



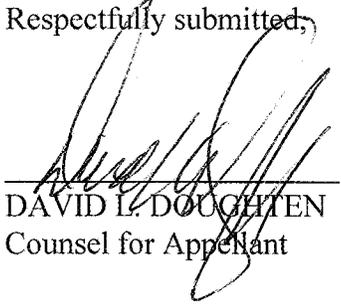
IN THE OHIO SUPREME COURT

No. 10-0944

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	
	:	
-vs-	:	
	:	
JEREMIAH JACKSON,	:	MOTION TO RECONSIDER AND TO
	:	STAY THE ISSUANCE OF MANDATE
Defendant-Appellant	:	
	:	
	:	DEATH PENALTY APPEAL

Now comes the appellant, Jeremiah Jackson, by and through his attorney, David L. Doughten and John P. Parker, pursuant to Supreme Court Rule of Practice XI.2 and 4, and moves this Honorable Court to reconsider the above-captioned case and to stay the issuance of the mandate. Specifically the appellant asks the Court to rehear Proposition of Law I and its determination that a new sentencing hearing is not mandated.

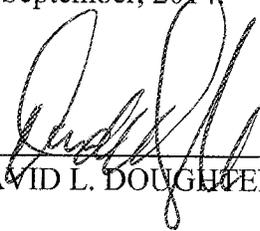
Respectfully submitted,

  
\_\_\_\_\_  
DAVID L. DOUGHTEN  
Counsel for Appellant

  
\_\_\_\_\_  
JOHN P. PARKER  
Counsel for Appellant

**CERTIFICATE OF SERVICE**

A copy of the foregoing Motion to Reconsider and to Stay the Mandate was served upon Timothy J. McGinty, Esq., Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on this 10<sup>th</sup> day of September, 2014.

  
\_\_\_\_\_  
DAVID L. DOUGHTEN  
Counsel for Appellant

## ARGUMENT

### **Proposition of Law I:**

**Judicial bias is present when the trial court *sua sponte* orders and conducts a reverse-Atkins v. Virginia (2002), 536 U.S. 304, hearing for a capital defendant where the court is aware that the defense has not conducted a complete mental retardation investigation.**

In this case, the trial judge, *sua sponte*, ordered the defense to file a request for an Atkins v. Virginia (2002), 536 U.S. 304 hearing. In his Briefings, Jackson argued that the Court revealed biased against Jackson and in favor of the State when it conducted, *sua sponte*, an “anti-Atkins” hearing. The judge, not trusting defense counsel was representing Jackson properly, actually called an expert witness over defense objection and required sworn testimony, complete with cross-examination by the prosecutor, about confidential information on the progress of the investigation on that issue. This not only interfered with the already fragile attorney-client relationship, but also violated work-product protections of the defense.

As noted in the dissent, “Given that the independent expert was Jackson's primary witness in mitigation, defense counsel could reasonably have determined that requiring that same witness to testify about Jackson's intellectual abilities in a pretrial *Atkins* hearing that was bound to fail would have the effect of blunting the expert testimony's impact and therefore might well cost Jackson his life.” The trial judge hear did not allow the defense to carry out the presentation of evidence as the believed would best serve Jackson. The State sought and obtained a death sentence from this same judge. The prejudice is self-evident.

#### **1. Dangerous Precedent Set**

This Court, in this case, State v. Jackson, 2014-Ohio-370, found that the trial judge's

invasion into the trial preparation of the defense to be an acceptable practice for trial judges to engage in. This is a dangerous precedent. One can only imagine if the judge had ordered the prosecutor or a practicing civil attorney in a large civil suit to place their experts on the witness stand before trial to ensure that party was doing its required duty on behalf of their client.

Specifically this Court justified its decision by holding as follows:

[\*P100] Based upon Jackson's IQ scores and the possible impact of the Flynn effect, the trial court was justified in inquiring into whether an evaluation of Jackson's mental abilities was appropriate. In that regard, the trial court did not demonstrate judicial bias or unduly interfere with defense counsel's function by eliciting that testimony.

Thus, after Jackson, if the judge learns of or obtains records of low IQ scores, that judge may hold an evidentiary hearing to determine why the defense chose not to go forward with an Atkins claim. Consistently, if the prosecution learns of such information, the state may move the court for a hearing for the same purposes. Such a hearing is tantamount to obtaining discovery investigation, under oath, that is not authorized by the rules of discovery or case law.

