No. 18-6316

In the Supreme Court of the United States

WILLIE G. WILKS, JR.,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Trial Phase

In May 2013, William (Mister) Wilkins, Jr. resided at 725 Park Avenue on Youngstown's north side with his girlfriend, Renae Jenkins, their four children, and Angela McClendon (Jenkins' mother). (Trial Tr., at 3359, 3361, 3500.) At this time, Mister worked at DSV Construction, along with his friend Alexander Morales, Jr. (Trial Tr., at 3412, 3499.)

On May 21, 2013, Mister and Morales arrived at the work site, but were told there was no work for them that day. (Trial Tr., at 3413.) That afternoon, Mister and Morales went (Morales drove) to Mary Aragon's house; Aragon is Mister's mother. Aragon was needed to secure a $1,000.00 loan. (Trial Tr., at 3502-3503.) Morales drove them to Ace Cash Advance, but Ace would not process the loan without her bank card. (Trial Tr., at 3415-3416.) Defendant-Appellant Willie G. Wilks, Jr., Aragon's boyfriend, had Aragon's bank card. (Trial Tr., at 3500-3503.) The three returned to Aragon's house at 3521 Elm Street. (Trial Tr., at 3500.)

Mister and Morales proceeded down the street to Defendant's house to get Aragon's bank card. (Trial Tr., at 3417, 3503.) Aragon knocked on the door and asked for her card; Defendant stated he would bring it out. (Trial Tr., at 3504.) Mister then knocked on the door after waiting a few minutes; Defendant's mother answered the door, and Mister asked for the card. (Trial

Tr., at 3504.) Defendant again stated that he would get the card. (Trial Tr., at 3504.)

Defendant eventually came out and asked Mister to walk with him around the corner towards Upland. (Trial Tr., at 3505-3506.) Morales could not hear the conversation from where he and Aragon were standing (Aragon and Morales were standing on the sidewalk on Upland). (Trial Tr., at 3418, 3421.) Morales stated that the two began walking towards Aragon's house; Defendant had his arm around Mister while the two were talking. (Trial Tr., at 3418-3419.)

Mister added that Defendant "was fidgeting with his pants like if he may have had a weapon or something like that." (Trial Tr., at 3507.) Mister got "angry with him[,]" and the two "exchanged a couple words," which Mister then tried "to like fight him or, you know, antagonize him, or whatever." (Trial Tr., at 3507.) Mister was upset because Defendant refused to give him Aragon's bank card. (Trial Tr., at 3507-3508.)

Mister then took off his shirt in anticipation of fighting Defendant. (Trial Tr., at 3508.) Both Mister and Morales stated that Defendant went into his house and returned with a "black small handgun[,]" and chased Mister down Upland towards Ohio with the gun in his hand. (Trial Tr., at 3418-3419, 3508-3509.) Mister turned around and taunted Defendant, calling him names; Mister assumed that Defendant would not shoot him with several people outside watching. (Trial Tr., at 3509.)

Morales described Defendant's gun as a 9mm; possibly a Ruger or Beretta, with black on the bottom and a silver or gray hammer. (Trial Tr., at 3421.) When Defendant put his gun back into his pocket, he stated to Morales, "You better get your boy. You better get your boy." (Trial Tr., at 3422.) Mister, Morales, and Aragon eventually returned to Aragon's house. (Trial Tr., at 3509-3510.) Mister and Morales left to play basketball at the courts in Arlington Heights on Park Avenue. (Trial Tr., at 3423, 3510.) Morales left his vehicle at Aragon's house while they played basketball. (Trial Tr., at 3423.)

After approximately 45 minutes of playing basketball, Mister stopped and called his mother, and asked her why she allowed Defendant to treat him that way, and allowed the situation to escalate. (Trial Tr., at 3424, 3510-3511.) While talking to her, Defendant took the phone off Aragon and asked Mister where he was at. (Trial Tr., at 3424, 3511-3512.) Mister got smart with him, called him a name, and hung up the phone. (Trial Tr., at 3512.) During their conversation, Defendant told Mister that he was going to kill him. (Trial Tr., at 3512.) Morales stated that he could not hear what Mister was saying during the phone call, but Mister was yelling and screaming. (Trial Tr., at 3425-3426.) They played for another 10 minutes, and then returned to Aragon's house to get Morales' car. Mister and Morales then drove to Mister's house on Park Avenue. (Trial Tr., at 3425, 3513.)

Renae Jenkins testified that Mister and Morales arrived there about 4:20 p.m. (Trial Tr., at 3363.) Everyone was outside on the porch—the kids, Ororo Wilkins (Mister's sister), Mister, Morales, Renae Jenkins (Mister's girlfriend), and Shantwone Jenkins (Renae's sister)—and Mister was telling them about the confrontation he had with Defendant earlier that day. (Trial Tr., at 3364, 3428, 3514.) Jenkins then went inside to wash dishes and clean the kitchen. (Trial Tr., at 3365.) Mister also came inside and helped Jenkins in the kitchen. (Trial Tr., at 3366, 3514-3515.) Morales stated that it was just he, Ororo, and the baby on the front porch. (Trial Tr., at 3431.) Ororo handed Morales the baby and Morales handed Ororo a cigarette. (Trial Tr., at 3432.)

About 10-20 minutes after arriving, Mister went upstairs to get a cigarette. (Trial Tr., at 3426, 3515, 3547.) While upstairs in his room, Mister heard "a skidding, like a car skidding." (Trial Tr., at 3518.) Morales then observed Defendant coming towards the front porch from the sidewalk. (Trial Tr., at 3432, 3521.) Morales saw a "dark-color blue/purplish Intrepid, Dodge Intrepid." (Trial Tr., at 3433.) Mister, who was upstairs, stated that he observed a purple Dodge Intrepid in front of the house, with two other occupants inside. (Trial Tr., at 3518-3519.)

