In the Supreme Court of Ohio

State of Ohio,	:	
Appellee,	:	Case No. 2010-1406
-vs-	:	Appeal taken from Hamilton County Court of Common Pleas
Mark Pickens,	:	Case No. B-0905088
Appellant.	:	**Capital Case**

APPELLANT MARK PICKENS' MOTION FOR RECONSIDERATION

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Appellant Mark Pickens requests that this Court reconsider the merits ruling of December 16, 2014, affirming both his convictions and death sentence. This request is made under Rule 18.02 of the Supreme Court Rules of Practice. The reasons for this Motion are more fully set forth in the attached memorandum in support.

Respectfully submitted,

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Memorandum In Support

This Court should reconsider its rulings as to Pickens' Fourth and Sixth Propositions of Law, regarding the presence of an admittedly racially biased juror who was allowed to determine Pickens' guilt and sentence, and regarding the trial court's admission of hearsay evidence against Pickens under the common law doctrine known as "forfeiture by wrongdoing." This Court ruled that neither Proposition of Law rose to a level that was so prejudicial as to have affected Pickens' substantial rights to a fair trial. *State v. Pickens*, 2014-Ohio-5445, ¶¶ 179, 192, 214, and 219 (December 16, 2014).

However, each Proposition of Law raised constitutional issues that substantially impacted Pickens' rights to a fair trial by an impartial jury, as outlined below. The case should be reversed and remanded for a new trial and sentencing hearing.

Proposition of Law No. 4

> Pickens' convictions and sentences are void and/or voidable since he was denied the effective assistance of counsel and due process guaranteed under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Section 10, Article I of the Ohio Constitution, §§1, 2, 5, 9, 10, 16 and 20 by defense counsel's errors during pre-trial, voir dire, trial phase, and sentencing phase of his capital murder trial.

The Sixth Amendment to the United States Constitution guarantees individuals who are criminally accused the right to counsel. *See Gideon v. Wainwright,* 372 U.S. 335 (1963). The right to counsel is the right to effective assistance of counsel. Counsel must provide objectively reasonable representation under the prevailing professional standards. *Strickland v. Washington,* 466 U.S. 668, 694 (1984); *State v. Lytle*, 48 Ohio St.2d 623 (1976); *McMann v. Richardson,* 397 U.S. 759, 771 (1970). To prevail on a claim of ineffective assistance of counsel, Pickens must show that his trial counsel acted unreasonably and, but for counsel's errors, there is a reasonable probability the result would have been different. *Strickland*, 466 U.S. at 687.

Pickens was denied the effective assistance of counsel and due process during the voir dire phase of his capital trial when trial counsel failed to effectively question Juror Michael F. Carroll about his admission regarding young, male African-Americans on the juror questionnaire.[1] In response to the question on the juror questionnaire, "Is there any racial or ethnic group that you do not feel comfortable being around?", Juror Carroll wrote that "yes" he is "[uncomfortable being around] "Young black men with their pants down to their knees." *Id.* at p. 12. Defense counsel failed to ask Juror Carroll any questions about his about his patent biases regarding African-Americans. Pickens is a young black man.

American jurisprudence demands that jurors be questioned about potential racial bias, yet defense counsel failed to exercise that necessity on behalf of Pickens, when they failed to question Juror Carroll about his readily evident racial bias. *Aldridge v. United States*, 283 U.S. 308, 313 (1931). A failure to challenge for cause can constitute ineffective assistance of counsel, and Pickens' counsel's failure to challenge for cause, or even effectively question, Juror Carroll violated his Sixth and Fourteenth Amendment rights. *See Virgil v. Dretke*, 446 F.3d 598, 601 (5th Cir. 2006). Before he walked into the courtroom Juror Carroll had a preconceived notion and stereotype of all young black men as people not to be trusted.

This Court found trial counsel's representation to be "deficient by failing to ask further questions about Carroll's racially based comments." *Pickens*, 2014-Ohio-5445 at ¶ 212. However, this Court failed to find that Pickens was prejudiced because he did not show that Carroll "was actually biased against Pickens." *Id.* at ¶ 213.

This Court cited to *State v. Mundt*, 115 Ohio St. 3d 22, 31 (2007), for the holding that Pickens was required to show that the juror was actually biased against him. Similarly, in

[1] On May 27, 2011, this Court ordered that the record be supplemented with the juror questionnaires.

Hughes v. United States, 258 F.3d 453 (6th Cir. 2001), the case involved a juror who admitted that she did not think she could be fair in the case. *Id.* at 455. The Court noted that "To maintain a claim that a biased juror prejudiced him, however, [Petitioner] must show that the juror was actually biased against him." *Id.* at 458 (citations omitted). *However*, in granting relief, the Court held that what distinguished Hughes' case from cases holding that actual, personal bias must be shown was "the conspicuous *lack of response*, by both counsel and the trial judge, to [the juror's] clear declaration that she did not think she could be a fair juror." *Id.* (emphasis added).

