

No. 18-8516

In the Supreme Court of the United States

JOHN DRUMMOND,

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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STATEMENT OF THE CASE

Trial Phase

On April 3, 2003, the Mahoning County Grand Jury indicted Defendant-Appellant John E. Drummond was indicted as follows: Count One, Aggravated Murder, in violation of R.C. 2903.01(A), with two accompanying Capital Specifications, in violation of R.C. 2929.04(A)(5) and R.C. 2929.04(A)(9); Count Two, Aggravated Murder, in violation of R.C. 2903.01(C), with two accompanying Capital Specifications, in violation of R.C. 2929.04(A)(5) and R.C. 2929.04(A)(9); Counts Three and Four, Attempted Murder, in violation of R.C. 2923.02(A) and R.C. 2903.02(A), felonies of the first degree; Counts Five and Six, Felonious Assault, in violation of R.C. 2903.11(A), felonies of the second degree; Count Seven, Improperly Discharging a Firearm at or into a Habitation, in violation of R.C. 2923.161(A)(1), a felony of the second degree; and Count Eight, Having a Weapon While Under Disability, in violation of R.C. 2923.13(A), a felony of the third degree. Each count had an accompanying Firearm Specification, in violation of R.C. 2941.145(A). The case was assigned number 2003 CR 358 in the Mahoning County Common Pleas Court. *See State v. Drummond*, 111 Ohio St.3d 14, 2006 Ohio 5084, 854 N.E.2d 1038.

The Supreme Court of Ohio previously summarized the facts that were presented at Defendant's trial:

The state presented several witnesses who testified at Drummond's trial that Drummond and Brett Schroeder

were members of the Lincoln Knolls Crips gang and considered themselves “original gangsters,” or “OGs.” Schroeder died from gunshot wounds in May 1998 in a death ruled a homicide. The perpetrator was convicted and is serving time in prison.

The Dent family, Jiyen Dent Sr., Latoya Butler, his girlfriend, and their son, Jiyen Dent Jr., had moved into a home at 74 Rutledge Drive in Youngstown around March 20, 1998. Dent did not know Drummond, Gilliam, or Schroeder.

In the early evening of the shooting, a few days after Dent moved in, ten to 20 people gathered for a party outside the home of Gail Miller on Duncan Avenue in Youngstown to drink and listen to music. Sometime that evening, Drummond and Gilliam arrived.

During the party, James “Cricket” Rozenblad overheard Drummond, Gilliam, and Andre Bryant talking about a “guy moving in in [their] neighborhood [who] could have had something to do with the death of Brett Schroeder.” Yaraldean Thomas also saw Drummond and Gilliam whispering to one another and heard Drummond say “It's on” after they finished talking.

Drummond left the party and returned a short time later with an assault rifle. He and Gilliam then got into Gilliam's burgundy Chevrolet Monte Carlo and drove down Duncan Lane toward Rutledge Drive. Approximately five to 15 minutes later, 11 shots were fired from an assault rifle into the Dent home. Within a few seconds, a 9 mm round was fired into the Dent home, and five 9 mm rounds were fired into the home of Diane Patrick, the Dents' next-door neighbor, who lived at 76 Rutledge Drive.

At around 11:25 p.m. that evening, Dent was in the living room watching a movie, Butler was in the kitchen, and Jiyen was in a baby swing in the living room. While watching TV, Dent heard gunshots and saw “bullets start coming through the windows and the walls.” He then picked up the baby and ran down the hallway towards the bathroom. Dent fell in the hallway and noticed that Jiyen

had been shot in the head. After making sure that his girlfriend was safe, Dent called 911.

That same night, Rebecca Perez, who lived nearby on Rutledge Drive, heard two series of shots when taking her trash outside. She saw shots coming from the corner of Duncan Lane and Rutledge Drive and noticed “a shadow up the street.” Shortly thereafter, Perez saw a maroon car pull out of the driveway next to 65 Rutledge Drive, where Drummond lived. The car then drove without any headlights on past the Perez home. Approximately half an hour to 45 minutes later, Perez noticed that the maroon car had returned to the driveway next to Drummond's home. At trial, Perez identified Gilliam's Monte Carlo as the car she had seen that night.