Morales stated that Defendant walked up and shot him first: Defendant "walked up, he raised a AK, asked where Mister was. I turned around to go inside with the baby, and that's when he shot me." (Trial Tr., at 3429, 3432, 3521.) When Morales saw Defendant raise the AK-47, he turned

around to run into the house with the baby, but Defendant shot him as soon as he turned around. (Trial Tr., at 3434.) The shot caused Morales to fall and drop the baby. (Trial Tr., at 3435.) Morales got up, but fell again as soon as he entered the house. (Trial Tr., at 3435.) Defendant then shot Ororo as she was trying to retrieve the baby. (Trial Tr., at 3435-3436.) Morales stated that he heard two more gunshots after he was wounded—"The one was when he shot Roro, and then the other shot when he shot up in the window at Mister." (Trial Tr., at 3459.)

Morales described the gun as "an assault rifle. It had a strap on it. It had a wooden handle, and it was -- it was long." (Trial Tr., at 3434-3435.) Likewise, Mister described the gun as "a large gun like some kind of rifle." (Trial Tr., at 3521.) Mister also acknowledged that the rifle was different from the gun Defendant had during the earlier altercation. (Trial Tr., at 3529.) Morales stated that Defendant was wearing black pants, a burgundy shirt, and a black hoodie. (Trial Tr., at 3435.) Similarly, Mister stated that Defendant was wearing all black with a hood. (Trial Tr., at 3521.)

Mister stated that he yelled out the window towards Defendant; Defendant then "made eye contact[]" with Mister and fired a shot towards the upstairs window. (Trial Tr., at 3522, 3558.) Mister ducked down, and then made his way downstairs. (Trial Tr., at 3522.) Mister observed Morales, Jenkins, his children, and Shantwone laying on the kitchen floor. (Trial Tr., at 3523.) Mister went outside to the front porch and found Ororo shot in the

head. (Trial Tr., at 3523-3524.) Mister picked her up and tried to stop the bleeding, and began screaming for help. (Trial Tr., at 3524.) The vehicle had already driven away by the time Mister made his way outside. (Trial Tr., at 3544.)

Both Mister and Morales identified Defendant in court as the person who shot Ororo and Morales that evening. (Trial Tr., at 3439-3440, 3527, 3530.)

At approximately 5:00 p.m., Youngstown Officer Melvin Johnson responded to the shooting. (Trial Tr., at 3320-3321.) Upon arriving, Johnson observed "a male sitting on a porch on the front cradling a female who was bleeding[]" from her head and face. (Trial Tr., at 3322.) Johnson recognized the male as Mister and the female as Ororo. (Trial Tr., at 3322.)

Mister was very distraught, and pleaded with Johnson to take her to the hospital. (Trial Tr., at 3324.) Johnson found Morales injured from a gunshot wound inside in the dining room. (Trial Tr., at 3326.) Johnson asked Morales who shot him, and Morales replied that "all he knew was a guy name Wilks." (Trial Tr., at 3327, 3344.)

Johnson broadcasted over the police radio that "Wilks" was a suspect, and a black or blue Dodge Intrepid or Chrysler were possible vehicles associated with the suspect. (Trial Tr., at 3334-3335.)

Youngstown Officer Jessica Shields was the second car to arrive. (Trial Tr., at 3388-3389.) Shields encountered Mister holding Ororo on the front

porch; his white shorts were "completely saturated in blood and brain matter." (Trial Tr., at 3392.) Ororo's "[b]rains were all over the place." (Trial Tr., at 3392.)

Shields stated that Mister was "completely in shock," and screaming: "Willie did this. Willie did this. I don't know why Willie did this." (Trial Tr., at 3393.) Mister also stated that the "bullet was meant for me, not my sister." (Trial Tr., at 3393-3394.)

Shields observed Morales with a gunshot wound inside. (Trial Tr., at 3394-3395.) Shields asked Morales who did this to you, to which Morales replied, "Willie did this. Willie did this." (Trial Tr., at 3395.) Shields then asked Morales if it was the Willie on the front porch, but Morales stated that it was "Willie that lives on the corner of Elm and Upland." (Trial Tr., at 3395-3396.) Morales was then taken to the hospital by ambulance. (Trial Tr., at 3396.)

Outside, Mister became upset when he learned that Ororo was not going to be taken to the hospital (because she had already died), and tried to flee the scene. (Trial Tr., at 3396.) Shields detained Mister inside her police cruiser. (Trial Tr., at 33963397.)

Later, Mister told Shields what occurred:

> a black Dodge Status pulled up, because he said he was looking out the window when it happened. He heard tires squeal, and he looked out the window. He saw a black Dodge Stratus pull up and slam on the brakes, tires squeal, which is why he looked out. He said that there was a male black driving, a male black in the passenger

> seat, and then Willie was in the back seat. He said Willie jumped out with a big gun. He wasn't sure what it was. He thought it was an AK-47.

(Trial Tr., at 3400.)

Youngstown Officer Mark Crissman, an officer assigned to the department's Crime Scene Unit, arrived at 5:30 p.m. (Trial Tr., at 3586, 3589.) Crissman collected a .30 caliber shell casing (State's Exhibit No. 34) that was found on the front porch. (Trial Tr., at 3605.) Crissman stated that this was the only shell casing found at the scene, and there were no 9mm shell casings found at the scene. (Trial Tr., at 3604, 3623.)

