

**IN THE  
SUPREME COURT OF OHIO**

**STATE OF OHIO** : **NO. 2010-1406**  
Plaintiff-Appellee : On Appeal from the Hamilton County  
Court of Common Pleas  
vs. : Case Number B-0905088  
**MARK PICKENS** :  
Defendant-Appellant :

**MERIT BRIEF OF PLAINTIFF-APPELLEE**

**Joseph T. Deters (0012084P)**  
Prosecuting Attorney

**Philip R. Cummings (0041497P)**  
Assistant Prosecuting Attorney

230 East Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
(513) 946-3012  
Fax No. (513) 946-3021

COUNSEL FOR PLAINTIFF-APPELLEE, STATE OF OHIO

**Daniel F. Burke, Jr. (0013836)**  
Attorney at Law  
William Howard Taft Law Center  
230 East Ninth Street, 2nd Floor  
Cincinnati, Ohio 45202  
(513) 946-3701; Fax No. (513) 946-3721

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**Roger W. Kirk (0024219)**  
Attorney at Law  
114 E. Eighth Street  
Cincinnati, Ohio 45202  
(513) 272-1100; Fax No. (513) 271-8888

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COUNSEL FOR DEFENDANT-APPELLANT, MARK PICKENS

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## STATEMENT OF THE CASE

Mark Pickens was charged by the Hamilton County Grand Jury in a six count indictment, B-0905088. The counts involved three victims as follows:

- (1) Noelle Washington: Rape and Aggravated Murder with purpose and prior calculation and design, with firearm specification, and two death specifications (to escape detection for Rape and course of conduct). Rape occurred on May 31, 2009 and Aggravated Murder occurred on June 1, 2009.
- (2) Sha'Railyn Wright: Aggravated Murder with purpose of one under thirteen years of age at the time. The count carried a firearm specification and two death specifications (course of conduct and victim under thirteen). The offense occurred on June 1, 2009.
- (3) Anthony Jones III: Aggravated Murder with purpose of one under thirteen years of age at the time. The count carried a firearm specification and two death specifications (course of conduct and victim under thirteen). The offense occurred on June 1, 2009.

Additionally, Pickens was charged with two counts of Having Weapons Under Disability.

A jury was impaneled and Pickens was found guilty as charged. At the conclusion of the sentencing hearing, the jury returned a recommendation of Death as to the three capital counts. The court sentenced Pickens to ten years on the Rape consecutive to five years on the merged Weapons Under Disability counts. The court imposed the sentence of death by lethal injection on the capital charges, consecutive to all other counts.

The trial court filed its sentencing opinion on July 13, 2010.

This appeal as of right from the death sentences followed.

## STATEMENT OF THE FACTS

On May 31, 2009, Mark Pickens raped Noelle Washington. The next day, Pickens went to Noelle's apartment and murdered her to stop her from pursuing a Rape charge against him. Noelle's nine month old child Anthony Jones, III was with her that night. Also present was

Sha'Railyn Wright – a three year old girl who Noelle was babysitting. Pickens shot all three victims in the head.

## BACKGROUND

Noelle Washington met Pickens in the fall of 2008 while working at the Family Dollar Store. They began a dating relationship. Over time, Noelle began growing apart from Pickens and spent more and more time visiting her sister in Tennessee. By May 2009, Noelle had decided to leave Pickens and move herself and son to Tennessee for a fresh start.

On May 30, 2009, Noelle went to Pickens' apartment to return some of his personal effects. They had consensual sex and Noelle returned home to her apartment for the night.

## SUNDAY, MAY 31, 2009

The next morning, Pickens began texting her to return to his place to have more sex. Because Pickens owed her money, she decided to return to Pickens' apartment at 508 Gateway Towers. Pickens and Noelle playfully wrestled and bantered for awhile, but Pickens soon became suspicious about who Noelle had been texting. She told him it was her sister in Tennessee and she told Pickens she had decided to leave Pickens and move there.

Angered, Pickens grabbed Noelle by the neck and slammed her down on the bed. He pulled out a gun and laid it on the dresser next to the bed. He tore her clothes off as she screamed for him to stop! After Pickens finished raping Noelle, he grabbed her by the hair and said "I hate you!" Then he pointed a gun at her head and said "I am going to blow us away and put us both out of our misery!" Pickens grabbed Noelle's phone and pushed her out of his apartment into the hallway of the complex. Surveillance video captured the scene. Noelle is seen falling into the hallway, disheveled, and trying to pick her purse up off the floor.

At this point, Pickens walked down the hall. Noelle reached in Pickens' pocket to retrieve her phone – but grabbed Pickens' instead. Pickens slammed Noelle to the floor. A neighbor in an apartment nearby heard this commotion and called the police. Noelle took refuge inside the neighbor's apartment at #509. Police soon respond and Noelle reported the rape. (T.p. 1168) Pickens, inside his own apartment at #508, soon begins texting Noelle – asking why she called the police and asking if there now was a warrant out for his arrest.

Noelle went to the police station and gave a lengthy statement about the rape. (State's Exhibit 23) Then she was transported to the hospital for a rape exam. During this time, Noelle called her mother Gwen and her brother Derrick, and told them that Pickens had raped her. (T.p. 1859-1862, 1893-1900)

Noelle returned home that night and texted family and friends about the rape. (T.p. 2873-2880, 1935-1947) She told her best friend Crystal (Sha'Railyn's mom) that Pickens is crazy and might kill her. (T.p. 2146-2172) Throughout the night, Pickens texted Noelle – asking: "Is there a warrant out for me?" "Am I going to jail?" (T.p. 2684-2688)

#### MONDAY, JUNE 1, 2009

Police, meanwhile, retrieved the rape exam from the hospital and attempted to interview defendant as his apartment. Defendant does not answer. Detective Schroder left his business card in Pickens' door.

On Sunday evening, Pickens visited another girlfriend – Jonda Palma. Jonda immediately noticed Pickens is acting angry and strange. Pickens asked Jonda to round up some girls and beat up a girl (Noelle) who is accusing him of rape. Jonda refused. Before Pickens leaves, Jonda notices he has a gun in his waistband. Pickens later texted Jonda, "I feel like killing somebody!" (T.p. 2106-2112)

Video surveillance tape captures Pickens' return to his apartment at 10:30 p.m. Monday night. Pickens finds Detective Schroder's card in his door and enters his apartment. At 10:38 p.m., Pickens exits his apartment. He leaves on a bike.

At approximately 11:00 p.m., across the street from Noelle's apartment, some women were sitting on the steps of a Baptist church. They observed Noelle, holding a child, arguing with a man. Noelle, the child and the man eventually walked into Noelle's apartment – 421 E. 13<sup>th</sup> Street. (T.p. 1128)

At approximately 11:12 p.m., Crystal received a text from Noelle saying:

“Mark is coming in through my kitchen!” (T.p. 2146-2172)

Crystal is concerned because her daughter Sha'Railyn, is with Noelle.

At approximately 11:30 pm., one Ronell Harris was in the area to catch a bus. He knew Noelle. He observed Noelle and a man he later identified as Pickens, arguing. (T.p. 1976-1982)

At approximately 11:37 p.m., Crystal texted Noelle to get ready to leave. Crystal planned to pick up all three (Noelle, Sha'Railyn and Anthony) and take them home with her. Noelle texted back:

“K.”

Crystal was too late. By the time she arrived, all three were already dead – shot in the head with a .45.

Pickens biked home and arrived back at his apartment at 11:59 p.m. Within hours, police interviewed Pickens and retrieved 45 caliber bullets, his bike and his jacket. Testing of the bike and jacket later revealed the presence of gun-shot residue.

