

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	Case No. 2010-1406
	:	
Plaintiff-Appellee	:	On Appeal from the Hamilton County
	:	Court of Common Pleas
vs.	:	Trial No. B-0905088
	:	
MARK PICKENS	:	This is a death penalty case
	:	
Defendant-Appellant	:	

REPLY BRIEF OF APPELLANT MARK PICKENS

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FILED
DEC 08 2011
CLERK OF COURT
SUPREME COURT OF OHIO

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PREFACE

Mark Pickens replies to the State of Ohio's argument put forth in its Appellee Merit Brief as Proposition of Law No. 4. The absence of a reply by Pickens on other claims and/or propositions of law is done simply to avoid duplications and re-argument of the Appellant's Merit Brief and Pickens reasserts all the arguments in his Merit Brief.

ARGUMENT

Proposition of Law No. 4: The Appellant in a capital case is entitled to effective assistance of counsel as to both the merit trial portion and the sentencing portion of the case under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Section 10, Article 1 of the Ohio Constitution, §§1, 2, 5, 9, 10, 16, and 20.

In Appellee's merit brief, the State argues that the standard which is applicable to a death penalty case is that which the United States Supreme Court set up in *Strickland v. Washington* (1994), 466 U.S. 688, 104 S.Ct. 2052. The prosecution accurately states that under *Strickland* this Court is still confronted with a two-part burden that is placed upon Appellant. He first must establish a breach of an essential duty, and then must show resultant prejudice.

Where the Appellee is wrong, however, is that in a capital case, a higher standard is required of defense counsel's performance at trial. The "gold standard" criteria of such counsel was clearly, concisely, and accurately spelled out in *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 2003 Edition, put forward by the American Bar Association. The Ohio Supreme Court has adopted the same philosophy when it adopted standards for certification of lead counsel and appointed counsel when it adopted Rule of Superintendence 20 for the Courts of Ohio, formerly Rule 65, under Section IV (B)(1).

A defendant is denied effective assistance of counsel when defense counsel fails to present to the jury any expert psychological testimony illustrating significant mitigation factors during the mitigation phase of the trial. *Wiggins v. Smith* (2003), 539 U.S. 510; *Williams v. Taylor* (2000), 529 U.S. 362, 120 S.Ct. 1495; *Glenn v. Tate* (6th Cir. 1995), 71 F.3d 1204. When available, to effectively represent a defendant, defense counsel should present an expert psychologist to present mitigation history and secure a neuropsychological evaluation and testing in mitigation. *State v. Herring* (2004), 94 Ohio St.3d 246, 962 N.E.2d 900. Although some of

these Courts reversed defendant's convictions and ordered new mitigation hearings, it is acknowledged the decisions held that the result was due to defense counsel not making adequate investigation to determine if a psychiatric expert could provide important mitigation testimony. It is also acknowledged defense counsel are given wide latitude as a trial tactic on what mitigation testing to present. *Wiggins, Supra; State v. Coleman* (1989), 45 Ohio St.3d 298, 544 N.E.2d 622.

In the present case, the State is wrong in not acknowledging the serious defect in Pickens' defense team by not presenting expert psychological mitigation. It is apparent from the record that Pickens' trial counsel was ineffective in not presenting any psychiatric expert testimony to illustrate significant mitigation facts for Mr. Pickens which would have obviously aided him in not receiving the death penalty.

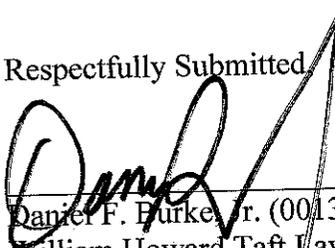
There is nothing in the record before the trial court documenting that defense counsel reasonably conducted the necessary investigations prior to making the relevant decisions to present expert psychiatric mitigation testimony. Pickens was prejudiced when the pro-death penalty jury heard no relevant mitigation testimony on his behalf. He was sentenced to death without his hired psychiatric experts ever being presented to help in his mitigation. Just as the United States Supreme Court concluded in *Rompilla v. Beard* (2005), 545 U.S. 374, the undisclosed and unrepresented expert mitigating evidence in this case might well have influenced the jury's appraisal of the appellant's culpability and the probability of a different sentence if defense counsel had presented the evidence.

This is sufficient to undermine confidence in the death penalty sentence reached by the jury.