Further, Crissman and Youngstown Detective-Sergeant John Perdue looked through the house, but they were unable to locate any bullet or bullet fragments in relation to the apparent bullet hole in the upper right-hand corner of the house (State's Exhibit No. 8). (Trial Tr., at 3628.) Crissman stated that they did not inspect the hole from the outside, and admitted that while it appeared to be a bullet hole, he "can't say for sure[.]"(Trial Tr., at 3629.) Crissman also conceded that he did not know when that occurred. (Trial Tr., at 3630.)

Youngstown Officer Robert Martini and his partner Officer Pete Bonilla responded to the scene. (Trial Tr., at 3483.) Martini stated that the scene was "chaos" when they arrived, and there was a black female deceased on the front porch. (Trial Tr., at 3484.) Martini and Bonilla were later sent to St. Elizabeth's Hospital to check on Morales. (Trial Tr., at 3487.)

Martini had a brief conversation with Morales directly before going into surgery. (Trial Tr., at 3488.) Martini identified himself to Morales; Morales stated "it was Wilks." (Trial Tr., at 3488.) Martini did not get a first name. (Trial Tr., at 3488.)

Morales further told Martini "that Mr. Wilks and Mr. Wilkinson [sic] were on Otis Street. They were playing basketball or something. They had got in an argument over his mother's missing money, and they had argued there. And then that's when that fight was over, they went back to Park Avenue residence, and that's when Mr. Wilks had come back and started shooting at people." (Trial Tr., at 3488-3489.)

Morales testified that he went in and out of consciousness, and vaguely remembered telling the police who shot him. (Trial Tr., at 3437.) The bullet left a 9-inch by 3-inch hole and fractured Morales' lumbar vertebrae on his spine. (Trial Tr., at 3437-3438.) Morales required eight surgeries, continued physical therapy, and is limited physically from certain activities and movements. (Trial Tr., at 3438.)

Dr. Joseph Ohr, M.D., Mahoning County's Deputy Coroner and Forensic Pathologist preformed Ororo Wilkins' autopsy. (Trial Tr., at 3721-3722, 3730; State's Exhibit No. 50.) Ororo suffered a gunshot wound to her head and hand. (Trial Tr., at 3731, 3733.) Dr. Ohr opined that the same bullet could have traveled through her head and hand. (Trial Tr., at 3741.)

Dr. Ohr explained that Ororo died instantly from the gunshot wound: "the damage that was done to this young woman's head is consistent with a very fast moving bullet, regardless of the caliber." (Trial Tr., at 3746.) "The energy that was delivered to the skull fractured the skull in many, many places; and, really, the tender tissues of the brain were -- pretty much destroyed." (Trial Tr., at 3748.)

Dr. Ohr concluded that the cause of death resulted from the "gunshot wound to the head. The manner of death is that of a homicide." (Trial Tr., at 3753.)

On May 22, 2013, Youngstown Officer Richard Geraci, Youngstown Officer Gregory Mullennex, and Youngstown Lieutenant Gerald Slattery assisted in Defendant's apprehension. (Trial Tr., at 3690, 3706, 3791.)

Slattery and Geraci were assigned to the department's Vice Unit that day, which is responsible for investigating drugs, prostitution, gambling, and other complaints that are sent to the Chief of Police. (Trial Tr., at 3689, 3789.) Whereas Mullennex was assigned to the U.S. Marshal's Violent Crimes Task Force. (Trial Tr., at 3704.)

That morning, Slattery and Geraci were training at the EMA Training Center on Industrial Road. (Trial Tr., at 3790-3791.) Slattery, who was the unit's Commander, broke them from training to locate Defendant after he had been spotted in the area between Market Street and Hillman Avenue on Youngstown's south side. (Trial Tr., at 3690-3691.) Once located, the officers

pursued Defendant's vehicle into Youngstown's east side, and Geraci eventually attempted to effectuate a traffic stop on Defendant's vehicle inside the Rockford Village housing project. (Trial Tr., at 3693-3694.) Defendant fled on foot from his vehicle when he noticed the police cruisers. (Trial Tr., at 3693-3694.) Geraci and several other officers pursued Defendant on foot. (Trial Tr., at 3695.) Geraci stated that Defendant climbed over a fence, which two officers continued pursuing Defendant; Geraci did not pursue over the fence due to heavy vest and assault rifle he was carrying. (Trial Tr., at 3696-3697.) Defendant was apprehended moments later. (Trial Tr., at 3699.)

Youngstown police recovered a 9mm pistol magazine (State's Exhibit No. 36) that Defendant dropped as he ran, a 9mm Luger (State's Exhibit No. 37) from his vehicle, and Mary Aragon's Ohio QuickPay card (State's Exhibit No. 41) that was found on Defendant's person when he was arrested. (Trial Tr., at 3613-3615, 3796.)

Martin Lewis, a forensic scientist assigned to BCI's trace evidence section, examined the gunshot residue test for Defendant (State's Exhibit No. 35). (Trial Tr., at 3665, 3669-3670; State's Exhibit No. 49.) Lewis concluded that Defendant's GSR kit revealed "particles highly indicative of gunshot primer residue were identified on both samples from Willie Wilks." (Trial Tr., at 3675.)

Joshua Barr, a forensic scientist assigned to BCI's firearms section, examined several pieces of ballistics evidence. (Trial Tr., at 3757-3759.) Barr

examined a SCCY 9mm Luger pistol (State's Exhibit No. 37), one fired 7.62 x 39mm caliber cartridge casing (State's Exhibit No. 34), two lead fragments recovered from the crime scene (BCI Item #3), materials submitted from Ororo's autopsy (BCI Item #4), and one bullet fragment recovered from Morales (State's Exhibit No. 40). (Trial Tr., at 3759.)