While incarcerated at the Justice Center, Pickens bragged to inmate Montez Lee that he killed Noelle because she was pressing rape charges against him. He shot Sha'Railyn in the head

because she might have been able to identify him. And Pickens shot 9 month old Anthony in the head for the thrill of it. (T.p. 2302-2314)

**ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**PROPOSITION OF LAW NO. 1: NO ABUSE OF DISCRETION IS DEMONSTRATED BY THE TRIAL COURT'S REFUSAL TO DECLARE A MISTRIAL WHERE: NO ERROR DURING VOIR DIRE OCCURRED AND; THE TRIAL COURT SUSTAINED DEFENSE COUNSEL'S OBJECTION TO THE PROSECUTOR'S LINE OF INQUIRY BEFORE THE PROSECUTOR COMPLETED THE QUESTION.**

Pickens first argues he was denied a proper capital case voir dire by the prosecutor's comment on his age. Citing *State v. Wilson*,<sup>1</sup> Pickens claims this was an improper reference to a specific mitigating factor and that the trial court erred by overruling his objection and motion for mistrial. Defendant's claim fails.

During voir dire, the prosecutor generally addressed the venire with the following:

PROSECUTOR: "... As far as Mr. Pickens goes, my understanding is he's around 20 years old or so now, and that he may have been around 19 or so around the time of these crimes. Do any of you feel because of his age - -

MR. ANCONA: Objection. Can we approach, your Honor?

THE COURT: Sure.

\* \* \*

MR. AUBIN: Yes, your Honor. The prosecution can't put into the record a mitigating factor. They now put in a mitigating factor.

THE COURT: They tried. You stopped them before they actually got to it. (T.p. 699-700)

\* \* \*

All right. Sustained. Motion for mistrial is overruled. Let's go on out.

(Conclusion of chambers proceeding.) (T.p. 703)

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<sup>1</sup> *State v. Wilson*, 74 Ohio St.3d 381; 659 N.E.2d 292, 1996-Ohio-103.

The trial court sustained defense counsel's objection, but overruled Pickens' motion for mistrial. (T.p. 703) Noting that defense counsel stopped the prosecutor's question by objecting, the trial court told the prosecutor to avoid any further reference to mitigating factors and ordered the prosecutor to move on. This was not error.

The scope of voir dire is generally within the trial court's discretion,<sup>2</sup> and trial counsel is entitled to exercise broad discretion in formulating voir dire questions. While parties are not entitled to ask about specific mitigating factors during voir dire,<sup>3</sup> the relevant inquiry during voir dire in a capital case is whether the juror's beliefs would prevent or substantially impair his or her performance of duties as a juror in accordance with the instructions and the oath.<sup>4</sup> "Clearly, a juror who is incapable of signing a death verdict demonstrates substantial impairment in his ability to fulfill his duties."<sup>5</sup>

A proper inquiry during voir dire must constitute more than mere "general questions of fairness or impartiality" as such will not be sufficient to determine a juror's true beliefs on the subject. Detailed questioning must occur beyond general questions of impartiality and fairness to guarantee that each juror is fully aware that the law requires a weighing of aggravating and mitigating circumstances prior to imposing the death penalty.<sup>6</sup>

Here, the State first submits the prosecutor was justified in seeking to probe the jury's view on Pickens' age. If a juror truly felt unable to recommend the death penalty for a younger defendant, the parties would be entitled to know that. In any case, no error occurred here

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<sup>2</sup> *State v. Lang*, 2011-WL-3862536 (Ohio); 2011-Ohio-4215

<sup>3</sup> See *Wilson*, supra, *State v. Mundt*, 115 Ohio St.3d 22, 873 N.E.2d 828, 2007-Ohio-4836

<sup>4</sup> *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 76, citing *Wainwright v. Witt* (1985), 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841.

<sup>5</sup> *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 34.

<sup>6</sup> *State v. Wilson* (1996), 74 Ohio St.3d 381, 386, 659 N.E.2d 292, citing *State v. Rogers* (1985), 17 Ohio St.3d 174, 478 N.E.2d 984.

because defense counsel stopped the prosecutor before he finished the question. (T.p. 699) If there was error, the sustained objection removed it.<sup>7</sup> (T.p. 703)

Pickens can demonstrate no prejudice as the jury was properly instructed as to the weighing of aggravating circumstances and mitigating factors at the penalty phase. (T.p. 3160-3162, 3244-45)

No abuse of discretion is demonstrated and a mistrial was certainly not warranted.

Pickens' first proposition of law is properly overruled.

**PROPOSITION OF LAW NO. 2: WHERE A PROSECUTOR PROVIDES ADEQUATE RACE-NEUTRAL REASONS FOR EXERCISING PEREMPTORY CHALLENGES, NO DUE PROCESS VIOLATION IS DEMONSTRATED. UNCERTAINTY ABOUT HOW A PROSPECTIVE JUROR PERCEIVES THE DEATH PENALTY IS A "RACE-NEUTRAL REASON" FOR EXERCISING A PEREMPTORY CHALLENGE AGAINST HER.**

In his second proposition of law, Pickens contends the State exercised three peremptory challenges to remove African-American prospective jurors because of race, in violation of *Batson v. Kentucky*.<sup>8</sup> Defendant's claim fails.

During jury selection, the prosecutor peremptorily challenged three African-American prospective jurors, Hemphill, Hutchinson and Bell. Pickens' counsel objected to the challenges as a violation of *Batson*.

#### JUROR HEMPHILL

Hemphill gave equivocal answers about the death penalty which conveyed an uncertainty as to whether she could vote for it:

MR. TIEGER [PROSECUTOR]: Tell me about the mixed feelings you have.

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<sup>7</sup> *State v. Rembert*, 2007-Ohio-2499 at ¶ 38; *State v. Jackson*, 107 Ohio St.3d 300, at ¶ 159, 2006-Ohio-1, 839 N.E.2d 362 (2006).

<sup>8</sup> (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69

PROSPECTIVE JUROR HEMPHILL: Well, on the one hand, if someone takes a life or takes several lives, why should they be able to enjoy their life? Then on the other hand, if it's such a heinous crime, one that we have very strong penalties for, then why would we use that as a solution when there are other alternatives, so I'm constantly going back and forth. (T.p. 727)

\* \* \*

I don't know. It would depend on the circumstance. I'm just saying if you ask me how I feel about the death penalty, I play devil's advocate with myself and say on the one hand, what's the ultimate punishment? On the other hand, what do we as a society want to say about ourselves, and so how you reconcile that, or can you ever reconcile that? ... (T.p. 728)

The prosecutor explained his challenge of her as follows:

"... If you look at her answer on the death penalty, it is extremely confusing and hard to understand. She says, mixed. If someone commits murder, should they experience to appreciate the extent of their crime, question mark, which doesn't make sense. Then she says or, and underlines or, if murder is so horrible and final, should we go there when we have alternatives for punishment, and has a question mark there. I think that's a very ambivalent answer. It is very anti death penalty. ..." (T.p. 970)

The court accepted this reason as a race neutral reason and excused her. (T.p. 972)

#### JUROR HUTCHINSON

During voir dire, Hutchinson stated "I believe in the death penalty if the evidence points to that ... [it] has to be beyond a shadow of a doubt" such as if "they confess to the crime." (T.p. 772)

The prosecutor explained that he challenged Hutchinson because:

PROSECUTOR: "... If you look at his questionnaire in response to question 51 on the death penalty, he says, proof beyond a shadow of a doubt, which is an incorrect standard, such as they confess to the crime.

So he is looking for something like a confession, which we do not have in this case which is the one criteria he wrote down that we don't have. ..." (T.p. 982-983)

The trial court accepted this as a race-neutral reason, stating:

"THE COURT: I am going to excuse him. I think the shadow of a doubt comment is a problem even if he did straighten it out. The confession issue is a

problem, even if he did address it. The risk is he would try to introduce another element to the offense. ..." (T.p. 985)

JUROR BELL

Juror Bell indicated she was uncomfortable placing a time limit on a person's life and sought counsel from her minister concerning the church's view on imposition of the death penalty:

MR. TIEGER: You talked about your questionnaire about the death penalty, can you talk to me little bit about that?

PROSPECTIVE JUROR 25: Sure. It's evolved some the past couple of days. I didn't really have any thought on it, but I hadn't had to consider it, so it's evolved some as far as feeling more confident and comfortable if I had to apply it just because of my background Baptist, and I wanted to make sure that if I had to it, would be okay, it would be the right thing to do.

