

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

PLAINTIFF-APPELLEE

-vs-

WILLIE G. WILKS, JR.

DEFENDANT-APPELLANT

CASE NO.: **2014-1035**

ON APPEAL FROM **MAHONING
COUNTY COURT OF COMMON PLEAS.**

COURT OF COMMON PLEAS

Case No. **2013 CR 540**

DEATH PENALTY CASE

STATE OF OHIO-APPELLEE'S ANSWER BRIEF

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Statements of the Case and Facts

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 Wilks, 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 3396-3397.)

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 were also dispatched 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 performed 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 Mullenex, 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 Mullenex 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 tests for Ororo Wilkins (State's Exhibit No. 32) and Defendant (State's Exhibit No. 35). (Trial Tr., at 3665, 3669-3670; State's Exhibit No. 49.) Lewis explained that when a firearm is discharged, a vaporous cloud of material is

expelled. (Trial Tr., at 3667.) The “cloud of gases quickly cools, and the materials in there will solidify, and they can be deposited on a shooter’s hands or areas nearby. And it’s all these various materials that are created in the firing of the gun that we refer to as gunshot residue.” (Trial Tr., at 3667.) “The closer you are to that weapon, the more likely you are to get it on you. The further away, the less likely.” (Trial Tr., at 3668-3669.)

Lewis concluded that Ororo’s GSR test revealed “particles highly indicative of gunshot primer residue were identified on one of the samples from Ororo Wilkins * * *.” (Trial Tr., at 3673.) Likewise, 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 tested fired the 9mm Luger with two live rounds that were submitted. (Trial Tr., at 3761-3762.) Barr concluded that the 9mm Luger was an operable firearm. (Trial Tr., at 3765.)

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) 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 Purdue 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. Purdue then told Officer Johnson to bring Antwone down to the station but Johnson never did. (Trial Tr., at 3920.) Purdue 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).

Defendant timely appealed as of right to this Honorable Court. The State now responds with its Answer Brief, and requests that this Honorable Court Overrule Appellant-Defendant Willie G. Wilks’ Propositions of Law and Deny his request for relief, allowing his conviction and death sentence to stand.

Law and Argument

- I. **Proposition of Law No. 1:** When the State Fails to Introduce Sufficient Evidence of Particular Charges, a Resulting Conviction Deprives a Capital Defendant of Substantive and Procedural Due Process in Violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 5, 6, and 16 of the Ohio Constitution.

State's Response to Proposition of Law No. 1: After Viewing the Evidence in a Light Most Favorable to the Prosecution, the State Presented Sufficient Evidence to Support Defendant's Convictions, Because Any Rational Juror Could Have Found Defendant's Identity as the Shooter Proven Beyond a Reasonable Doubt by the Testimony of William (Mister) Wilkins and Alexander Morales.

As for Defendant's first proposition of law, he contends that the State failed to present sufficient evidence to establish his identity as the perpetrator of the offenses for which he was convicted. Only after taking *all facts as true*, did the state lack evidence to support an element of an offense, may this Court find the State presented insufficient evidence. Therefore, the State presented sufficient evidence to establish Defendant's identity as the shooter with the testimony of William (Mister) Wilkins, Jr. and Alexander Morales.

- A. **ONLY AFTER TAKING ALL FACTS AS TRUE, DID THE STATE LACK EVIDENCE TO SUPPORT AN ELEMENT OF AN OFFENSE, MAY A REVIEWING COURT FIND INSUFFICIENT EVIDENCE.**

Sufficiency is a legal standard that is applied to determine whether the evidence admitted at trial is legally sufficient to support the verdict as a matter of law. *See State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 1997 Ohio 52, 678 N.E.2d 541. The relevant inquiry is whether there existed adequate evidence to submit the case to the jury:

An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the

evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

State v. Jenks, 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus (1991); accord *State v. Beverly*, 143 Ohio St.3d 258, 262, 2015 Ohio 219, 37 N.E.3d 116; see also *State v. Lewis*, 7th Dist. No. 03 MA 36, 2005 Ohio 2699.

Given that, sufficiency is a test of adequacy. Again, whether the evidence presented in a case is legally sufficient to sustain a verdict is a matter of law—rather than a matter of fact. And on a sufficiency challenge, *all the facts are taken as true*. See *id.*; *State v. Bridgeman*, 55 Ohio St.2d 261 (1978). And “[i]t is well-established that the appellate court is to consider *all* of the testimony before the jury, *whether or not it was properly admitted*.” (Emphasis sic.) *State v. Peeples*, 7th Dist. No. 07 MA 212, 2009 Ohio 1198, ¶ 17, citing *State v. Yarbrough*, 95 Ohio St.3d 227, ¶ 80 (2002), citing *Lockhart v. Nelson*, 488 U.S. 33, 40-42 (1988), and citing *State v. Goff*, 82 Ohio St.3d 123, 138 (1998).

1. **THE STATE PRESENTED SUFFICIENT EVIDENCE THAT DEFENDANT WAS THE SHOOTER.**

Here, Defendant contends that the State failed to present sufficient evidence to establish his identity as the perpetrator of the offenses. Defendant's argument, however, concentrates on the evidence that the State *should have* or *did not* present, rather than the evidence that the State *did* present. In viewing the evidence in a light most favorable to the prosecution, the State presented sufficient evidence to establish Defendant's identity.

During the afternoon of May 21, 2013, Mister and Morales went (Morales drove) to Mary Aragon's house to secure a 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 Wilks, 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 brandishing the gun. (Trial Tr., at 3418-3419, 3508-3509.) Mister turned around and taunted Defendant, calling him names; Mister assumed Defendant would not shoot him with several people outside watching. (Trial Tr., at 3509.)

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 about 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. (Trial Tr., at 3425, 3513.)

Rena Jenkins testified that Mister and Morales arrived around 4:20 p.m. (Trial Tr., at 3363.) Everyone was outside on the porch—the kids, Ororo Wilkins (Mister’s sister), Mister, Morales, Rena Jenkins (Mister’s girlfriend), and Shantwone Jenkins

(Renaë'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.)

Youngstown Officer Jessica Shields encountered Morales and asked him who did this to you, to which Morales replied, “Willie did this. Willie did this.” (Trial Tr., at 3394-3395.) 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.) 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.)

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. (Trial Tr., at 3604, 3623.)

Youngstown Officer Robert Martini and his partner Officer Pete Bonilla were dispatched to 725 Park Avenue, but 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.)

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.)

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

Here, *Mister and Morales' testimony alone* established Defendant's identity as the perpetrator of the offenses for which he was convicted. (Trial Tr., at 3439-3440, 3527, 3530.)

Again, Defendant contends that the above summary of facts failed to establish his identity as the perpetrator of the offenses. In a sufficiency review, however, “[n]either evidence of a particular motive for a crime nor physical evidence is necessary to support a conviction.” *State v. Patterson*, 8th Dist. No. 101415, 2015 Ohio 873, ¶ 44, citing *State v. Kemp*, 8th Dist. No. 97913, 2013 Ohio 167, ¶ 47, and *State v. Lopez*, 8th Dist. No. 94312, 2011 Ohio 182, ¶ 62.

In fact, sufficient evidence can be established by a single eyewitness, even though there exists no physical evidence linking the defendant to the crime. *See, e.g., State v. Rudd*, 8th Dist. No. 102754, 2016 Ohio 106, ¶¶ 39, 60 (sufficient evidence established by eyewitness testimony and circumstantial evidence even though no physical evidence linked the defendant to the shooting); *Patterson*, supra at ¶ 45 (sufficient evidence established solely by eyewitness testimony); *State v. Lawshea*, 8th Dist. No. 101895, 2015

Ohio 2391, ¶ 41 (sufficient evidence established by a single eyewitness alone); *State v. Cloud*, 5th Dist. No. 06 CAA 090068, 2007 Ohio 4241, ¶ 25 (sufficient evidence established solely by eyewitness testimony); *State v. Bennett*, 11th Dist. No. 2002-A-0020, 2005 Ohio 1567, ¶ 48 (concluding “there was sufficient evidence, in the eyewitness testimony of Dorothy alone, where a jury could find, beyond a reasonable doubt, that Bennett was guilty.”); *State v. Jordan*, 10th Dist. No. 04AP-827, 2005 Ohio 3790, ¶ 14 (sufficient evidence established by a single eyewitness even though no weapon or forensic evidence linked the defendant to the shooting); *State v. Pryor*, 10th Dist. No. 03AP-1041, 2004 Ohio 4558, ¶ 19 (sufficient evidence established by a single eyewitness alone).

Therefore, the State presented sufficient evidence to establish Defendant’s convictions with the testimony of William (Mister) Wilkins, Jr. and Alexander Morales, because in viewing their testimony in a light most favorable to the prosecution, their testimony established Defendant’s identity as the shooter.

Defendant’s first proposition of law is meritless and must be overruled.

II. Proposition of Law No. 2: When the Conviction of a Defendant is Against the Weight of the Evidence an Appellate Court Must Reverse that Conviction, Failure to do so Deprives a Capital Defendant of Substantive and Procedural Due Process in Violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 5, 9, and 16 of the Ohio Constitution.

State's Response to Proposition of Law No. 2: The Manifest Weight of the Evidence Supported Defendant's Convictions, Because Eyewitness Identification Testimony Alone is Sufficient to Support a Conviction so long as a Reasonable Juror Could Find the Eyewitness Testimony to be Credible.

As for Defendant's second assignment of error, he contends that the manifest weight of the evidence did not support his convictions. Under Ohio law, only if the trier of fact had no rational basis for the conviction may a reviewing court reverse. Here, the jury had substantial evidence and a rational basis to find that Defendant was the assailant who fired the fatal shots using a large assault rifle. Therefore, the manifest weight of the evidence supported Defendant's convictions.

A. ONLY IF THE TRIER OF FACT HAD NO RATIONAL BASIS FOR A CONVICTION, MAY A REVIEWING COURT REVERSE ON A MANIFEST WEIGHT OF THE EVIDENCE CHALLENGE.

Unlike sufficiency, manifest weight of the evidence challenge contests the *believability* of all the evidence produced at trial. *See State v. Schlee*, 11th Dist. No. 93-L-082, 1994 WL 738452, at *13 (Dec. 23, 1994). This determination requires "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist. 1983).

Notwithstanding, granting a new trial is appropriate only in extraordinary cases in which the evidence weighs heavily against a conviction. *See id.* This recognizes that the “trier of fact sits in the best position to assess the weight of the evidence and credibility of the witnesses whose gestures, voice inflections, and demeanor are personally observed.” *State v. Rouse*, 7th Dist. No. 04 BE 53, 2005 Ohio 6328, ¶ 49, citing *State v. Hill*, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996), *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967), and *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). And the reviewing court will defer to the trier of fact “unless the evidence weighs so heavily against conviction that [it is] compelled to intervene.” *Rouse*, *supra*, citing *State v. Black*, 7th Dist. No. 03 JE 1, 2004 Ohio 1537.

Further, this Court has stated that “[w]eight of the evidence concerns “the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.” (Emphasis sic.) *Thompkins*, 78 Ohio St.3d at 387, quoting Black’s Law Dictionary 1594 (6th Ed. 1990).

Thus, the issue when reviewing a manifest weight of the evidence challenge is whether there is substantial evidence upon which a jury could reasonably conclude that the State established the elements of the indictment beyond a reasonable doubt. *See State v. Nields*, 93 Ohio St.3d 6, 25, 2001 Ohio 1291, 752 N.E.2d 859, quoting *State v. Getsy*, 84 Ohio St.3d 180, 193-194, 1998 Ohio 533, 702 N.E.2d 866.

1. **THE MANIFEST WEIGHT
OF THE EVIDENCE SUPPORTED
DEFENDANT’S CONVICTIONS, BECAUSE
A REASONABLE JUROR COULD FIND THE
EYEWITNESS TESTIMONY TO BE CREDIBLE.**

Here, Defendant contends that the manifest weight of the evidence did not support his convictions, because the eyewitnesses were not credible.

In a manifest weight analysis, “even where discrepancies exist, eyewitness identification testimony alone is sufficient to support a conviction so long as a reasonable juror could find the eyewitness testimony to be credible.” *Jordan*, supra at ¶ 14, citing *State v. Coleman*, 10th Dist. No. 99AP-1387, 2000 WL 1724817 (Nov. 21, 2000), *State v. Artis*, 10th Dist. No. 93APA11-1547, 1994 WL 194953 (May 17, 1994), and *State v. Epley*, 10th Dist. Nos. 97APA12-1611, 97AP-A12-1612, 1998 WL 635098 (Sept. 17, 1998); accord *State v. Johnson*, 8th Dist. No. 99822, 2014 Ohio 494, ¶ 52 (stating, “eyewitness identification testimony alone is sufficient to support a conviction so long as a reasonable juror could find the eyewitness testimony to be credible.”); *State v. Royal*, 7th Dist. No. 12 MA 148, 2014 Ohio 1175, ¶ 71 (recognizing that there was no “physical evidence linking [the defendant] to the shooting. But in reviewing manifest weight of the evidence challenges, even where discrepancies exist, eyewitness identification testimony alone is sufficient to support a conviction as long as a reasonable juror could find the eyewitness testimony to be credible.”).

“While the jury may take note of the inconsistencies and resolve or discount them accordingly, * * * such inconsistencies do not render defendant’s conviction against the manifest weight or sufficiency of the evidence.” *State v. Mann*, 10th Dist. No. 10AP-1131, 2011 Ohio 5286, ¶ 37, quoting *State v. Nivens*, 10th Dist. No. 95APA09-1236, 1996

WL 284714, at *3 (May 28, 1996). “The decision whether, and to what extent, to believe the testimony of particular witnesses is ‘within the peculiar competence of the factfinder, who has seen and heard the witness.’” *Patterson*, supra at ¶ 51, quoting *Johnson*, supra at ¶ 54.

Further, the Seventh District has previously recognized that even “[w]hen there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one should be believed.” *State v. Walenciej*, 7th Dist. No. 07 JE 6, 2007 Ohio 7206, ¶ 42, citing *State v. Gore*, 131 Ohio App.3d 197, 201 (7th Dist. 1999).

Therefore, given the above summary of the facts and law, the manifest weight of the evidence supported Defendant’s convictions, because the jury had substantial evidence and a rational basis to find that Defendant was the assailant who fired the fatal shots using a large assault rifle.

Defendant’s second proposition of law is meritless and must be overruled.

III. Proposition of Law No. 3: Available Exculpatory Evidence Concerning the Identity of the Perpetrator in a Capital Offense Must be Presented to the Grand Jury under Art. I, Section 10 of the Ohio Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments of the Federal Constitution.

State's Response to Proposition of Law No. 3: The State has No Obligation, Constitutionally or Statutorily, to Present Evidence Favorable to the Defense or Evidence Negating a Defendant's Guilt to the Grand Jury.

As for Defendant's third proposition of law, he contends that the State is required to present all available exculpatory evidence concerning the identity of the perpetrator to the grand jury. To the contrary, the State has no obligation to present evidence favorable to the defense or evidence negating a defendant's guilt to the grand jury. Therefore, the Ohio and United States Constitutions do not require the State to present all available exculpatory evidence concerning the identity of the perpetrator to the grand jury.

The U.S. Supreme Court previously held that the government is not required to disclose "substantial exculpatory evidence" in its possession to the grand jury. *See United States v. Williams*, 504 U.S. 36, 112 S.Ct. 1735 (1992). The 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." *Id.* 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, the Tenth District previously concluded that "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 *United States v. Calandra*, 414 U.S. 338, 343-344, 94 S.Ct. 613, 618 (1974).

Here, the State was under no obligation, constitutionally or statutorily, to present the statements of Shantwone Jenkins and Defendant to 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 Defendant’s guilt. *See Ciambrone*, 601 F.2d at 623. In fact, Det. Perdue testified to some of these inconsistencies at trial. (Trial Tr., at 3843-3844.)

Therefore, the State was under no obligation to present evidence favorable to the defense or evidence negating Defendant’s guilt to the grand jury, because neither the Ohio nor the United States Constitution requires the State to present all available exculpatory evidence concerning the identity of the perpetrator to the grand jury.