Leonard Schroeder, the brother of Brett Schroeder, who had been killed nearly five years before, lived near Rutledge Drive. On the evening of March 24, Leonard heard a series of gunshots. Shortly afterwards, Drummond and Gilliam arrived at Leonard's home in Gilliam's car. Leonard asked Drummond about the shots, and Drummond said that he “didn't know who it is. It was probably Cricket and Wany.” Gilliam said only that “some fools are shooting over there.”

Arriving police and paramedics found that Jiyen had been killed. Investigators secured the scene and began their investigation. Officer Kerry Wigley walked down Rutledge Drive, looking for shell casings, and noticed two men in the dark, leaning against a car parked in a driveway. Wigley intercepted the two men, asked for their identification, and identified them as Drummond and Gilliam.

During the investigation, Patrolman David Wilson found ten cartridge casings from assault-rifle ammunition lying between two houses that were across the street and several houses away from the Dent home on Rutledge Drive. The police also found six 9 mm shell casings at the corner of Rutledge Drive and Duncan Lane.

Investigators found that someone had fired 11 bullets from an assault rifle into the Dent home. Three bullets

had hit the house near the front door, three others had hit elsewhere on the front of the house, and five bullets had hit the west side of the house where the bedrooms were located. A 9 mm bullet hole was also found on the east side of the Dent home.

Ed Carlini, an Ohio Bureau of Criminal Investigation (“BCI”) agent, examined the trajectory of the bullets entering the Dent home. Carlini determined that the shots had originated from a location on Rutledge Drive where ten shell casings were found. He also determined that the 9 mm shot that hit the Dent home originated from east of the house.

Carlini and Officer Anthony Marzullo, a crime lab technician, examined bullet holes inside the Dent home. There were five bullet holes inside the southwest bedroom and three bullet holes inside the northwest bedroom. One bullet entered the living room, fragmented, and was found in the far living-room wall. A 9 mm slug was found in the kitchen wall. Marzullo recovered other bullet fragments and copper-jacketed slugs inside the house. He also recovered bullet fragments and bits of blue plastic that had been removed from the victim during the autopsy.

Andrew Chappell, a ballistics expert, compared the ten 7.62 x 39 mm assault-rifle cartridge casings and concluded that they could have been fired from the same firearm. He stated that an assault rifle such as an AK-47 semiautomatic rifle would have fired this ammunition. Chappell examined the six 9 mm cartridge casings and concluded that each of the casings had been fired from the same firearm. Chappell also examined the slugs and bullet fragments obtained from the Dent home and identified one 9 mm Luger bullet, a 7.62 mm bullet, a 7.62 mm bullet jacket fragment, a piece of metal, and a couple of lead fragments. He determined that the 7.62 bullet and the 7.62 bullet jacket fragment were fired from the same weapon, but he was unable to make any comparisons with the lead fragment and the blue plastic recovered from the victim at the autopsy.

As the murder investigation progressed, Drummond and Gilliam were identified as suspects. On March 27,

2003, the police searched Drummond's Rutledge Drive residence and arrested him. When he was arrested, Drummond told police "that he had nothing to do with the shooting of the baby. He was on Duncan Lane that night and heard gunshots and he walked to Rutledge to see what had happened." During the search, the police seized a drum containing 75 rounds of 7.62 x 39 mm ammunition, three boxes containing 46 rounds of 7.62 x 39 mm ammunition, a single round of 7.62 x 39 mm ammunition, an empty AK magazine, a Taurus 9 mm handgun with no barrel, a bulletproof vest, and several rounds of 9 mm, .45 caliber, and .357 caliber ammunition.