\* \* \*

MR. TIEGER: Did you talk to anybody in your church about the death penalty? Who was the person?

\* \* \*

JUROR BELL: It's one of the ministers at our church. (T.p. 873-875)

When asked to give his race-neutral reason for challenging Bell, the prosecutor stated:

PROSECUTOR: " ... It was troubling to me that she indicated to everybody here that after she was told not to discuss the case with anybody, she talked to somebody with her church as far as whether it is the right thing to do or not or whether or it is a law or rule she could follow. She has somewhat violated the rule the Court gave her in discussing the case with somebody else. If she is going to do that right off the bat as far as what her views on the death penalty are, that in and of itself would be enough to excuse her. ..." (T.p. 987-988)

The trial court accepted this reason, stating:

THE COURT: All right. The race neutral reason of her going and seeking independent counsel on the issue of death penalty is sufficient to excuse her from the panel. Whether it should have been for cause or whether not, it is the State's detriment they are using a peremptory to excuse her.

\* \* \*

I do find the fact she sought outside counsel to be a problem. So the Batson challenge on that basis is overruled. (T.p. 990-991)

As these excerpts demonstrate, each of Pickens' *Batson* challenges was properly overruled.

A court adjudicates a *Batson* claim in three steps.<sup>9</sup> First, the opponent of the peremptory challenge must make a prima facie case of racial discrimination. Second, if the trial court finds this requirement fulfilled, the proponent of the challenge must provide a racially neutral explanation for the challenge.<sup>10</sup> Finally, the trial court must decide based on all the circumstances, whether the opponent has proved purposeful racial discrimination.<sup>11</sup> A trial court's finding of no discriminatory intent will not be reversed on appeal unless clearly erroneous.<sup>12</sup> The race-neutral reason need not be persuasive or plausible - just one that does not deny equal protection.<sup>13</sup>

Juror Hutchinson seemed inclined to hold the State to a higher burden of proof: "beyond a shadow of a doubt." And Juror Bell already admitted to seeking outside input and counsel on the death penalty. Clearly, these are race-neutral reasons for the prosecutor's challenges.

As for Juror Hemphill, her answers conveyed uncertainty about her position on the death penalty. Uncertainty about how a prospective juror perceives the death penalty is a "race-neutral reason" for exercising a peremptory challenge against her.<sup>14</sup> Even equivocal opposition to the

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<sup>9</sup> *State v. Murphy* (2001), 91 Ohio St.3d 516, 528, 747 N.E.2d 765.

<sup>10</sup> *Batson*, 476 U.S. at 96-98, 106 S.Ct. 1712, 90 L.Ed.2d 69.

<sup>11</sup> *Id.* at 98, 106 S.Ct. 1712, 90 L.Ed.2d 69. See also *Purkett v. Elem* (1995), 514 U.S. 765, 767-768, 115 S.Ct. 1769, 131 L.Ed.2d 834.

<sup>12</sup> *State v. Hernandez* (1992), 63 Ohio St.3d 577, 583, 589 N.E.2d 1310, following *Hernandez v. New York* (1991), 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395; *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 106.

<sup>13</sup> *Purkett v. Elem*, *supra*.

<sup>14</sup> See *State v. White* (1999), 85 Ohio St.3d 433, 437, 709 N.E.2d 140.

death penalty by a prospective juror is proper ground for exclusion.<sup>15</sup> In *State v. Huertas*,<sup>16</sup> the Court held there was no abuse of discretion in excluding a juror “not totally opposed” to the death penalty.

In short, Pickens’ due process rights were not violated by the challenges. Pickens’ second proposition of law is properly overruled.

**PROPOSITION OF LAW NO. 3:**

**(A) NO DISCOVERY OR *BRADY* VIOLATION IS DEMONSTRATED WHERE (1) PICKENS FAILS TO IDENTIFY ANY EXCULPATORY OR MATERIAL EVIDENCE WITHHELD BY THE STATE, (2) AND HIS COUNSEL REPEATEDLY DECLINED THE TRIAL COURT’S OFFER OF CONTINUANCES.**

**(B) IN AN OPENING STATEMENT IN A CRIMINAL TRIAL THE PROSECUTOR MAY DESCRIBE THE FACTS HE EXPECTS WILL BE DEVELOPED AT TRIAL.**

**(C) DURING CLOSING ARGUMENT IN A CAPITAL TRIAL, THE PROSECUTOR MAY COMMENT ON THE FACTS IN THE RECORD AND REASONABLE INFERENCES DRAWN THEREFROM.**

First, Pickens generally complains about discovery violations, undisclosed *Brady* material and inadequate time to prepare. However, a review of the record does not support Pickens’ claims.

Due to the voluminous material both sides had to review to prepare for trial, delay in providing some material and witness statements was inevitable. (T.p. 522) The State gave defendant discovery and supplemented it twice. (T.p. 498) The State offered to show defense counsel witness statements pre-trial – even though the State had no obligation to do so until the witnesses testified. Defense counsel even conceded as much. (T.p. 500, 517) The State made criminal records of State witnesses available to Pickens. (T.p. 513) Pickens’ claim that Montez

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<sup>15</sup> *State v. Steffen* (1987), 31 Ohio St.3d 111, 120-121, 509 N.E.2d 383, 392-393.

<sup>16</sup> (1990), 51 Ohio St.3d 22, 29, 553 N.E.2d 1058, 1066-1067

Lee was a surprise witness is simply not true. The prosecutor told Pickens' counsel of Lee and his plea deal in the fall of 2009. (T.p. 519-520)

Pickens characterizes inconsistencies in Noelle's statements as "favorable" evidence – but they reflect just different versions of events as told by her to different people. Nothing exculpates defendant – nothing. Pickens has failed to identify any undisclosed exculpatory or material evidence. And significantly, Pickens' counsel declined repeatedly to request a continuance. (T.p. 509, 524-25) No discovery violation is demonstrated.

Pickens next claims he was prejudiced by Detective Gehring's interview of Montez Lee during trial and the delay in receiving the substance of the interview. However, Detective Gehring was the State's agent for the duration of the trial, and the trial court found nothing improper had been done. (T.p. 2276) Out of an abundance of caution however, the trial court told Detective Gehring to refrain from future participation in any witness interviews. (T.p. 2276) Pickens' counsel declined an opportunity to delay the trial saying:

MR. ANCONA: We will just proceed. (T.p. 2285)

The trial court noted that the State had disclosed the Lee interview and that Detective Gehring would be subject to cross-examination about it. This satisfied Pickens' counsel:

THE COURT: And they just effectively by one means or another disclosed that Detective Gehring apparently will testify to that when he comes in and testifies.

MR. ANCONA: Thank you. (T.p. 2288)

No *Brady* violations or prejudice is demonstrated.

#### OPENING AND CLOSING ARGUMENT

Pickens next lists a series of comments by the prosecutor during argument – claiming they were improper and denied him a fair trial. Most of these were waived as Pickens failed to

object. Others were fair comment on the evidence. The trial court sustained some objections curing any error. In short, no prejudice is demonstrated.

The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights.<sup>17</sup> The touchstone of the analysis "is the fairness of the trial, not the culpability of the prosecutor."<sup>18</sup>

### OPENING ARGUMENT

Specifically, defendant points to the following statements:

(1) Noelle responds "K." Okay. I will go with you, you are right. (T.p. 1115)

(2) . . . There is only going to be one verdict you can return that would comport with the oaths you have taken as jurors and that is that this man right here is guilty of raping Noelle Washington . . . and then that he is guilty of aggravated murder. . . (T.p. 1118)

First of all, there were no objections to these remarks, so the claim of error is waived.<sup>19</sup> Moreover, the remarks were not error. The first remark, interpreting the text "K" as "okay," is correct and proper. It is simply stating the obvious. The second comment also is not improper. The whole point of the State's argument is to convince the jury that Pickens' guilt will be clear after the evidence is adduced.