CONCLUSION

For each of the foregoing reasons, Appellant Mark Pickens's convictions and death sentence must be reversed.

Respectfully Submitted

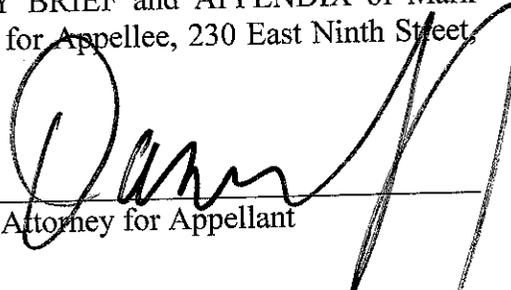

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing REPLY BRIEF and APPENDIX of Mark Pickens was hand-delivered to Philip Cummings, Attorney for Appellee, 230 East Ninth Street, Cincinnati, OH 45202 this 8th day of December, 2011.


Attorney for Appellant

RULE 20. Appointment of Counsel for Indigent Defendants in Capital Cases--Courts of Common Pleas.

I. Applicability.

(A) This rule shall apply in cases where an indigent defendant has been charged with aggravated murder and the indictment includes one or more specifications of aggravating circumstances listed in R.C. 2929.04(A). This rule shall apply in cases where a juvenile defendant is indicted for a capital offense, but because of his or her age, cannot be sentenced to death.

(B) The provisions for the appointment of counsel set forth in this rule apply only in cases where the defendant is indigent and counsel is not privately retained by or for the defendant.

(C) If the defendant is entitled to the appointment of counsel, the court shall appoint two attorneys certified pursuant to this rule. If the defendant engages one privately retained attorney, the court shall not appoint a second attorney pursuant to this rule.

(D) The provisions of this rule apply in addition to the reporting requirements created by section 2929.021 of the Revised Code.

II. Qualifications for certification as counsel for indigent defendants in capital cases.

(A) **Trial Counsel (1)** At least two attorneys shall be appointed by the court to represent an indigent defendant charged with aggravated murder and the indictment includes one or more specifications of aggravating circumstances listed in R.C. 2929.04(A). At least one of the appointed counsel must maintain a law office in Ohio and have experience in Ohio criminal trial practice.

The counsel appointed shall be designated "lead counsel" and "co-counsel."

(2) Lead counsel shall satisfy all of the following:

- (a) Be admitted to the practice of law in Ohio or admitted to practice *pro hac vice*;
- (b) Have at least five years of civil or criminal litigation or appellate experience;
- (c) Have specialized training, as approved by the Committee, on subjects that will assist counsel in the defense of persons accused of capital crimes in the two-year period prior to making application;
- (d) Have at least one of the following qualifications:
 - (i) Experience as "lead counsel" in the jury trial of at least one capital case;

(ii) Experience as "co-counsel" in the trial of at least two capital cases;

(e) Have at least one of the following qualifications:

(i) Experience as "lead counsel" in the jury trial of at least one murder or aggravated murder case;

(ii) Experience as "lead counsel" in ten or more criminal or civil jury trials, at least three of which were felony jury trials;

(iii) Experience as "lead counsel" in either: three murder or aggravated murder jury trials; one murder or aggravated murder jury trial and three felony jury trials; or three aggravated or first- or second-degree felony jury trials in a court of common pleas in the three years prior to making application.

(3) Co-counsel shall satisfy all of the following:

(a) Be admitted to the practice of law in Ohio or admitted to practice *pro hac vice*;

(b) Have at least three years of civil or criminal litigation or appellate experience;

(c) Have specialized training, as approved by the Committee, on subjects that will assist counsel in the defense of persons accused of capital crimes in the two years prior to making application;

(d) Have at least one of the following qualifications:

(i) Experience as "co-counsel" in one murder or aggravated murder trial;

(ii) Experience as "lead counsel" in one first-degree felony jury trial;

(iii) Experience as "lead" or "co-counsel" in at least two felony jury or civil jury trials in a court of common pleas in the three years prior to making application.

(4) As used in this rule, "trial" means a case concluded with a judgment of acquittal under Criminal Rule 29 or submission to the trial court or jury for decision and verdict.

(B) Appellate counsel. (1) At least two attorneys shall be appointed by the court to appeal cases where the trial court has imposed the death penalty on an indigent defendant. At least one of the appointed counsel shall maintain a law office in Ohio.