During the search of Drummond's residence, police also seized an album of gang photographs of the Lincoln Knolls Crips. Drummond appears in many photographs. The album also contained a number of photographs and tributes to Brett Schroeder and other members of the gang who had been killed. One page of the album shows two photographs of Drummond with a cake that says, "RIP Brett." Another photograph shows tattoos of guns, tombstones, and other symbols on Drummond's back. The tombstone tattoo contains Schroeder's name and names of Drummond's other dead friends.

Dr. Dorothy Dean, Deputy Coroner for Franklin County, conducted the autopsy of three-month-old Jiyen. Dean testified that Jiyen died from a gunshot wound to the head. The entry wound was on the back of Jiyen's head, and the exit wound was just below the left eye.

Between March and August 2003, Chauncey Walker and Drummond were incarcerated in the same cellblock at the Mahoning County jail. Drummond talked to Walker about his case almost "[e]very single day." Walker testified, "[A]s soon as he'd come out of his cell, he'd come directly to my cell * * * [and] he'd be talking to me about that case." As to what happened on March 24, Drummond told Walker that he "was sitting in his sister['s] driveway and Wayne pulled up, and * * * he asked Wayne to take him to go get a gun somewhere. * * * So Wayne gave him a ride to go get the gun. * * * [W]hen Wayne backed up in the driveway after he * * * got the gun, the dude, Jiyen, supposed to have stayed * * * a couple houses up from his

sister or right around the corner, * * * [and] he said he got out the car and fired some shots at the house and then he got back in the car and pulled off.” Drummond told Walker that “he intended to hurt whoever the bullet hit,” but “he didn't intend to kill no baby.”

Nathaniel Morris was another inmate in the same cellblock with Drummond and Walker. During May 2003, Morris overheard Drummond tell Walker that “he didn't meant [sic] to kill the baby; he was trying to get at somebody else * * *.” On more than one occasion, Morris overheard Drummond asking Walker, “[Y]ou think I'm going to get convicted on this, you think they have anything on me, stuff like that.”

Drummond called five witnesses. William Harris, an inmate at the Mahoning County jail, was incarcerated in a cell adjacent to Walker's. He said that in March 2003, Walker told Harris that “he knew how [Walker] could get outta of jail. [Walker] would have to go over and talk to the prosecutor and say that John [Drummond] admitted to his part in the case.” Harris also said that Walker's cell was some distance from Drummond's cell and that Drummond and Walker “couldn't talk unless they yelled across the range.” On another occasion, Harris saw Walker enter Drummond's cell after he “told the deputy he was gonna get a magazine, and he come out with [Drummond's] discovery pack [i.e., court papers].”

Elisa Rodriguez, who lived next door to Drummond on Rutledge Drive, testified that on the evening of March 24, she was at home with her eight-year-old son. Rodriguez observed Gilliam's car parked in front of her house. While in her back bedroom, she heard voices, looked into the back yard, and saw Gilliam and a “tall, skinny guy.” She saw them walk towards the front of her home and then heard shooting. Rodriguez and her son went to the living room, looked out the front window, and saw Gilliam standing in her neighbor's front yard shooting a “big gun” at a house across the street. Rodriguez said that after the shooting stopped, Gilliam got into his car alone and fled the scene. Rodriguez then saw Jawany, who was a “tall, skinny black man” from the neighborhood, running down Rutledge Drive shooting a gun. She next said that she

heard Jawany firing his last gunshot in front of the Dent home and saw him flee down an alleyway between two houses. Rodriguez testified that she did not see Drummond in the area when the gunshots were fired.

Rodriguez's son, Jimmy Figuera, testified that on that evening, he heard gunshots while at home with his mother. He looked out the front window and saw Wayne shooting a “big” gun. He then saw “Wayne comin' down the street shootin' from Duncan.” Jimmy did not see Drummond, whom he referred to as “Uncle J,” when the shootings took place.