It is beyond dispute that in opening statement at a criminal trial the prosecutor may detail the facts he expects his evidence will show.<sup>20</sup> Where the statements of the prosecutor conform to the evidence subsequently adduced, error only occurs if that evidence is improperly admitted.<sup>21</sup>

It is certainly not improper for the prosecutor, in opening remarks, to ask the jury to return a verdict favorable to the state. As this court has stated, "Prosecutors can urge the merits of their cause and legitimately argue that defense mitigation evidence is worthy of little or no

<sup>17</sup> *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 14 OBR 317, 470 N.E.2d 883.

<sup>18</sup> *State v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78.

<sup>19</sup> *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959.

<sup>20</sup> *State v. Davis* (1991), 62 Ohio St.3d 326.

<sup>21</sup> *State v. Davis*, 62 Ohio St.3d at 337.

weight.”<sup>22</sup> The jury was properly instructed that the opening remarks of counsel are not to be considered as evidence. These comments were within the proper scope of opening statement.

### CLOSING

Pickens waived the following comments during closing by failing to object:

(1) “What does everybody think when they think of Public Defenders? Overworked. Underpaid. You could care less about the people you represent. You are just going through the motions.

And I think that when you review Mr. Aubin and Mr. Ancona’s performance, it was passionate, they were well-prepared.” (T.p. 3023)

(2) Noelle: “So when you nutted me, that’s not going to be yours?”

Prosecutor: Nutted is slang for ejaculated. . .” (T.p. 3039)

(3) “Now, for him (Pickens) to tell Detective Gehring that he had no idea what that part was about is ludicrous. It is not sleep deprivation.” (T.p. 3040)

(4) He goes over there, he uses her own keys to get in her apartment, they go outside there is an argument, he sweet talks his way back in knowing full well what his is going to do. Because no Noelle Washington means no charges because there is no victim. (T.p. 3047)

None of these instances amount to outcome-determinative plain error.

The general rule as to closing arguments is that the State is free to comment on the facts and on all reasonable inferences drawn therefrom. The State is free to respond to arguments and evidence of the defense.<sup>23</sup> Parties are given wide latitude in closing argument, with control of such argument left to the sound discretion of the trial court.<sup>24</sup> Prejudicial error in closing argument only occurs where the defendant has been denied a fair trial and would have been

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<sup>22</sup> *State v. Wilson* (1996), 74 Ohio St.3d 381, 389, 659 N.E.2d 292.

<sup>23</sup> *State v. Beuke* (1988), 38 Ohio St.3d 29, 526 N.E.2d 274; *State v. Landrum* (1990), 53 Ohio St.3d 107, 559 N.E.2d 710; *State v. Waddy* (1992), 63 Ohio St.3d 424, 588 N.E.2d 819.

<sup>24</sup> *State v. Loza* (1994), 71 Ohio St.3d 61, 641 N.E.2d 1082.

acquitted but for such argument.<sup>25</sup> In the present case, the prosecutor's argument was well within proper bounds.

In the first comment, the prosecutor is actually complimenting the performance of Pickens' counsel – not denigrating them. The prosecutor's interpretation of “nuttled” is truthful and fair comment on the evidence. Characterizing Pickens' story to police as “ludicrous” is hardly a vicious attack on Pickens – moreover, it is fair given the overwhelming evidence of defendant's guilt. The last comment is simply the State's theory of the case as supported by the evidence.

It is entirely permissible at a criminal trial for the prosecutor to make reasonable inferences from facts presented at trial.<sup>26</sup> The prosecutors argument here was not the type of “speculation” covered by *State v. Wogenstahl*.<sup>27</sup>

Pickens objected to the prosecutor's comment that Pickens was a killer:

“So, one killer to another, Pickens to Lee.” (T.p. 3036)

The objection was overruled. It is hardly reversible error to call Pickens a “killer” – he is. This was not an outrageous attempt to prejudice the jury – it was fair comment on evidence in the record.

Pickens claims he was prejudiced by the prosecutor's “vouching” for Detective Gehring with this comment:

However, Detective Gehring is a 13-year veteran. He is young, he is smart, and he is talented. And he is extremely competent to handle this case. It is insulting to ask Detective Gehring, you needed a bike because that fits your theory. (T.p. 3041)

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<sup>25</sup> *State v. Loza*, supra.

<sup>26</sup> *State v. Brinkley*, supra, at ¶136; *State v. Campbell*, 90 Ohio St.3d 320 at 336, 738 N.E.2d 1178 (2000).

<sup>27</sup> 75 Ohio St.3d 344, 662 N.E.2d 311 (1996).

A defense objection is made and sustained, and the trial court ordered the comment stricken. (T.p. 3041)

The prosecutor's comment was in response to defendant's insinuation that Detective Gehring was inept. (T.p. 3001-3021) No error occurred. If there was error, the sustained objection and strike removed it.<sup>28</sup> The same is true for the sustained objections to Noelle's DNA swabs. (T.p. 3029, 3044)

Lastly, Pickens claims he was unduly prejudiced when the prosecutor assumed the jury would find him guilty:

MR. TIEGER: . . . "This evidence is overwhelming. I would ask you to find him guilty. We will come back in a couple days and figure out the appropriate penalty in the penalty phase of this trial.

MR. ANCONA: I object. That's not their job today.

THE COURT: Sustained. Your job today will be to begin deliberations on the question of guilt or innocence.

MR. TIEGER: Thank you. That's all I have. (T.p. 3047)

In context, the prosecutor simply asked the jury to return guilty verdicts and, if it did, then there would be a punishment phase to the trial. This is a correct statement of the procedure of the case which was discussed with the jury from the outset of the case. This remark hardly amounted to reversible error.

Moreover, the trial court sustained the defense objection and immediately instructed the jury of their duty that day.<sup>29</sup>

Defendant's third proposition of law is properly overruled.

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<sup>28</sup> See *State v. Heinisch* (1990), 50 Ohio St.3d 231, 241, 553 N.E.2d 1026.

<sup>29</sup> See *State v. Heinisch* (1990), 50 Ohio St.3d 231, 241, 553 N.E.2d 1026 ("Where a jury is cautioned and a correction is given to the jury, the effect of improper evidence may be cured").

**PROPOSITION OF LAW NO. 4: IN ORDER TO DEMONSTRATE A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL A DEFENDANT MUST DEMONSTRATE A SERIOUS BREACH OF AN ESSENTIAL DUTY OWED BY COUNSEL TO CLIENT, COUPLED WITH A SHOWING OF RESULTANT PREJUDICE.**

In his fourth proposition of law, Pickens raises several claims of ineffective assistance of counsel. Pickens' burden in making such claims requires him to make a two part showing. He must first establish a serious breach of an essential duty, and second he must show resultant prejudice.<sup>30</sup> In *State v. Frazier*,<sup>31</sup> this Court discussed just how the *Strickland* standard should be used.

“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.*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694.

“Additionally this court had held in *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, at paragraph two of the syllabus, that ‘[counsel’s performance will not be deemed ineffective unless and until counsel’s performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel’s performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674], followed.)”

“Additionally, the *Strickland* court strongly cautioned courts considering the issue of ineffective assistance of counsel that ‘[j]udicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134 [102 S.Ct. 1558, 1574, 1575, 71 L.Ed.2d 783, 804] (1982). \* \* \* ”

<sup>30</sup> *Strickland v. Washington* (1984), 466 U.S. 688, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus.

<sup>31</sup> (1991), 61 Ohio St.3d 247

In *State v. Hanna*,<sup>32</sup> this court again indicated that a showing of “prejudice” is a showing that, but for the error complained of, the outcome of the trial would have been different. Accord: *State v. Bradley*, supra.

(1) Pickens first claims his counsel failed him by failing to call his mother – Trevina Griffin – as an alibi witness. This claim fails because Pickens can not demonstrate prejudice.

Whenever claimed ineffectiveness of counsel is premised on a failure to call a certain witness, a defendant can not demonstrate prejudice on direct appeal because an appellate court is limited to facts that appear in the record before the trial court. Because this Court can only speculate as to the testimony of the alibi witness, prejudice cannot be evaluated. Speculation regarding the prejudicial effects of counsel’s performance will not establish ineffective assistance of counsel.<sup>33</sup>

(2) Here, Pickens claims his counsel were ineffective for allowing Juror Carroll to remain on his jury. He claims Carroll was pro-death penalty and biased against young black men. Pickens claims Carroll thus denied him a fair trial.

