned by either morals or law, it would still be wrong. It would be wrong if condemned only by law because it follows, as the night the

day, that if wrong on either count it would be wrong and it would not necessarily have to be wrong on both counts. If the act were wrong solely because it was condemned by law it would meet the test. Therefore, the jury could have found under said instruction, that defendant understood that to kill was against the law and therefore that he knew it was wrong. There was no need to proceed with the inquiry of whether he understood that it was morally wrong to kill. His understanding in this regard became immaterial. This Court has eliminated the words 'he did not know it was wrong in the sense that' from the instruction and then has determined the meaning of the instruction with those words eliminated. It has related the words 'morals or law' back to the words 'cannot be convicted' rather than to the word 'wrong'. The words 'in the sense that' demand the conclusion that the words 'such act was condemned by morals or law' relates back to the word

'wrong' rather than to the words 'cannot be convicted'. If these words relate to the word 'wrong' then they are descriptive of the word 'wrong'. If they are descriptive of the word 'wrong' then they qualify and limit the meaning of the word 'wrong'. The only conceivable qualification of the meaning of wrong is that an act is 'wrong if condemned by morals' and it is 'wrong if condemned by law' and the act needn't be condemned by both in order to be wrong or otherwise the word 'and' would have been used rather than the word 'or'. That such a misinterpretation should be applied in a capitol punishment case seems to us to be most regrettable.

We also wish to point out that the only proper basis for sustaining this Court's opinion would be if its language were unambiguous. This Court has recognized this fact where it states: "Neither uncertainty nor confusion appears in such language." Even if the language referred





ACQUITTAL AND WOULD DIVEST THE COURTS OF JURISDICTION TO LATER DETERMINE WHETHER ACCUSED IS MENTALLY ILL AND LIKELY TO INJURE HIMSELF OR OTHERS IF ALLOWED TO REMAIN AT LIBERTY.

This Court has misinterpreted the true import of Point II in appellants brief where it states in its opinion:

"Defendant urges error in 1) the giving of an instruction relating to insanity and 2) in failing to instruct that the state had a mental institution for those suffering from mental illness."

It was never our contention that failure to advise the jury that a mental institution is in existence in Utah constituted prejudicial error. Our complaint was, and is, that prejudicial error occurred when the District Attorney stated: "Should you acquit him, he would be turned loose." (R. 204) and the trial court nevertheless refused to correct this obvious misstatement of the law. Again, this Court has justified its opinion on a ground never



briefed or argued by respondent where it states:

"In the first place the District Attorney, in a technical sense, was not in error, since the jury had before it a verdict which it could have signed which read: 'We the Jurors impaneled in the above case, find the defendant Barton Kay Kirkham not guilty.' Had this verdict been signed, the District Attorney's statement no doubt would have been correct."

Apparently this Court has overlooked the reality of the situation. Counsel for the defendant from the beginning readily conceded that defendant shot the gun that killed David Avon Frame. The only defense ever presented was that of insanity. At R. 88, the following appears:

"Mr. Black: Well, your Honor, please we stipulated this morning-- we will stipulate again--two shell casings were found, both of them from a gun of the description of this particular gun, and we will also stipulate that ballistic tests would show, and have shown, that those two shell casings represent the two cartridges fired from this same gun and the self-same gun that was in the possession and was used by the defendant on this evening.

Mr. Anderson: Was in the possession and used by the defendant?

Mr. Black: We so stipulate.

Mr. Anderson: And that he shot the two victims with this gun at that time?

Mr. Black: We so stipulate; no question about it, and we make no issue on it."

The arguments of counsel for the defendant appear in the record. They indicate that not one word was ever uttered in defense of Barton Kay Kirkham except on the issue of insanity.