Barr testified that the 7.62 x 39mm caliber cartridge casing (State's Exhibit No. 34) collected at the crime scene was likely fired from a large rifle:

> They could be semiautomatic or full automatic. Typically in the civilian market it's a semiautomatic rifle. They have recently started making some pistols in this caliber that are based on a AK-47 frame, so it's still a fairly large gun, but it is classified as a pistol. Typically the most common gun that's going to fire this cartridge here is either an SKS or an AK-47 style rifle, which are both Soviet origin rifles.

(Trial Tr., at 3766-3767.) Barr stated that an SKS or AK-47 "would be much larger[]" than the 9mm Luger (State's Exhibit No. 37) that he test fired. (Trial Tr., at 3768.) An SKS or AK-47, however, was not submitted to allow Barr to compare the fired cartridge casing to the weapon. (Trial Tr., at 3769.)

Barr found that the two lead fragments recovered from crime scene (BCI Item #3) "were unsuitable for microscopic comparison because there was no rifling detail present." (Trial Tr., at 3772.) And likewise, the bullet fragment recovered from Morales (BCI Item #5) "was unsuitable for comparison." (Trial Tr., at 3773.)

Youngstown Detective-Sergeant John Perdue was assigned to investigate the shooting at 725 Park Avenue. (Trial Tr., at 3804.) Perdue soon

learned that Defendant-Appellant Willie Wilks was a suspect, and several witnesses were transported to the Youngstown Police station for questioning. (Trial Tr., at 3808-3810.)

Mister was the first to be interviewed. (Trial Tr., at 3810.) Mister stated that Defendant shot at him and Ororo. (Trial Tr., at 3811.) Mister stated that the vehicle was a dark-colored Dodge Intrepid, and there were two other persons in the vehicle besides Defendant. (Trial Tr., at 3811.) LEADS indicated that Defendant owned a purple, 2004 Dodge Stratus, but police were also unable to locate the vehicle during its investigation. (Trial Tr., at 3816, 3897.) Mister identified Troy Cunningham and Scott Anderson as the other two individuals inside the vehicle (not including Defendant-shooter), but Purdue was unable to locate either of them. (Trial Tr., at 3812-3813, 3864.)

Morales was interviewed the next day while he was still in the hospital. (Trial Tr., at 3816.) Morales stated that Defendant shot him, and also mentioned the altercation between Defendant and Mister that occurred earlier that day concerning Mary Aragon's debit/bank card. (Trial Tr., at 3816.)

Purdue testified that the shell casing found at the scene was consistent with the description of the firearm (an AK-47) that Mister stated Defendant used. (Trial Tr., at 3817, 3838-3839.)

During cross examination, Purdue admitted that Shantwone Jenkins stated that a description of the suspect included dreadlocks. (Trial Tr., at 3843, 3920.) Further, Mister never told Perdue during his interview that Defendant shot at him in the upstairs window; stated that he made eye contact and aimed his gun at Mister. (Trial Tr., at 3873-3874.) Purdue also stated that Antwone Jenkins indicated at the scene that he would talk to the detectives but not in front of others. Perdue then told Officer Johnson to bring Antwone down to the station but Johnson never did. (Trial Tr., at 3920.) Perdue later returned to 725 Park Ave. but Antwone could not be located. (Trial Tr., at 3920.)

Verdict

The jury found Defendant guilty of the following offenses: Count One, Aggravated Murder, in violation of R.C. 2903.01(A)(F), the accompanying Death Specification, in violation of R.C. 2929.04(A)(5), and the accompanying Firearm Specification, in violation of R.C. 2941.145(A); Count Two, Murder, in violation of R.C. 2903.02(B)(D), and the accompanying Firearm Specification, in violation of R.C. 2941.145(A); Count Three, Attempted Aggravated Murder, in violation of R.C. 2923.02(A) and R.C. 2903.01(A), a felony of the first degree, and the accompanying Firearm Specification, in violation of R.C. 2941.145(A); Count Four, Attempted Aggravated Murder, in violation of R.C. 2923.02(A) and R.C. 2903.01(A), a felony of the first degree, and the accompanying Firearm Specification, in violation of R.C. 2941.145(A); Count Five, Felonious Assault, in violation of R.C. 2903.11(A)(2)(D), a felony of the second degree, and the accompanying Firearm Specification, in violation of R.C. 2941.145(A); Count Six, Felonious Assault, in violation of R.C. 2903.11(A)(2)(D), a felony of the second degree, and the accompanying Firearm Specification, in violation of R.C. 2941.145(A); and Count Seven, Improperly Discharging a Firearm at or into a Habitation, in violation of R.C. 2923.161(A)(1)(C), a felony of the second degree, and the accompanying Firearm Specification, in violation of R.C. 2941.145(A).

Mitigation Phase

During the mitigation phase, Defendant presented the testimony of Tikisha D'Altorio, Tracey Lynell Wilks, and Patricia Wilks.

Tikisha M. D'Altorio testified that she has a son with Defendant; the child's name is Willie Tracy Wilks, and was 3-years-old at time of her testimony. (Trial Tr., at 4226-4227.) D'Altorio stated that up until Defendant's arrest, Defendant worked and was attentive to their son. (Trial Tr., at 4227. Defendant spent time with his son every day, even though Defendant did not live with D'Altorio. (Trial Tr., at 4228.) Defendant supported his son financially. (Trial Tr., at 4228.)