The decision of whether to go forward with a mental retardation claim is solely that of the defense. Unlike a competency issue, the statutory and case law does not provide the trial judge with an independent right or duty to inquire into the intellectual capacity of a defendant, particularly pre-trial before the expert has completed the inquiry. It is difficult to come to any conclusion other than that the judge did not think counsel was doing an adequate job. This constitutes a prejudgment of what the defense ought to be presenting on behalf of Jackson. Had the court had confidence in counsels' performance in their duty to Jackson, the issue never would have been addressed.

The dissent in Jackson clearly understood that it was improper for the trial judge to act to avoid or protect an issue for appeal. The dissent understood that by her actions, the trial judge violated her duty to be a neutral arbitrator. ¶¶ 313, 314. The requirement of neutrality safeguards against the taking away of life, liberty or property on the basis of erroneous or distorted conception of the facts or law. A trial judge's conduct must also "satisfy the appearance of justice." Offut v. United States (1954), 348 U.S. 11, 14.

This Court did recognize that "trial courts cannot interfere with counsel's trial tactics or representation of their client." ¶ 88, citing State v. Hill, 75 Ohio St.3d 195, 212, 1996 Ohio 222. Nevertheless, this Court then found that the judge's action's here did not interfere with the defense preparation of Jackson's defense.

First, this Court found that the action of the trial court would not interfere with the attorney-client relationship. ¶89. This is inaccurate. The representation of a capital client is very difficult. As this Court has seen, the capital defendant more often than not, as here, suffers from severe mental health or personality disorders that make it difficult to establish and maintain such a relationship with assigned counsel. There is often great paranoia on behalf the client that his attorney, being paid by the state, is not working on his behalf. Further, attorney-client discussions are confidential. The subject matter and details of attorney-client discussions about strategy and very personal facts regarding the client's family and background should not be revealed until or unless it is an agreed upon strategy for saving the clients life. It is the client that controls this issue, not the attorney, or in this matter, the court.

Here, by forcing a defense expert to testify before trial, and before any investigation into

adaptive skills has been completed, Dr. Fabian was required to report to a fact-finding judge about his conversations with the defendant and the attorney. Jackson, hearing his confidential expert reveal information to the same judge that would be determining his guilt and sentence, may have distrusted his counsel even more, thus further damaging an already fragile relationship. The trial court's interference would be a chilling factor undercutting Jackson's, or future defendants, willingness to work with counsel. Further, if counsel had originally instructed his client that all communications were privileged (which counsel likely advised Jackson), that fact that the judge was able to interfere would cut directly against counsel's promise, thereby damaging the limited trust further.

## **2. Work Product Protections Violated Here**

The Court also failed to properly consider the trial judge's violation of the "work product" privilege. Under Criminal Rule 16(J), a defense attorney's work product is not subject to disclosure. The work product rule applies to the agents of the attorney as well.

Work product doctrine emanates from Hickman v. Taylor (1947), 329 U.S. 495, 511 where the U.S. Supreme Court recognized that "proper preparation of a client's case demands that [the attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. \*\*\* Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal

profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.”

As one court has stated, work product privilege establishes “a zone of privacy in which lawyers can analyze and prepare their client’s case free from scrutiny or interference by an adversary.” Hobley v. Burge, 433 F.3d 946, 949 (7<sup>th</sup> Cir. 2006).

The trial judge invaded the “zone of privacy” and forced disclosure of the work-product of Jackson’s lawyers and that of their agent Dr. Fabian before the prosecutor. The prosecutor did not request an invasion of the zone of privacy. The trial judge did the bidding for the prosecutor. Such conduct by the trial judge is a clear indication of bias against the defense.

The Court’s conclusion that the trial judge was trying to assist Jackson misses the point. The trial judge was supposed to be neutral and detached. The trial judge is not there to assist the defendant. It is the lawyer’s job to assist the defendant. The trial judge is to decide disputed legal matters. It is one thing to ask the defense if it had looked into an Atkins defense. It is quite another to call a defense expert witness and inquire into previously thought to be privileged information.