Drummond, 111 Ohio St.3d at 15-19. Defendant was convicted as charged (Count Eight was later dismissed) and sentenced to death. *See id.* at 19.

Direct Appeal

Defendant filed his direct appeal of right with the Supreme Court of Ohio, and on October 18, 2006, the Court affirmed Defendant's convictions and death sentence. *See id.* at 52. On April 18, 2007, the Court denied Defendant's Application for Reopening. *See State v. Drummond*, 113 Ohio St.3d 1463, 864 N.E.2d 651 (2007).

Postconviction Proceedings

On January 28, 2005, Defendant filed a petition for postconviction relief pursuant to R.C. 2953.21 in the Mahoning County Common Pleas Court. *See State v. Drummond*, 7th Dist. No. 05 MA 197, 2006 Ohio 7078, ¶ 10. On September 29, 2005, the trial court granted the State's motion for summary judgment. *See id.* at ¶ 11.

The Seventh District Court of Appeals affirmed the trial court's denial of Defendant's petition for postconviction relief on December 20, 2006. *See id.*

at ¶ 128. The Supreme Court of Ohio then declined jurisdiction on May 16, 2007. Defendant did not appeal the denial to this Court. This completed Defendant's state appeals.

Federal Habeas Corpus Proceedings

On June 15, 2007, Defendant filed a notice of intent to file a habeas corpus petition, and on May 5, 2007, Defendant filed an Amended Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. 2254 in the United States District Court for the Northern District of Ohio in which he raised thirteen claims for relief. *See Drummond v. Houk*, 761 F.Supp.2d 638, 658 (N.D. Ohio 2007).

On January 26, 2010, the District Court "issued an Order to Show Cause (ECF No. 61) wherein the Court required Respondent to show cause why the Court should not hold an evidentiary hearing on Drummond's claim of ineffective assistance of counsel during the mitigation, or penalty, phase of the trial." *Id.* at 659-660.

In Defendant's first ground for relief, he argued that "his Sixth Amendment right to a public trial was violated when the trial court closed the courtroom for portions of his trial on February 4 and February 5." *Id.* at 665. In short, the District Court found that "the trial court's partial closure of the courtroom on February 4 resulted in structural error and, therefore, Drummond's Sixth Amendment right to a public trial was violated.

Accordingly, Drummond’s first ground for relief is granted in part.” *Id.* at 680.

The District Court then issued a Certificate of Appealability pursuant to 28 U.S.C. 2253(c), 28 U.S.C. 1915(a)(3), and Fed. R.App. P. 22(b) for Defendant’s second ground for relief—Defendant’s limited cross-examination of James Rozenblad. *See id.* at 716-717.

In conclusion, the District Court granted Defendant’s petition for writ of habeas corpus in-part and ordered a new trial after it found “meritorious that portion of Ground One that asserts a denial of Drummond’s Sixth Amendment right to a public trial because of the partial closure of his trial on February 4, 2004[.]” *Id.* at 718.

Following the District Court’s granting of Defendant’s petition for writ of habeas corpus in-part, both parties appealed. *See Drummond v. Houk*, 728 F.3d 520 (6th Cir., 2013). The Sixth Circuit affirmed the District Court’s granting of Defendant’s petition for writ of habeas corpus in-part and order for a new trial. *See id.* at 534.

On April 28, 2014, this Court granted the warden’s petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit, and remanded the case to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *White v. Woodall*, 572 U.S. ___, 134 S.Ct. 1697, 188 L.Ed.2d 698 (2014). *See Robinson v. Drummond*, 134 S.Ct. 1934 (Mem), 188 L.Ed.2d 957, 82 USLW 3262 (2014).

Upon remand, the Sixth Circuit reversed the District Court's granting of Defendant's petition for writ of habeas corpus in-part and order for a new trial after it concluded, in light of *White v. Woodall*, 572 U.S. ___, 134 S.Ct. 1697, 188 L.Ed.2d 698 (2014), that the partial closure of courtroom during the testimony of prosecution witnesses did not violate Defendant's Sixth Amendment right to a public trial. *See Drummond v. Houk*, 797 F.3d 400 (6th Cir., 2015). The Sixth Circuit then denied Defendant's motion for an *en banc* hearing on September 14, 2015.