Tracy Lynell Wilks, Defendant's half-brother, testified that he observed Defendant with his son every day since he had been born. (Trial Tr., at 4233.) Defendant worked at the Vindicator and O'Charley's simultaneously, which Tracey helped Defendant secure. (Trial Tr., at 4233-4234.) Tracey stated that Defendant was attentive to and cares for his mother. (Trial Tr., at 4234.)

Patricia Wilks, Defendant and Tracy's mother, testified that Defendant was 9 months old when she left Alabama. This was the last time that she had any interaction with Defendant's father. (Trial Tr., at 4236.)

Patricia admitted that she had a drinking problem when Defendant was growing up, but had since stopped drinking. (Trial Tr., at 4236.) Patricia also previously suffered from cancer. (Trial Tr., at 4237.)

Patricia resides with Defendant and her 59-year-old brother Fred Perkins. (Trial Tr., at 4237.) Fred is mentally ill and suffers from schizophrenia. (Trial Tr., at 4237-4238.) Patricia stated that Defendant is attentive to her and his son's needs. (Trial Tr., at 4238.)

During cross-examination, Patricia stated that Tracy's father was involved in both Tracy and Defendant's lives until he died in 2005. (Trial Tr., at 4240-4241.) Tracy's father served as a role model for Defendant. (Trial Tr., at 4241.) Patricia stated that she always provided for her children, kept them safe, and provided her children a religious upbringing. (Trial Tr., at 4241-4242.)

Finally, Defendant made an unsworn statement:

> I understand and respect the light in which you all may be viewing me in at this point. So, first and foremost, I would like to appeal to the humanity in each person in this honorable courtroom to briefly view me as a member of the human race. I extend from the bottom of my heart, my heartfelt condolences to the Wilkins family for the loss of a beautiful person. Ororo will be dearly missed and forever deeply loved by every person who had the pleasure of coming in contact with her, including myself.
>
> I want to apologize to the people who were present in this honorable courtroom and who witnessed my very shocked, disruptive and disrespectful reaction to the verdicts as they were read. I especially want to apologize to Honorable Judge D'Apolito, who was reading the verdicts while I was acting up.
>
> Sir, you have treated me with respect, dignity and consistent fairness since I first laid eyes on you. You are truly the personification of the title honorable. I apologize to you, sir, and I meant no disrespect to you, sir.

> Ladies and gentlemen of the jury, your collective verdicts resoundingly expressed your belief that I am guilty of these charges which were brought against myself by the State. However, and respectfully, I know and God Almighty knows that I am, in fact, not guilty of any of these charges. Respectfully having expressed that, all that counts at this point is what you all believe, which is backed up by the full force of the law, and as a result of that, my very life hangs in the balance.
>
> Therefore, I sincerely and humbly ask each of you jurors for your leniency. I ask for leniency with full knowledge that the charges I've been convicted of don't require any leniency, but I don't ask for leniency for myself. I ask for leniency with respect for my three-year-old son who will be victimized forever, and will likely fall victim as I did to the circumstances which this environment has to offer. With his father around, although incarcerated, as he comes of age, his actions and decisions will be afforded the benefit of being guided and aided by his loving father who has skimmed through the rubble of life that he's now beginning to navigate through. My position will serve as an absolute example of where bad decisions and thoughtless living will land him.
>
> I ask for leniency with respect to allowing what's hidden in the darkness to come to the light, because the true perpetrator of these crimes is not among you.
>
> In closing, I thank you all for extending me the brief respect of viewing me as a human being for the purpose of giving a statement. I commit my soul to the mercy of God through each of you 12 jurors in the hopes that you will thoughtfully and reflectively consider extending leniency upon my downtrodden soul with an open mind, even in the midst of what you believe I've done.
>
> May God bless each and every person in this honorable courtroom.

(Trial Tr., at 4245-4248.)

Sentence

Defendant was sentenced as follows: Death for Count One, Aggravated Murder, in violation of R.C. 2903.01(A)(F) and R.C. 2929.04(A)(5), and 3 Years for the accompanying Firearm Specification, in violation of R.C. 2941.145(A); 11 Years for Count Three, Attempted Aggravated Murder (Alexander Morales), in violation of R.C. 2923.02(A) and R.C. 2903.01(A), a felony of the first degree, and 3 Years for the accompanying Firearm Specification, in violation of R.C. 2941.145(A); 11 Years for Count Four, Attempted Aggravated Murder (William "Mister" Wilkins), in violation of R.C. 2923.02(A) and R.C. 2903.01(A), a felony of the first degree, and 3 Years for the accompanying Firearm Specification, in violation of R.C. 2941.145(A).

Direct Appeal

Defendant timely appealed as of right to the Supreme Court of Ohio, and the Court affirmed Defendant's convictions and death sentence. *State v. Wilks*, Slip Opinion No. 2018 Ohio 1562.

REASONS FOR DENYING THE WRIT

III. Defendant Failed to Establish that the Grand Jury Proceedings Violated his Right to Due Process, Because the Record is Devoid of Any Evidence that the State Presented False Testimony Before the Grand Jury, and Defendant Failed to Establish that the State Infringed Upon the Grand Jury's Ability to Freely Exercise its Independent Judgment.

As for Defendant's first question presented, he contends that the State misled the grand jury through the assistant prosecutor's questioning of Youngstown Detective-Sergeant John Perdue. To the contrary, Defendant failed to establish that the State presented false testimony before the Grand Jury, and further failed to establish that the State infringed upon the grand jury's ability to freely exercise its independent judgment. Therefore, Defendant was not denied his constitutional right to due process.

