

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO, :  
Appellee, :  
vs. : Case No. 2010-1406  
MARK PICKENS, :  
Appellant. : **Capital Case**

---

**On Appeal from the  
Hamilton County Court of Common Pleas  
Case No. B-0905088**

---

**Appellant Mark Pickens' Application For Reopening  
Pursuant To S.Ct. Prac. R. 11.6**

---

JOSEPH T. DETERS (0012084)  
Hamilton County Prosecutor

PHILLIP CUMMINGS (0041497)  
Assistant Prosecuting Attorney

Hamilton County Prosecutor's Office  
230 East Ninth Street  
Suite 4000  
Cincinnati, Ohio 45202  
(513) 946-3012

COUNSEL FOR APPELLEE

THE OFFICE OF THE  
OHIO PUBLIC DEFENDER

TYSON FLEMING (0073135)  
Assistant State Public Defender  
[Tyson.Fleming@opd.ohio.gov](mailto:Tyson.Fleming@opd.ohio.gov)  
Counsel of Record

DANIEL P. JONES (0041224)  
Assistant State Public Defender  
[Dan.Jones@opd.ohio.gov](mailto:Dan.Jones@opd.ohio.gov)

Office of the Ohio Public Defender  
250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 644-0708 (fax)

COUNSEL FOR APPELLANT  
MARK PICKENS

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO, :  
Appellee, :  
vs. : Case No. 2010-1406  
MARK PICKENS, :  
Appellant. : **Capital Case**

---

**Appellant Pickens' Application for Reopening Pursuant to S.Ct. Prac. R. 11.6**

---

Appellant Mark Pickens requests that this Court grant his Application for Reopening based upon the ineffective assistance of counsel during Pickens' direct appeal. S.Ct. Prac. R. 11.6 and *State v. Murnahan*, 63 Ohio St. 3d 60 (1992).

**I. Introduction**

The Due Process Clause guarantees effective assistance of counsel on a criminal appeal as of right. *Evitts v. Lucey*, 469 U.S. 387 (1985). Appellate counsel must act as an advocate and support the cause of the client to the best of their ability. *See, e.g., Anders v. California*, 386 U.S. 738 (1967); *Penson v. Ohio*, 488 U.S. 75 (1988). Appellate counsel failed to raise meritorious claims in Pickens' direct appeal proceedings, and thus were ineffective in representing this capital defendant. *See* Exhibit A; Proposition of Law No. 1, *infra*.

Because appellate counsel were prejudicially ineffective in this case, this Court must reopen Pickens's appeal. *State v. Murnahan*, 63 Ohio St. 3d 60 (1992); S.Ct. Prac. R. 11.6. Pickens was denied the effective assistance of appellate counsel as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I sections 2, 9, 10 and 16 of the Ohio Constitution.

**II. Appellate counsel were prejudicially ineffective for failing to raise meritorious issues.<sup>1</sup>**

The failure to present meritorious issues for review constitutes ineffective assistance of appellate counsel. *See, e.g., Franklin v. Anderson*, 434 F.3d 412 (6<sup>th</sup> Cir. 2007); *State v. Ketterer*, 111 Ohio St.3d 70 (2006). Counsel must provide “reasonably effective assistance” and counsel’s decisions must be based on “reasonable professional judgment.” *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Any aggrieved defendant must also show resultant prejudice, *e.g.*, “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

Appellate counsel showed fundamental misunderstanding of Ohio Supreme Court capital briefing practice and procedures throughout Pickens’ direct appeal. This Court can take judicial notice that Pickens’ appellate counsel improperly filed Pickens’ Petition for Post-conviction Relief and its exhibits as an attachment to the merit appeal filed with this Court on October 25, 2011. *See* docket. The result of this filing was to place non-record matters into this Court’s record, thus contaminating the capital “record.” This procedural error of judgment directly evidences the failure of both appellate counsel to understand capital litigation procedures that are routinely followed in Ohio. Perhaps this fundamental error is not surprising, given that Pickens’ appellate counsel Burke believes that he lacked both the experience and the training necessary to serve effectively as Pickens’ appellate counsel on the direct appeal to this Court. *See* Ex. A, attached.