This Court denied *certiorari* on May 16, 2016. *See Drummond v. Robinson*, ___ S.Ct. ___, 2016 WL 542380 (Mem) (2016).

Delayed Postconviction Petition in State Court

On January 12, 2017, Petitioner filed a Successive Postconviction Petition Pursuant to R.C. 2953.23 in state court.

Petitioner contended that he was entitled to a successive petition pursuant to R.C. 2953.23(A)(1) based upon this Court's decision in *Hurst v. Florida*, 577 U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), in which this Court found that Florida's capital-sentencing scheme violated a defendant's Sixth Amendment right to a jury trial, because Florida law required the judge, rather than the jury, to make the factual determinations necessary to support a death sentence.

On June 20, 2018, the trial court denied Petitioner's successive postconviction petition. No appeal was taken in state court.

Motion for Relief Before the Supreme Court of Ohio

On September 28, 2018, Petitioner filed a Motion for Relief pursuant to Supreme Court of Ohio Rule 4.01.

In his motion for relief, Petitioner requested the Court to re-visit an issue that was previously decided on direct appeal—the admission of ammunition. *See Drummond*, 111 Ohio St.3d at 27-28, 854 N.E.2d at 1058-1059. The Supreme Court of Ohio properly concluded that “[t]he trial court did not abuse its discretion in admitting the ammunition and the 9 mm handgun seized from Drummond’s residence.” *Id.* Petitioner, however, contended that the Court’s recent decision in *State v. Thomas*, 152 Ohio St.3d 15, 2017 Ohio 8011, 92 N.E.3d 821, undermined his direct appeal.

On December 19, 2018, the Supreme Court of Ohio denied Petitioner’s Motion for Relief.

On March 18, 2019, Defendant filed a Petition for a Writ of *Certiorari* and a Motion for Leave to proceed *In Forma Pauperis* in this Honorable Court.

The State of Ohio-Respondent now responds with its Brief in Opposition, and prays this Honorable Court Deny Defendant-Petitioner John Drummond’s Petition for a Writ of *Certiorari*.

REASONS FOR DENYING THE WRIT

I. The Supreme Court of Ohio's Decision in *State v. Thomas*, Rendered After Drummond's Direct Appeal, Does Not Mandate a New Trial.

As for Petitioner's first question presented, he contends that a subsequent case from the Supreme Court of Ohio, rendered after his direct appeal, would have mandated a new trial. To the contrary, the Supreme Court of Ohio's decision in *State v. Thomas*, 152 Ohio St.3d 15, 2017 Ohio 8011, 92 N.E.3d 821, would not have mandated a new trial had *Thomas* been decided before Petitioner's direct appeal.

I. THE SUPREME COURT OF OHIO'S PRIOR DECISION THAT FOUND THE ADMISSION OF AMMUNITION SEIZED FROM DRUMMOND'S RESIDENCE WAS RELEVANT IS UNAFFECTED BY *THOMAS*.

In his Motion for Relief before the Supreme Court of Ohio, Defendant-Petitioner John Drummond contended that his conviction should be vacated because the trial court's admission of evidence concerning the amount and type of ammunition found inside his residence resulted in prejudicial error. To the contrary, the substantial amount and type of ammunition found inside Petitioner's residence was ***relevant*** to establish his opportunity and ability to commit the offenses. *See Drummond*, 111 Ohio St.3d at 28. Therefore, the trial court properly admitted the substantial amount of ammunition found inside Defendant's residence by Youngstown police, because the Supreme

Court of Ohio's conclusion in *Drummond* remains unaffected by its subsequent decision in *Thomas*, supra.