To begin, "traditionally, the grand jury has had 'wide latitude to inquire into violations of criminal law' and that the 'technical procedural and evidentiary rules governing the conduct of criminal trials' do not restrain its operation." *Wilks*, supra at ¶ 37, quoting *United States v. Calandra*, 414 U.S. 338, 343, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). "Additionally, a facially valid indictment is not subject to challenge based on grounds of inadequate or incompetent evidence." *Wilks*, supra at ¶ 37, citing *Calandra*, 414 U.S. at 345. Accordingly, Ohio law holds that "[t]he conduct of a prosecuting attorney cannot be the ground for error unless the conduct deprived the defendant of a fair trial." *State v. Franklin*, 97 Ohio St.3d 1, 7, 2002 Ohio 5304, 776 N.E.2d

26, citing *State v. Maurer*, 15 Ohio St.3d 239, 266, 473 N.E.2d 768 (1984); *State v. Fears*, 86 Ohio St.3d 329, 332, 1999 Ohio 111, 715 N.E.2d 136.

Here, Defendant contends that the State misled the grand jury with false and misleading testimony through the assistant prosecutor's questioning of Youngstown Detective-Sergeant John Perdue.

"Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. * * * The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged." *State v. Baker*, 137 Ohio App.3d 628, 645, 739 N.E.2d 819 (12th Dist. 2000), quoting *State v. Crist*, 12th Dist. No. CA96-08-159, 1997 WL 656307, at *9 (Oct. 20, 1997); *see* Ohio Evid.R. 101(C)(2) (stating that the rules of evidence do not apply to grand jury proceedings).

Constitutionally speaking, "an individual accused of a felony is entitled to an indictment setting forth the 'nature and cause of the accusation.'" *Baker*, 137 Ohio App.3d at 644, quoting *State v. Marshall*, 12th Dist. No. CA90-04-010, 1991 WL 69356, at *2 (Apr. 29, 1991). "An indictment is generally sufficient if it contains, in substance, a statement that the accused has committed some public offense therein specified." *Id.*, quoting *State v. Sellards*, 17 Ohio St.3d 169, 170, 478 N.E.2d 781 (1985).

Specific to Defendant's argument here, this Court previously recognized that a grand jury's indictment is unaffected by the character of the evidence it considers:

> The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence * * * or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination.

Calandra, 414 U.S. at 344-345.

Furthermore, the Tenth Circuit concluded that a defendant's claim of prosecutorial misconduct regarding the grand jury is rendered moot by the petit jury's finding of guilt beyond a reasonable doubt. *See United States v. Hillman*, 642 F.3d 929, 933 (10th Cir., 2011); *see also State v. Smith*, 97 Ohio St.3d 367, 376, 2002 Ohio 6659, 780 N.E.2d 221.

Here, Defendant failed to demonstrate that the State presented perjured testimony, misstated the law, or misled the grand jury through the assistant prosecutor's questioning of Detective-Sergeant John Perdue. In fact, the Supreme Court of Ohio concluded that "[n]othing shows that the prosecutor lied to or misled the grand jury." *Wilks*, supra at ¶ 46. Thus, the State's conduct before the grand jury was proper.

Therefore, Defendant was not denied his constitutional right to a fair trial, because Defendant failed to establish that the State presented false testimony before the grand jury, and failed to establish that the State infringed upon the grand jury's ability to freely exercise its independent judgment. *See Wilks*, supra at ¶¶ 38-46.

In regards to Defendant's argument regarding available exculpatory evidence, the Supreme Court of Ohio relied upon this Court's previous holding that "a prosecutor has no duty to present exculpatory evidence to the grand jury." *See Wilks*, supra at ¶ 31, citing *United States v. Williams*, 504 U.S. 36, 51, 112 S.Ct. 1735 (1992). This Court reasoned that such a "rule would neither preserve nor enhance the traditional functioning of the institution that the Fifth Amendment demands. To the contrary, requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body." *Williams*, 504 U.S. at 51, 112 S.Ct. at 1744. "As a consequence, neither in this country nor in England has the suspect under investigation by the grand jury ever been thought to have a right to testify or to have exculpatory evidence presented." *Id.* at 52, 112 S.Ct. at 1744.

Likewise, Ohio "R.C. 2939.01 *et seq.* imposes no statutory duty upon the prosecutor to present exculpatory evidence to the grand jury." *Mayes v. Columbus*, 105 Ohio App.3d 728, 740, 664 N.E.2d 1340 (10th Dist. 1995), citing *State v. Ball*, 72 Ohio App.3d 549, 551, 595 N.E.2d 502 (11th Dist. 1991), and *United States v. Adamo*, 742 F.2d 927, 937 (6th Cir., 1984) (concluding, "[a] federal prosecutor is not obligated to present exculpatory evidence to the grand jury."); *accord State v. Rittner*, 6th Dist. No. F-05-003, 2005 Ohio 6526, ¶ 69; *accord State v. Robinson*, 8th Dist. No. 85207, 2005 Ohio 5132, ¶ 30.

The Second Circuit has long recognized that such a requirement advocated by Defendant would be burdensome and wasteful:

> [t]o convert a grand jury proceeding from an investigative one into a mini-trial of the merits would be unnecessarily burdensome and wasteful, since, even if an indictment should be filed, the defendant could be found guilty only after a guilty plea or criminal jury trial in which guilt was established beyond a reasonable doubt.

United States v. Ciambrone, 601 F.2d 616, 622 (2nd Cir., 1979). Simply stated, "an indictment is not defective because the defendant did not have an opportunity to present his version of the facts before the grand jury." *Id*. at 623.

Justice Black likewise recognized that there exists no constitutional requirement:

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

(Footnote omitted) *Costello v. United States*, 350 U.S. 359, 363, 76 S.Ct. 406, 408 (1956).