Appellate counsel to Pickens were ineffective during the briefing phase and through oral argument. Thus, the leading case authority on the issue, *Giles v. California*, 554 U.S. 353

---

<sup>1</sup> If this Honorable Court finds that this Proposition of Law was not adequately raised or supported by facts and/or law, given page limitations, current appellate counsel respectfully request further briefing be allowed.

(2008), remained entirely hidden from this Court until shortly before oral argument, when it was cited as supplemental authority. It wasn't until preparations for oral argument, after discussing Pickens' case with postconviction counsel that Pickens direct appeal counsel learned of the leading authority on forfeiture by wrongdoing.

Due to appellate counsel's lack of experience and knowledge, they failed to effectively raise proposition of law three. Appellate counsel also completely failed to raise several other claims that would have shown Pickens' rights were violated during his capital trial. These claims include the following:

**PROPOSITION OF LAW NO. I: A capital defendant is denied the right to a fair trial when the prosecutor commits prejudicial misconduct during a trial. U.S. Const. Amends. V, XIV; Ohio Const. Art. I, § 16.**

Appellate counsel ineffectively raised the issue of prosecutorial misconduct in the third proposition of law of their merit brief. See Merit Brief pp. 18-25. Pickens' trial transcript reveals numerous instances of prosecutorial misconduct that were either never raised or were ineffectively raised by appellate counsel.

Appellate counsel raised the issue that "suggestions were made (by the prosecutor) that the jury were allowed to consider as aggravating factors the nature and circumstances of the three homicides." *Id.* at 23. Appellate counsel were correct in stating that this was improper under *State v. Wogenstahl*, 75 Ohio St. 3d 344, 356 (1996). However, appellate counsel failed to cite to any incidents where the prosecutor actually made these improper suggestions.

A clear incident where the prosecutor made such an improper suggestion was when the prosecutor introduced evidence that "Shay (the 3 year old victim) was huddled on the floor with her hands over her ears" during the murders. Tr. 3195. This information was clearly referencing the nature and circumstance of the murders, and the State introduced it as an aggravating

circumstance. This was a prejudicial because the State was attempting to appeal to the jurors emotions rather than their intellect in deciding the proper sentence for Pickens based on their emotions rather than their intellect.

Appellant counsel completely failed to raise the following incidents of prosecutorial misconduct in their merit brief. The prosecutor, at the penalty stage of a capital trial, may only introduce evidence that is “relevant to the aggravating circumstances the offender was found guilty of committing.” *State v. Williams*, 73 Ohio St. 3d 153, 159 (1995). Here, the prosecutor introduced evidence that Antony Jones (one of the victims) just took his first two steps, had his first two teeth. Tr. 3195. This information had nothing to do with aggravating circumstances in this case, and was another attempt by the prosecutor to introduce information that would appeal to the jury’s emotions when deciding what penalty to impose on Pickens.

Finally, in closing argument, the prosecution asserted as a proven “fact” to the jury that Pickens had told people, the day before the murders occurred, that he wanted to kill Noelle Washington. Yet no witness for the State had testified in support of this extremely damaging, entirely unwarranted conclusory remark to the jury made shortly before it rendered its capital verdict. *See* Tr. at p. 2970.

This combination of instances of prosecutorial misconduct that were inadequately briefed or completely missed were prejudicial to Pickens. This Court should re-open Pickens’ appeal to address these violations of Pickens’ right to a fair trial.

**PROPOSITION OF LAW NO. II: A capital defendant’s right to a fair sentencing hearing is violated when the trial court improperly instructed the jury on the weighing procedure to determine the appropriate sentence. U.S. Const. Amends. VI, XIV; Ohio Const. Art. I, § 16.**

The trial court improperly instructed Pickens’ jury on the weighing process during the sentencing phase of his capital trial. The trial court instructed Pickens jury that if they found

beyond a reasonable doubt that the aggravating circumstances outweighed “**any** mitigating factors presented by the defendant,” they shall recommend a sentence of death. Tr. 3161. (emphasis added). This was a clear misstatement of the law by the trial court.