Defendant’s third proposition of law is meritless and must be overruled.

IV. Proposition of Law No. 4: Prosecutorial Misconduct in the Grand Jury Proceedings Denied Appellant his Rights under Article I, Section 10, of the Ohio Constitution and the Sixth, Eighth, and Fourteenth Amendments of the Federal Constitution.

State's Response to Proposition of Law No. 4: Defendant Failed to Establish that Prosecutorial Misconduct Resulted from the Grand Jury Proceedings, Because the Record is Devoid of Any Evidence that the State's Conduct was Improper, or that the State Infringed Upon the Grand Jury's Ability to Freely Exercise its Independent Judgment.

As for Defendant's fourth proposition of law, 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 alleged conduct was improper, or 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 a fair trial.

To begin, "[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. "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Johnson*, 144 Ohio St.3d 518, 531, 2015 Ohio 4903, 45 N.E.3d 208, quoting *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464 (1986), quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868 (1974).

This Court must consider two factors in determining whether the conduct deprived the defendant of a fair trial: "(1) whether the conduct was improper, and (2) if

so, whether it prejudicially affected the defendant's substantial rights." *Johnson*, 144 Ohio St.3d at 531, citing *State v. Maxwell*, 139 Ohio St.3d 12, 61, 2014 Ohio 1019, 9 N.E.3d 930. Further, this Court analyzes the second part regarding prejudice by determining the misconduct's effect "on the jury in the context of the *entire* trial." (Emphasis added.) *Johnson*, 144 Ohio St.3d at 531, quoting *State v. Keenan*, 66 Ohio St.3d 402, 410, 613 N.E.2d 203 (1993).

Here, Defendant contends that the State misled the grand jury through the assistant prosecutor's questioning of Youngstown Detective-Sergeant John Perdue. Thus, this Court must analyze Defendant's argument in the context of the *grand jury* proceedings, rather than the *trial* proceedings.

"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* 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, the Twelfth District 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.

Baker, 137 Ohio App.3d at 645, quoting *Calandra*, 414 U.S. at 344-345.

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. Thus, the State's conduct was proper.

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 (stating, "[u]nless otherwise noted, the defense did not object to the purported acts of prosecutorial misconduct and thus waived all but plain error.>").

Therefore, Defendant was not denied his constitutional right to a fair trial, because Defendant failed to establish that the State's conduct was improper, or that the State infringed upon the grand jury's ability to freely exercise its independent judgment. *See Williams*, 504 U.S. at 51, 112 S.Ct. at 1744 (holding that the government is not required to disclose "substantial exculpatory evidence" in its possession to the grand jury).

Defendant's fourth proposition of law is meritless and must be overruled.

- V. **Proposition of Law No. 5:** The First, Sixth, and Fourteenth Amendments Guarantee the Right to a Public Trial. This Right is Violated When the Trial Court Holds the Voir Dire of the Jurors in a Backroom Away from Public Access and Closes the Courtroom During the Jury Instructions.

State's Response to Proposition of Law No. 5: The Trial Court Did Not Violate Defendant's Sixth Amendment Right to a Public Trial When it Conducted Individual Voir Dire in the Court's Jury Room at Defendant's Request, Because the Jury Room Remained Open to the Public. Further, No Spectators were Removed From or Denied Access to the Courtroom While the Court Read the Jury Instructions During the Penalty Phase.

As for Defendant's fifth proposition of law, he contends that the trial court violated his Sixth Amendment right to a public trial when it conducted individual voir dire in the court's jury room, and further violated his right to a public trial when the court locked the doors while it read the jury instructions during the penalty phase. To the contrary, the jury room remained open and accessible to the public during individual voir dire, and at no time were any spectators removed from or denied access to the courtroom while the court read the jury instructions during the penalty phase. Therefore, the trial court did not violate Defendant's Sixth Amendment right to a public trial.

A. **THE RIGHT TO A PUBLIC TRIAL
IS A FUNDAMENTAL GUARANTEE OF BOTH
THE OHIO AND UNITED STATES CONSTITUTIONS.**

It is well-settled that "the right to a public trial * * * is a fundamental guarantee of both the United States and Ohio Constitutions." *State v. Cassano*, 96 Ohio St.3d 94, 104, 2002 Ohio 3751, 772 N.E.2d 81, quoting *State v. Lane*, 60 Ohio St.2d 112, 397 N.E.2d 1338, paragraph two of the syllabus (1979); see Sixth Amendment to the U.S. Constitution; Ohio Constitution, Article I, Section 10. "This guarantee is a 'cornerstone of our democracy which should not be circumvented unless there are extreme overriding

circumstances.”” *State v. Drummond*, 111 Ohio St.3d 14, 21, 2006 Ohio 5084, 854 N.E.2d 1038, quoting *Lane*, 60 Ohio St.2d 119.

The United States Supreme Court noted in *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210 (1984), “that the central aim of a criminal proceeding is to try the accused fairly and recognized that the public-trial guarantee allows the public to see for itself that the accused is fairly dealt with and not unjustly condemned. In addition, a public trial ensures that the judge and prosecutor carry out their duties responsibly, encourages witnesses to come forward, and discourages perjury.” *State v. Conway*, 108 Ohio St.3d 214, 232-233, 2006 Ohio 791, 842 N.E.2d 996, citing *Waller*, 467 U.S. at 46.

While the violation of a defendant’s right to a public trial is a structural error, an appellate court must first find that a constitutional error has occurred before any error may be structural. (Internal citations omitted.) See *State v. Dovala*, 9th Dist. No. 05CA008767, 2007 Ohio 4914, at ¶ 10, citing *Conway*, 108 Ohio St.3d at 223.

1. **THE TRIAL COURT DID NOT VIOLATE DEFENDANT’S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED INDIVIDUAL VOIR DIRE IN ITS JURY ROOM UPON HIS REQUEST, AND THE TRIAL COURT AT NO TIME DENIED COURTROOM ACCESS TO ANY SPECTATOR.**

First, Defendant contends that the trial court violated his Sixth Amendment right to a public trial when it conducted individual voir dire in the court’s jury room at the request of defense counsel.

To begin, the U.S. Supreme Court concluded in a per curiam opinion that a defendant’s Sixth Amendment right to a public trial extends to jury voir dire of prospective jurors. See *Presely v. Georgia*, 558 U.S. 209, 213, 130 S.Ct. 721, 724 (2010).

Here, unlike the cases upon which Defendant relies upon, the record demonstrates that the court's jury room remained open and accessible to the public during individual voir dire:

THE COURT: Lastly, when we began the case we did it with a one-on-one, extensive, detailed discussion and interview of each jurors. *We did that in the open jury room* which is adjacent to the courtroom with your -- *the door was opened where anyone who wishes admitted was permitted.* That was done rather than in open court. At the direction and request of the defense of that long period of four weeks or so of the jury voir dire, individual voir dire regarding pretrial publicity as well as the death penalty aspect of the case, the defendant was not shackled, was in street clothes sitting at the table with prospective jurors and counsel was present, and *it was done at the behest of the defense.*

MR. YARWOOD: I'll make the record very clear on this. First of all, our client was in civilian clothes during the entire proceedings. *He was given, I think, tremendous latitude assisting us during it.* In fact, the fact that we were back in *the jury room that was open for people to come in and it was available* -- and from our perspective that *would meet the requirement of an open courtroom for purposes of people who wanted to come in and sit.* There were chairs there for them to do it. It was available. Our position is that was of *great benefit to be able to individually ask jurors in that form,* and the Court and record should be very clear that we were satisfied with that. Mr. Wilks was very satisfied with that means and manner. I had even, in fact, told -- when they were asking, where is other individuals? You're allowed to come in and sit down. It is open. So from our perspective we see it as a nonissue. I wanted that on the record. That was appropriate in what we --

MR. ZENA: To reemphasize in some way what Ron [Yarwood] said, and this was discussed at length by us. Quite frankly, we asked that you proceed in that fashion in the *hope that certain people wouldn't come and*

observe and thus expose this case to yet more publicity. We accomplished that fact by the manner in which it was ***conducted without barring anybody from the room.*** That's all on us, and we asked you to do it that way.

(Emphasis added.) (Trial Tr., at 4166-4168.) The record unequivocally demonstrates that the jury room remained open and accessible to the public during the individual voir dire proceedings, and was only moved at Defendant's request. *See State v. Williams*, 9th Dist. No. 26014, 2012 Ohio 5873, ¶ 10 (finding "there is not enough evidence in the record from which one can conclusively deduce that a closure actually occurred.").

Thus, Defendant failed to demonstrate that a constitutional error actually occurred; thus, this Court need not engage in a structural error analysis. *See Williams*, supra at ¶ 10, citing *Dovala*, supra at ¶ 10.

Further, even if this Court would find that the trial court erred in conducting individual voir dire in the court's jury room, Defendant cannot take advantage of an error that he induced the trial court to make. *See Cassano*, 96 Ohio St.3d at 105.

In *Cassano*, this Court concluded that the trial court erred in closing the courtroom for a suppression hearing at the defendant's request "without conducting a separate hearing, making findings justifying such closure, and considering alternatives to closure." *Cassano*, 96 Ohio St.3d at 105, citing *Waller*, 467 U.S. at 48. This Court, however, found that reversal was not required because the defendant invited the error by requesting the courtroom to be closed. *See Cassano*, 96 Ohio St.3d at 105. Thus, the defendant could not "take advantage of an error he invited or induced." *Cassano*, 96 Ohio St.3d at 105, citing *State v. Seiber*, 56 Ohio St.3d 4, 17, 564 N.E.2d 408 (1990), and *State v. Murphy*, 91 Ohio St.3d 516, 535, 747 N.E.2d 765 (2001).

Second, Defendant also contends that his Sixth Amendment right to a public trial was violated when the court locked the doors while he read the jury instructions during the penalty phase.

Following the parties' closing arguments, the trial court informed the spectators that they were free to stay, but it would lock the courtroom doors while it read the jury instructions:

Thank you. I'm going to give you your final closing instructions. It will take about a half hour. Those in the rear of the courtroom, you're certainly welcomed to stay; however, when I begin this instruction, it will take about a half hour and we're going to close the door and lock it, and it will remain closed for the duration. So if you don't want to stay for the duration, you should leave, so you're welcomed to do that now.

(Trial Tr., at 4271-4272.) The trial court then read the instructions. The record unequivocally demonstrates that no spectators either left the courtroom or were denied access to the courtroom while the instructions were read. (Trial Tr., at 4271-4288.) *See State v. Patel*, 9th Dist. No. 24024, 2008 Ohio 4692, ¶ 43 (stating "this Court will not rely upon pure speculation in determining whether an error occurred.").

Further, the record demonstrates that Defendant waived this issue for appeal. *See Conway*, 108 Ohio St.3d at 233; *Drummond*, 111 Ohio St.3d at 24.

Therefore, the trial court did not violate Defendant's Sixth Amendment right to a public trial, because the jury room remained open and accessible to the public during individual voir dire, and at no time were any spectators removed from or denied access to the courtroom while the court read the jury instructions during the penalty phase.

Defendant's fifth proposition of law is meritless and must be overruled.

VI. Proposition of Law No. 6: A Criminal Defendant Has a Fundamental Right to a Fair Cross-Section of the Community that is going to Try Him and Determine Whether He Should be Sentenced to Death. The Excusal for Cause of a Spanish-Speaking Prospective Juror Denied Him His Right to a Fair Cross-Section as Guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution. It Further Denied the Prospective Juror’s Right to Access the Court and Equal Protection.

State’s Response to Proposition of Law No. 6: The Trial Court Did Not Abuse its Discretion when it Removed Alfonso Guzman, a Spanish-Speaking Juror, Because Both the State and Defendant Agreed that He Lacked a Sufficient Understanding of the English Language to Adequately Serve on this Jury.

As for Defendant’s sixth proposition of law, he contends that the trial court abused its discretion when it removed Alfonso Guzman, a Spanish-speaking juror. To the contrary, both parties agreed that Mr. Guzman lacked a sufficient understanding of the English language to adequately serve on the jury. Therefore, the trial court did not abuse its discretion when it removed for cause Alfonso Guzman.

A. THE DECISION TO REMOVE A PROSPECTIVE JUROR FOR CAUSE FALLS WITHIN THE TRIAL COURT’S SOUND DISCRETION.

It is well-settled that the trial court has broad discretion to remove a prospective juror for cause. *See Maxwell*, 139 Ohio St.3d at 32, citing *State v. Cornwell*, 86 Ohio St.3d 560, 563, 715 N.E.2d 1144 (1999); *accord State v. Trimble*, 122 Ohio St.3d 297, 307, 2009 Ohio 2961, 911 N.E.2d 242. Thus, this Court “must defer to that finding if the record supports it[.]” *State v. Frazier*, 9th Dist. No. 25654, 2012 Ohio 790, ¶ 29, quoting *State v. Group*, 98 Ohio St.3d 248, 255, 2002 Ohio 7247, 781 N.E.2d 980, citing *State v. Wilson*, 29 Ohio St.2d 203, 211, 280 N.E.2d 915 (1972).

1. **THE TRIAL COURT PROPERLY REMOVED FOR CAUSE ALFONSO GUZMAN, A SPANISH-SPEAKING JUROR, BECAUSE BOTH PARTIES AGREED THAT HE LACKED A SUFFICIENT UNDERSTANDING OF THE ENGLISH LANGUAGE.**

There is no doubt that the right to a fair and impartial jury is one of the most basic and fundamental constitutional rights that we as citizens of the United States are entitled to: “England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury.” *Irvin v. Dowd*, 366 U.S. 717, 721 (1961); Sixth Amendment to the U.S. Constitution. Thus, “only the jury can strip a man of his liberty or his life.” *Irvin*, 366 U.S. 722

“The Sixth Amendment guarantee to a jury trial ‘contemplates a jury drawn from a fair cross-section of the community.’” *State v. Bryan*, 101 Ohio St.3d 272, 288, 2004 Ohio 971, 804 N.E.2d 433, quoting *Taylor v. Louisiana*, 419 U.S. 522, 527, 95 S.Ct. 692 (1975). And while the jury must be drawn from the defendant’s community, a defendant is not entitled to a petit jury that mirrors the various racial and ethnic groups of the community in which he lives:

there is “no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.”

Bryan, 101 Ohio St.3d at 288, quoting *State v. Johnson*, 88 Ohio St.3d 95, 117, 2000 Ohio 276, 723 N.E.2d 1054, quoting *Taylor*, 419 U.S. at 538, and citing *State v. Fulton*, 57 Ohio St.3d 120, 566 N.E.2d 1195, paragraph two of the syllabus (1991).

This Sixth Amendment right to a jury trial must also ensure that every jury member is able to effectively perceive and evaluate the evidence presented at trial: “[t]he right to a fair trial requires that all members of the jury have the ability to understand all of the evidence presented, to evaluate that evidence in a rational manner, to communicate effectively with other jurors during deliberations, and to comprehend the applicable legal principles as instructed by the court.” *State v. Speer*, 124 Ohio St.3d 564, 2010 Ohio 649, 925 N.E.2d 584, paragraph two of the syllabus.

Accordingly, R.C. 2945.25(N) specifies that any party may challenge a juror for cause in a criminal case when “English is not his native language, and his knowledge of English is insufficient to permit him to understand the facts and law in the case[.]” R.C. 2945.25(N); *accord* Crim.R. 24(C)(13).

In *State v. Getsy*, this Court concluded that the trial court did not abuse its discretion when it removed a juror for cause when the record established that he “had been in this country for just six years, had trouble with big words, and had had some difficulty understanding the written orientation instructions provided by the court.” *Getsy*, 84 Ohio St.3d at 191-192. The prospective juror further had trouble understanding the legal proceedings, and had another juror explain the written instructions to him. *See id.*

In *State v. Oliver*, the Eleventh District concluded the trial court did not abuse its discretion when it removed a juror for cause where she was born in Gandhi and spoke Tregan, English was not her native language, the juror lacked a sufficient understanding of the English language, and she admitted that she could not adequately listen to the evidence. *See State v. Oliver*, 11th Dist. No. 2010-P-0017, 2012 Ohio 122, ¶ 73.