(2) Appellate counsel shall satisfy all of the following:

(a) Be admitted to the practice of law in Ohio or admitted to practice *pro hac vice*;

- (b) Have at least three years of civil or criminal litigation or appellate experience;
- (c) Have specialized training, as approved by the Committee, on subjects that will assist counsel in the defense of persons accused of capital crimes in the two years prior to making application;
- (d) Have specialized training, as approved by the Committee, on subjects that will assist counsel in the appeal of cases in which the death penalty was imposed in the two years prior to making application;
- (e) Have experience as counsel in the appeal of at least three felony convictions in the three years prior to making application.

(C) **Exceptional circumstances.** If an attorney does not satisfy the requirements of divisions (A)(2), (A)(3), or (B)(2) of this section, the attorney may be certified as lead counsel, co-counsel, or appellate counsel if it can be demonstrated to the satisfaction of the Committee that competent representation will be provided to the defendant. In so determining, the Committee may consider the following:

- (a) Specialized training on subjects that will assist counsel in the trial or appeal of cases in which the death penalty may be or was imposed;
- (b) Experience in the trial or appeal of criminal or civil cases;
- (c) Experience in the investigation, preparation, and litigation of capital cases that were resolved prior to trial;
- (d) Any other relevant considerations.

(D) **Savings clause.** Attorneys certified by the Committee prior to January 1, 1991 may maintain their certification by complying with the requirements of Section VII of this rule, notwithstanding the requirements of Sections II(A)(2)(d), II(A)(3)(b) and (d), and II(B)(2)(d) as amended effective January 1, 1991.

III. Committee on the appointment of counsel for indigent defendants in capital cases.

(A) There shall be a Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases.

(B) **Appointment of Committee members.** The Committee shall be composed of five attorneys. Three members shall be appointed by a majority vote of all members of the Supreme Court of Ohio; one shall be appointed by the Ohio State Bar Association; and one shall be appointed by the Ohio Public Defender Commission.

(C) Eligibility for appointment to the Committee. Each member of the Committee shall satisfy all of the following qualifications:

- (1) Be admitted to the practice of law in Ohio;
- (2) Have represented criminal defendants for not less than five years;
- (3) Demonstrate a knowledge of the law and practice of capital cases;
- (4) Currently not serving as a prosecuting attorney, city director of law, village solicitor, or similar officer or their assistant or employee, or an employee of any court.

(D) Overall composition. The overall composition of the Committee shall meet both of the following criteria:

- (1) No more than two members shall reside in the same county;
- (2) No more than one shall be a judge.

(E) Terms; vacancies. The term of office for each member shall be five years, each term beginning on the first day of January. Members shall be eligible for reappointment. Vacancies shall be filled in the same manner as original appointments. Any member appointed to fill a vacancy occurring prior to the expiration of a term shall hold office for the remainder of the term.

(F) Election of chair. The Committee shall elect a chair and such other officers as are necessary. The officers shall serve for two years and may be reelected to additional terms.

(G) Powers and duties of the Committee. The Committee shall do all of the following:

- (1) Prepare and notify attorneys of procedures for applying for certification to be appointed counsel for indigent defendants in capital cases;
- (2) Periodically provide all common pleas and appellate court judges and the Ohio Public Defender with a list of all attorneys who are certified to be appointed counsel for indigent capital defendants;
- (3) Periodically review the list of certified counsel, all court appointments given to attorneys in capital cases, and the result and status of those cases;
- (4) Develop criteria and procedures for retention of certification including, but not limited to, mandatory continuing legal education on the defense and appeal of capital cases;
- (5) Expand, reduce, or otherwise modify the list of certified attorneys as appropriate and necessary in accord with division (G)(4) of this section;

(6) Review and approve specialized training programs on subjects that will assist counsel in the defense and appeal of capital cases;

(7) Recommend to the Supreme Court of Ohio amendments to this rule or any other rule or statute relative to the defense or appeal of capital cases.

(H) **Meetings.** The Committee shall meet at the call of the chair, at the request of a majority of the members, or at the request of the Supreme Court of Ohio. A quorum consists of three members. A majority of the Committee is necessary for the Committee to elect a chair and take any other action.

(I) **Compensation.** All members of the Committee shall receive equal compensation in an amount to be established by the Supreme Court of Ohio.