The juror in *Hughes* was not asked follow-up questions to her declaration. The Court noted that, "both the district court and counsel failed to conduct the most rudimentary inquiry of the potential juror to inquire further into her statement that she could not be fair." *Id.* at 458-59. That juror "never said that she would be able to render a fair and impartial verdict [based on her personal relationships with a police officer and police detectives]." *Id.* at 460. Similarly, Juror Carroll in Pickens' case also never said that he could render a fair and impartial verdict to a young black man, whom he specifically took the time to negatively write about in his questionnaire.

Additionally, and unreasonably, given the pronouncements Carroll was making during voir dire, Pickens' counsel failed to exhaust their peremptory challenges and remove the juror. Out of six peremptory challenges available, counsel only used four. Tr. 992. "Decisions on the exercise of peremptory challenges are a part of trial strategy." *State v. Trimble*, 122 Ohio St. 3d 297, 311 (2009), citing *State v. Goodwin*, 84 Ohio St. 3d 331, 341 (1999). However, simply labeling a decision as strategic does not insulate it from actually being ineffectiveness of counsel. "The question of whether to seat a biased juror is not a discretionary or strategic decision." *Hughes*, 258 F.3d at 463. "Failure to remove biased jurors taints the entire trial, and therefore…

[the resulting] conviction must be overturned." *Id.* (quoting *Wolfe v. Brigano*, 232 F.3d 499, 503 (6th Cir. 2000)). The decision by Pickens' counsel *not* to excuse juror Carroll when they had two peremptory challenges remaining plainly was deficient lawyering, and Pickens was prejudiced as a direct consequence of his counsel's failures. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Jackson*, 64 Ohio St. 2d 107, 111 (1980).

Whether or not Pickens stated that he agreed with his counsels' decision not to use further peremptory challenges is irrelevant. The same situation occurred in *Hughes* where the defendant stated that he was satisfied with his counsel's representation. *Hughes*, 258 F.3d at 462. The Sixth Circuit was "hesitant to further limit the prospects of an ineffective assistance claim by placing great weight on a defendant's admission of satisfaction with counsel's performance at trial." *Id.* The rote affirmation of Pickens, a young man not educated in law, to his trial counsel's leading question about his satisfaction with the jury should not be given any weight.

Pickens' established that he was denied the effective assistance of counsel by failing to question juror Carroll about his racially-based statement and seating him on the jury. Pickens showed that his counsels' lack of questioning and failure to excuse juror Carroll was objectively unreasonable. The "presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice" *Id.* at 463 (quoting *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000)). Despite not being required to show prejudice, Pickens has done so by showing that a juror with an admitted bias towards individuals like Pickens was seated on his jury.

Pickens' rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution, §§ 1, 2, 5, 9,

10, 16 and 20 were violated when a racially biased juror determined his fate. As such, Pickens must be granted a new trial.

Proposition of Law No. 6

> The mere fact that a defendant kills a person who had earlier sworn out a complaint against the defendant for an offense is insufficient to sustain a finding of guilt for the O.R.C. § 2929.04(A)(8) specification. The evidence must prove beyond a reasonable doubt that the defendant killed the victim because she had sworn out the earlier complaint.

As noted by this Court at *Pickens*, 2014-Ohio-5445 at ¶ 156, and as stipulated to by Pickens' counsel at oral argument, the specification at issue under this Proposition of Law actually was that of R.C. 2929.04(A)(3), charging that Pickens "committed the offense for the purpose of escaping detection or apprehension or trial or punishment for another crime committed by him, to wit: RAPE (2907.02 ORC)." Thus, the question is whether Pickens' Confrontation Clause rights were violated when the trial court allowed hearsay statements by Noelle Washington to be admitted at trial to prove that Pickens committed the murders for the purpose of evading the charge that he raped her. The trial court allowed the hearsay to be heard by the jury deciding Pickens' capital trial, expressly justifying its ruling under the common law doctrine known as "forfeiture by wrongdoing."

Filed as supplemental authority and argued by Pickens' counsel at oral argument was the leading constitutional authority on the viability of the "forfeiture by wrongdoing" doctrine as applied to hearsay and Confrontation Clause concerns, *Giles v. California*, 554 U.S. 353 (2008). This Court briefly mentioned *Giles* at *Pickens*, 2014-Ohio-5445 at ¶ 159; however, the United States Supreme Court's analysis of "forfeiture by wrongdoing" in *Giles* was not properly applied, and the hearsay statements at issue were improperly admitted in Pickens' capital trial.