In *State v. Frazier*, the Ninth District likewise concluded that the trial court did not abuse its discretion when it removed a juror for cause where “the venireperson’s native language was Spanish. He averred that it could at times be hard to understand the proceedings. In addition, he felt that the language barrier could affect his ability to be a fair juror on the case.” *Frazier*, supra at ¶ 29.

Here, both parties agreed that Mr. Guzman lacked a sufficient understanding of the English language to serve on the jury. (Voir Dire Tr., at 673.) The record established that Mr. Guzman does not sufficiently speak and understand the English language, had difficulty understanding the entire juror questionnaire, and relies exclusively on Spanish-speaking media outlets. (Voir Dire Tr., at 672-673.)

Furthermore, this Court previously held that even if a prospective juror was erroneously excluded from the venire, “an erroneous excusal for cause, on grounds other than the venireman’s views on capital punishment, is not cognizable error, since a party has no right to have any particular person sit on the jury. Unlike the erroneous denial of a challenge for cause, an erroneous excusal cannot cause the seating of a biased juror and therefore does not taint the jury’s impartiality.” *State v. Sanders*, 92 Ohio St.3d 245, 249, 2001 Ohio 189, 750 N.E.2d 90; accord *State v. Tenace*, 109 Ohio St.3d 255, 259, 2006 Ohio 2417, 847 N.E.2d 386; *State v. Gross*, 97 Ohio St.3d 121, 132, 2002 Ohio 5524, 776 N.E.2d 1061; *State v. Harrison*, 31 N.E.3d 220, 233-234, 2015 Ohio 1419 (3rd Dist.).

Therefore, the trial court did not abuse its discretion when it removed for cause Alfonso Guzman, a Spanish-speaking juror, because both parties agreed that Mr. Guzman lacked a sufficient understanding of the English language to adequately serve on the jury.

Defendant’s sixth proposition of law is meritless and must be overruled.

VII. Proposition of Law No. 7: A Criminal Defendant is Denied a Right to a Fair Trial, as Guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution When the Trial Court Allows the Introduction of Victim Character Evidence and Emotionally Laden Graphic Testimony During the Trial Phase of a Capital Trial.

State's Response to Proposition of Law No. 7: Defendant was Not Denied his Right to a Fair Trial, Because Youngstown Officer Jessica Shields and Dr. Joseph Ohr's Testimony was Relevant to the Facts Attendant to the Offense, and Traniece Wilkins' Testimony Regarding the Victim Did Not Amount to Plain Error.

As for Defendant's seventh proposition of law, he contends that the trial court abused its discretion when it allowed testimony concerning the victim and the crime scene. To the contrary, Traniece Wilkins' testimony regarding Ororo Wilkins' general character did not amount to plain error, and Youngstown Officer Jessica Shields and Dr. Joseph Ohr's testimony regarding the crime scene and Ororo Wilkins' injuries was relevant evidence that related to the facts attendant to the offense. Therefore, Defendant was not denied his right to a fair trial by the admission of the witnesses' testimony.

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

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 (1989). This includes expert witness testimony. *See State v. White*, 4th Dist. No. 03CA2926, 2004 Ohio 6005, ¶ 42, citing *State v. Thomas*, 97 Ohio St.3d 309, 317, 2002 Ohio 1017, 779 N.E.2d 1017, and *State v. Hartman*, 93 Ohio St.3d 274, 281, 754 N.E.2d 1150 (2001).

“‘[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). Further, when applying this standard, an appellate court may not substitute its own discretion for that of the trial court. *See Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

1. PLAIN ERROR DID NOT RESULT FROM TRANIECE WILKINS’ TESTIMONY REGARDING ORORO WILKINS.

First, Defendant contends that Traniece Wilkins’ testimony regarding Ororo Wilkins amounted to improper character evidence that was irrelevant and unfairly prejudicial. Defendant, however, did not object to Traniece Wilkins’ testimony. (Trial Tr., at 3302-3309.)

Generally, objections not made at trial waive the issue for appeal. *See State v. Tapscott*, 2012 Ohio 4213, 978 N.E.2d 210, 215 (7th Dist.), citing *State v. Grubb*, 28 Ohio St.3d 199, 201-203, 503 N.E.2d 142 (1986), and *State v. Hancock*, 108 Ohio St.3d 57, 67, 2006 Ohio 160, 840 N.E.2d 1032.

“Plain error is a discretionary doctrine to be used with the utmost of care by the appellate court only in exceptional circumstances in order to avoid a manifest miscarriage of justice.” *Tapscott*, 978 N.E.2d at 215-216, citing *State v. Noling*, 98 Ohio St.3d 44, 2002 Ohio 7044, 781 N.E.2d 88, ¶ 62; Crim.R. 52(B). Thus, “[t]he doctrine can be employed only where there was an obvious error affecting substantial rights in that the error was clearly outcome determinative.” *Id.*, citing *Hancock*, 108 Ohio St.3d at 67.

Here, Traniece Wilkins’ testimony regarding Ororo Wilkins’ general character was an isolated, passing reference to her personality that did not amount to plain error.

See *State v. McKnight*, 107 Ohio St.3d 101, 117, 2005 Ohio 6046, 837 N.E.2d 315 (concluding “such testimony did not constitute outcome-determinative plain error.”); *State v. Tyler*, 50 Ohio St.3d 24, 35, 553 N.E.2d 576 (1990); *State v. Griffith*, 4th Dist. No. 00CA2583, 2002 Ohio 6142, ¶ 23 (concluding the witness’s testimony that the victim was not a troublemaker did not amount to plain error); *State v. Richardson*, 103 Ohio App.3d 21, 26-27, 658 N.E.2d 321 (1st Dist. 1995) (finding “[t]he decision not to object to inadmissible but, given the facts of the case, not very prejudicial testimony, may well have been deliberate trial strategy, which this court will not second-guess.”); *State v. Hunter*, 8th Dist. No. 86048, 2006 Ohio 20, ¶¶ 69-70.

2. **YOUNGSTOWN OFFICER
JESSICA SHIELDS AND DR. JOSEPH
OHR’S TESTIMONY REGARDING THE CRIME
SCENE AND ORORO WILKINS’ INJURIES WAS
RELEVANT AND NOT UNFAIRLY PREJUDICIAL.**

Second, Defendant contends that Youngstown Officer Jessica Shields and Dr. Joseph Ohr’s testimony regarding the crime scene and Ororo Wilkins’ injuries also amounted to improper victim-impact evidence that was unfairly prejudicial.¹

“Evidence relating to the facts attendant to the offense is ‘clearly admissible’ during the guilt phase, even though it might be characterized as victim-impact evidence.” *McKnight*, 107 Ohio St.3d at 116, citing *State v. Fautenberry*, 72 Ohio St.3d 435, 440, 650 N.E.2d 878 (1995); see also *State v. Neyland*, 139 Ohio St.3d 353, 379, 2014 Ohio 1914, 12 N.E.3d 1112. Further, evidence that “illustrate[s] the nature and circumstances of the crime, including the physical condition and circumstances of the victim [] * * * is relevant and admissible.” *State v. Jones*, 91 Ohio St.3d 335, 343, 2001 Ohio 57, 744

¹ This Court must proceed to a plain-error analysis with regards to Dr. Ohr’s testimony, because Defendant did not object to his testimony (or even cross-examine him).

N.E.2d 1163. This Court previously recognized that “[t]he victi[m] cannot be separated from the crime.” *Jones*, 91 Ohio St.3d at 343, quoting *State v. Lorraine*, 66 Ohio St.3d 414, 420, 613 N.E.2d 212, 218-219 (1993).

For example, in *State v. Jones*, this Court found that “evidence concerning Officer’s Glover’s difficulty in breathing, his internal bleeding and brain injury, * * * the consultations between medical personnel and Officer Glover’s family[.]” and his medical records was relevant and admissible. *See Jones*, 91 Ohio St.3d at 343-344.

Here, Youngstown Officer Jessica Shields and Dr. Joseph Ohr’s testimony regarding the crime scene and Ororo Wilkins’ injuries was relevant evidence that related to the facts attendant to the offense. *See State v. Mundt*, 115 Ohio St.3d 22, 35, 2007 Ohio 4836, 873 N.E.2d 828 (testimony describing the crime scene, including the victim’s body, was relevant to corroborate the coroner’s subsequent testimony); *Drummond*, 111 Ohio St.3d at 45 (concluding an officer’s testimony that “brain matter” was found at the crime scene was proper); *Smith*, 97 Ohio St.3d at 374-375 (concluding that admitting witness testimony describing the victim’s injuries was proper); *State v. Bradley*, 42 Ohio St.3d 136, 147, 538 N.E.2d 373 (1989) (concluding that the probative value of testimony graphically describing the condition of the victim’s body was not substantially outweighed by the danger of unfair prejudice).

Therefore, Traniece Wilkins’ testimony regarding Ororo Wilkins’ general character was an isolated, passing reference to her personality that did not amount to plain error, and Officer Jessica Shields and Dr. Joseph Ohr’s testimony regarding the crime scene and the victim’s injuries was relevant and not unfairly prejudicial.

Defendant’s seventh proposition of law is meritless and must be overruled.

VIII. Proposition of Law No. 8: It is Prejudicial Error to Admit Evidence of a Firearm Not Used in the Homicide and that is Not Relevant to the Charges Being Decided by the Jury in Violation of Art. I, Section 10 of the Ohio Constitution and the Sixth, Eighth, and Fourteenth Amendments of the Federal Constitution.

State's Response to Proposition of Law No. 8: Plain Error Did Not Result from the Trial Court's Admission of Relevant Testimony Concerning the 9mm Firearm that was Seized from Defendant upon his Arrest.

As for Defendant's eighth proposition of law, he contends that plain error resulted from the trial court's admission of testimony concerning the 9mm firearm that was seized from him upon his arrest. To the contrary, the 9mm firearm was relevant to establish William Wilkins and Alexander Morales' credibility. Therefore, plain error did not result from the trial court's admission of testimony concerning the 9mm firearm.

A. TO ESTABLISH PLAIN ERROR, DEFENDANT MUST DEMONSTRATE THAT, BUT FOR THE ERROR, THE TRIAL'S OUTCOME WOULD HAVE BEEN DIFFERENT.

The State of Ohio-Appellee will incorporate the above summary regarding the application of plain error previously set forth above in subsection VII(A)(1).

B. THE ADMISSION OR EXCLUSION OF RELEVANT EVIDENCE AT TRIAL LIES WITHIN THE SOUND DISCRETION OF THE TRIAL COURT.

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 Jackson*, supra at *1, citing *Finnerty*, 45 Ohio St.3d at 107. "[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." *Adams*, 62 Ohio St.2d at 157-158. Further, an appellate court may not substitute its own discretion for that of the trial court. *See Blakemore*, 5 Ohio St.3d at 219.

1. **THE ADMISSION OF TESTIMONY CONCERNING THE 9MM FIREARM SEIZED FROM DEFENDANT UPON HIS ARREST WAS RELEVANT TO ESTABLISH THE CREDIBILITY OF MISTER WILKINS AND ALEX MORALES.**

Here, Defendant contends that testimony concerning the 9mm firearm seized from him upon his arrest was not relevant to the charges being decided by the jury. Defendant, however, failed to object to this testimony; thus, this Court must review for plain error.

To begin, absent certain exceptions, “[a]ll relevant evidence is admissible[.]” Evid.R. 402. “‘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.” Evid.R. 401.

“The jury is entitled to all information that might bear on the accuracy and truth of a witness’s testimony.” *Tapscott*, 978 N.E.2d at 216, 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.

This Court 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.*

Here, the State presented testimony that a 9mm Luger firearm was recovered in the minivan that Defendant drove minutes before his arrest. (Trial Tr., at 3613-3614; 3759-3765.) Both Mister Wilkins and Alex Morales testified that Defendant threatened Mister with a 9mm “black small handgun” when they went to Defendant’s house to retrieve Mary Aragon’s bank card. (Trial Tr., at 3419-3421, 3503-3508.) Their testimony corroborated the fact that Defendant threatened Mister following a brief argument about an hour before the shooting on Park Avenue. (Trial Tr., at 3424-3426.) This testimony further established Defendant’s motive for the shooting.

Therefore, plain error did not result from the trial court’s admission of testimony concerning the 9mm Luger firearm, because the testimony was relevant to establish the credibility of Mister Wilkins and Alex Morales. *See Moore*, 40 Ohio St.3d at 65.

Defendant’s eighth proposition of law is meritless and must be overruled.

IX. Proposition of Law No. 9: Defective Jury Instructions Deprived the Appellant of Due Process and Fundamental Fairness Under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

State's Response to Proposition of Law No. 9: Plain Error Did Not Result from the Trial Court's Instruction Regarding the State's Burden in Establishing Aggravating Murder in Count One, Because Defendant Failed to Establish that the Trial's Outcome Would Have Clearly Been Different Had the Court Not Misspoken in Relation to Aggravating Murder in Count One.

As for Defendant's ninth proposition of law, he contends that the trial court erred 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 had the trial court not misspoken in regards to a single, isolated instruction. Therefore, plain error did not result from the trial court's instruction in regards to Aggravated Murder in Count One.

A. TO ESTABLISH PLAIN ERROR, DEFENDANT MUST DEMONSTRATE THAT, BUT FOR THE ERROR, THE TRIAL'S OUTCOME WOULD HAVE BEEN DIFFERENT.

The State of Ohio-Appellee will incorporate the above summary of the law regarding the application of plain error previously set forth above in subsection VII(A)(1).

B. ONLY IF THE ENTIRE JURY CHARGE RESULTED IN A MANIFEST MISCARRIAGE OF JUSTICE, MAY THIS COURT REVERSE DEFENDANT'S CONVICTION.

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).

The jury 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 *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*, Slip Opinion No. 2015 Ohio 4347, ¶ 135; *State v. Horton*, 10th Dist. No. 03 AP 665, 2005 Ohio 458; *State v. Moore*, 7th Dist. No. 02 CA 152, 2004 Ohio 2320, ¶ 12, citing *State v. Noggle*, 140 Ohio App.3d 733 (3rd Dist. 2000).

Thus, a judgment will not be reversed if a portion of the general charge is improper or misleading unless the entire charge resulted in prejudicial error. *See State v. Baker*, 92 Ohio App.3d 516, 536 (8th Dist. 1968). “An instruction results in prejudicial error when from the record it is gleaned that such an instruction resulted in a manifest miscarriage of justice.” *Moore*, 2004 Ohio 2320, at ¶ 12, citing *State v. McKibbon*, 1st Dist. No. C-010145, 2002 Ohio 2041.

“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).

1. **PLAIN ERROR DID NOT RESULT FROM THE COURT'S INSTRUCTION, BECAUSE THE OVERALL JURY CHARGE DID NOT ESTABLISH THAT THE TRIAL'S OUTCOME WOULD HAVE BEEN DIFFERENT.**

Here, Defendant contends 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. 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 above instruction should have included the word “any” rather than “all.” This instruction, however, did not constitute plain error.

It is well-settled law in Ohio 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:

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.)

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.

(Trial Tr., at 4082.) Thus, 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.

Therefore, plain error did not result from the trial court's instruction in regards to Aggravated Murder in Count One, because Defendant failed to establish that the trial's outcome would have clearly been different had the trial court not misspoken in regards to a single, isolated instruction in relation to Aggravated Murder in Count One.

Defendant's ninth proposition of law is meritless and must be overruled.

- X. **Proposition of Law No. 10:** Errors in the Trial Phase Jury Instructions Deprived Appellant Wilks of Due Process Under the Sixth, Eight and Fourteenth Amendments to the United States Constitution.

State's Response to Proposition of Law No. 10: The Trial Court Properly Instructed the Jury on the Doctrine of Transferred Intent, Because Defendant's Scheme was Designed to Implement the Calculated Decision to Kill Someone Other than the Victim.