A. **THE ADMISSION OR EXCLUSION OF
RELEVANT EVIDENCE LIES WITHIN
THE DISCRETION OF THE TRIAL COURT.**

It is well-established law that “[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio. Evidence which is not relevant is not admissible.” *City of Columbus v. Taylor*, 39 Ohio St.3d 162, 164, 529 N.E.2d 1382 (1988), quoting Ohio Evid.R. 402; accord Fed.R.Evid. 402.

Accordingly, the admission or exclusion of relevant evidence at trial is within the sound discretion of the court to determine, and the reviewing court will not reverse that decision absent an abuse of discretion. See *State v. Jackson*, 7th Dist. No. 99 BA 9, 2001 Ohio 3222, at *1, citing *State v. Finnerty*, 45 Ohio St.3d 104, 107, 543 N.E.2d 1233 (1989). “[A]buse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary, or unconscionable.” *State v. Adams*, 62 Ohio St.2d 151, 157-158, 404 N.E.2d 144 (1980).

1. **The Admission of Evidence
Concerning the Ammunition
Seized by Youngstown Police was
Relevant to Establish Petitioner's
Opportunity to Commit the Offenses.**

In Petitioner's Motion for Relief, he contended that his conviction should be vacated because the trial court's admission of evidence concerning the amount and type of ammunition found inside his residence resulted in prejudicial error.

To begin, absent certain exceptions, "[a]ll relevant evidence is admissible[.]" Ohio Evid.R. 402; *accord* Fed.R.Evid. 402; *Corley v. United States*, 556 U.S. 303, 321, 129 S.Ct. 1558, 1570, 173 L.Ed.2d 443 (2009). "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ohio Evid.R. 401.

The Supreme Court of Ohio recognized that "relevant evidence is not limited to merely direct evidence proving a claim or defense. Rather, circumstantial evidence bearing upon the probative value of other evidence in the case can also be of consequence to the action." *State v. Moore*, 40 Ohio St.3d 63, 65, 531 N.E.2d 691, 693-694 (1988). "For example, the evidence establishing or impeaching the credibility of witnesses is of consequence to the action because it might determine whether the jury believes a particular witness." *Id.*

“The jury is entitled to all information that might bear on the accuracy and truth of a witness’s testimony.” *State v. Tapscott*, 2012 Ohio 4213, 978 N.E.2d 210, 216 (7th Dist.), citing *United States v. Abel*, 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984). “The credibility of a witness is always a relevant issue.” *Tapscott*, 978 N.E.2d at 216, citing *State v. Curry*, 11th Dist. No. 92 A 1738, 1993 WL 256967 (June 30, 1993), *State v. Lumpkin*, 2nd Dist. No. 90 CA 82, 1991 WL 216919 (Oct. 25, 1991), and *State v. Oddi*, 5th Dist. No. 02CAA01005, 2002 Ohio 5926, 2002 WL 31417665, ¶ 32.

Simply stated, the Supreme Court of Ohio’s decision in *Thomas* is distinguishable from the facts present here, because *Thomas* addressed “other weapons evidence,” which the Court defined as “**irrelevant** evidence of weapons unrelated to the charges.” *Thomas*, 152 Ohio St.3d at 22, 92 N.E.3d at 828-829.

At issue in *Thomas* were five knives that the defendant owned, but were *unrelated* to the offenses for which he was charged. *See id.* The Supreme Court of Ohio concluded that plain error resulted from their admission, because the knives had nothing to do with being able to handle knives, the knives were unrelated to the murder, and the evidence merely painted the defendant as acting in conformity with a bad character (in violation of Evidence Rule 404(B)). *See id.*, 152 Ohio St.3d at 25-26, 92 N.E.3d at 831.