Yet this Court now suggests that probably what the District Attorney meant was that defendant would be turned loose only if found not guilty on some imaginary ground other than that of insanity, and that if such was his meaning the remark was proper. Respondent didn't oppose this appeal on such tenuous ground. In respondent's brief the Attorney General stated:  
" \* \* \* we find ourselves concerned over the propriety of the remarks complained of, however, we here claim, upon the record, for no prejudicial error." The District Attorney

Digitized by the U.S. National Library of Medicine for digitization, provided by the National Library of Medicine  
Library Services and Technology Act, administered by the National Library of Medicine  
Machine-generated OCR, may contain errors.

stated: "Should you acquit him he would be turned loose." The defendant asked for an acquittal only on the ground of insanity. Therefore, the jury had to have the insanity defense in mind when it listened to the District Attorney's statement. The statement was erroneous because defendant would have been subjected to a sanity hearing on a proper complaint regardless of the outcome of his murder trial. But this Court has now confounded the legal profession with a decision to be followed in the future by the bench and bar of this state to the effect that a man found not guilty in a criminal case is immune from a subsequent hearing on proper complaint being made to determine his sanity. Again, we could understand although disagreeing with a decision that the remark of the District Attorney, although incorrect was not prejudicial error. But to justify the remark on an unsupportable technicality would seem to us to be unthinkable.



This Court further states:

"Furthermore, the expert medical witness called by the defendant's own counsel, clearly indicated that the defendant's disorder was not the type that usually resulted in hospitalization."

This Court is overlooking the true meaning of the doctor's testimony. He was stating that hospitalization and treatment would probably not help the patient and, therefore, strictly from the point of view of his mental condition, he would not recommend it. He did not have in mind the important matter of whether the defendant should have been incarcerated because of his mental condition for the safety of himself and society. The doctor was not passing on the following language from Utah Code Annotated, 1953, 64-7-36:

"If, upon completion of the hearing and consideration of the record, the court finds that the proposed patient (1) is mentally ill, and (2) because of his illness is likely to injure himself or others if allowed to remain at liberty \* \* \* it shall order his hospitalization \* \* \* \*."

The question of the likelihood of a person injuring himself or others is entirely different than that of whether or not treatment would benefit him. Dr. Nelson's testimony is clear and undisputed that the defendant's emotional immaturity and the condition of his mind was such that if freed he would likely injure or kill if the circumstances indicated to him that such was the easiest course. Under that testimony there can be no question but that if freed by the jury defendant would have been subjected to a sanity hearing and that a finding that he was likely to injure himself or others was inevitable and certain. Although treatment would probably not cure him unless administered over a period of years, incarceration in a mental institution would be required under the law because of the likelihood that under certain stimulus he would injure himself or others. (See R. 158, 159, 168, 169).

This Court has stated that even though the District Attorney's remark was incorrect, that such statement was "so watered down by attack on and denial of such statement by opposing counsel, of its accuracy, as to destroy its effectiveness." Here is a situation where a public officer has erroneously stated the law. The trial court has refused to correct the error and by its silence has tacitly given that error its approval. Yet defense counsel has been so eloquent and persuasive that the jury must be presumed to have overlooked the error. This is true even though defense counsel, in spite of their persuasiveness and eloquence, managed only to achieve the worst result possible.

In conclusion this Court has made the following remark:

"Further, it seems to us, that had the jury been impressed by the questioned remark to the point where they decided to convict rather than to acquit, on the theory they did not wish defendant to be returned to society, certainly they would have returned



the verdict, one of several handed them, that would have recommended life imprisonment, which they failed to do."

The foregoing <sup>single</sup> conclusion does not necessarily follow. If the jury felt that there was no chance of defendant being sent to a mental institution after his acquittal and upon proper hearing by a court of competent jurisdiction, and if they believed that defendant in his insane condition should not languish in prison, they may very well have decided upon a death penalty. Who can say that the District Attorney's argument did not leave its mark on the thinking of the jury? Any reasonable doubt about this matter, as well as others, should be resolved in favor of the accused.

#### CONCLUSION

We respectfully submit that a rehearing should be granted in order that this Honorable Court may have an opportunity to fully hear and consider the new issues raised by its decision herein.