As for Defendant's tenth proposition of law, he contends that the doctrine of transferred intent cannot be applied to the R.C. 2929.04(A)(5) course-of-conduct specification —“course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offense.” To the contrary, Defendant's scheme was designed to implement the calculated decision to kill Mister Wilkins rather than the actual murder victim, Ororo Wilkins. Therefore, the trial court properly instructed the jury regarding the doctrine of transferred intent in relation to the R.C. 2929.04(A)(5) course-of-conduct specification.

- A. **ONLY IF THE ENTIRE JURY CHARGE RESULTED IN A MANIFEST MISCARRIAGE OF JUSTICE, MAY THIS COURT REVERSE DEFENDANT'S CONVICTION.**

The State of Ohio-Appellee will incorporate the above summary of the law regarding the trial court's instructions previously set forth above in subsection IX(B).

1. **THE TRIAL COURT DID NOT ERR WHEN IT INSTRUCTED THE JURY ON TRANSFERRED INTENT, BECAUSE DEFENDANT'S SCHEME WAS DESIGNED TO IMPLEMENT THE CALCULATED DECISION TO KILL SOMEONE OTHER THAN THE VICTIM.**

“The doctrine of transferred intent is a long-standing feature of Ohio's criminal law.” *State v. Williams*, 7th Dist. No. 98 CA 74, 2000 WL 309390, at *3 (Mar. 20, 2000),

citing *Wareham v. State*, 25 Ohio St. 601 (1874). The most common uses of the doctrine in a homicide murder setting are where an unintended individual is killed:

For instance, if the defendant makes a calculated decision to kill a particular person, then the defendant is guilty of aggravated murder if any bystander is accidentally killed during the defendant's attempt to kill his intended victim. See *State v. Richey* (1992), 64 Ohio St.3d 353, 364 (holding that where the intended victims escape from an act of arson but a baby dies in the fire, the defendant's intent regarding the individuals that escaped transfers to the baby). This type of case is also often characterized by stray bullets which result in the death of a bystander rather than the intended victim. Similarly, if a defendant kills someone whom he thinks is his intended victim and later finds out that he misidentified his victim, then the defendant is just as guilty as if he killed his intended victim.

Williams, supra at *3. The doctrine also applies where “a defendant makes a calculated decision to kill someone and while engaging in his scheme to kill his intended victim, he purposely, but maybe not with actual prior calculation and design, kills someone else.” *Id.* at *4.

Accordingly, this Court held in *Solomon*, “if one purposely causes the death of another and the death is the result of a scheme designed to implement the calculated decision to kill someone other than the victim, the offender is guilty of aggravated murder in violation of R.C. 2903.01(A).” *State v. Solomon*, 66 Ohio St.2d 214, 218, 421 N.E.2d 139 (1981); accord *State v. Sowell*, 39 Ohio St.3d 322, 530 N.E.2d 1294, paragraph two of the syllabus (1988).

Here, Defendant contends that while the doctrine of transferred intent can be applied to the aggravated murder, the doctrine cannot be automatically applied to the R.C. 2929.04(A)(5) course-of-conduct specification—“course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offense.”

Specific to Defendant’s argument, the Eighth District previously concluded that the transferred intent instruction could be given and applied to the R.C. 2929.04(A)(5) course-of-conduct specification. *See State v. Brooks*, 8th Dist. No. 57034, 1991 WL 1494, at *6 (Jan. 10, 1991) (concluding “this evidence supported the jury instruction regarding the mass murder specification. The intent to kill or attempt to kill two or more persons was sufficiently established as the above evidence reveals that the natural and probable consequence of appellant’s wrongful act was his intention to kill or attempt to kill two or more persons.”); *see also State v. Collins*, 10th Dist. No. 00AP-650, 2001 WL 345347, at *3-4 (Apr. 10, 2001).

This Court also addressed analogous arguments in *Sowell*, *supra* and *Dean*, *supra* that sought to limit the doctrine’s application.

In *Sowell*, similar to Defendant here, the defendant argued “that the essential element of prior calculation and design cannot be enlarged to include the slain victim against whom such prior calculation and design was not directed, where the offender shoots both the person killed and the person against whom the prior calculation and design was directed.” *Sowell*, 39 Ohio St.3d at 331. And like the defendant in *Sowell*, Defendant seeks to benefit from the fact that he shot and killed Ororo Wilkins and attempted to kill Alex Morales instead of his intended target, Mister Wilkins. *See id.*

In *Sowell*, this Court specifically stated that the “case involved one course of conduct, *i.e.*, the scheme designed to implement the calculated decision to shoot and kill [the intended victim]. [The unintended victim] was killed during this course of conduct.” *Id.* at 331. Thus, “[t]he doctrine of transferred intent is not eliminated by the fact that the defendant proceeds with his scheme and injures his intended victim.” *Id.*, citing *State v.*

Gandy, 283 S.C. 571, 324 S.E.2d 65 (1984), *United States v. Sampol*, 636 F.2d 621, 674 (D.C. Cir., 1980), and *State v. Hamilton*, 89 N.M. 746, 557 P.2d 1095 (1976).

Similarly in *Dean*, the defendant argued that the doctrine of transferred intent could not be applied to attempted murder because those offenses involved unintended victims that were uninjured. *See Dean*, supra at ¶ 138. In *Dean*, this Court recognized that “the doctrine of transferred intent is not limited to killings. * * * It is instead ‘a general principle which permits liability for any crime involving a *mens rea* of intent—be it arson, assault, theft or trespass—where the actual object of the crime is not the intended object.’” *Dean*, supra at ¶ 142, quoting *Harrison v. State*, 382 Md. 477, 511, fn. 3, 855 A.2d 1220 (2004), quoting Dillon, *Transferred Intent: An Inquiry into the Nature of Criminal Culpability*, 1 Buff.Crim.L.Rev. 501, 504 (1998). Thus, the doctrine is not necessarily limited to aggravated murder, as Defendant contends here.

Further, this Court has previously concluded that similar instructions regarding transferred intent were proper in cases where the defendant was convicted of the R.C. 2929.04(A)(5) course-of-conduct specification. *See State v. Powell*, 132 Ohio St.3d 233, 261-262, 2012 Ohio 2577, 971 N.E.2d 865; *Conway*, 108 Ohio St.3d at 240-241; *State v. Richey*, 64 Ohio St.3d 353, 363-364, 1992 Ohio 44, 595 N.E.2d 915; *Sowell*, 39 Ohio St.3d at 330-332.

Accordingly, the doctrine of transferred intent is not limited to the underlying aggravated murder, and can be applied to the corresponding R.C. 2929.04(A)(5) course-of-conduct specification (or any other capital specification).

Nevertheless, the jury had overwhelming evidence that Defendant had a specific purpose to kill when he fired multiple shots with a high-powered semi-automatic assault rifle from close range at the defenseless victims—killing Ororo Wilkins and nearly killing Alex Morales. “It is a fundamental principle that a person is presumed to intend the natural, reasonable and probable consequences of his voluntary acts.” *Conway*, 108 Ohio St.3d at 241, quoting *State v. Johnson*, 56 Ohio St.2d 35, 39, 381 N.E.2d 637 (1978). And “[i]ntent is gathered from the surrounding facts and circumstances.” *Conway*, 108 Ohio St.3d at 241, citing *Johnson*, 56 Ohio St.2d at 38, and *State v. Lott*, 51 Ohio St.3d 160, 168, 555 N.E.2d 293 (1990).

Therefore, the trial court properly instructed the jury regarding the doctrine of transferred intent in relation to the R.C. 2929.04(A)(5) course-of-conduct specification, because Defendant’s actions involved one course of conduct, *i.e.*, the scheme designed to implement the calculated decision to shoot and kill Mister Wilkins.

Defendant’s tenth proposition of law is meritless and must be overruled.

- XI. Proposition of Law No. 11:** When the Only Factual Issue is the Identity of the Shooter, then the Trial Court May Not Instruct a Jury on Lesser-Included Offenses.

State's Response to Proposition of Law No. 11: Plain Error Did Not Result from the Trial Court Instructing the Jury on the Lesser-Included Offenses of Murder and Felonious Assault, Because a Reasonable Juror Could Have Found that the State Failed to Establish that Defendant Formed the Requisite "Prior Calculation and Design."

As for Defendant's eleventh proposition of law, he contends that the trial court improperly instructed the jury on the lesser-included offenses because he only disputed the shooter's identity. To the contrary, "a defendant who presents an 'all or nothing' defense in a criminal trial" does not have "the right to prevent a trial court from giving lesser-included-offense jury instructions." *State v. Wine*, 140 Ohio St.3d 409, 409, 2014 Ohio 3948, 18 N.E.3d 1207. Therefore, the trial court properly instructed the jury on the lesser-included offenses even though Defendant only disputed the shooter's identity.

A. PLAIN ERROR DID NOT RESULT FROM THE TRIAL COURT'S INSTRUCTION REGARDING COUNT ONE.

The State of Ohio-Appellee will incorporate the above summary of the law regarding the application of plain error previously set forth above in subsection VII(A)(1).

B. ONLY IF THE ENTIRE JURY CHARGE RESULTED IN A MANIFEST MISCARRIAGE OF JUSTICE, MAY THIS COURT REVERSE APPELLANT'S CONVICTION.

The State of Ohio-Appellee will incorporate the above summary of the law regarding the trial court's jury instructions previously set forth above in subsection IX(B).

C. **AN INSTRUCTION OF
A LESSER-INCLUDED OFFENSE IS
WARRANTED WHEN THE EVIDENCE
WOULD REASONABLY SUPPORT BOTH
AN ACQUITTAL ON THE OFFENSE CHARGED
AND A CONVICTION OF THE LESSER-INCLUDED.**

“At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged.” *Wine*, 140 Ohio St.3d at 413, citing *Beck v. Alabama*, 447 U.S. 625, 633, 100 S.Ct. 2382 (1980).

This Court previously held that “a charge on such lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense.” *State v. Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264, paragraph two of the syllabus (1984), clarifying *State v. Kidder*, 32 Ohio St.3d 279, 513 N.E.2d 311 (1987), *State v. Davis*, 6 Ohio St.3d 91, 451 N.E.2d 772 (1983), and *State v. Wilkins*, 64 Ohio St.2d 382, 415 N.E.2d 303 (1980); *see also State v. Evans*, 122 Ohio St.3d 381, 385, 2009 Ohio 2974, 911 N.E.2d 889.

Accordingly, a defendant is not entitled to an instruction on a lesser-included offense whenever there is “some evidence” that he acted in a way to satisfy the requirements of a lesser-included offense. *See State v. Shane*, 63 Ohio St.3d 630, 632, 590 N.E.2d 272 (1992), citing *State v. Muscatello*, 55 Ohio St.2d 201, 378 N.E.2d 738, paragraph four of the syllabus (1978), and *Tyler*, 50 Ohio St.3d at 37. Thus, an instruction is warranted “when sufficient evidence is presented which would allow a jury to *reasonably* reject the greater offense and find the defendant guilty on a lesser included (or inferior-degree) offense.” (Emphasis sic.) *Id.* at 632-633.

Further, “[i]n determining whether lesser-included-offense instructions are appropriate, ‘the trial court must view the evidence in the light most favorable to the defendant.’” *Wine*, 140 Ohio St.3d at 414, quoting *State v. Monroe*, 105 Ohio St.3d 384, 2005 Ohio 2282, 827 N.E.2d 285, ¶ 37.

1. **INSTRUCTIONS ON
THE LESSER-INCLUDED
OFFENSES WERE WARRANTED,
BECAUSE A REASONABLE JUROR COULD
HAVE FOUND THAT THE STATE FAILED TO
ESTABLISH THAT DEFENDANT FORMED THE
REQUISITE PRIOR CALCULATION AND DESIGN.**

Here, Defendant contends that plain error resulted from the trial court instructing the jury on the lesser-included offenses of Murder and Felonious Assault, because he only disputed the shooter’s identity.

To begin, this Court recently held that “a defendant who presents an ‘all or nothing’ defense in a criminal trial” does not have “the right to prevent a trial court from giving lesser-included-offense jury instructions.” *Wine*, 140 Ohio St.3d at 409. Ohio law requires an instruction on a lesser-included offense “if the trier could *reasonably* find against the state and for the accused upon one or more of the elements of the crime charged and for the state and against the accused on the remaining elements, which by themselves would sustain a conviction upon a lesser included offense[.]” *Wine*, 140 Ohio St.3d at 415, quoting *State v. Nolton*, 19 Ohio St.2d 133, 135, 249 N.E.2d 797 (1969). This benefits not only the State but the defendant as well. *See id.*

This Court explained in *Wilkins* that “even when a complete defense is offered by the defendant, if the state’s evidence could be interpreted as supporting only a lesser included offense, a lesser-included-offense charge to the jury is appropriate[.]” *Wine*, 140

Ohio St.3d at 416. This Court recently reiterated in *Wine* that it “left no doubt that it is the quality of the evidence offered, not the strategy of the defendant, that determines whether a lesser-included-offense charge should be given to a jury.” *Wine*, 140 Ohio St.3d at 416.

“A defendant’s choice to pursue an all-or-nothing defense does not require a trial judge to impose upon the state an all-or-nothing prosecution of the crime charged if the evidence would support a conviction on a lesser included offense[,]” because “a jury can both reject an all-or-nothing defense—e.g., alibi, mistaken identity, or self-defense—and find that the state has failed to meet its evidentiary burden on an element of the charged crime. (Emphasis sic.) *Wine*, 140 Ohio St.3d at 418; *see also Solomon*, 66 Ohio St.2d at 221. Thus, “[t]he fact that the evidence could be interpreted by the jury as questionable on a single element does not mean that the defendant committed no crime[.]” *Wine*, 140 Ohio St.3d at 418.

Here, the trial court properly instructed the jury on the lesser-included offenses of Murder and Felonious Assault, because a reasonable juror could have found that the State failed to establish that Defendant formed the requisite “prior calculation and design.”

Therefore, plain error did not result from the trial court instructing the jury on the lesser-included offenses of Murder and Felonious Assault even though Defendant only disputed the shooter’s identity, because a criminal defendant does not have the power “to prevent a trial court from instructing a jury on lesser included offenses[.]” * * * “if under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense.” *Wine*, 140 Ohio St.3d at 418.

Defendant’s eleventh assignment of error is meritless and must be overruled.

XII. Proposition of Law No. 12: A Criminal Defendant Should Not be Made to Appear in Court with Shackles, Unless the Trial Court Holds a Hearing at Which the Prosecution Demonstrates the Need for the Restraint.

State's Response to Proposition of Law No. 12: The Record Supports the Trial Court's Decision to Order Defendant to be Restrained During the Penalty-Phase Proceedings After He Demonstrated a Likelihood of Additional Violence By His Outburst While the Trial Court Read the Jury's Verdicts.

As for Defendant's twelfth proposition of law, he contends that the trial court's failure to hold a hearing in which to demonstrate whether there existed the need to place him in restraints during the penalty phase violated his right to a fair trial and his right to counsel. To the contrary, the record supports the trial court's decision after Defendant demonstrated a likelihood of additional violence after his outburst when the trial court read the jury's verdicts. Therefore, the trial court did not abuse its discretion when it ordered Defendant to be restrained during the penalty-phase proceedings.

A. ONLY IF THE TRIAL COURT HAD NO RATIONAL BASIS FOR ORDERING DEFENDANT TO BE RESTRAINED MAY A THIS COURT FIND AN ABUSE OF DISCRETION.

"The decision to require restraints is left to the sound discretion of the trial court, which is in a position to consider the prisoner's actions both inside and outside the courtroom, as well as his demeanor while the court is in session." *Neyland*, 139 Ohio St.3d at 367, citing *Franklin*, 97 Ohio St.3d at 19.

This Court has concluded that an abuse of discretion "connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Adams*, 62 Ohio St.2d at 157.

1. **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ORDERED DEFENDANT TO BE RESTRAINED DURING THE PENALTY PHASE AFTER HIS OUTBURST FOLLOWING THE JURY’S VERDICT, WHICH HE HAD TO BE SUBDUED BY THE COURTROOM DEPUTIES.**

To begin, this Court has *never required* a trial court to hold an evidentiary hearing before ordering a defendant to be restrained: “Although we stress that the preferred and encouraged practice prior to handcuffing a defendant during any phase of trial is to hold a hearing on the matter, *we do not find this to be an absolute rule.*” (Emphasis added.) *Franklin*, 97 Ohio St.3d at 19; *accord Neyland*, 139 Ohio St.3d at 368.