In Petitioner's direct appeal, the Supreme Court of Ohio properly found that the ammunition and 9mm handgun were **relevant** to establish Petitioner's ability and opportunity to commit the offenses:

During a search of Drummond's residence, the police seized a drum containing 75 rounds of 7.62 x 39 mm ammunition, three boxes containing 46 rounds of 7.62 x 39 mm ammunition, a single round of 7.62 x 39 mm ammunition, and an empty AK magazine. Police also seized a Taurus 9 mm handgun with no barrel, a bulletproof vest, and several rounds of 9 mm, .45 caliber, and .357 caliber ammunition. Drummond argues that this evidence was not relevant because the state failed to link this ammunition to the shell casings found near the crime scene.

The admission of Drummond's ammunition rested upon a question of relevance. Evid.R. 401 provides: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. See *Sage*, 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343, paragraph two of the syllabus.

The trial court did not abuse its discretion in admitting the ammunition and the 9 mm handgun seized from Drummond's residence. Drummond's possession of numerous rounds of ammunition shortly after the murder tended to prove that he had timely access to the means to commit the murder. In addition, Drummond's possession of 7.62 x 39 mm rounds of ammunition tended to prove that he had access to a weapon of the type used to kill Jiyen. See *State v. Hartman* (2001), 93 Ohio St.3d 274, 281, 2001 Ohio 1580, 754 N.E.2d 1150 (defendant's set of knives admissible as showing his easy access to a possible murder weapon and his familiarity with using knives). Further, Drummond's possession of a 9 mm handgun and 9 mm ammunition was relevant because a 9 mm weapon was fired at the Dent home on the evening of March 24.

Drummond, 111 Ohio St.3d at 27, 28, 854 N.E.2d at 1059. Thus, the cases are clearly distinguishable, because *Thomas* addressed “**irrelevant**” evidence of weapons unrelated to the charges,” *Thomas*, 152 Ohio St.3d at 22, 92 N.E.3d at 828-829, whereas *Drummond* addressed **relevant** evidence to establish his ability and opportunity to commit the offenses. *See Drummond*, 111 Ohio St.3d at 27, 28, 854 N.E.2d at 1059.

In a more recent case, *State v. Wilks*, the state presented testimony that the defendant pointed a 9mm Luger firearm at one of the victims in an earlier confrontation, and a 9mm Luger was recovered in the defendant’s minivan at the time the defendant was arrested. (Trial Tr., at 3613-3614; 3759-3765.) *State v. Wilks*, 2018 Ohio 1562, 114 N.E.3d 1092, ¶¶ 92-93. At the crime scene, Youngstown police found a single 7.62 x 39 mm shell casing on the front porch. *See id.* at ¶ 15.

In *Wilks*, two witnesses testified that the defendant threatened one with a 9mm “black small handgun” when they went to the defendant’s house to retrieve a bank card. (Trial Tr., at 3419-3421, 3503-3508.) Their testimony corroborated the fact that the defendant threatened the witness following a brief argument about an hour before the shooting. (Trial Tr., at 3424-3426.) This testimony further established the defendant’s motive for the shooting. Witnesses at the crime scene, however, stated that the defendant used an AK-47 assault-type rifle. *See Wilks*, *supra* at ¶¶ 10-15, 22-24.

The Supreme Court of Ohio stated in *Wilks* that like *Drummond*, “[t]he admission of the evidence regarding the 9 mm handgun rested upon its relevance.” *Wilks*, supra at ¶ 95. The Court concluded that the 9mm Luger handgun was relevant and admissible, because the defendant’s “use of the handgun was part of the chain of events leading from the initial confrontation outside [the defendant’s] home to the murder and attempted murders at Mister’s house.” *Id.*; see also *Moore*, 40 Ohio St.3d at 65.

Here, the question is one of relevance. Cases like *Thomas*, supra, and *State v. Trimble*, 122 Ohio St.3d 297, 2009 Ohio 2961, 911 N.E.2d 242 (admitting 19 unrelated firearms found in the defendant’s basement), addressed “**irrelevant**” evidence of weapons unrelated to the charges.” *Thomas*, 152 Ohio St.3d at 22, 92 N.E.3d at 828-829.