The Supreme Court of New Jersey likewise declined to adopt such a rule: "We thus decline to adopt any rule that would compel prosecutors

generally to provide the grand jury with evidence on behalf of the accused. Such a rule would unduly alter the traditional function of the grand jury by changing the proceedings from an *ex parte* inquest into a mini-trial." *State v. Hogan*, 144 N.J. 216, 235, 676 A.2d 533 (1996). The court reasoned that "[t]he grand jury's role is not to weigh evidence presented by each party, but rather to investigate potential defendants and decide whether a criminal proceeding should be commenced." *Id.*, citing *Calandra*, 414 U.S. at 343-344, 94 S.Ct. at 618.

Here, the State was under no obligation, constitutionally or otherwise, to present any evidence favorable to Defendant before the grand jury. Nevertheless, the additional witness testimony, including Defendant's self-serving statements to the Youngstown detectives, is not "substantial evidence" that would have negated his guilt. *See Ciambrone*, 601 F.2d at 623. In fact, Youngstown Detective John Perdue testified at trial that Shantwone Jenkins described the shooter as having dreadlocks (testimony that Defendant did not have dreadlocks was presented at trial). (Trial Tr., at 3843-3844, 3920.) *See Wilks*, supra at ¶¶ 30, 32 (finding, "[i]n any event, we do not view the allegedly exculpatory evidence as substantial.").

Therefore, the State was under no obligation, constitutional or otherwise, to present evidence favorable to the defense, because neither the Ohio nor the United States Constitution requires the State to present any available exculpatory evidence to the grand jury. *See Wilks*, supra at ¶ 34.

IV. An Isolated Jury Instruction Does Not Amount to Reversible Error if the Instruction Does Not Vitiate All of the Jury's Findings When Viewed in the Context of the Overall Jury Charge.

As for Defendant's second question presented, he contends that structural error resulted from the trial court's isolated misstatement when it instructed the jury in regards to Aggravated Murder in Count One. To the contrary, in reviewing the instruction in the context of the *entire* jury charge, Defendant failed to establish that the trial's outcome would have been different absent the trial court's single, isolated instruction. Therefore, the trial court's instruction did not amount to reversible error, structural or otherwise, because it did not "vitiate[e] *all* the jury's findings." (Emphasis sic.) *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S.Ct. 2078, 2083, 124 L.Ed.2d 182 (1993).

First, the Supreme Court of Ohio properly concluded that plain error did not result from the isolated instruction. *See Wilks*, supra at ¶¶ 122-130.

A "criminal defendant is entitled to have the trial court give complete and accurate jury instructions on all the issues raised by the evidence." *State v. Sneed*, 63 Ohio St.3d 3, 9, 584 N.E.2d 1160 (1990); *see also State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640, paragraph two of the syllabus (1990).

In reviewing for an alleged error in the jury instructions, the instructions must be *viewed in the context of the overall charge*, rather than in light of a single instruction to the jury: "A single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the

overall charge." *State v. Jones*, 91 Ohio St.3d 335, 348-349, 2001 Ohio 57, 744 N.E.2d 1163, quoting *State v. Price*, 60 Ohio St.2d 136, 398 N.E.2d 772, paragraph four of the syllabus (1979); *accord Fears*, 86 Ohio St.3d at 340 (stating "[i]t is fundamental that jury instructions must be considered as a whole."); *accord State v. Dean*, 146 Ohio St.3d 106, 2015 Ohio 4347, 54 N.E.3d 80, ¶ 135.

At trial, trial counsel did not object the trial court's instructions; thus, the Supreme Court of Ohio employed a plain-error analysis. "An erroneous jury instruction does not constitute plain error unless, but for the error, the outcome of the trial clearly would have been otherwise." *State v. Cunningham*, 105 Ohio St.3d 197, 207, 2004 Ohio 7007, 824 N.E.2d 504, citing *State v. Underwood*, 3 Ohio St.3d 12, 444 N.E.2d 1332, syllabus (1983), following *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978).

Here, Defendant argued that the trial court erred when it instructed the jury in regards to Aggravated Murder in Count One:

> Lesser included offense: If you find that the state failed to prove beyond a reasonable doubt ***all*** the essential elements of aggravated murder as defined in Count 1, then your verdict must be not guilty of that offense.

(Emphasis added.) (Trial Tr., at 4066.) The above instruction should have included the word "any" rather than "all." This instruction, however, did not constitute plain error.

It is well-settled law that a trial court's instructions must be *viewed in the context of the overall charge*, rather than in light of a single instruction to the jury: "A single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge." *Jones*, 91 Ohio St.3d at 348-349, quoting *Price*, at paragraph four of the syllabus; *accord Dean*, supra at ¶ 135.

Here, the trial court otherwise properly instructed the jury regarding the State's burden of proof regarding each offense and specification:

> And in that event you will continue your deliberations to decide whether the **state has proved** beyond a reasonable doubt **all** the essential elements of the lesser included offense of murder. (Trial Tr., at 4066.)
>
> * * *
>
> The defendant is presumed innocent until his guilt is established beyond a reasonable doubt. The defendant must be acquitted unless the state produces evidence which convinces you beyond a reasonable doubt of **every** essential element of the offenses charged in the indictment. (Trial Tr., at 4058.)
>
> * * *
>
> If you find that the state proved beyond a reasonable doubt **all** of the essential elements of the Specification 1 to Count 1, your verdict must be guilty. If you find the state failed to prove beyond a reasonable doubt **any** of the essential elements of Specification 1 to Count 1, your verdict must be not guilty. (Trial Tr., at 4064.)
>
> * * *
>
> If you find the state proved beyond a reasonable doubt **all** the essential elements of Specification 2 to Count 1,