Accordingly, the trial court was not required to hold a formal evidentiary hearing before it ordered Defendant to be restrained. *See Neyland*, 139 Ohio St.3d at 369.

“[I]t is widely accepted that a prisoner may be shackled when there is a danger of violence or escape.” *Neyland*, 139 Ohio St.3d at 367, citing *State v. Woodards*, 6 Ohio St.2d 14, 23, 215 N.E.2d 568 (1966). This Court further noted “that a court need not sit by helplessly waiting for a defendant to commit a violent or disruptive act in the courtroom before being cloaked with the power to invoke extra security measures.” *Franklin*, 97 Ohio St.3d at 19, citing *Loux v. United States*, 389 F.2d 911, 919-920 (9th Cir., 1968).

Thus, “[w]here the facts and circumstances surrounding a defendant illustrate a compelling need to impose exceptional security procedures, the trial court’s exercise of discretion in this regard should not be disturbed unless its actions are not supported by the evidence before it.” *Franklin*, 97 Ohio St.3d at 19.

Here, Defendant interrupted the trial court as he read the jury’s verdict:

THE COURT: Ladies and gentlemen, I'm told you have a verdict. Would you please give it to my bailiff? Thank you. We, the jury, find the Defendant, Willie Gene Wilks, Jr., guilty of aggravated murder, in violation of Revised Code Section 2903.01(A)(F) --

DEFENDANT: I didn't do it.

THE COURT: Please, let's maintain our composure.

(Trial Tr., at 4113-4114.) The trial court summarized Defendant's outburst: "Upon announcement of the Jury's verdict in open court, the Defendant had a physical and verbal reaction to the verdict and upon his exiting of the Courtroom; he became unruly, kicked a large hole in a plaster wall adjacent to the Courtroom and had to be physically subdued." (Judgment Entry, April 30, 2014.) The trial court then ordered Defendant to appear during the penalty-phase proceedings with restraints to ensure the safety of everyone inside the courtroom. (Status Hearing Transcript, April 25, 2014, before the Honorable Lou A. D'Apolito, at 4145-4147.)

Further, the trial court stated that the restraints would be concealed by Defendant's clothing to ensure that no attention would be drawn to them:

I have determined that what I'm going to do is I'm going to permit the defendant to appear in street civilian clothes, but we are going to have him restrained so that it doesn't -- ***we don't draw attention to that.*** It is obvious that someone who has been convicted of this nature of a crime, there would be nothing unusual about having him handcuffed. But what I'm going to do, as best as I can, to have some normalcy is ***to have whatever restraints there are concealed by clothing.*** And if, in fact -- and I don't know whether he will make a statement under oath or a statement not under oath, but if he chose -- if he chooses to do so, of course, there will be the appropriate instruction, what I'm going to do is ***have the jury removed and let the defendant appear and put the jury in place, remove the jury and the defendant can be removed back to his seat.***

(Status Hrg. Tr., at 4146-4147.) And when it came time for Defendant's unsworn statement, the trial court removed his handcuffs, and also removed the jury from the courtroom as he was taken to the podium: "We're going to permit for this part of the proceedings that ***the handcuffs be removed*** for him to deliver a presentation to the jury. Upon his presentation, he will sit back in his chair, and ***the jury will be excused***, and then the Defendant will be rehandcuffed and secured again." (Emphasis added.) (Trial Tr., at 4244.)

Thus, the record is more than sufficient for this Court to determine that the trial court's decision to place Defendant in restraints during the penalty-phase proceedings did not amount to an abuse of discretion.

For comparison, in *State v. Neyland*, this Court concluded that the trial court did not abuse its discretion when it ordered the defendant to wear a leg restraint absent any exhibited violent or disruptive behavior. *See Neyland*, 139 Ohio St.3d at 369. In *Neyland*, the trial court's decision was instead based upon the defendant's "*potential* for disruptive courtroom behavior[.]" as "[d]efense counsel stated that Neyland was 'very unpredictable' and acknowledged that he 'would be demonstrative, not necessarily disruptive.'" *Neyland*, 139 Ohio St.3d at 369. The trial court further observed that the defendant was a large man who the deputies could have trouble handling him should he become disruptive. *Neyland*, 139 Ohio St.3d at 369. And similar to Defendant, the trial court noted that the defendant had been "pretty well-behaved[]" throughout the trial. *See Neyland*, 139 Ohio St.3d at 369.

Similarly in *State v. Franklin*, this Court concluded that the trial court did not abuse its discretion when it allowed the defendant to be handcuffed with two sheriff's

deputies positioned behind him during the penalty phase. *See Franklin*, 97 Ohio St.3d at 20. This Court found that despite the lack of a hearing, or any discussion regarding the trial court's decision to restrain the defendant, the record demonstrated that the trial court's decision was reasonable, because the defendant was convicted of three brutal murders, and had previously stabbed an inmate while incarcerated. *See Franklin*, 97 Ohio St.3d at 19. Further, the defense's own expert described the defendant as "a time bomb waiting to happen. * * * [O]ne can never tell when he will become violent." *Franklin*, 97 Ohio St.3d at 19.

This Court concluded in both *Franklin* and *Neyland* that the trial court properly ordered the defendant to be restrained despite the lack of a hearing. Further, unlike Defendant's outburst and violent behavior (kicking a large hole into the wall outside the courtroom), both *Franklin* and *Neyland* lacked any outbursts or violent behavior during any phase of the trial proceedings before the defendants were ordered to be restrained.

Furthermore, there is no evidence in the record that the restraints inhibited Defendant's communication with counsel, or that the restraints were visible to the jury. *See United States v. McKissick*, 204 F.3d 1282, 1299 (10th Cir., 2000) (concluding that prejudice will not be presumed where there is no evidence that jury knew that the defendant was wearing a restraint).

Therefore, the trial court did not abuse its discretion when it ordered Defendant to be restrained during the penalty-phase proceedings, because the record supports the court's decision after Defendant demonstrated a likelihood of additional violence after his outburst and violent behavior when the trial court announced the jury's verdicts.

Defendant's twelfth proposition of law is meritless and must be overruled.

XIII. Proposition of Law No. 13: It Violates the Eighth and Fourteenth Amendments to the U.S. Constitution and Ohio Constitution, Article I, Sections 1, 2, 9, and 16 to Uphold a Sentence of Death when an Independent Weighing of the Aggravating Circumstance Versus the Mitigating Factors Demonstrates that the Aggravating Circumstance Does Not Outweigh the Mitigating Factors Beyond Any Reasonable Doubt, and that Death is Not the Appropriate Sentence.

State's Response to Proposition of Law No. 13: This Court's Independent Review of Defendant's Sentence Must Demonstrate that the Aggravating Circumstance Outweighs the Mitigating Factors Beyond a Reasonable Doubt, and Defendant's Death Sentence is Appropriate and Proportionate.

As for Defendant's thirteenth proposition of law, he contends that an independent review of his sentence demonstrates that the aggravating circumstance does not outweigh the mitigating factors beyond a reasonable doubt, and his death sentence is neither appropriate nor proportionate. To the contrary, the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt, and Defendant's death sentence is both appropriate and proportionate. Therefore, Defendant's death sentence must stand.

A. **THIS COURT MUST INDEPENDENTLY REVIEW DEFENDANT'S DEATH SENTENCE BY WEIGHING THE AGGRAVATING CIRCUMSTANCE AGAINST THE MITIGATING FACTORS PRESENTED.**

This Court must determine if Defendant's death sentence is the appropriate punishment by independently determining if the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt. *See* R.C. 2929.05(A); *Trimble*, 122 Ohio St.3d at 333.

1. THE AGGRAVATING CIRCUMSTANCE (COURSE-OF-CONDUCT) OUTWEIGHS THE MITIGATING FACTORS BEYOND A REASONABLE DOUBT.

a.) Mitigating Factors

Against the aggravating circumstance, Defendant presented the testimony of three witnesses to establish the existence of mitigating factors pursuant to R.C. 2929.04(B).

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 3-year-old son with Defendant; the child’s name is Willie Tracy Wilks. (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 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 had 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.)

b.) Aggravating Circumstance

The jury found Defendant guilty of Aggravated Murder, in violation of R.C. 2903.01(A)(F), and the accompanying Death Specification, in violation of R.C. 2929.04(A)(5) (stating, “the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.”).

Here, the evidence at trial established beyond a reasonable doubt that on the afternoon of May 21, 2013, Mister and Morales proceeded to Defendant’s house to get Aragon’s bank card. (Trial Tr., at 3417, 3503.) When Defendant finally came outside, he and Mister walked around the corner towards Upland. (Trial Tr., at 3505-3506.)

Mister got “angry with him[.]” and the two “exchanged a couple words,” which Mister then tried “to like fight him or, * * * antagonize him[.]” (Trial Tr., at 3507.) Mister was upset because Defendant refused to give him Aragon’s bank card. (Trial Tr., at 3507-3508.) 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 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 brandishing the gun. (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.)

Mister and Morales eventually left to play basketball at the courts in Arlington Heights on Park Avenue. (Trial Tr., at 3423, 3509-3510.) 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.)

Mister and Morales arrived at 725 Park Avenue (Mister's home) around 4:20 p.m. (Trial Tr., at 3363.) About 10-20 later, Morales observed Defendant coming towards the front porch from the sidewalk. (Trial Tr., at 3432, 3521.) 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.)

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 used during the earlier altercation. (Trial Tr., at 3529.)

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.)

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.)

Here, the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt. *See* R.C. 2929.04(A)(5).

2. DEFENDANT’S DEATH SENTENCE IS PROPORTIONATE TO OTHER CASES IN WHICH THE DEATH PENALTY WAS IMPOSED.

Here, Defendant’s death sentence is appropriate and proportionate in this case, when compared to death sentences approved in other course-of-conduct murders. *See, e.g., Drummond*, 111 Ohio St.3d at 51 (concluding the death penalty was proportionate after John Drummond and Wayne Gilliam fired multiple shots into the home of Jiyen Dent, Latoya Butler (Dent’s girlfriend), and Jiyen Dent Jr. during a drive-by shooting that killed 3-month-old Jiyen Dent Jr., who was sitting in his baby swing); *Cornwell*, 86 Ohio St.3d at 574-575 (concluding the death penalty was proportionate after Sydney Cornwell opened fired into an apartment killing a 3-year-old child and wounding three others after his intended target was not present); *State v. Foust*, 105 Ohio St.3d 137, 170-171, 2004 Ohio 7006, 823 N.E.2d 836 (concluding the death penalty was proportionate after Kelly Foust killed Jose Coreano with a hammer and then repeatedly raped Coreano’s 17-year-old daughter, Damaris; Foust then tied Damaris to the bathtub and set the house on fire, but Damaris managed to escape); *State v. Filiaggi*, 86 Ohio St.3d 230, 254, 1999 Ohio

99, 714 N.E.2d 867 (concluding the death penalty was proportionate after James Filiaggi murdered his ex-wife Lisa Filiaggi and then drove to the home of Delbert Yepko, Lisa Filiaggi's stepfather, and attempted to kill him); *Sowell*, 39 Ohio St.3d at 337 (concluding the death penalty was proportionate after Billy Joe Sowell murdered a friend by shooting him in the head and nearly killed another after shooting her three times).

Further, all of the above mentioned cases involved the murder of *one* individual and the attempted murder of at least *one additional* individual; two of which occurred in Mahoning County.

Therefore, this Court's independent review must demonstrate that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt, and Defendant's death sentence is both appropriate and proportionate when compared to death sentences approved in similar cases.

Defendant's thirteenth proposition of law is meritless and must be overruled.

XIV. Proposition of Law No. 14: It Violates the Sixth, Eighth and Fourteenth Amendments of the Federal Constitution to Not Instruct the Jury that Mercy can be Considered During its Penalty Phase Deliberations.

State's Response to Proposition of Law No. 14: Defendant was Afforded His Right to Due Process under the Federal Constitution, Because the Trial Court is Not Required to Give the Jury an Instruction to Consider "Mercy" During its Penalty-Phase Deliberations.

As for Defendant's fourteenth proposition of law, he contends that the trial court's refusal to allow the jury to consider "mercy" during its penalty-phase deliberations violated his Sixth, Eighth, and Fourteenth Amendment rights. This Court, however, has previously held that the failure to give the jury a limited instruction on "mercy" is consistent with the Eighth Amendment, because it "would violate the well-established principle that the death penalty must not be administered in an arbitrary, capricious or unpredictable manner." *Lorraine*, 66 Ohio St.3d at 417, citing *California v. Brown*, 479 U.S. 538, 541 (1987), *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Furman v. Georgia*, 408 U.S. 238 (1972). Therefore the trial court did not abuse its discretion when it refused to instruct the jury to consider "mercy" during its penalty-phase deliberations.

**A. A TRIAL COURT'S DECISION TO GIVE
A REQUESTED JURY INSTRUCTION LIES
WITHIN THE COURT'S SOUND DISCRETION.**

This Court must determine whether the trial court abused its discretion when it refused to give a requested jury instruction. *See State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989).

1. **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO INSTRUCT THE JURY ON “MERCY.”**

The U.S. Supreme Court’s Eighth Amendment jurisprudence establishes two separate prerequisites to a valid death sentence. “First, sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion.” *Brown*, 479 U.S. at 541, citing *Gregg*, 428 U.S. at 153, and *Furman*, 408 U.S. at 238.

“Second, even though the sentencer’s discretion must be restricted, the capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his ‘character or record and any of the circumstances of the offense.’” *Brown*, 479 U.S. at 541, quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954 (1978). “Consideration of such evidence is a ‘constitutionally indispensable part of the process of inflicting the penalty of death.’” *Brown*, 479 U.S. at 541, quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

In *Brown*, the jury was instructed not to be persuaded by “mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.” *Brown*, 479 U.S. at 542. The U.S. Court concluded that the instruction was proper. *See id.* at 543. Prior to *Brown*, this Court held that “[t]he instruction to the jury in the penalty phase of a capital prosecution to exclude consideration of bias, sympathy or prejudice is intended to insure that the sentencing decision is based upon a consideration of the reviewable

guidelines fixed by statute as opposed to the individual juror's personal biases or sympathies." *Jenkins*, at paragraph three of the syllabus.

The U.S. Court reasoned that the instruction was consistent with the Eighth Amendment's need for reliability, and provides a safeguard to ensure that reliability is present in the sentencing process:

An instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial, does not violate the United States Constitution. It serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him. And to the extent that the instruction helps to limit the jury's consideration to matters introduced in evidence before it, it fosters the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson*, 428 U.S., at 305, 96 S.Ct., at 2991. Indeed, by limiting the jury's sentencing considerations to record evidence, the State also ensures the availability of meaningful judicial review, another safeguard that improves the reliability of the sentencing process. *See Roberts v. Louisiana*, 428 U.S. 325, 335, and n. 11, 96 S.Ct. 3001, 3007, and n. 11, 49 L.Ed.2d 974 (1976) (opinion of Stewart, Powell and Stevens, JJ.).

Brown, 479 U.S. at 543.

Subsequently, this Court likened the Court's analysis of "sympathy" in *Brown* to that of "mercy." *Lorraine*, 66 Ohio St.3d at 417. "Mercy, like bias, prejudice, and sympathy, is irrelevant to the duty of the jurors." *State v. Clark*, 8th Dist. No. 89371, 2008 Ohio 1404, ¶ 57, quoting *Lorraine*, 66 Ohio St.3d at 418. This Court previously found "[m]ercy is not a mitigating factor." *State v. O'Neal*, 87 Ohio St.3d 402, 416, 2000 Ohio 449, 721 N.E.2d 73.