It must also be emphasized at this point that it is important to accurately describe Dr. Aronoff’s function in this case. One can come away from the court’s opinion believing Dr. Aronoff had an opinion concerning whether Jackson was intellectually disabled or not.(¶¶ 70-73; 82) However, Dr. Aronoff testified that he ONLY conducted a sanity and competency evaluation. He was not charged with investigating whether Jackson was intellectually disabled or not and “*he had no opinion*” on the topic. In fact, he did not conduct any adaptive behavior

assessments. (T. 205).

Moreover, the defense objected to Dr. Fabian's testimony (T. 145; 231-249). Nonetheless, the trial judge invaded the zone of privacy guaranteed by the work-product privilege and compelled the testimony of Dr. Fabian. [The Court incorrectly found that Dr. Fabian was "interviewed" by the trial judge. ¶ 74.] Dr. Fabian was sworn in as a witness. (T. 232) The State was given the first opportunity to ask him questions. (T. 232) The trial judge did not have an "open mind" (¶ 80) but was determined to invade the work product of defense counsel in order to "build a record" concerning an issue that was not brought before the court by either party but rather *sua sponte* raised by the trial judge.

As noted by the dissenting opinion, a biased judge is structural error that requires no showing of prejudice. ¶ 315 Opinion. Arizona v. Fulminante, 499 U.S. 279,309 (1991).

The biased judge then had the responsibility, after the jury was waived, of determining the facts and the weight to be given the mitigating evidence that was presented. In the end, the judge became the jury and had to decide whether Jackson received the death penalty. Under the peculiar circumstances of this case, structural error via a biased judge denied Jackson his rights under the federal Constitution and he was denied a fair trial in both the fact and penalty phases of the trial as well as at the ultimate sentencing hearing. A new trial must be ordered.

### **3. Neutral Judge Inquiry**

Within the issue raised in Jackson's merit brief, Jackson argued that if the trial court had a genuine concern about defense counsel's performance, then she should have requested another judge conduct an *ex parte* inquiry on the record. See State v. Gillard, 40 Ohio St.3d 226

(1988)(where a judge hears information under Crim. R. 16 that a defendant may have attempted to harm a witness, there is an unnecessary risk that the judge will harbor a bias against the defendant and another judge, not the trial judge, must conduct such a hearing) The basis for this argument was that in a jury waiver case, the trial judge was now a finder of facts and not just an arbiter of the law.

In no other case would a judge be privy to testimony of a material issue before the trial. In no other circumstance could a judge demand to hear testimony of a material witness relative to the ultimate outcome before the start of trial. Here, the judge was hearing evidence that, if not indicative of Atkins, certainly established the mitigator of low intelligence. This is strong evidence in mitigation. Hearing it up front, and in a context different that it should have to received, the court prejudged the finding. The trial court provided this factor very little weight in its sentencing opinion, although it is unquestionably a strong mitigator.

In denying this aspect of the claim, this Court failed to address the prejudging of evidence as was argued in the brief. Instead this Court found:

[\*P85] Finally, Jackson invokes *State v. Gillard*, 40 Ohio St.3d 226, 533 N.E.2d 272, 535 N.E.2d 315 (1988), overruled in part on other grounds, *State v. McGuire*, 80 Ohio St.3d 390, 402-403, 1997 Ohio 335, 686 N.E.2d 1112 (1997), and argues that the trial court should have appointed another judge to conduct the *Atkins* hearing so that the sitting judge would not have been influenced by the adduced evidence. *Gillard* holds, "When the state seeks to obtain relief from discovery or to perpetuate testimony under Crim.R. 16(B)(1)(e) [now, Crim.R. 16(D)(1)], the judge who disposes of such a motion may not be the same judge who will conduct the trial." *Id.* at paragraph one of the syllabus. *Gillard* adopted this rule because "when a judge hears information [while conducting a pretrial hearing] that a defendant has attempted to harm, coerce, or intimidate an opposing witness, there is an unnecessary risk that the judge will harbor a bias against that defendant." *Id.* at 229.

[\*P86] *Gillard*, however, is inapposite. Testimony about mental retardation is not similar to testimony that the defendant may have intimidated witnesses, nor did Jackson argue convincingly otherwise. Thus, the trial court did not need to appoint another judge to conduct an *Atkins* hearing.