O.R.C. § 2929.04(B) states that a jury shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

- (1) Whether the victim of the offense induced or facilitated it;
- (2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
- (3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender’s conduct or to conform the offender’s conduct to the requirements of the law;
- (4) The youth of the offender;
- (5) The offender’s lack of a significant history of prior criminal convictions and delinquency adjudications;
- (6) If the offender was a participant in the offense but not the principal offender, the degree of the offender’s participation in the offense and the degree of the offender’s participation in the acts that led to the death of the victim;
- (7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

This provision of the Ohio Revised Code stresses that a capital jury must balance the aggravating circumstances against all of a defendant’s mitigating factors that are presented.

The trial court’s erroneous instruction mandated that Pickens’ jury weigh the aggravating circumstances in the case against any one of Pickens’ individual migrating factors. This drastically tipped the scales in favor of the aggravating circumstances and increased the chance that Pickens would receive a death sentence. Pickens is entitled to a new sentencing hearing where his jury will be instructed on the proper weighing procedure in a capital case.

**PROPOSITION OF LAW NO. III: A capital defendant’s right to a fair trial is violated when the trial court allows the State to present prejudicial evidence that was not properly authenticated. U.S. Const. Amends. V, XIX; Ohio Const. Art. I, § 16.**

The trial court allowed State's witness Tamika Washington to testify concerning phone calls she allegedly had with Pickens without proper voice authentication. Tr. 2877. "The standard for the admissibility of an opinion as to the identity of a speaker is merely that the identifier has heard the voice of the alleged speaker at any time." *United States v. Cooke*, 795 F.2d 527, 530 (6th Cir. 1988). See also, Ohio R. Evid. 901(B)(5) "Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker."

Under these precedents, the only way Washington could authenticate that the phone calls were from Pickens was if she had heard his voice either in person, on the phone, or on a recording prior to these phone calls. But, Washington testified that she had never met or talked to Pickens prior to the alleged phone calls in this case. Tr. 2887.

Still, the trial court allowed Washington to testify about the content of the phone calls. Tr. 2428. The trial court's improper decision allowed the State to introduce evidence that was prejudicial to Pickens. Washington testified that the caller allegedly stated that if he went to jail for the rape charges he was "going to fuck [Noelle Washington] up." Tr. 2878. Not only was this improper hearsay evidence, but it also would have improperly swayed the jury to find Pickens guilty, violating his right to a fair trial. Pickens is entitled to a new trial where improper and prejudicial evidence is not admitted and used against him.

**PROPOSITION OF LAW NO. IV: A capital defendant's right to a fair trial is violated when the trial court allows the State to present prejudicial photographic evidence during the defendant's capital trial. U.S. Const. Amends. V, XIX; Ohio Const. Art. I, § 16.**

The trial court violated Pickens' right to a fair trial when it allowed the State, over trial counsels' objection, to introduce gruesome photographs of the victims during Pickens' capital

trial. These photographs were introduced through the testimony of the Hamilton County Coroner Dr. William Ralston. However, prior to the introduction of the gruesome photographs, Dr. Ralston testified concerning the cause of death, the entrance and exit wounds, the path of the bullets, and his internal and external examination of each victim in this case. Tr. 2514-2535.

The State then had Dr. Ralston testify to the same information, but this time using the photographs to demonstrate his prior testimony. Tr. 2536-2552. Pursuant to Ohio R. Evid. 403 (B), relevant evidence may be excluded if its probative value is substantially outweighed by the needless presentation of cumulative evidence. Since Dr. Ralston previously testified to the same information the State introduced through the photographs, the probative value of the photographs was minimal, and the information was needlessly cumulative. Therefore, the trial court should have barred the State from introducing the gruesome photographs.