"Permitting a jury to consider mercy, which is not a mitigating factor and thus irrelevant to sentencing, would violate the well-established principle that the death

penalty must not be administered in an arbitrary, capricious or unpredictable manner.” *Lorraine*, 66 Ohio St.3d at 417, citing *Brown*, 479 U.S. at 541, *Gregg*, 428 U.S. at 153, and *Furman*, 408 U.S. at 238. And “[t]he arbitrary result which may occur from a jury’s consideration of mercy is the exact reason the General Assembly established the procedure now used in Ohio.” *Lorraine*, 66 Ohio St.3d at 417.

While the trial court’s instructions may admonish the jury to “ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase[,]” the instructions, however, “must clearly inform the jury that they are to consider any relevant mitigating evidence about a defendant’s background and character, or about the circumstances of the crime.” *Brown*, 479 U.S. at 544-545 (O’Connor, J., concurring).

Here, the trial court’s instructions satisfied the above point that the instructions must nevertheless clearly inform the jury that they were to consider any relevant mitigating evidence about Defendant’s background and character:

Mitigating factors are factors about an individual or an offense that weigh in favor of a decision that a life sentence, rather than a death sentence is appropriate. Mitigating factors are factors that diminish the appropriateness of a death sentence. You must consider all of the mitigating factors presented to you. Mitigating factors include, but are not limited to, the nature and circumstances of the offense, the history, character and background of Willie Gene Wilks, Jr., and any other factors that weigh in favor of a sentence other than death. This means you are not limited to the specific mitigating factors that have been described to you. You should consider any other mitigating factors that weigh in favor of a sentence other than death.

Any one of these mitigating factors standing alone is sufficient to support a sentence of life imprisonment if the aggravating circumstance is not sufficient to outweigh that mitigating factor beyond a reasonable doubt. Also the cumulative effect of the -- also the cumulative effect of the mitigating factors will support a

sentence of life imprisonment if the aggravating circumstance is not sufficient to outweigh the mitigating factors beyond a reasonable doubt.

(Mitigation Hrg. Tr., at 4275-4276.) *See Brown*, 479 U.S. at 544-545 (O'Connor, J., concurring) (stating “an instruction informing the jury that they ‘must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling’ does not by itself violate the Eighth and Fourteenth Amendments to the United States Constitution. At the same time, the jury instructions-taken as a whole-must clearly inform the jury that they are to consider any relevant mitigating evidence about a defendant’s background and character, or about the circumstances of the crime.”).

And specific to Defendant’s argument here, this Court recently concluded that neither *Kansas v. Marsh*, 548 U.S. 163, 176, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006), nor *Penry v. Lynaugh*, 492 U.S. 302, 326, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), “holds that a trial court must consider mercy as a mitigating factor in capital proceedings.” *State v. Jackson*, 141 Ohio St.3d 171, 216, 2014 Ohio 3707, 23 N.E.3d 1023.

Therefore, it cannot be said that the trial court erred by refusing Defendant’s request to include an instruction on “mercy.” This decision was consistent with both the U.S. and Ohio Constitutions, and the trial court’s instructions to the jury were precisely what due process commands. *See State v. Davis*, 116 Ohio St.3d 404 (2008); *State v. Carter*, 89 Ohio St.3d 593 (2000); *O’Neal*, 87 Ohio St.3d at 416.

Defendant’s fourteenth proposition of law is meritless and must be overruled.

XV. Proposition of Law No. 15: The Sixth, Eighth and Fourteenth Amendments of the Federal Constitution are Violated if One is Not Allowed to Argue “Residual Doubt” and Have the Jury Instructed Concerning “Residual Doubt” in a Capital Case Sentencing Hearing.

State’s Response to Proposition of Law No. 15: Defendant was Afforded His Right to Due Process under the Federal Constitution, Because the Trial Court is Not Required to Give the Jury an Instruction to Consider “Residual Doubt” During its Penalty-Phase Deliberations.

As for Defendant’s fifteenth proposition of law, he contends that the trial court’s refusal to allow the jury to consider “residual doubt” during its penalty-phase deliberations violated his Sixth, Eighth, and Fourteenth Amendment rights. This Court, however, has previously held that “[r]esidual doubt is not an acceptable mitigating factor under R.C. 2929.04(B), since it is irrelevant to the issue of whether the defendant should be sentenced to death.” *State v. McGuire*, 80 Ohio St.3d 390, 1997 Ohio 335, 686 N.E.2d 1112, syllabus; *see Oregon v. Guzek*, 546 U.S. 517, 525, 126 S.Ct. 1226 (2006) (recognizing that it was “clear that the Oregon Supreme Court erred in interpreting *Green* as providing a capital defendant with a constitutional right to introduce residual doubt evidence at sentencing.”). Therefore, the trial court did not abuse its discretion when it refused to instruct the jury to consider “residual doubt” during its penalty-phase deliberations.

**A. A TRIAL COURT’S DECISION TO GIVE
A REQUESTED JURY INSTRUCTION LIES
WITHIN THE COURT’S SOUND DISCRETION.**

This Court must determine whether the trial court abused its discretion when it refused to give a requested jury instruction. *See Wolons*, 44 Ohio St.3d at 68.

1. **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO INSTRUCT THE JURY ON “RESIDUAL DOUBT.”**

As Defendant conceded in his merit brief that this Court previously held that “[r]esidual doubt is not an acceptable mitigating factor under R.C. 2929.04(B), since it is irrelevant to the issue of whether the defendant should be sentenced to death.” *McGuire*, syllabus.

In *McGuire*, this Court recognized that while it previously held that residual doubt could be a mitigating factor, more recently however, this Court held that a defendant is not entitled to an instruction on residual doubt. *See McGuire*, 80 Ohio St.3d at 402-403, citing *State v. Garner*, 74 Ohio St.3d 49, 56-57, 1995 Ohio 168, 656 N.E.2d 623, 632. This Court relied upon the U.S. Supreme Court’s opinion in *Franklin v. Lynaugh*, which “held that states are not required to allow a defendant the opportunity to argue residual doubt as a mitigating circumstance. The court stated that residual doubt did not have to be considered as a mitigating factor because it was not relevant to the defendant’s character, record, or any circumstances of the offense.” *McGuire*, 80 Ohio St.3d at 402-403, citing *Franklin v. Lynaugh*, 487 U.S. 164, 174, 108 S.Ct. 2320, 2327 (1988).

Thus, “[r]esidual or lingering doubt as to the defendant’s guilt or innocence is not a factor relevant to the imposition of the death sentence because it has nothing to do with the nature and circumstances of the offense or the history, character, and background of the offender.” *McGuire*, 80 Ohio St.3d at 403, citing *King v. Florida*, 514 So.2d 354, 358 (Fla. 1987), *People v. McDonald*, 168 Ill.2d 420, 456, 660 N.E.2d 832, 847 (1995), and *State v. Walls*, 342 N.C. 1, 52-53, 463 S.E.2d 738, 765-766 (1995).

In fact, “[r]esidual doubt casts a shadow over the reliability and credibility of our legal system in that it allows the jury to second-guess its verdict of guilt in the separate penalty phase of a murder trial.” *State v. Watson*, 61 Ohio St.3d 1, 20, 572 N.E.2d 97, 112 (1991) (Resnick, J., dissenting).

Therefore the trial court did not abuse its discretion when it refused to instruct the jury to consider “residual doubt” during its penalty-phase deliberations. *See Davis*, 116 Ohio St.3d at 435; *State v. Hand*, 107 Ohio St.3d 378, 417, 2006 Ohio 18, 840 N.E.2d 151, citing *State v. Brinkley*, 105 Ohio St.3d 231, 2005 Ohio 1507, 824 N.E.2d 959, ¶ 160, and *Cunningham*, 105 Ohio St.3d at 219.

Defendant’s fifteenth proposition of law is meritless and must be overruled.

XVI. Proposition of Law No. 16: Prosecutorial Misconduct Deprived the Appellant of a Fair Trial Under Fifth, Sixth, Eight and Fourteenth Amendments of the Federal Constitution and Article I, Section 10 of the Ohio Constitution.

State's Response to Proposition of Law No. 16: The Prosecution's Conduct and Arguments Were Proper under Both Ohio and Federal Law, and Did Not Otherwise Prejudice Defendant's Substantial Rights.

As for Defendant's sixteenth proposition of law, he contends that the prosecutor's cumulative misconduct rendered his trial unfair in violation of his federal and state constitutional rights. To the contrary, the prosecution's conduct and arguments were proper, and did not otherwise prejudice Defendant's substantial rights. Therefore, the prosecution's conduct and arguments did not amount to prosecutorial misconduct.

A. ONLY IF THE PROSECUTOR'S CONDUCT OR COMMENTS WERE IMPROPER, AND THE CONDUCT OR COMMENTS PREJUDICED DEFENDANT'S SUBSTANTIAL RIGHTS, MAY THIS COURT FIND DEFENDANT WAS DEPRIVED OF A FAIR TRIAL.

“The standard for prosecutorial misconduct is whether the comments or questions were improper and, if so, whether they prejudiced appellant's substantial rights.” *State v. Green*, 7th Dist. No. 01 CA 54, 2003 Ohio 5442, ¶ 12, citing *State v. Treesh*, 90 Ohio St.3d 460, 480, 2001 Ohio 4, 739 N.E.2d 749, citing *Lott*, 51 Ohio St.3d at 165. And “[g]enerally the conduct of the prosecuting attorney during a trial cannot be made a ground of error unless the conduct is so egregious in the context of the entire trial that it renders the trial fundamentally unfair.” *Green*, supra at ¶ 15, citing *State v. Papp*, 64 Ohio App.2d 203 (8th Dist. 1978).

Thus, “[t]o demonstrate prejudice, a defendant must show that the improper remarks or questions were so prejudicial that the outcome of the trial would clearly have

been otherwise had they not occurred.” *State v. Jones*, 12th Dist. No. CA2006-11-298, 2008 Ohio 865, ¶ 21, quoting *State v. Trewartha*, 10th Dist. Nos. 05AP-513, 05AP-514, 2006 Ohio 5040, ¶ 15, citing *State v. Campbell*, 69 Ohio St.3d 38, 51, 1994 Ohio 492, 630 N.E.2d 339. And “[t]he touchstone of the analysis ‘is the fairness of the trial, not the culpability of the prosecutor.’” *State v. Dorsey*, 5th Dist. No. 2014CA00217, 2015 Ohio 4659, ¶ 37, quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940 (1982), and citing *State v. Pickens*, 141 Ohio St.3d 462, 485, 2014 Ohio 5445, 25 N.E.3d 1023.

1. THE PROSECUTION DID NOT COMMIT ANY MISCONDUCT DURING THE PRE-TRIAL PROCEEDINGS.

a.) Grand Jury Proceedings

As stated above in response to Defendant’s third and fourth propositions of law, the State did not commit any misconduct during the grand jury proceedings.

First, Defendant failed to demonstrate that State presented perjured testimony, misstated the law, or misled the grand jury through the assistant prosecutor’s questioning of Detective-Sergeant John Perdue.

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 guilty beyond a reasonable doubt. *See Hillman*, 642 F.3d at 933; *see also Smith*, 97 Ohio St.3d at 376 (stating, “[u]nless otherwise noted, the defense did not object to the purported acts of prosecutorial misconduct and thus waived all but plain error.”).

Simply stated, the State was under no obligation, constitutionally or statutorily, to present the statements of Shantwone Jenkins and Defendant to 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 Defendant’s guilt. *See Ciambrone*, 601 F.2d at 623. In fact, Det. Perdue testified to some of these inconsistencies at trial. (Trial Tr., at 3843-3844.)

b.) Voir Dire

The State properly stated during voir dire that mitigation was fact based, because this Court has previously held that the failure to allow the jury to consider “mercy” is consistent with the Eighth Amendment, because it “would violate the well-established principle that the death penalty must not be administered in an arbitrary, capricious or unpredictable manner.” *Lorraine*, 66 Ohio St.3d at 417; *accord State v. Belton*, Slip Opinion No. 2016 Ohio 1581, ¶ 88.

2. THE PROSECUTION DID NOT COMMIT ANY MISCONDUCT DURING THE TRIAL-PHASE PROCEEDINGS.

a.) Traniece Wilkins

Traniece Wilkins’ testimony regarding Ororo Wilkins’ general character was an isolated, passing reference to her personality that did not amount to plain error. *See McKnight*, 107 Ohio St.3d at 117 (concluding “such testimony did not constitute outcome-determinative plain error.”); *Griffith*, supra at ¶ 23 (concluding the witness’s testimony that the victim was not a troublemaker did not amount to plain error); *Richardson*, 103 Ohio App.3d at 26-27 (finding “[t]he decision not to object to inadmissible but, given the facts of the case, not very prejudicial testimony, may well have been deliberate trial strategy, which this court will not second-guess.”).

b.) Youngstown Officer Jessica Shields

Youngstown Officer Jessica Shields' testimony regarding the crime scene and Ororo Wilkins' injuries was relevant evidence that related to the facts attendant to the offense. *See Drummond*, 111 Ohio St.3d at 45 (concluding that admitting an officer's testimony that "brain matter" was found at the crime scene was proper); *Smith*, 97 Ohio St.3d at 374-375 (concluding that admitting witness testimony describing the victim's injuries was proper); *Bradley*, 42 Ohio St.3d at 147 (concluding that the probative value of testimony graphically describing the condition of the victim's body was not substantially outweighed by the danger of unfair prejudice).

"Evidence relating to the facts attendant to the offense is 'clearly admissible' during the guilt phase, even though it might be characterized as victim-impact evidence." *McKnight*, 107 Ohio St.3d at 116, citing *Fautenberry*, 72 Ohio St.3d at 440. Further, evidence that "illustrate[s] the nature and circumstances of the crime, including the physical condition and circumstances of the victim [] * * * is relevant and admissible." *Jones*, 91 Ohio St.3d at 343. This Court previously recognized that "[t]he victi[m] cannot be separated from the crime." *Jones*, 91 Ohio St.3d at 343, quoting *Lorraine*, 66 Ohio St.3d at 420.

c.) Defendant's Failure to Present Evidence

Specific to closing arguments, this Court has previously allowed prosecutors "a certain degree of latitude in summation. The prosecutor may draw reasonable inferences from the evidence presented at trial, and may comment on those inferences during closing argument. We view the state's closing argument in its entirety to determine whether the allegedly improper remarks were prejudicial." (Internal citations omitted) *State v.*

Robinson, 7th Dist. No. 05 JE 8, 2007 Ohio 3501, ¶ 80, quoting *Treesh*, 90 Ohio St.3d at 466.

Thus, it is well-established that the State may comment on Defendant’s failure to offer evidence in support of its case, including witnesses to support his theory. *See State v. Collins*, 89 Ohio St.3d 524, 527, 2000 Ohio 231, 733 N.E.2d 1118. “Such comments do not imply that the burden of proof has shifted to the defense, nor do they necessarily constitute a penalty on the defendant’s exercise of his Fifth Amendment right to remain silent.” *Collins*, 89 Ohio St.3d at 527-528.

**3. THE PROSECUTION DID
NOT COMMIT ANY MISCONDUCT
DURING THE PENALTY-PHASE PROCEEDINGS.**

Again, the State properly argued during the penalty-phase proceedings that mitigation was fact based, because this Court has previously held that the failure to allow the jury to consider “mercy” is consistent with the Eighth Amendment, because it “would violate the well-established principle that the death penalty must not be administered in an arbitrary, capricious or unpredictable manner.” *Lorraine*, 66 Ohio St.3d at 417; *accord Belton*, *supra* at ¶ 88.

Therefore, the prosecution’s conduct and arguments did not amount to prosecutorial misconduct, because the prosecution’s conduct and arguments were proper, and did not otherwise prejudice Defendant’s substantial rights.

Defendant’s sixteenth proposition of law is meritless and must be overruled.

XVII. Proposition of Law No. 17: The Right to Effective Assistance of Counsel is Violated when Counsel's Deficient Performance Results in Prejudice to the Defendant in Violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution.

State's Response to Proposition of Law No. 17: Defendant was Afforded His Sixth Amendment Right to the Effective Assistance of Counsel, Because Counsels' Performance was Neither Deficient Nor Prejudicial.

