

IN THE SUPREME COURT OF OHIO

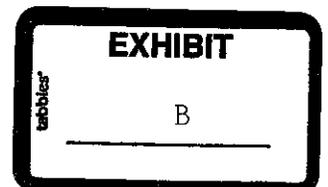
STATE OF OHIO, :
Appellee, :
vs. : Case No. 2010-1406
MARK PICKENS, :
Appellant. : **Capital Case**

AFFIDAVIT OF TYSON FLEMING

STATE OF OHIO,)
)
COUNTY OF FRANKLIN) ss:

I, Tyson Fleming, after being duly sworn, hereby state as follows:

1. I am an attorney licensed to practice law in the state of Ohio since 2000, and I have been an assistant state public defender since 2007. My sole area of practice is capital litigation.
2. I was assigned to work on Mark Pickens' motion to reopen.
3. I have reviewed the record in *State v. Pickens*, Hamilton County Common Pleas Case B-0905088. I have also reviewed the direct appeal briefs presented to this Court in this case.
4. I am Rule 20 certified to represent indigent clients in death penalty appeals.
5. Because of the focus of my practice of law, my Rule 20 certification, and my attendance at death-penalty seminars, I am aware of the standards of practice involved in the appeal of a case in which the death sentence was imposed.
6. The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on an appeal as of right. *Evitts v. Lucey*, 469 U.S. 587 (1985).
7. The initial responsibility of appellate counsel, once the transcript is filed, is to ensure that the entire record has been filed with the appellate court. Appellate counsel has a fundamental duty in every criminal case, and especially in a capital case, to ensure that the entire record is before the reviewing courts on appeal. R.C. 2929.05; *State ex rel. Spirko v. Judges of the Court of Appeals*, Third Appellate District, 27 Ohio St. 3d 13, 501 N.E. 2d 625 (1986); see



also *Griffin v. Illinois*, 351 U.S. 12 (1956) (recognizing the necessity of the transcript in order to vindicate a defendant's constitutional right to appellate review).

8. After ensuring that the record is complete, counsel must then review the record for purposes of issue identification. This review of the record not only includes the transcript, but also the trial motions, exhibits, and the jury questionnaires.
9. For counsel to properly identify issues, they must have a good knowledge of criminal law in general. Most trial issues in capital cases will be decided by criminal law that is applicable to non-capital cases. As a result, appellate counsel must be informed about the recent developments in criminal law when identifying potential issues to raise on appeal. Counsel must remain knowledgeable about recent developments in the law after the merit brief is filed.
10. Since the reintroduction of capital punishment in response to the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the area of capital litigation has become a recognized specialty in the practice of criminal law. Many substantive and procedural areas unique to capital litigation have been carved out by the United States Supreme Court. As a result, anyone who litigates in the area of capital punishment must be familiar with Supreme Court precedent and developments in the law to raise and preserve all relevant issues for appellate review.
11. Appellate representation of a death-sentenced defendant requires recognizing that the case will most likely proceed to the federal courts at least twice: first, on petition for Writ of Certiorari in the United States Supreme Court, and again on petition for Writ of Habeas Corpus filed in a federal district court. Appellate counsel must preserve all issues throughout the state-court proceedings on the assumption that relief is likely to be sought in federal court. The issues that must be preserved are not only issues unique to capital litigation, but also case-and fact-related issues unique to the case that impinge on federal constitutional rights.
12. It is a basic principle of appellate practice that to preserve an issue for federal review, the issue must be exhausted in the state courts. This is all the more important in light of the United State Supreme Court's holding in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). To exhaust an issue, the issue must be presented to the state courts in such a manner that a reasonable jurist would have been alerted to the existence of a violation of the United States Constitution. The better practice to exhaust an issue is to cite directly to the relevant provisions of the United States Constitution in each proposition of law to avoid any exhaustion problems in federal court.

13. It is important that appellate counsel realize that the reversal rate in the state of Ohio is approximately eleven percent on direct appeal and two percent in post-conviction. It is my understanding that forty to sixty percent (depending on which of several studies is relied upon) of all habeas corpus petitions are granted. Thus, appellate counsel must realize that in Ohio, a capital case is very likely to reach federal court and, therefore, counsel should prepare the appeal accordingly.
14. Based on the foregoing standards, I have identified the following issues that should have been evaluated by appellate counsel and fully presented to this Court:

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

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

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.

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.

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

15. These issues are meritorious and warrant relief. Thus, appellate counsel's failure to present these errors amounts to ineffective assistance of appellate counsel in this case.
16. Appellate counsel failed to raise these issues in appellant Mark Pickens' direct appeal to this Court. Based on my evaluation of the record and understanding of the law, I believe the issues raised in this Application For Reopening are meritorious. Also, had appellate counsel raised these issues, each error would have been properly preserved for federal-court review.

17. Therefore, Appellant Mark Pickens was detrimentally affected by the deficient performance of his former appellate counsel.

Further affiant sayeth naught.

s/ Tyson Fleming
Tyson Fleming
Counsel for Mark Pickens

Sworn to and subscribed before me on this 1st day of September, 2015.

Robert W. Love
Notary Public



ROBERT W. LOVE
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES 11-23-19