Juror Carroll did believe in the death penalty. When asked, he responded as follows:

MR. TIEGER: As far as the death penalty, how do you feel about that?

PROSPECTIVE JUROR CARROLL: I feel it is an unfortunately necessary tool in our society. There are some people that need to be removed from society. I don’t have any trouble with it. If they have committed a crime that, as you say, meets the specifications, I wouldn’t have any trouble at all.

But he also assured the court he would follow the law:

MR. TIEGER: Could you choose between the life options and death option when it came to that, follow the law that Judge Martin would give to you?

PROSPECTIVE JUROR CARROLL: Yes, I could. (T.p. 801-802)

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<sup>32</sup> 95 Ohio St.3d 285, 302 2002-Ohio-2221, at ¶ 109

<sup>33</sup> *State v. Starks*, 2008-Ohio-408.

This demonstrates Carroll would not automatically vote for death.<sup>34</sup> No ineffective assistance of counsel is demonstrated.

(3) Here, in a related claim, Pickens alleges that his counsel provided ineffective assistance by failing to exhaust all of his peremptory challenges. By only using four of six, Pickens claims his counsel permitted pro-death penalty jurors to sit on his case – specifically Juror Carroll.

This Court has held that a trial counsel's failure to exercise peremptory challenges against jurors who were allegedly predisposed to be pro-death penalty did not constitute ineffective assistance of counsel.<sup>35</sup>

Decisions on the exercise of peremptory challenges are a part of trial strategy.<sup>36</sup> Trial counsel, who observe the jurors firsthand, are in a much better position to determine whether a prospective juror should be peremptorily challenged.<sup>37</sup> Pickens has failed to establish that his counsel were deficient or that he was prejudiced by the failure to challenge Juror Carroll. As set forth above, Carroll indicated that he would follow the law and could choose between the life options and death option as given to him by the trial court. (T.p. 802) Accordingly, Pickens has not shown that having Carroll sit on his case denied him a fair trial.<sup>38</sup>

(4) Next, Pickens claims he was denied effective assistance of counsel by counsel's failure to present mitigation evidence regarding his ability to adapt to prison confinement.

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<sup>34</sup> See *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 40 (no abuse of discretion in denying a challenge for cause if a juror, even one predisposed in favor of imposing heath, states that he or she will follow the law.

<sup>35</sup> *State v. Trimble*, 122 Ohio St.3d 297, 911 N.E.2d 242, 2009-Ohio-2961.

<sup>36</sup> *State v. Goodwin* (1999), 84 Ohio St.3d 331, 341, 703 N.E.2d 1251.

<sup>37</sup> See *State v. Keith* (1997), 79 Ohio St.3d 514, 521, 684 N.E.2d 47.

<sup>38</sup> *Trimble*, supra. See *State v. Lindsey* (2000), 87 Ohio St.3d 479, 490, 721 N.E.2d 995; *State v. Davis* (1991), 62 Ohio St.3d 326, 350, 581 N.E.2d 1362 (counsel not ineffective by failing to use peremptory challenges when prospective jurors indicate they can set aside their personal views about the death penalty and apply the law to the facts of the case).

The presentation of mitigating evidence is a matter of trial strategy.<sup>39</sup> “Moreover, ‘strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.’”<sup>40</sup> A decision to forgo the presentation of mitigation evidence does not itself constitute proof of ineffective assistance of counsel.<sup>41</sup>

Again, this Court cannot evaluate prejudice because it is limited to the trial record. However, a review of the record does not indicate any probability (let alone “reasonable” probability) that presentation of evidence of Pickens’ alleged ability to adapt to prison life would have altered the outcome of his trial.<sup>42</sup>

(5) Here, Pickens argues he was denied the effective assistance of counsel because counsel failed to present any expert psychological testimony in mitigation. He posits that a neuro-psychologist could have testified about brain-trauma risk factors which may have humanized him in the eyes of the jury. And he questions his counsels’ decision not to call the psychiatric experts appointed to him. A decision by trial counsel not to call an expert witness generally will not sustain a claim of ineffective assistance of counsel.<sup>43</sup> The record does not reveal why the experts appointed to Pickens were not called to testify or what testimony a neuro-psychologist would have provided. As such, nothing establishes that counsel was deficient.<sup>44</sup>

(6) Lastly, Pickens argues his counsel failed to persuasively support his theory of “residual doubt.” No ineffectiveness is demonstrated here as the evidence against Pickens was overwhelming. Indeed, the trial court noted that the State had proven its case beyond almost “any” doubt at the end of the Forfeiture by Wrongdoing hearing. (T.p. 384-85)

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<sup>39</sup> *State v. Keith* (1997), 79 Ohio St.3d 514, 530, 684 N.E.2d 47.

<sup>40</sup> *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 189, quoting *Wiggins v. Smith* (2003), 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471.

<sup>41</sup> *Keith*, supra.

<sup>42</sup> *State v. Hessler*, Not Reported in N.E.2d, 2002 WL 1379249 (Ohio App. 10 Dist.), 2002-Ohio-3321.

<sup>43</sup> *State v. Coleman* (1989), 45 Ohio St.3d 298, 307-308, 544 N.E.2d 622; *State v. Thompson* (1987), 33 Ohio St.3d 1, 10-11, 514 N.E.2d 407.

<sup>44</sup> See *State v. Goodwin* (1999), 84 Ohio St.3d 331, 335, 703 N.E.2d 1251.

In sum, Pickens has not shown that he was deprived of the effective assistance of trial counsel.

His fourth proposition of law is properly overruled.

**PROPOSITION OF LAW NO. 5: THE DETERMINATION OF WHETHER OR NOT AGGRAVATING FACTORS OUTWEIGH MITIGATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT IN A CAPITAL SENTENCING HEARING IS A DETERMINATION TO BE MADE BY THE TRIER OF FACT.**

Pickens argues that the mitigation evidence presented raised a reasonable doubt as to the appropriateness of the death penalty. A review of the evidence presented at trial refutes this claim.

Pickens was sentenced to death for the aggravated murders of Noelle Washington, her nine month old boy Anthony Jones III and three year old Sha'Railyn Wright. The death specifications as to the counts were:

- COUNT 2: Aggravated Murder – Noelle Washington
- Specification 2 – Escape Punishment
  - Specification 3 – Course of Conduct
- COUNT 3: Aggravated Murder – Sha'Railyn Wright
- Specification 2 – Course of Conduct
  - Specification 3 – Principal Offender, Victim Under Thirteen Years of Age
- COUNT 4: Aggravated Murder – Anthony Jones III
- Specification 2 – Course of Conduct
  - Specification 3 – Principal Offender – Victim Under Thirteen Years of Age

**AGGRAVATING CIRCUMSTANCES**

The aggravating circumstances for each case included the fact that Pickens engaged in a course of conduct commencing on June 1, 2009 where he purposely caused the death of three people. All of the victims were extremely vulnerable to Pickens. The adult victim, Noelle

Washington, was simply at her residence with her nine month old child Anthony Jones III and Sha'Railyn Wright, the three year old daughter of her best friend. They were all helpless against the handgun possessed and used by Pickens as he systematically executed all three people one after another.

The aggravated murder charge in Count 2 also contained a specification that he committed the offense to silence Ms. Washington for pursuing the rape charge against him. The aggravated murder charges in Counts 3 & 4 also contain a specification that each of the two remaining victims were under thirteen years of age. Obviously the course of conduct wherein Pickens purposely caused the death of three helpless people carried a heavy weight on the aggravating circumstance side of the scale. Specifically, to purposefully kill Sha'Railyn, age three, and Anthony, age nine months, as they were helplessly trapped in a small room with no way to escape carried extreme weight simply due to their tender ages.

#### MITIGATING FACTORS

The mitigating factors included the nature and circumstances of the case along with any other factor that weighed in favor of a sentence other than death.