The essential constitutional problem raised by *Giles* and never analyzed here is one of circularity – in order for the alleged statements of Noelle Washington to be admitted at trial for purposes of establishing the alleged rape charges, the trial court had to *first* assume that Pickens murdered Noelle Washington to eliminate her as a witness to the rape charge. Thus, the trial court had to *first* determine that Pickens was guilty of the murders, well before a verdict ever issued on the murders, so that the jury could hear out of court statements by the decedent about the rape charges and then determine, based upon Noelle Washington's hearsay statements, whether Pickens committed her murder so he could avoid facing the rape charge. While the "forfeiture by wrongdoing " doctrine once was embraced by courts as a mechanism for dealing with this problem as to an unavailable witness, the doctrine was rejected in *Giles* in 2008, and so the doctrine should not have been employed to Pickens' constitutional prejudice here.

Justice Scalia's opinion for the Court in *Giles* vacated and remanded a first-degree murder conviction because the defendant had not forfeited his Sixth Amendment rights of confrontation under the theory of "forfeiture by wrongdoing." Justice Scalia determined that this common law doctrine did not exist at the time of the founding of our republic, and therefore could not trump the Sixth Amendment right of confrontation. *Giles* at p. 366. The same ruling applied to state hearsay exceptions, which are based upon Confrontation Clause principles. *Id.* at 365. The only exception to the right of confrontation that would allow forfeiture that Justice Scalia could identify would be in the context of a "deliberate witness tampering" scenario. *Id.* at 366. And no "deliberate witness tampering" scenario was proven beyond a reasonable doubt as to Pickens.

Justice Scalia flatly rejected the notion, advocated by the dissent in *Giles*, that the "forfeiture by wrongdoing" doctrine was permissible as based upon principles of fairness. "It is

not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) the underlying values. The Sixth Amendment seeks fairness indeed – but seeks it through very specific means (one of which is confrontation) that were the trial rights of Englishmen." *Id.* at 375-76.

The concurrence by Justices Souter and Ginsburg agreed with Justice Scalia's historical analysis of the common law doctrine vis a vis the Sixth Amendment's Confrontation Clause, but raised a more practical and fundamental reason for not applying this doctrine in a murder case – it requires courts to make circular arguments, on differing standards of proof, as to a defendant's guilt, as follows:

> If the victim's prior statement were admissible solely because the defendant kept the witness out of court by committing homicide, admissibility of the victim's statement to prove guilt would turn on finding the defendant guilty of the homicidal act causing the absence; *evidence that the defendant killed would come in because the defendant probably killed.* The only thing saving admissibility and liability determinations from question begging would be (in a jury case) the distinct functions of judge and jury: judges would find by a preponderance of evidence that the defendant killed (and so would admit the testimonial statement), while the jury could so find only on proof beyond a reasonable doubt. *Equity demands something more that this near circularity before the right to confrontation is forfeited,* and more is supplied by showing intent to prevent the witness from testifying.

Id. at 379, citing *Davis v. Washington*, 547 U.S. 813, 833 (2006) (emphasis added). *See also Pickens*, 2014-Ohio-5445 at ¶169 (Pickens' trial court judge expressly applied the preponderance of the evidence standard in making his ruling that allowed the hearsay statements of Noelle Washington that ultimately offered against Pickens before the jury).

When *Giles* is properly applied to Pickens' merit appeal on the hearsay and Confrontation Clause concerns raised in Proposition of Law No. 6, the circularity of logic problem Justices Souter and Ginsburg had warned about is fully exposed -- the trial judge

allowed Noelle Washington's statements about the alleged rape by Pickens to be heard by the jury, on the judge's apparent theory that Pickens "probably killed" her so as to avoid a later rape proceeding against him. But Pickens' intent in this regard never became an issue for the jury to determine on the standard of "beyond a reasonable doubt," because the trial judge had already made the prior preponderance of the evidence determination that Pickens "probably killed" Washington with this intent, so her hearsay statements would be admitted. Thus, Pickens' Sixth Amendment right of confrontation was eviscerated based upon the invalid common law doctrine of "forfeiture by wrongdoing," despite the United States Supreme Court's ruling in *Giles* in 2008, well before the crimes at issue here had been committed, that set forth the constitutional protections that should have been, but were not, available to Pickens during his capital trial. Pickens must be granted a new trial.

Conclusion

Based on the foregoing, Appellant moves this Court to reconsider the merits ruling of December 16, 2014, which affirmed Pickens' convictions and death sentence. Pickens is entitled to a new trial under clearly established constitutional law.

Respectfully submitted,

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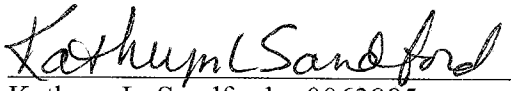
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing APPELLANT PICKENS' MOTION FOR RECONSIDERATION was sent by first-class U.S. mail to Philip R. Cummings, Assistant Prosecuting Attorney, Hamilton County Prosecutor's Office, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, on this 26th day of December, 2014.



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