Contrarily, *Drummond* and *Wilks* addressed **relevant** evidence to establish the defendant’s motive and intent, and his ability and opportunity to commit the offenses, respectively. See *Drummond*, 111 Ohio St.3d at 27, 28, 854 N.E.2d at 1059; *Wilks*, supra at ¶ 98.

Therefore, the Supreme Court of Ohio’s decision in *Thomas* would not have mandated a new trial had it been decided before *Drummond*, because the ammunition and 9mm handgun was **relevant** to establish Petitioner’s ability and opportunity to commit the offenses. See *Drummond*, 111 Ohio St.3d at 27, 28, 854 N.E.2d at 1059.

**II. Ohio's Post-Conviction Procedures Provide
Petitioner and Similarly-Situated Capital
Defendants an Adequate Forum to Litigate
Constitutional Claims Beyond Their Direct Appeal.**

As for Petitioner's second question presented, he contends that the State of Ohio fails to provide capital defendants an adequate forum to litigate constitutional claims that requires the combination of both the direct appeal and the collateral proceedings. To the contrary, Ohio's post-conviction procedures provide him and other similarly-situated capital defendants an adequate forum that combines both the direct appeal and the collateral proceedings. Therefore, Ohio's capital defendants have an adequate forum to litigate their constitutional claims.

"Ohio's Post-Conviction Remedy Act, was enacted in 1965 in response to the United States Supreme Court order that states must provide their prisoners with some 'clearly defined method by which they may raise claims of denial of federal rights.'" *State v. Calhoun*, 86 Ohio St.3d 279, 281, 1999 Ohio 102, 714 N.E.2d 905, quoting *Young v. Ragen*, 337 U.S. 235, 239 (1949).

The Supreme Court of Ohio has recognized that "a postconviction proceeding is not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment." *Calhoun*, 86 Ohio St.3d at 281, citing *State v. Steffen*, 70 Ohio St.3d 399, 410 (1994), citing *State v. Crowder*, 60 Ohio St.3d 151 (1991).

Ohio Revised Code 2953.21 established the procedure for defendants to effectively litigate a constitutional claim by combining the records from both the direct appeal and collateral proceedings:

Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, * * * may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

Ohio Rev. Code 2953.21(A)(1)(a). In determining whether a defendant's constitutional rights were violated, "the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript." Ohio Rev. Code 2953.21(D).

Further, it is well-settled law that Ohio's post-conviction procedures have been consistently found to be constitutional. *See State v. Zich*, 6th Dist. No. L-15-1263, 2017 Ohio 414, ¶ 29; *State v. Lawson*, 12th Dist. No. CA2013-12-093, 2014 Ohio 3554, ¶ 43; *State v. Bies*, 1st Dist. No. C-020306, 2003 Ohio 442, ¶ 13; *State v. Cassano*, 5th Dist. No. 12 CA 55, 2013 Ohio 1783, ¶ 32; *State v. La Mar*, 4th Dist. No. 98 CA 23, 2000 WL 297413 (Mar. 17, 2000);

State v. Murphy, 10th Dist. No. 00AP-233, 2000 WL 1877526 (Dec. 26, 2000);
see also State v. Ahmed, 7th Dist. No. 05 BE 15, 2006 Ohio 7069, ¶ 37.

Thus, Ohio's post-conviction statutes allow defendants to demonstrate—through the petition, supporting affidavits, all the files and records pertaining to the proceedings against the defendant, including, journal entries and the transcripts—that he suffered a violation of his constitutional rights. *See State v. Jackson*, 64 Ohio St. 2d 107, 112, 413 N.E.2d 819, 823, syllabus (1980).

Therefore, Ohio's post-conviction procedures provide Petitioner and other similarly-situated capital defendants an adequate forum to litigate their constitutional claims that requires the combination of both the direct appeal and the collateral proceedings.

Conclusion

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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