There was nothing about the nature and circumstances of Pickens' crimes that was in any way mitigating. Pickens planned to kill Noelle Washington because she reported and pursued a rape charge against him. Pickens, then, needlessly but purposely shot and killed two young children who were with Noelle Washington. These shots were all shots to the head from very close range. None of the victims had a chance against Pickens' brutal murderous assault. Each was methodically targeted, even as Pickens had to reload due to a jamming problem with his gun. None of this conduct could be construed as mitigating.

The defense called Pickens' mother, Trevina Griffin, who testified she loved her son and begged the jury to spare his life. (T.p. 3175) Although the trial court gave this some weight, it is slight and pitifully cliché. Through her testimony it was brought out that Pickens was nineteen years of age at the time of the offenses, twenty years of age at the time of the trial. None of this mitigated or lessened Pickens' monstrous conduct.

Pickens offered an unsworn statement wherein he denied committing the offenses. He refused to take responsibility and showed an absolute lack of remorse. Whatever weight attributed to the mitigation presented paled in comparison to the overwhelming weight of the aggravating circumstances of each of these three counts of aggravated murder.

The defense primarily argued residual doubt – rearguing issues of witness credibility and self-interest. (T.p. 3213-3221) The trial court flatly rejected the notion – finding no doubt whatsoever that Pickens' was guilty of the Aggravated Murders.

This Court, in reviewing similar cases involving these issues, has found them to be not well taken. In *State v. Hulton*,<sup>45</sup> this Court held that residual doubt is not a mitigating factor and should be given very little weight. In *State v. Bethel*,<sup>46</sup> although this Court held that age can be given some weight in mitigation, the case facts regarding aggravating circumstances far outweighed this factor.

The same is certainly true here. Pickens' fifth proposition of law is properly overruled.

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<sup>45</sup> (2003), 100 Ohio St.3d 176, ¶ 79

<sup>46</sup> (2006), 110 Ohio St.3d 416, ¶ 203

**PROPOSITION OF LAW NO. 6: MORE THAN SUFFICIENT EVIDENCE WAS PRESENTED TO PERMIT THE ADMISSION OF NOELLE'S STATEMENTS UNDER EVID. R. 804(B)(6).**

**MORE THAN SUFFICIENT EVIDENCE WAS PRESENTED TO PROVE THE R.C. 2929.04(A)(3) SPECIFICATION BEYOND A REASONABLE DOUBT.**

The premise of Pickens' sixth proposition of law is flawed. He claims the State failed to prove beyond a reasonable doubt Specification 2 to Count 2. He claims Specification 2 charged him under R.C. 2929.04(A)(8) - but it did not. Specification 2 to Count 2 charged Pickens under R.C. 2929.04(A)(3).

I. R.C. 2929.04(A)(3)

The first capital specification under Count 2 (Aggravated Murder of Noelle Washington) charged Pickens with committing the aggravated murder "for the purpose of escaping detection or apprehension or trial or punishment for the Rape of Neolle Washington" pursuant to R.C. 2929.04(A)(3). (Pickens is mistaken in assuming he was charged pursuant to R.C. 2929.04(A)(8) - which is a capital specification concerning the killing of a witness to prevent that witness-victim's testimony in a criminal proceeding.)

II. FORFEITURE BY WRONGDOING

Also, in this proposition, Pickens argues the trial court improperly admitted statements of Noelle Washington (to family friends and police) to the effect that Pickens raped her on May 31, 2009. However, the trial court properly admitted these statements under Evid. R. 804(B)(6). Under Evid. R. 804(B)(6), a statement offered against a party is not excluded by the hearsay rule "if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying." Before admitting Washington's statements at trial, the trial court conducted an evidentiary hearing. The applicable standard in determining

the admissibility of Washington's statements under Evid. R. 804(B)(6) is "preponderance of the evidence."<sup>47</sup>

At the hearing, the State called several witnesses establishing by a preponderance, that Pickens raped Washington the day before her murder:

- Police Officer Marion Jenkins testified that Washington reported to him that she had been raped by Pickens. (T.p. 156-161)
- Detective Chris Schroder, of Cincinnati Police Department Personal Crimes Unit, testified that Washington described to him, in detail, her rape by Pickens. (T.p. 178-181)
- Tamika Washington, (Noelle's sister) testified that Noelle told her that Pickens raped her and told Noelle he would kill her. (T.p. 222) When Tamika spoke with Pickens on the phone, Pickens said "If I go to jail (for rape) I am going to fuck her up!" (T.p. 225)
- Tanisha Scott, (Noelle's cousin), testified that Noelle told her Pickens pulled a gun on her and raped her. (T.p. 233-241)
- Gwen Washington, Noelle's mother, testified that Noelle told her that Pickens pulled a gun and told Noelle he would shoot her if she did not have sex. Noelle told her mother Pickens then raped her. (T.p. 285-286)
- Derrick Washington (Noelle's brother) testified that Noelle called him from the hospital crying. She repeated, "He raped me." (T.p. 293)
- Crystal Lewis, (Noelle's best friend and victim Sha'Railyn Wright's mother) testified that Noelle called her and told her Pickens raped her. (T.p. 298) The next day, Noelle texted Crystal that Pickens had just come through her kitchen window. (T.p. 308) Crystal Lewis, concerned about the safety of her daughter and Noelle, texted Noelle that she was coming to pick them all

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<sup>47</sup> See *State v. Hand*, 107 Ohio St.3d 378, 840 N.E.2d 151, 2006-Ohio-18.

up and take them home with her (Crystal). By the time Crystal arrived at Noelle's apartment - 10 minutes later - all three victims were already dead. (T.p. 311)

- Detective Greg Gehring testified that Noelle had texted Pickens: "I will see you in court." (T.p. 330) Pickens texted multiple messages to Noelle, such as:

- "Do I have a warrant out for my arrest?"
- "Am I going to jail?"
- "Why are you going to send me to jail?" (T.p. 330)

Additionally, Detective Gehring testified that Pickens had asked one Jonda Palmer to "beat up a girl who was trying to get him arrested for rape." (T.p. 331-332) The murders were committed with 45 caliber ammunition - the same type found in Pickens' apartment. Additionally, there was gun-shot residue found on Pickens' jacket and bike. And a Ronell Harris identified Pickens as the man he saw arguing with Noelle outside her apartment the night just before the murders occurred. (T.p. 326-335)

Based on this evidence, the trial court found:

" ... THE COURT: All right. I listened to the testimony. I do find the witnesses to be credible as to what Noelle Washington said, and so I do find that the State can get this evidence in. I find that beyond a preponderance or by a preponderance that the defendant engaged in wrongdoing that resulted in the witness' unavailability and one of the purposes was to make the witness unavailable for trial.

\* \* \*

they have proven beyond almost any doubt, certainly by a preponderance at this point in time. ..." (T.p. 384-385)

Pickens alleges several reasons why the trial court erred in admitting Noelle's statements. He argues that discrepancies and inconsistencies in Noelle's statements rendered them unreliable. He claims that Pickens always denied raping Noelle and that no charges had been filed at the time of the murders. Hence, the State failed to prove that the killings were to prevent

Noelle from testifying. This Court has already rejected such an argument. In *State v. Hand*,<sup>48</sup> this Court held that:

Evidence that a murder defendant intended to make a victim unavailable to testify against him at trial was sufficient to warrant the admission at trial of the victim's statements to third parties under "the wrongdoing of a party" exception to the rule against hearsay, despite the fact that no charges were pending against the defendant at time of the murder, where the hearsay exception applied to the killing of potential witnesses, and the defendant's admissions established that the elimination of a victim as a potential witness was one of his purposes. Rules of Evid. Rule 804(B)(6).

As for the credibility of the statements, the issue was for the trial court's determination and it was rightly persuaded by the overwhelming evidence. The decision whether to admit these hearsay statements was within the trial court's discretion.<sup>49</sup> In short, Pickens failed to show how the trial court abused its discretion in admitting Noelle's statements under Evid. R. 804(B)(6).