IV. Procedures for court appointments of counsel.

(A) **Appointing counsel.** Only counsel who have been certified by the Committee shall be appointed to represent indigent defendants charged with aggravated murder and the indictment includes one or more specifications of aggravating circumstances listed in R.C. 2929.04(A). Each court may adopt local rules establishing qualifications in addition to and not in conflict with those established by this rule. Appointments of counsel for these cases should be distributed as widely as possible among the certified attorneys in the jurisdiction of the appointing court.

(B) Workload of appointed counsel.

(1) In appointing counsel, the court shall consider the nature and volume of the workload of the prospective counsel to ensure that counsel, if appointed, could direct sufficient attention to the defense of the case and provide competent representation to the defendant.

(2) Attorneys accepting appointments shall provide each client with competent representation in accordance with constitutional and professional standards. Appointed counsel shall not accept workloads that, by reason of their excessive size, interfere with the rendering of competent representation or lead to the breach of professional obligations.

(C) Notice to the Committee.

(1) Within two weeks of appointment, the appointing court shall notify the Committee secretary of the appointment on a form prescribed by the Committee. The notice shall include all of the following:

- (a) The court and the judge assigned to the case;
- (b) The case name and number;

- (c) A copy of the indictment;
- (d) The names, business addresses, telephone numbers, and Sup. R. 20 certification of all attorneys appointed;
- (e) Any other information considered relevant by the Committee or appointing court.

(2) Within two weeks of disposition, the trial court shall notify the Committee secretary of the disposition of the case on a form prescribed by the Committee. The notice shall include all of the following:

- (a) The outcome of the case;
- (b) The title and section of the Revised Code of any crimes to which the defendant pleaded or was found guilty;
- (c) The date of dismissal, acquittal, or that sentence was imposed;
- (d) The sentence, if any;
- (e) A copy of the judgment entry reflecting the above;
- (f) If the death penalty was imposed, the name of counsel appointed to represent the defendant on appeal.
- (g) Any other information considered relevant by the Committee or trial court.

(D) **Support services.** The appointing court shall provide appointed counsel, as required by Ohio law or the federal Constitution, federal statutes, and professional standards, with the investigator, mitigation specialists, mental health professional, and other forensic experts and other support services reasonably necessary or appropriate for counsel to prepare for and present an adequate defense at every stage of the proceedings including, but not limited to, determinations relevant to competency to stand trial, a not guilty by reason of insanity plea, cross-examination of expert witnesses called by the prosecution, disposition following conviction, and preparation for and presentation of mitigating evidence in the sentencing phase of the trial.

V. **Monitoring; removal.**

(A) The appointing court should monitor the performance of assigned counsel to ensure that the defendant is receiving competent representation. If there is compelling evidence before any court, trial or appellate, that an attorney has ignored basic responsibilities of providing competent counsel, which results in prejudice to the defendant's case, the court, in addition to any other action it may take, shall report this evidence to the Committee, which shall accord the attorney an opportunity to be heard.

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(B) Complaints concerning the performance of attorneys assigned in the trials or appeals of indigent defendants in capital cases shall be reviewed by the Committee pursuant to the provisions of Section III(G)(3), (4), and (5) of this rule.

VI. Programs for specialized training.

(A) Programs for specialized training in the defense of persons charged with a capital offense.

(1) To be approved by the Committee, a death penalty trial seminar shall include instruction devoted to the investigation, preparation, and presentation of a death penalty trial.

(2) The curriculum for an approved death penalty trial seminar should include, but is not limited to, specialized training in the following areas:

- (a) An overview of current developments in death penalty litigation;
- (b) Death penalty voir dire;
- (c) Trial phase presentation;
- (d) Use of experts in the trial and penalty phase;
- (e) Investigation, preparation, and presentation of mitigation;
- (f) Preservation of the record;
- (g) Counsel's relationship with the accused and the accused's family;
- (h) Death penalty appellate and post-conviction litigation in state and federal courts.

(B) Programs for specialized training in the appeal of cases in which the death penalty has been imposed.

(1) To be approved by the Committee, a death penalty appeals seminar shall include instruction devoted to the appeal of a case in which the death penalty has been imposed.

(2) The curriculum for an approved death penalty appeal seminar should include, but is not limited to, specialized training in the following areas:

- (a) An overview of current developments in death penalty law;
- (b) Completion, correction, and supplementation of the record on appeal;
- (c) Reviewing the record for unique death penalty issues;

- (d) Motion practice for death penalty appeals;
- (e) Preservation and presentation of constitutional issues;
- (f) Preparing and presenting oral argument;

(g) Unique aspects of death penalty practice in the courts of appeals, the Supreme Court of Ohio, and the United States Supreme Court;

(h) The relationship of counsel with the appellant and the appellant's family during the course of the appeals.