As for Defendant's seventeenth proposition of law, he contends that he was deprived of his Sixth Amendment right to effective representation. To the contrary, trial counsel provided constitutionally effective representation, as they competently and effectively represented Defendant, and he suffered no prejudice as a result. Therefore, Defendant was not deprived of his Sixth Amendment right to effective representation.

A. TO REVERSE FOR INEFFECTIVE ASSISTANCE OF COUNSEL, DEFENDANT MUST ESTABLISH BOTH DEFICIENT PERFORMANCE AND MUST HAVE SUFFERED PREJUDICE AS A RESULT.

"To obtain a reversal of a conviction on the basis of ineffective assistance of counsel, the defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 2000 Ohio 448, 721 N.E.2d 52, citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052 (1984).

And "[a] defendant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other." *Madrigal*, 87 Ohio St.3d at 389, citing *Strickland*, 466 U.S. at 697.

In the first prong, a court determines whether trial counsel's assistance was actually ineffective—whether counsel's performance fell below an objective standard of reasonable advocacy or fell short of counsel's basic duties to the client. *See Bradley*, supra. To prove the performance was deficient, the defendant must show that counsel made errors, which were so serious that counsel was not acting in a manner guaranteed by the Sixth Amendment. *See id.*

Because of the difficulties inherent in making the evaluation, a court must indulge a ***strong presumption*** that counsel's conduct fell within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *See Strickland*, 466 U.S. at 689; *State v. Vlahopoulos*, 8th Dist. App. No. 82035, 2005 Ohio 4287, at ¶ 3, citing *Jones v. Barnes*, 463 U.S. 745, 750-753, 103 S.Ct. 3308 (1983); *see also State v. Spivey*, 7th Dist. App. No. 89 C.A. 172, 1998 WL 78656, *6 (Feb. 11, 1998).

If a reviewing court finds ineffective assistance of counsel on those terms, the court continues to the second prong to determine whether or not the defendant's defense actually suffered prejudice due to defense counsel's shortcomings, such that the reliability of the outcome of the case should be suspect. *See Bradley*, supra. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the proceeding would have turned in favor of the defendant. *See id.*

Thus, the defendant must affirmatively prove the prejudice occurred. *See Strickland*, 466 U.S. at 693. "It is not enough for the defendant [Appellant] to show that the errors had some conceivable effects on the outcome of the proceeding." *Id.* Rather,

Defendant must show that there is a “reasonable probability” the results would have been different, “but for” counsel’s deficient performance. *Id.* at 694.

Further, “[a] reviewing court is not permitted to use the benefit of hindsight to second-guess the strategies of trial counsel.” *State v. Layne*, 12th Dist. No. CA2009-07-043, 2010 Ohio 2308, ¶ 47, citing *State v. Gleckler*, 12th Dist. No. CA2009-03-021, 2010 Ohio 496, ¶ 10. This Court “ordinarily refrains from second-guessing strategic decisions counsel makes at trial, even when counsel’s trial strategy was questionable.” *State v. Jackson*, 107 Ohio St.3d 300, 317, 2006 Ohio 1, 839 N.E.2d 362, citing *State v. Clayton*, 62 Ohio St.2d 45, 49, 402 N.E.2d 1189 (1980).

More recently, the U.S. Supreme Court has rejected the notion of holding defense counsel to the American Bar Association standards. *See Bobby v. Van Hook*, 130 S. Ct 13, 16 (2009); recognized and followed by *Coley v. Bagley*, N.D. Ohio No. 1:02CV0457, 2010 WL 1375217, at *55 (Apr. 5, 2010); accord *State v. Craig*, 9th Dist. No. 24580, 2010 Ohio 1169, ¶ 17. Previously in *Strickland*, the Court recognized that “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” *Bobby*, 130 S. Ct at 16, quoting *Strickland*, 466 U.S. at 688-689. Accordingly, ABA guidelines and the like are merely guides, and do not create a higher standard of representation beyond that of an objective standard of reasonableness:

Strickland stressed, however, that “American Bar Association standards and the like” are “only guides” to what reasonableness means, not its definition. 466 U.S., at 688, 104 S.Ct. 2052. We have since regarded them as such. *See Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). What we have said of state requirements is *a fortiori* true of standards set by

private organizations: “[W]hile States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.” *Roe v. Flores-Ortega*, 528 U.S. 470, 479, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

Bobby, 130 S. Ct. at 17. Thus, the Court continues to recognize that “[j]udicial scrutiny of counsel’s performance must be highly deferential.” *Wong v. Belmontes*, 558 U.S. 15, 130 S. Ct. 383, 384-385 (2009), quoting *Strickland*, 466 U.S. at 689.

1. **DEFENDANT’S TRIAL COUNSEL PROVIDED CONSTITUTIONALLY EFFECTIVE ASSISTANCE, GUARANTEED TO HIM BY THE SIXTH AMENDMENT, AS THEY WERE NEITHER DEFICIENT NOR WAS DEFENDANT PREJUDICED.**

Defendant was afforded constitutionally effective assistance of trial counsel throughout the proceedings below, because trial counsels’ performance went beyond the objective standard of reasonable representation, and their performance did not result in an unreliable or fundamentally unfair outcome.

a.) **Voir Dire—Ensuring a Public Trial**

Here, the record demonstrates that the court’s jury room remained open and accessible to the public during individual voir dire:

THE COURT: Lastly, when we began the case we did it with a one-on-one, extensive, detailed discussion and interview of each jurors. *We did that in the open jury room* which is adjacent to the courtroom with your -- *the door was opened where anyone who wishes admitted was permitted.* That was done rather than in open court. At the direction and request of the defense of that long period of four weeks or so of the jury voir dire, individual voir dire regarding pretrial publicity as well as the death penalty aspect of the case, *the defendant was not shackled*, was in street clothes sitting at the table

with prospective jurors and counsel was present, and it was done at the behest of the defense.

MR. YARWOOD: I'll make the record very clear on this. First of all, our client was in civilian clothes during the entire proceedings. *He was given, I think, tremendous latitude assisting us during it.* In fact, the fact that we were back in *the jury room that was open for people to come in and it was available* -- and from our perspective that would meet the requirement of an open courtroom for purposes of people who wanted to come in and sit. There were chairs there for them to do it. It was available. Our position is that was of great benefit to be able to individually ask jurors in that form, and the Court and record should be very clear that we were satisfied with that. Mr. Wilks was very satisfied with that means and manner. I had even, in fact, told -- when they were asking, where is other individuals? You're allowed to come in and sit down. It is open. So from our perspective we see it as a nonissue. I wanted that on the record. That was appropriate in what we --

MR. ZENA: To reemphasize in some way what Ron [Yarwood] said, and this was discussed at length by us. Quite frankly, we asked that you proceed in that fashion in the hope that certain people wouldn't come and observe and thus expose this case to yet more publicity. We accomplished that fact by the manner in which it was conducted without barring anybody from the room. That's all on us, and we asked you to do it that way.

(Trial Tr., at 4166-4168.) The record unequivocally demonstrates that the jury room remained open and accessible to the public during the individual voir dire proceedings, and was only moved to the jury room at Defendant's request. *See Williams*, 2012 Ohio 5873, at ¶ 10 (finding "there is not enough evidence in the record from which one can conclusively deduce that a closure actually occurred.").

Here, Defendant failed to demonstrate that a constitutional error actually occurred. *See Williams*, supra at ¶ 10, citing *Dovala*, supra at ¶ 10.

b.) Voir Dire—Removal of Juror Linda Diver

In *Morgan v. Illinois*, “the United States Supreme Court held that a juror who will automatically vote for death without regard to mitigating factors is biased and may not sit on a capital case.” *State v. Fry*, 125 Ohio St.3d 163, 198, 2010 Ohio 1017, 926 N.E.2d 1239, citing *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S.Ct. 2222 (1992). Thus, “[a] capital defendant may challenge for cause any prospective juror who, regardless of the evidence of aggravating and mitigating circumstances and in disregard of the jury instructions, will automatically vote for the death penalty.” *Trimble*, 122 Ohio St.3d at 307, citing *Morgan*, 504 U.S. at 729, and *State v. Williams*, 79 Ohio St.3d 1, 6 (1997). *Morgan*-excludables are also known as “automatic death jurors,” meaning they are inclined to vote for death simply upon a conviction for aggravated murder, regardless of the mitigating factors that exist.

For example, in *State v. Trimble*, this Court found no error in allowing a juror to remain despite the fact that he initially indicated that he viewed the death penalty as an “eye for an eye,” and would impose death if convicted. *Trimble*, 122 Ohio St.3d at 308. This Court reasoned that the juror was not an “automatic death juror,” because he “had assured the court that he could listen to the evidence, follow the court’s instructions, and vote for a life sentence if the State failed to prove beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors.” *Id.* at 308, citing *Jackson*, 107 Ohio St.3d at 61.

Further, a juror who indicates on his questionnaire that the death penalty is appropriate in every case in which someone has been murdered is not automatically invalidated under *Morgan*. See *Fry*, 125 Ohio St.3d 163, 198. In *Fry*, this Court found that the juror was not an “automatic death juror,” because during individual voir dire, he indicated that “he would be able to set aside his views and decide the case on only the facts, the evidence, and the court’s instructions on the law.” *Id.* Under an ineffective assistance claim, the Court concluded that trial counsel would not have succeeded in challenging him for cause. *Id.*, citing *Mundt*, supra at ¶ 82.

Thus, where a juror states that he or she could follow the court’s instructions, consider the evidence closely, and give fair consideration to life-sentencing options, he or she would not qualify as an “automatic death juror” under *Morgan*. See *Trimble*, 122 Ohio St.3d at 308. Likewise, the Seventh District recognized that “[a] changed viewpoint after a juror learns the proper law does not indicate coercion.” *State v. Adams*, 7th Dist. No. 08 MA 246, 2011 Ohio 5361, ¶ 180, *rev’d on other grounds*, *State v. Adams*, 144 Ohio St.3d 429, 2015 Ohio 3954, 45 N.E.3d 127.

Here, Linda Diver, Juror No. 508, stated that she would not automatically vote in favor of the death penalty in every case in which someone is killed, and would likewise not automatically vote against the death penalty in every case. (Trial Tr., at 815.) Juror Diver stated that she would consider both the aggravating circumstance and the mitigation evidence presented to her. (Trial Tr., at 828-829.) More importantly, Juror Diver stated that she would follow the trial court’s instructions. (Trial Tr., at 835, 841.)

Thus, trial counsel was not ineffective for not challenging for cause Juror Diver, or using a peremptory challenge to remove her. See *Pickens*, 141 Ohio St.3d at 507

(recognizing that an appellate record will rarely disclose ineffective assistance, “because the use of peremptory challenges is inherently subjective and intuitive[.]”).

c.) Voir Dire—State’s Mitigation Arguments

Here, the State properly stated during voir dire that mitigation was fact based, because this Court has previously held that the failure to allow the jury to consider “mercy” is consistent with the Eighth Amendment, because it “would violate the well-established principle that the death penalty must not be administered in an arbitrary, capricious or unpredictable manner.” *Lorraine*, 66 Ohio St.3d at 417.

d.) Voir Dire—Removal Juror Alfonso Guzman

Here, both parties agreed that Mr. Guzman lacked a sufficient understanding of the English language to serve on the jury. (Voir Dire Tr., at 673.) Nevertheless, the record established that Mr. Guzman does not sufficiently speak and understand the English language, had difficulty understanding the entire juror questionnaire, and relies exclusively on Spanish-speaking media outlets. (Voir Dire Tr., at 672-673.)

For example, in *State v. Getsy*, this Court concluded that the trial court did not abuse its discretion when it removed a juror for cause when the record established that he “had been in this country for just six years, had trouble with big words, and had had some difficulty understanding the written orientation instructions provided by the court.” *Getsy*, 84 Ohio St.3d at 191-192. This prospective juror further had trouble understanding the legal proceedings, and had another juror explain the written instructions to him. *See id.*

Furthermore, this Court previously held that even if a prospective juror was erroneously excluded from the venire, “an erroneous excusal for cause, on grounds other than the venireman’s views on capital punishment, is not cognizable error, since a party

has no right to have any particular person sit on the jury. Unlike the erroneous denial of a challenge for cause, an erroneous excusal cannot cause the seating of a biased juror and therefore does not taint the jury's impartiality." *Sanders*, 92 Ohio St.3d at 249.

e.) Trial—Admission of 9mm Firearm

Here, the State presented testimony that a 9mm Luger firearm was recovered in the minivan that Defendant drove minutes before his arrest. (Trial Tr., at 3613-3614; 3759-3765.) Both Mister Wilkins and Alex Morales testified that Defendant threatened Mister with a 9mm "black small handgun" when Mister and Morales went to Defendant's house to retrieve Mary Aragon's bank card. (Trial Tr., at 3419-3421, 3503-3508.) Their testimony corroborated the fact that Defendant threatened Mister following a brief argument about an hour before the shooting on Park Avenue. (Trial Tr., at 3424-3426.) This testimony further established Defendant's motive for the shooting.

This Court 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." *Moore*, 40 Ohio St.3d at 65. "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.*

Thus, the testimony concerning the 9mm firearm was relevant to establish the credibility of William Wilkins and Alex Morales. *See Moore*, 40 Ohio St.3d at 65.

f.) Trial—State's Arguments

First, Youngstown Officer Jessica Shields' testimony regarding the crime scene and Ororo Wilkins' injuries was relevant evidence that related to the facts attendant to the

offense. *See Drummond*, 111 Ohio St.3d at 45 (concluding that admitting an officer’s testimony that “brain matter” was found at the crime scene was proper); *Smith*, 97 Ohio St.3d at 374-375 (concluding that admitting witness testimony describing the victim’s injuries was proper); *Bradley*, 42 Ohio St.3d at 147 (concluding that the probative value of testimony graphically describing the condition of the victim’s body was not substantially outweighed by the danger of unfair prejudice).

This Court previously recognized that “[e]vidence relating to the facts attendant to the offense is ‘clearly admissible’ during the guilt phase, even though it might be characterized as victim-impact evidence.” *McKnight*, 107 Ohio St.3d at 116, citing *Fautenberry*, 72 Ohio St.3d at 440. Further, evidence that “illustrate[s] the nature and circumstances of the crime, including the physical condition and circumstances of the victim [] * * * is relevant and admissible.” *Jones*, 91 Ohio St.3d at 343. This Court previously recognized that “[t]he victi[m] cannot be separated from the crime.” *Jones*, 91 Ohio St.3d at 343, quoting *Lorraine*, 66 Ohio St.3d at 420.

Second, specific to closing arguments, this Court has previously allowed prosecutors “a certain degree of latitude in summation. The prosecutor may draw reasonable inferences from the evidence presented at trial, and may comment on those inferences during closing argument. We view the state’s closing argument in its entirety to determine whether the allegedly improper remarks were prejudicial.” (Internal citations omitted) *Robinson*, supra at ¶ 80, quoting *Treesh*, 90 Ohio St.3d at 466.

Thus, it is well established that the State may comment on Defendant’s failure to offer evidence in support of its case, including witnesses to support his theory. *See Collins*, 89 Ohio St.3d at 527. “Such comments do not imply that the burden of proof has

shifted to the defense, nor do they necessarily constitute a penalty on the defendant's exercise of his Fifth Amendment right to remain silent." *Id.* at 527-528.

g.) Trial—Eyewitness Expert

This Court previously recognized that “[a] decision by trial counsel not to call an expert witness generally will not sustain a claim of ineffective assistance of counsel.” *Conway*, 109 Ohio St.3d at 433, citing *State v. Coleman*, 45 Ohio St.3d 298, 307-308, 544 N.E.2d 622 (1989), and *State v. Thompson*, 33 Ohio St.3d 1, 10-11, 514 N.E.2d 407 (1987).