### III. SUFFICIENCY OF THE EVIDENCE REGARDING R.C. 2929.04(A)(3) CAPITAL SPECIFICATION (MURDER TO ESCAPE DETECTION)

Also in this proposition of law, Pickens arguably challenges the sufficiency of the evidence regarding the Count 2's second specification - Murder to Escape Detection. In reviewing a record for sufficiency, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the

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<sup>48</sup> 107 Ohio St.3d 378, 840 n.E.2d 151, 2006-Ohio-18.

<sup>49</sup> See *State v. Sage* (1987), 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343, paragraph two of the syllabus (the admission of relevant evidence rests within the sound discretion of the trial court); cf. *State v. Landrum* (1990), 53 Ohio St.3d 107, 114, 559 N.E.2d 710. ("[T]he determination of whether corroborating circumstances are sufficient to admit statements against penal interest, as a hearsay exception, generally rests within the discretion of the trial court.")

essential elements of the crime proven beyond a reasonable doubt.”<sup>50</sup> The weight to be given the evidence and the credibility of witnesses are primarily for the trier of fact.<sup>51</sup>

Here, Pickens claims the State did not prove that his purpose in killing was to prevent Noelle from testifying - or that he killed Noelle as retaliation for filing a complaint. Again, however, it is noted that Pickens was charged with a R.C. 2929.04(A)(3) specification - not an (A)(8).

In *State v. Jones*,<sup>52</sup> this Court held that proof of the defendant’s commission of the prior offense constituted an essential element of the R.C. 2929.04(A)(3) specification. Thus, the State was required to prove beyond a reasonable doubt that Pickens committed the Rape of Noelle for which he sought to avoid detection, trial and punishment. It did.

At trial, the previously listed witnesses testified similarly to their testimony at the Forfeiture by Wrongdoing hearing:

Police Officer Jenkins - (T.p. 1168)  
Detective Schroder - (T.p. 1407-1612) State’s Exhibit 23  
Tamika Washington - (T.p. 2873-2880)  
Tanisha Scott - (T.p. 1935-1947)  
Gwen Washington - (T.p. 1893-1900)  
Derrick Washington - (T.p. 1859-1862)  
Crystal Lewis - (T.p. 2146-2172)  
Detective Gehring - (T.p. 2684-2688)

Additionally, Ronell Harris testified that he observed Pickens and Noelle talking outside her apartment minutes before the murders. (T.p. 1976-1982) Jonda Palmer testified that Pickens visited her on May 31, 2009 and told her he was angry because someone had accused him of Rape. (T.p. 2106) Pickens asked Jonda to round up some other girls and “beat” the girl who had

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<sup>50</sup> *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

<sup>51</sup> *State v. Waddy* (1992), 63 Ohio St.3d 424, 430, 588 N.E.2d 819; *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 39 O.O.2d 366, 227 N.E.2d 212.

<sup>52</sup> (2001), 91 Ohio St.3d 335, 347, 744 N.E.2d 1163

accused him. (T.p. 2108) She found a gun concealed in his waist area. (T.p. 2110) Later, Pickens texted Jonda, "I feel like killing someone." (T.p. 2112)

Montez Lee testified that he shared a cell block with Pickens in jail in June, 2009. (T.p. 2302) Pickens told Lee, "I killed that bitch and the babies." (T.p. 2303) Pickens told Lee he shot them in the head. (T.p. 2303) Pickens told Lee that Noelle kept calling the police on him. (T.p. 2307) he also said he used a .45 and that it continually jammed. (T.p. 2310) He told Lee he knew he was going to shoot Noelle when he went to her apartment. He shot the three-year old because she could identify him. He shot the baby because he got a rush out of it. (T.p. 2314)

Michael Trimpe, of the Coroner's Crime Lab, testified that gun-shot residue was found on Pickens' bike and jacket. (T.p. 2445-2453) Ballistics determined that markings on bullets recovered from the victims' autopsies were consistent with being fired from a gun that jammed. (T.p. 2479) The coroner testified that each of the victims had been shot in the head - just as Pickens reported to cell mate Lee. (T.p. 2516, 2526, 2531)

Construing all this evidence in a light most favorable to the State, a rational juror certainly could have concluded beyond a reasonable doubt that Pickens Raped Noelle Washington. And thus, sufficient evidence was presented to prove this element of the R.C. 2929.04(A)(3) specification.

Defendant's sixth proposition of law is properly overruled.

**PROPOSITION OF LAW NO. 7: THE DEFENSE DID NOT ULTIMATELY OBJECT TO THE ADMISSION OF THE SPLICED DVDS, BUT RATHER, AFFIRMATIVELY ACQUIESCED TO THEIR ADMISSION. PICKENS WAIVED ANY ALLEGED ERROR. ANY ISSUE CREATED BY THE SPLICING OF THE VIDEOTAPE GOES TO ITS WEIGHT – NOT ITS ADMISSIBILITY.**

Next, Pickens complains that edited (or spliced) security camera video depicting his arrivals and departures from his apartment on May 31 and June 2, 2009 was improperly admitted into evidence. Pickens affirmatively waived this claim.

At trial, the State sought to introduce a DVD which was an edited compilation of security camera video of defendant's apartment. Layne Hurst, property manager for Gateway Plaza Apartments, testified that he rented defendant apartment 508. He also explained that the apartment complex installed a security system consisting of eight DVRS and 140 cameras that monitor the property. (T.p. 2562-2563) Hurst is the sole person at Gateway that operates the system. (T.p. 2565) It was operational during the time the murders occurred.

At the request of Cincinnati Police, Hurst compiled several DVD clips of Pickens coming and going from his apartment (T.p. 2565-2568) during the time frame of the murders. Cincinnati Police then spliced these into a single DVD format for viewing. (T.p. 2569) Hurst viewed the work product of the police and found it a true and accurate reflection of the clips he provided. (T.p. 2560-70) When the State sought to introduce the DVD, the defense objected, claiming they had been unaware the DVD had been spliced. (T.p. 2570)

An extensive in-chambers discussion ensued – after which the court decided it would view the DVD. (T.p. 2577) After the trial judge watched the DVD, he concluded that it should have been obvious to the defense that the DVD was spliced. The Court also noted that any issue with the splicing would go to the DVD's weight – not to its admissibility. (T.p. 2587-88)

Defense counsel declined an offer to watch hours of the unedited source tapes and Pickens himself expressed his desire to admit the DVD and move the case forward. (T.p. 2594)

With this background, it becomes clear Pickens' claim is meritless. First, he waived any objection by failing to re-new it when Exhibits 24A-B were admitted. (T.p. 2903, 2613) Pickens' failure to object constitutes a waiver of the issue.<sup>53</sup> Therefore, Pickens failed to properly preserve this issue for appeal. Not only did he waive any objection to the exhibit, he affirmatively expressed his desire to admit the exhibit and move the trial forward. (T.p. 2594, 2613) No plain error<sup>54</sup> occurred, because it is clear that the outcome of Pickens' trial would not have been different but for the admission of the Exhibit. There was overwhelming evidence of his guilt.

Nor has Pickens demonstrated undue prejudice. Of course, the DVD is damaging evidence to defendant, but that does not render it inadmissible.

Finally, it is noted that the DVD was properly authenticated. Evid. R. 901 provides for the authentication or identification of evidence prior to its admissibility. The rule provides, in pertinent part:

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.<sup>55</sup>

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<sup>53</sup> See *State v. Grubb* (1986), 28 Ohio St.3d 199, 203, 503 N.E.2d 142.

<sup>54</sup> Pursuant to Crim. R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This exception to the general rule is to be invoked reluctantly. "Notice of plain error under Crim. R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. In order for this Court to apply Crim. R. 52(B), it must be clear that the outcome of the trial would have been different but for the alleged error. See *State v. Lane* (1995), 108 Ohio App.3d 477, 482, 671 N.E.2d 272.

<sup>55</sup> Evid. R. 901(A)

A tape (or DVD) is properly admitted into evidence upon a showing that it accurately depicts what the proponent claims it to depict,<sup>56</sup> and any quality problems in the videotape go to its weight, not to its admissibility.<sup>57</sup>

Here, Layne Hurst testified that the DVD accurately depicted the events at defendant's apartment building. (T.p. 2600-2601) Any insinuation that the DVD was spliced to take out parts favorable to Pickens is pure, unfounded speculation. No abuse of discretion is demonstrated. Defendant's seventh proposition of law is properly overruled.