(i) Procedure and practice in collateral litigation, extraordinary remedies, state post-conviction litigation, and federal habeas corpus litigation.

(C) The sponsor of a death penalty seminar shall apply for approval from the Committee at least sixty days before the date of the proposed seminar. An application for approval shall include the curriculum for the seminar and include biographical information of each member of the seminar faculty.

(D) The Committee shall obtain a list of attendees from the Supreme Court Commission on Continuing Legal Education that shall be used to verify attendance at and grant Sup. R. 20 credit for each Committee-approved seminar. Credit for purposes of this rule shall be granted to instructors using the same ratio provided in Rule X of the Supreme Court Rules for the Government of the Bar of Ohio.

(E) The Committee may accredit programs other than those approved pursuant to divisions (A) and (B) of this section. To receive accreditation, the program shall include instructions in all areas set forth in divisions (A) and (B) of this section. Application for accreditation of an in-state program may be made by the program sponsor or a program attendee and shall be made prior to the program. Application for accreditation of an out-of-state program may be submitted by the program sponsor or a program attendee and may be made prior to or after completion of the program. The request for credit from a program sponsor shall include the program curriculum and individual faculty biographical information. The request for credit from a program attendee shall include all of the following:

- (1) Program curriculum;
- (2) Individual faculty biographical information;

(3) A written breakdown of sessions attended and credit hours received if the seminar held concurrent sessions;

- (4) Proof of attendance.

VII. Standards for retention of Sup. R. 20 certification.

(A)(1) To retain certification, an attorney who has previously been certified by the Committee shall complete at least twelve hours of Committee-approved specialized training every two years. To maintain certification as lead counsel or co-counsel, at least six of the twelve hours shall be devoted to instruction in the trial of capital cases. To maintain certification as appellate counsel, at least six of the twelve hours shall be devoted to instruction in the appeal of capital cases.

(2) On the first day of July of each year, the Committee shall review the list of certified counsel and revoke the certification of any attorney who has not complied with the specialized training requirements of this rule. An attorney whose certification has been revoked shall not be eligible to accept future appointment as counsel for an indigent defendant charged with or convicted of an offense for which the death penalty can be or has been imposed.

(B) The Committee may accredit an out-of-state program that provides specialized instruction devoted to the investigation, preparation, and presentation of a death penalty trial or specialized instruction devoted to the appeal of a case in which the defendant received the death penalty, or both. Requests for credit for an out-of-state program may be submitted by the seminar sponsor or a seminar attendee. The request for credit from a program sponsor shall include the program curriculum and individual faculty biographical information. The request for credit from a program attendee shall include all of the following:

(1) Program curriculum;

(2) Individual faculty biographical information;

(3) A written breakdown of sessions attended and credit hours received if the seminar held concurrent sessions;

(4) Proof of attendance.

(C) An attorney who has previously been certified but whose certification has been revoked for failure to comply with the specialized training requirements of this rule must, in order to regain certification, submit a new application that demonstrates that the attorney has completed twelve hours of Committee approved specialized training in the two year period prior to making application for recertification.

VIII. Reserved.

IX. Effective date.

(A) The effective date of this rule shall be October 1, 1987.

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(B) The amendments to Section II(A)(5)(b), Section III(B)(2), and to the Subcommittee Comments following Section II of this Rule adopted by the Supreme Court of Ohio on June 28, 1989, shall be effective on July 1, 1989.

(C) The amendments to Sections I(A)(2), I(A)(3), I(B), and II, and the addition of Sections I(C) and IV, adopted by the Supreme Court of Ohio on December 11, 1990, shall be effective on January 1, 1991.

(D) The amendments to this rule adopted by the Supreme Court of Ohio on April 19, 1995, shall take effect on July 1, 1995.

(E) The amendment to Sup. R. 20 adopted by the Supreme Court on December 4, 2002, shall take effect on January 6, 2003.

(F) The amendment to Sup. R. 20 adopted by the Supreme Court on February 1, 2005, shall take effect on March 7, 2005.

Commentary (July 1, 1997)

This rule is identical to former C.P. Sup. R. 65.