> your verdict must be guilty. If you find that the state failed to prove beyond a reasonable doubt **any** of the essential elements of Specification 2 to Count 1, your verdict must be not guilty. (Trial Tr., at 4065-4066.)
>
> * * *
>
> And in that event you will continue your deliberations to decide whether the **state has proved** beyond a reasonable doubt **all** the essential elements of the lesser included offense of murder.
>
> If all of you are unable to agree on a verdict of either guilty or not guilty of the offense of aggravated murder in Count 1, then you will continue your deliberations to decide whether the state has proven beyond a reasonable doubt **all** the essential elements of the lesser included offense of murder. (Trial Tr., at 4066.)
>
> * * *
>
> If you find that the state proved beyond a reasonable doubt **all** the essential elements of the offense of murder of Ororo Wilkins, your verdict must be guilty of murder.
>
> If you find the state failed to prove beyond a reasonable doubt **any** one of the essential elements of the offense of murder, your verdict must be not guilty. (Trial Tr., at 4067.)
>
> * * *
>
> If you find the state proved beyond a reasonable doubt **all** of the essential elements of Specification 2 to Count 2, your verdict must be guilty. If you find the state failed to prove beyond a reasonable doubt **any** of the elements of Specification 2 to Count 1, your verdict must be not guilty. (Trial Tr., at 4068-4069.)

(Emphasis added.) The trial court further *concluded* its jury instructions with a summary regarding the State's burden of proof regarding each offense and specification:

> If you find that the **state proved** beyond a reasonable doubt ***all*** the essential elements of any one or more of the offenses charged in the separate counts or specifications in the indictment, your verdict must be guilty as to such offense or offenses or specifications according to your findings.
>
> If you find that the **state failed to prove** beyond a reasonable doubt any one of the essential elements of ***any*** **one or more** of the offenses charged in this separate count or specification of the indictment, your verdict must be not guilty as to such offense or offenses according to your findings.

(Emphasis added.) (Trial Tr., at 4082.)

Thus, the Supreme Court of Ohio properly concluded that plain error did not result from the isolated instruction, because the trial court otherwise properly instructed the jury on the State's burden of proof that requires it to establish every element beyond a reasonable doubt. *See Wilks*, supra at ¶ 130.

Second, the Supreme Court of Ohio properly concluded that a structural-error analysis did not apply to the review of the trial court's instruction. *See Wilks*, supra at ¶¶ 131-139. Defendant contends that a structural-error analysis should have been employed by the court regarding the trial court's jury instructions.

This Court has previously stated that a structural error "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Structural errors "permeate '[t]he entire

conduct of the trial from beginning to end.'" *Wilks*, supra at ¶ 132, quoting *State v. Perry*, 101 Ohio St. 3d 118, 2004 Ohio 297, 802 N.E.2d 643, ¶ 17, quoting *Fulminante*, 499 U.S. at 309. This Court recognized that an error is only structural when it "*necessarily* render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (Emphasis sic.) *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

The Supreme Court of Ohio recognized that this Court "has found an error to be structural, and thus subject to automatic reversal, only in a very limited class of cases. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (race discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); *Waller*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable-doubt instruction to jury)." *Wilks*, supra at ¶ 133.

The Supreme Court of Ohio compared the structural error found in *Sullivan v. Louisiana*, supra, to the alleged error here:

> The error in *Sullivan* was structural because the trial court in that case had defined "reasonable doubt" to mean

> "grave uncertainty," a definition the Supreme Court already had held to be unconstitutional. *Id.* at 277; *see Cage v. Louisiana*, 498 U.S. 39, 40, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). The court held that although most constitutional errors are amenable to harmless-error analysis, the harmless-error doctrine cannot apply when the burden of proof has been misdefined. *Id.* at 279-281. The court reasoned that a jury cannot render a guilty-beyond-a-reasonable-doubt verdict when "reasonable doubt" itself has been misdefined. *Sullivan* at 280. There was "no jury verdict within the meaning of the Sixth Amendment" that harmless-error analysis could salvage. *Id.*

Wilks, supra at ¶ 135. The improper instruction defining "reasonable doubt" was an error that "vitiate[d] *all* the jury's findings." (Emphasis sic.) *Sullivan*, 508 U.S. at 281, 113 S.Ct. at 2083.

But not all improper jury instructions have required a structural-error analysis. *See Neder*, supra. In *Neder*, this Court reviewed the trial court's instructions under a harmless-error analysis, because the erroneous instruction did not "vitiat[e] *all* the jury's findings." (Emphasis sic.) *Id.* at 11, quoting *Sullivan*, 508 U.S. at 281-282, 113 S.Ct. 2078.

Thus, the Supreme Court of Ohio properly concluded that the structural error found in *Sullivan*, supra, was distinguishable from the alleged error here, because "[t]he instructions here did not misrepresent 'reasonable doubt,' and the failure to present more precise instructions did not vitiate *all* the jury's findings." *Wilks*, supra at ¶ 138.

Third, the Supreme Court of Ohio properly concluded that Defendant did not establish that trial court was constitutionally ineffective. *See Wilks*, supra at ¶¶ 140-141.

Defendant could not establish that trial counsel's failure to object to the trial court's instructions amounted to constitutionally ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), because "the trial court gave other unambiguous instructions that correctly articulated the state's burden of proof as to each of the elements of aggravated murder." *Wilks*, supra at ¶ 141.

Therefore, the trial court's instruction did not amount to reversible error, structural or otherwise, because it did not "vitiate[e] *all* the jury's findings." (Emphasis sic.) *Sullivan*, 508 U.S. at 281, 113 S.Ct. at 2083.

Conclusion

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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