Respectfully, Gillard is not inapposite. It is extremely relevant to issues such as this in a capital proceeding. The point of Gillard was, or should have been, that if a trial judge may be influenced in its decision making by hearing and making factual determinations and rulings based upon evidence outside the confines of the actual trial, another judge should hear the matter. Judges are human. It is difficult to “unhear” evidence. Here, taking the step of having the administrative judge or another member of the court make the inquiry would have protected Jackson from the risk of having the trier of fact pre-judge evidence.

This Court noted that there is no particular weight that a sentencing tribunal is required to provide to a mitigating factor. ¶250. This is an accurate statement of the law. However, the real issue that needs to be addressed is the effect that an improper procedure may have upon the weight assigned to the factor. This includes judicial interference and pre-exposure to yet to be fully developed mitigation evidence.

To that end, the Supreme Court of the United States has long emphasized the importance of maintaining the appearance of impartiality. In Cooke v. United States, 267 U.S. 517 (1925) , the Court found that in a contempt matter, where the attorney personally attacked the judge, that:

. . . where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place.

Cooke, 267 U.S. at 539.

It is understood that this was not a contempt case. But the rationale is solid. To avoid even the appearance of impartiality, another judge should have been called upon to make the inquiry, if the inquiry is deemed necessary. “A fair trial in a fair tribunal is a basic requirement of due process.” In re Murchison, 349 U.S. 133, 136 (1955). This requires courts to be concerned about not just actual bias or prejudice, but also the appearance of impropriety when it may reasonably cause impartiality to be questioned. *See* Liteky v. United States, 510 U.S. 540, 548 (1994).

In United States v. Whitman, 209 F.3d 619 (6<sup>th</sup> Cir. 2000) the defendant alleged that the trial judge exhibited impermissible bias against her and her counsel and sentenced her to a higher sentence than was appropriate. Although there was a basis in the record to support the court’s sentence, the court had also referred to matters not part of the record and not relevant to the sentence. It was not clear how much the judge relied upon the irrelevant factors in determining the sentence. Therefore, the circuit reversed the sentence and remanded to the district court for a new sentencing hearing.

Importantly, in Whitman, it was noted that the district judge chastised defense counsel for his improper representation at the sentencing hearing. The district judge believed it was his duty to improve the practice of law in the circuit. The Sixth Circuit found it was not the duty of the trial court to improve the duty of the practice of law. The circuit held:

We must emphasize that there is no evidence that the district judge was actually swayed by bias in this matter, nor do we suggest that he allowed secondary considerations as to his mission to influence his judgment. However, the district judge's lengthy harangue in this case had the unfortunate effect of creating the impression that the impartial administration of the law was not his primary concern. We therefore believe it advisable to assign Whitman's resentencing on

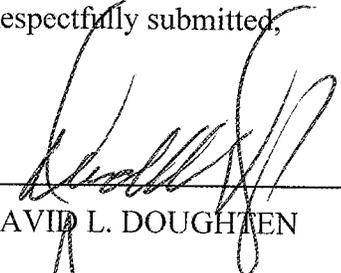
remand to a different judge.

Whitman at 625-626.

The court did not require proof that the judge was biased. Because the underlying facts established the appearance of impropriety and may have influenced the court's sentence, the sentence was reversed and a new judge was mandated. *See Bercheny v. Johnson*, 633 F.2d 473, 476-77 (6th Cir. 1980) (listing, as one of the principal factors to be considered in determining whether a case should be remanded to a different judge, whether reassignment is advisable to preserve the appearance of justice).

Here, in a death penalty case, the facts established the appearance of bias and impartiality. Had the panel in its sentencing opinion given significant weight to the mental health, abuse and low intelligence mitigation, one would know that the judge here was not influenced by her considering and judging this evidence pretrial. But that is not the case here. The prejudice is presumed. A new sentencing hearing must be ordered.

Respectfully submitted,



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DAVID L. DOUGHTEN



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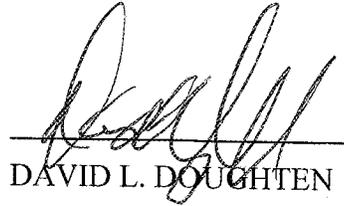
JOHN P. PARKER

Counsel for Appellant

**CONCLUSION**

Pursuant to the above argument, the defendant-appellant Jeremiah Jackson respectfully requests that this Honorable Court rehear the above issue and ultimately remand this matter for a new sentencing hearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Doughten", is written over a horizontal line.

DAVID L. DOUGHTEN  
Counsel for Appellant