**PROPOSITION OF LAW NO. 8: THE OHIO DEATH PENALTY STATUTES ARE CONSISTENT WITH THE UNITED STATES CONSTITUTION AND OHIO CONSTITUTION. THEY ARE NOT MEASURED AGAINST "INTERNATIONAL LAW." CLAIMS NOT RAISED AT TRIAL ARE WAIVED.**

In his eighth proposition of law, Pickens challenges the constitutionality of Ohio's death penalty. He includes in his arguments reliance on international law and treaties, as well as references to the American Bar Association's anti-death penalty positions. All of Pickens' individual arguments have been considered and rejected by this Court in the past.<sup>58</sup>

In situations such as this, the Court has declined to rehash well-settled issues.<sup>59</sup> In *Brinkley*, this Court wrote:

“{¶163} **Constitutionality.** We summarily reject Brinkley's proposition of law XXIV, which challenges the constitutionality of Ohio's death-penalty statute. *Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446, ¶104.”

The State submits that the Ohio death penalty statutes are constitutional, and are constitutionally implemented.

<sup>56</sup> *Midland Steel Prods. Co. v. U.A. W. Local 486* (1991), 61 Ohio St.3d 121, 129, 573 N.E.2d 98

<sup>57</sup> *State v. Benson*, 11<sup>th</sup> Dist. No. 2001-P-0086, 2002-Ohio-6942, ¶ 17.

<sup>58</sup> *State v. Ferguson* (2006), 108 Ohio St.3d 451, ¶84 et seq., 844 N.E.2d 806; *State v. Mink* (2004), 101 Ohio St.3d 350, ¶101 set seq., 805 N.E.2d 1004.

<sup>59</sup> *State v. Brinkley*, 105 Ohio St.3d 231, at ¶163, 2005-Ohio-1507, 824 N.E.2d 959.

Controlling decisions of this Court relative to specific claims are set forth below.

(1) First, Pickens claims that Ohio's death penalty is arbitrary and imposes unequal punishment. He cites to prosecutorial discretion, racial discrimination and a claim that the death penalty is not the "least restrictive" or "most effective" punishment.

These claims have been rejected in *State v. Jenkins*, *State v. Rojas* and *State v. Issa*.<sup>60</sup> A claim that Pickens was denied a fair trial by the discretionary and discriminatory process by which the Hamilton County Prosecutor determined that Pickens would be capitally charged, is meritless. This claim has been repeatedly rejected by this Court.<sup>61</sup> Any claim that Ohio sentencing procedures are unreliable in that they run afoul of due process and equal protection guaranties was rejected in *State v. Issa*, *State v. Lawson*, and *State v. Hook*.<sup>62</sup>

(2) Pickens next argues that the death penalty is in violation of various international treaties ie: ICCPR (1992);<sup>63</sup> ICERD (1994);<sup>64</sup> CAT (1994).<sup>65</sup> Such claims have been consistently and summarily rejected by this Court.<sup>66</sup>

In short, Pickens' constitutional challenges to Ohio's death penalty have previously been reviewed and rejected by this Court. Pickens' eighth proposition of law is properly overruled.

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<sup>60</sup> *State v. Jenkins* (1984), 15 Ohio St.3d 164, 473 N.E.2d 264; *State v. Rojas* (1992), 64 Ohio St.3d 131, 592 N.E.2d 1376; *State v. Issa*, 93 Ohio St.3d 68-69.

<sup>61</sup> *State v. Jenkins* (1984), 15 Ohio St.3d 164, 169; *State v. Glenn* (1986), 28 Ohio St.3d 451, 453; *State v. Coleman* (1989), 45 Ohio St.3d 298, 308, 544 N.E.2d 622.

<sup>62</sup> *State v. Issa*, 93 Ohio St.3d at 69; *State v. Lawson* (1992), 64 Ohio St.3d 336, 595 N.E.2d 902; *State v. Hook* (1988), 39 Ohio St.3d 67, 529 N.E.2d 429.

<sup>63</sup> International Covenant on Civil and Political Rights

<sup>64</sup> International Convention on the Elimination of All Forms of Racial Discrimination

<sup>65</sup> Convention Against Torture and Other Cruel Treatment

<sup>66</sup> *State v. Davis*, 116 Ohio St.3d 404, 880 N.E.2d 31, 2008-Ohio-2, at ¶383; *State v. Phillips* (1995), 74 Ohio St.3d 72, 103-104, 656 N.E.2d 643; *State v. Bey* (1999), 85 Ohio St.3d 487, 709 N.E.2d 484; and recently in *State v. Twyford* (2002), 94 Ohio St.3d 340, 364; *State v. Goodwin* (1999), 84 Ohio St.3d 331, 349-350, 703 N.E.2d 1251; *State v. Ashworth* (1999), 85 Ohio St.3d 56, 70, 706 N.E.2d 1231.

**PROPOSITION OF LAW NO. 9: IN A CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE THE APPELLATE COURT MUST VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, AND MUST AFFIRM IF IT DETERMINES THAT ANY RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CRIMES PROVEN BEYOND A REASONABLE DOUBT.**

In his Proposition of Law No. 9 Pickens argues that his convictions for Rape and the three Aggravated Murders were based on insufficient evidence. This claim requires this reviewing court to review the evidence in the light most favorable to the state. If such review demonstrates that any rational trier of fact could have found guilt beyond a reasonable doubt then the reviewing court must affirm.<sup>67</sup> Such a review here leaves no doubt as to the Picken's guilt.

The State presented more than sufficient evidence that Pickens committed the Rape offense (as against Noelle Washington) for which he had sought to avoid detection and trial as alleged in count one and the first capital murder specification to Count 2. And the evidence overwhelmingly demonstrated that Pickens executed Noelle Washington, Sha'Railyn Wright and Anthony Jones III on June 1, 2009. (See Statement of Facts; State's response to Defendant's sixth proposition of law.)

Defendant's ninth proposition of law lacks merit.

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<sup>67</sup> *State v. Leonard*, 104 Ohio St.3d 54, at ¶77, 2004-Ohio-6235, 818 N.E.2d 229; *State v. Williams*, 74 Ohio St.3d 569, 660 N.E.2d 724 (1996); *State v. Jenks*, 61 Ohio St.3d 259, second syllabus, 574 N.E.2d 492 (1991).

**PROPOSITION OF LAW NO. 10: CUMULATIVE ERROR DOCTRINES CANNOT APPLY IN THE ABSENCE OF A SHOWING OF MULTIPLE ERRORS, NOR CAN HARMLESS ERROR BECOME PREJUDICIAL THROUGH WEIGHT OF NUMBERS.**

Pickens makes a brief cumulative error argument. The predicate for such an argument is a showing of multiple, prejudicial errors. Pickens has made no such showing, so his argument must be rejected.<sup>68</sup>

**CONCLUSION**

Appellee submits that the verdicts and sentence below must be affirmed.

Respectfully,

Joseph T. Deters, 0012084P  
Prosecuting Attorney



Philip R. Cummings, 0041497P  
Assistant Prosecuting Attorney  
230 East Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
Phone: (513) 946-3012

Attorneys for Plaintiff-Appellee, State of  
Ohio

**PROOF OF SERVICE**

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Daniel F. Burke, Jr. (0013836), William Howard Taft Law Center, 230 East Ninth Street, 2nd Floor, Cincinnati, Ohio 45202, and to Roger W. Kirk (0024219), Attorney at Law, 114 E. Eighth Street, Cincinnati, Ohio 45202, counsel of record, this 11 day of October, 2011.



Philip R. Cummings, 0041497P  
Assistant Prosecuting Attorney

<sup>68</sup> *State v. Garner*, 74 Ohio St.3d 49, at 64, 656 N.E.2d 623 (1995); *State v. Fry*, 125 Ohio St.3d 163, at ¶217, 2010-Ohio-1017, 926 N.E.2d 1239.