The minimal value of the photographs was also “substantially outweighed by the unfair prejudice” to Pickens, and therefore not admissible pursuant to Ohio R. Evid. 403(A). The unwarranted gratuitous demonstration of photographs showing the dead victims, especially two children, only played on the jury’s emotions. The photographs would have also improperly made the jury respond to their instinct to punish Pickens. This was clearly demonstrated when the State told the jury in closing that “if any of you are considering a life sentence, take the photographs out and look at them.” Tr. 3239.

The trial court erred in allowing the State to introduce prejudicial photographic evidence. This affected the jury in their decision as to Pickens’ guilt as well as in their decision on his appropriate sentence. Pickens is entitled to a new trial where prejudicial evidence is not introduced in order to convict him and sentence him to death.

**PROPOSITION OF LAW NO. V: A capital defendant is denied the right to the effective assistance of trial counsel when trial counsel prejudicially fails to adequately question a State's witness. U.S. Const. Amends. VI, XIV; Ohio Const. Art. I, § 16.**

Pickens' trial counsel were ineffective for failing to adequately question State's witness Kathleen Ferrara. Ferrara was the nurse who examined Noelle Washington after she alleged that she was raped by Pickens. Tr. 1687. Ferrara testified that Washington had several fresh injuries on her body. TR. 1701-06. Ferrara testified that she took pictures of these injuries, but could not demonstrate any of the injuries to the jury because the pictures were too blurry. Tr. 1700. This was despite the fact that Ferrara alleged that she had conducted close to five hundred of these exams in the past. Tr. 1687. Ferrara also testified that the injury to Washington's genitalia was "consistent with someone that is not having consensual sex." Tr. 1713.

Trial counsel were ineffective for failing to contest Ferrara's testimony with the fact that Washington previously told Detective Broxterman that she suffered no injuries from Pickens. Tr. 1511. This would have demonstrated to the jury that any injuries found by Ferrara on Washington could not have been caused by Pickens.

Pickens' was prejudiced by trial counsel's failure when this Court relied on Ferrara's testimony in finding that Pickens had raped Washington. *See, State v. Pickens*, 141 Ohio St. 3d 462, 465 (2014) ("Ferrara testified that these were fresh injuries ... [and] these injuries were 'consistent with someone that is not having consensual sex.'"). Pickens is entitled to a new trial where his trial counsel effectively questions the State's witnesses and points out inconsistencies in their testimony.

### **III. Conclusion**

To summarize, Pickens' appellate counsel were woefully inadequate in their representation of him in the direct capital appeal before this Court, and their failure to provide

adequate representation violated Pickens' right to a fair trial and sentencing proceeding as provided by the Due Process Clause of the United States Constitution. Appellant Pickens requests that this Application for Reopening be granted. S.Ct. Prac. R. 11.06 and *State v. Murnahan*, 63 Ohio St. 3d 60 (1992).

Respectfully submitted,

The Office of the Ohio Public Defender

By: s/ Tyson Fleming

Tyson Fleming (0073135)  
Assistant State Public Defender  
[Tyson.Fleming@opd.ohio.gov](mailto:Tyson.Fleming@opd.ohio.gov)  
Counsel of Record

By: s/ Daniel Jones

Daniel P. Jones (0041224)  
Assistant State Public Defender  
[Dan.Jones@opd.ohio.gov](mailto:Dan.Jones@opd.ohio.gov)

Office of the Ohio Public Defender  
250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 644-0708 (fax)

#### **Certificate of Service**

I hereby certify that on September 1, 2015, I served a copy of the foregoing APPELLANT MARK PICKENS' APPLICATION FOR REOPENING PURSUANT TO S.CT. PRAC. R. 11.6, by regular United States mail, addressed to Phillip Cummings, Assistant Prosecuting Attorney, Hamilton County Prosecutor's Office, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202.

s/ Tyson Fleming  
TYSON FLEMING (0073135)  
Counsel of Record

COUNSEL OF APPELLANT