Likewise, the Sixth Circuit stated that “[n]o precedent establishes that defense counsel must call an expert witness about the problems with eyewitness testimony in identification cases or risk falling below the minimum requirements of the Sixth Amendment.” *White v. Smith*, N.D. Ohio No. 1:10CV23, 2011 WL 9688085 (Nov. 16, 2011), quoting *Perkins v. McKee*, 411 Fed.Appx. 822, 833 (6th Cir., 2011); *see, e.g., Dorch v. Smith*, 105 Fed. Appx. 650, 653 (6th Cir., 2004) (concluding counsel's failure to call an eyewitness expert did not establish ineffectiveness under *Strickland*, because counsel presented several alibi witnesses, and cross-examined the eyewitnesses on the inconsistencies regarding their identification); *Tipton v. United States*, 6th Cir. No. 96-5026, 1996 WL 549802, at *1-2 (Sept. 26, 1996) (concluding that the defendant was not prejudiced by counsel's failure to hire an eyewitness expert within the meaning of *Strickland*).

At trial, 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.)

Morales testified that he observed Defendant coming towards the front porch from the sidewalk. (Trial Tr., at 3432, 3521.) 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.) 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 used 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.)

During cross examination, Det. Purdue admitted that Shantwone Jenkins stated that a description of the suspect included dreadlocks. (Trial Tr., at 3843, 3920.) Further, Mister never told Purdue 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 detectives but not in front of others. Purdue then told Officer Johnson to bring Antwone down to the station but Johnson never did. (Trial Tr., at 3920.) Purdue later returned to 725 Park Ave. but Antwone could not be located. (Trial Tr., at 3920.)

Thus, Defendant has not overcome the presumption that trial counsels' decision not to call an eyewitness expert was a matter of strategy, or that the decision deprived Defendant of a substantial defense.

h.) Trial—Jury Instructions

Here, Defendant contends that counsel should have objected to the trial court's instruction regarding 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. 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 above instruction should have included the word “any” rather than “all.” This instruction, however, did not constitute plain error or violate Defendant's Sixth Amendment right to effective assistance of counsel.

It is well-settled law in Ohio 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:

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.) The trial court further concluded its instructions to the jury 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.

(Trial Tr., at 4082.) Thus, 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.

Thus, Defendant failed to establish that the trial's outcome would have clearly been different had the trial court not misspoken in regards to a single, isolated instruction in relation to Aggravated Murder in Count One.

i.) Penalty Phase—Mitigation Presentation

It is well-settled that “[t]he presentation of mitigating evidence is a matter of trial strategy.” *Hand*, 107 Ohio St.3d at 411, citing *State v. Keith*, 79 Ohio St.3d 514, 530, 684 N.E.2d 47 (1997); accord *Bryan*, 101 Ohio St.3d at 300. “Moreover, ‘strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.’” *Hand*, 107 Ohio St.3d at 411, quoting *Bryan*, 101 Ohio St.3d at 300, quoting *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527 (2003). Further, “[t]he decision to forgo the presentation of additional mitigating evidence does not itself constitute proof of ineffective assistance of counsel.” *Hand*, 107 Ohio St.3d at 414, quoting *Keith*, 79 Ohio St.3d at 536.

Here, defense counsel employed a mitigation team of Donald McPherson and Dr. Sandra McPherson, Ph.D., who was a mitigation specialist and forensic psychologist:

Your Honor, as the Court may be aware, we have a mitigation team in place, Dr. McPherson and Donald McPherson. They have had the opportunity to meet with our client. They have been performing testing as deemed necessary in preparation for mitigation, and they have gone about requesting records that would be important for purposes of mitigation, and they have been interviewing witnesses that they deem would be appropriate, along with our input.

So they have, one, talked to Mr. Wilks on a number of occasions. They kept him apprised of the status of the mitigation, and they've also kept us advised. So that is going along smoothly so far. They have not indicated that they would need anything that would require the Court's intervention as sometimes may occur, but at this point, we don't need anything that would involve the Court's involvement.

(Pre-trial Hearing Transcript, October 30, 2013, before the Honorable Lou A. D’Apolito, at 48-49; Trial Tr., at 4123-4124.)

Thus, Defendant failed to support his claim that trial counsel failed to adequately develop the mitigation witnesses’ testimony, and failed to show what additional information these witnesses could have provided, or how such testimony could have altered the outcome. *See Hand*, 107 Ohio St.3d at 412; *Davis*, *supra*.

j.) Penalty Phase—State’s Closing Argument

Again, the State properly argued during the penalty-phase proceedings that mitigation was fact based, because this Court has previously held that the failure to allow the jury to consider “mercy” is consistent with the Eighth Amendment, because it “would violate the well-established principle that the death penalty must not be administered in an arbitrary, capricious or unpredictable manner.” *Lorraine*, 66 Ohio St.3d at 417.

k.) Penalty Phase—Defense Counsel’s Closing

Given the “strong presumption” that counsel’s performance was reasonable, counsel’s closing argument must be viewed as a tactical decision:

And when I sit down, they always get up and they have something to say, and I want to get back up. I want to get back up, because of the certainty. ***I implore you, life.*** This is not -- it’s the hardest thing to come to somebody and say, “We know this thing happened. Give weight to this,” but give weight to it. As much weight as you can. We’re not expecting something like, you know, life without the possibility of parole.

(Trial Tr., at 4266.) Thus, counsel was clearly advocating for a sentence *less* than life without the possibility of parole.

l.) Penalty Phase—Courtroom Closure

Here, following the parties' closing arguments, the trial court informed the spectators that they were free to stay, but it would lock the courtroom doors while it read the jury instructions:

Thank you. I'm going to give you your final closing instructions. It will take about a half hour. Those in the rear of the courtroom, you're certainly welcomed to stay; however, when I begin this instruction, it will take about a half hour and we're going to close the door and lock it, and it will remain closed for the duration. So if you don't want to stay for the duration, you should leave, so you're welcomed to do that now.

(Trial Tr., at 4271-4272.) The trial court then continued into reading the instructions. The record here unequivocally demonstrates that no spectators either left the courtroom or were denied access to the courtroom while the instructions were read. (Trial Tr., at 4271-4288.) *See Patel*, supra at ¶ 43 (stating “this Court will not rely upon pure speculation in determining whether an error occurred.”).

Thus, at no time were any spectators removed from or denied access to the courtroom while the court read the jury instructions during the penalty phase.

m.) Defendant's Presence at Critical Proceedings

While “[a]n accused has a fundamental right to be present at all critical stages of his criminal trial[.]” * * * “the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, *and to that extent only*.” (Emphasis sic.) *State v. Hale*, 119 Ohio St.3d 118, 134, 2008 Ohio 3426, 892 N.E.2d 864, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107-108, 54 S.Ct. 330 (1934). Thus, “[t]he question is whether his presence has a ‘reasonably substantial’ relationship

to ‘the fullness of his opportunity to defend against the charge.’” *Hale*, 119 Ohio St.3d at 134, quoting *Snyder*, 291 U.S. at 105-106.

Here, Defendant’s absence in any of the instances cited in his brief “was not prejudicial because the jury received neither testimony nor evidence, and no critical stage of the trial was involved.” *Hale*, 119 Ohio St.3d at 134, quoting *State v. Frazier*, 115 Ohio St.3d 139, 160, 2007 Ohio 5048, 873 N.E.2d 1263.

Therefore, trial counsel provided constitutionally effective assistance throughout the trial proceedings, because Defendant failed to overcome the *strong presumption* that counsels’ conduct fell within the wide range of reasonable professional assistance.

Defendant’s seventeenth proposition of law is meritless and must be overruled.

XVIII. Proposition of Law No. 18: Cumulative Errors Deprived Willie Wilks of a Fair Trial and an Unreliable Sentencing Hearing.

State's Response to Proposition of Law No. 18: Defendant Received a Fair Trial Guaranteed to Him by the Ohio and U.S. Constitutions, and Defendant was Not Unfairly Prejudiced by Any Cumulative Error.

As for Defendant's eighteenth proposition of law, he contends that he was denied a fair trial due to the cumulative errors by the trial court, defense counsel, and the prosecution. To the contrary, Defendant has failed to show that any such errors had the cumulative effect of depriving him of a fair trial.

The cumulative error doctrine holds that a conviction can be reversed where the cumulative effect of errors in a trial deprived the defendant of the constitutional right to a fair trial even though each individual error did not constitute a cause for reversal. *See Pickens*, 141 Ohio St.3d at 510-511; *Garner*, 74 Ohio St.3d at 64. Further, this Court "has held that it is not enough to simply 'intone the phrase cumulative error.'" *State v. Young*, 7th Dist. No. 07 MA 120, 2008 Ohio 5046, ¶ 65, quoting *State v. Bethel*, 110 Ohio St.3d 416, 2006 Ohio 4853, 854 N.E.2d 150, ¶ 197.

Therefore, Defendant cannot prevail through the cumulative error doctrine, because he failed to establish that errors existed in any of the other eighteen propositions of law.

Defendant's eighteenth proposition of law is meritless and must be overruled.

XIX. Proposition of Law No. 19: Ohio's Death Penalty is Unconstitutional. Ohio Rev. Code Ann. §§2903.01, 2929.02, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 Do Not Meet the Prescribed Constitutional Requirements and are Unconstitutional on Their Face and As-Applied to Willie Wilks. U.S. Const. Amends. V, VI, VIII, and XIV; Ohio Const. Art. I, §§2, 9, 10, and 16. Further, Ohio's Death Penalty Statute Violates the United States' Obligations under International Law.

State's Response to Proposition of Law No. 19: Ohio's Death Penalty is Constitutional under Both the U.S. and Ohio Constitutions, and Does Not Otherwise Violate the United States' Obligations under International Law.

As for Defendant's nineteenth proposition of law, he contends that Ohio's death penalty is unconstitutional pursuant to state, federal, and international law. To the contrary, it is well-settled law that Ohio's death-penalty statutes are constitutional pursuant to state, federal, and international law, because Ohio's capital punishment scheme ensures that the death penalty is not imposed in an arbitrary or discriminatory manner. Therefore, Defendant's death sentence must stand.

A. IT IS WELL-SETTLED LAW THAT OHIO'S CAPITAL PUNISHMENT SCHEME IS CONSTITUTIONAL PURSUANT TO STATE, FEDERAL, AND INTERNATIONAL LAW.

In the United States, capital punishment has been a facet of the law since the birth of this country. *See* Fifth Amendment to the U.S. Constitution. Over time, the death penalty has been refined and even halted, but never found per se unconstitutional. *See State v. Phillips*, 74 Ohio St.3d 72, 103, 1995 Ohio 171, 656 N.E.2d 643, citing *Lorraine*, 66 Ohio St.3d at 426, *State v. Henderson*, 39 Ohio St.3d 24, 528 N.E.2d 1237 (1988), and *Jenkins*, *supra*, *cert. denied*, *Jenkins v. Ohio*, 472 U.S. 1032 (1985); *Pickens*, 141 Ohio St.3d at 511.

1. **OHIO'S CAPITAL PUNISHMENT SCHEME DOES NOT ALLOW FOR ARBITRARY AND UNEQUAL PUNISHMENT.**

This Court has repeatedly rejected Defendant's argument that Ohio's capital punishment scheme is applied in an arbitrary manner. *See Pickens*, 141 Ohio St.3d at 511; *Jenkins*, 15 Ohio St.3d at 169 (repudiating Defendant's claim that Ohio's capital punishment scheme is unconstitutional because it gives prosecutors unfettered discretion to indict), citing *Gregg*, supra. It is constitutional for the State to impose a death sentence so long as the discretion of the sentencing authority is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action" in imposing the sentence. *Jenkins*, 15 Ohio St. 3d at 169, citing *Zant v. Stephens*, 462 U.S. 862, 873, 103 S.Ct. 2733 (1983).

This Court has likewise rejected Defendant's argument that Ohio's capital punishment scheme is applied in a discriminatory manner. *See State v. Kirkland*, 140 Ohio St.3d 73, 2014 Ohio 1966, 15 N.E.3d 818, ¶ 107 (ruling that Ohio's statutory scheme is not racially discriminatory), citing *State v. Short*, 129 Ohio St.3d 360, 2011 Ohio 3641, 952 N.E.2d 1121, ¶ 137. And where Defendant offers absolutely no evidence that improper racial considerations gave rise to the jury's verdict, his equal protection claim must fail. *See State v. Steffen*, 31 Ohio St.3d 111, 125, 509 N.E.2d 383 (1987).

Further, the U.S. Supreme Court previously rejected the "least restrictive means" argument in *Gregg*, supra. *See Jenkins*, 15 Ohio St.3d at 169, citing *Gregg*, 428 U.S. at 184. In *Gregg*, the U.S. Court stated that the decision that capital punishment may be appropriate in extreme cases is an expression of the community's belief that some crimes are so egregious that the only adequate response may be the death penalty. *See id.*

**2. OHIO’S CAPITAL PUNISHMENT
SCHEME DOES NOT INCORPORATE
UNRELIABLE SENTENCING PROCEDURES.**

Defendant contends that R.C. 2929.03’s language “that the aggravating circumstances * * * outweigh the mitigating factors” invites arbitrary and capricious jury decisions that lead to arbitrary and capricious imposition of the death penalty. Both this Court and the U.S. Supreme Court have rejected this argument. *See Jenkins*, 15 Ohio St.3d at 173 (rejecting the argument that by requiring sentencing authorities to “weigh” aggravating circumstances against mitigating factors, the General Assembly somehow failed to limit the sentencing authority’s discretion), citing *Proffitt v. Florida*, 428 US. 242, 96 S.Ct. 2960, 49 Led.2d 913 (1976). In *Proffitt*, the U.S. Court reasoned that, “while the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority’s discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capricious in its imposition.” *Id.* at 257-258.

Defendant next contends that Ohio’s scheme requiring a sentencing recommendation by the same jury that determined his guilt violated his Sixth Amendment right to effective assistance to counsel.

In *Jenkins*, this Court recognized that the U.S. Supreme Court has never required separate juries for the guilt and penalty phases of a capital trial. *See Jenkins*, 15 Ohio St.3d at 187; *State v. Carter*, 72 Ohio St.3d 545, 559-560, 1995 Ohio 104, 651 N.E.2d 965 (stating, “in Ohio the same jury which found the capital defendant guilty of aggravated murder and the death specification *must* also return the recommendation of

life or death following the mitigation hearing.”); accord *Kirkland*, 140 Ohio St.3d at 89 (rejecting the defendant’s argument that using the same jury at trial and sentencing burdens a defendant’s rights to counsel and an impartial jury), citing *State v. Mapes*, 19 Ohio St.3d 108, 116-117, 484 N.E.2d 140 (1985).

Further, both this Court and the U.S. Supreme Courts have rejected Defendant’s argument that Ohio’s death penalty statutes are unconstitutional because they require proof of aggravating circumstances in the guilt phase. See *Jenkins*, 15 Ohio St.3d at 178. To satisfy constitutional requirements, a capital sentencing scheme must “genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *Lowenfield v. Phelps*, 484 U.S. 231, 241-246, 108 S.Ct 546 (1988), citing *Zant*, 462 U.S. at 877. The use of “aggravating circumstances” is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury’s discretion. See *Lowenfield*, 484 U.S. at 244. Thus, there is no reason why this narrowing function may not be performed by the jury findings at either the guilt or penalty phase. See *id.*

3. **OHIO’S CAPITAL PUNISHMENT SCHEME DOES NOT BURDEN DEFENDANT’S RIGHT TO A JURY.**

This Court has previously determined that Ohio Criminal Rule 11(C)(3), which allow[s] the trial courts to dismiss the death penalty if the defendant pleads guilty and the “interests of justice” so require, is constitutional because it does not impose an impermissible risk of death on capital defendants who choose to exercise their right to a jury trial. See *Kirkland*, 140 Ohio St.3d at 89, citing *State v. Van Hook*, 39 Ohio St.3d 256, 265, 530 N.E.2d 883 (1988).

4. **OHIO'S DEATH PENALTY
STATUTE THAT REQUIRES
MANDATORY SUBMISSION OF REPORTS
AND EVALUATIONS IS CONSTITUTIONAL.**

This Court has previously rejected the argument that Ohio statutes are unconstitutional because they require submission of the pre-sentence investigation report and the mental evaluation to the jury or judge once requested by a capital defendant. *See State v. Buell*, 22 Ohio St.3d 124, 137-138, 489 N.E.2d 795 (1986) (reasoning that it is the defendant's choice whether to expose himself to the risk of potentially incriminating pre-sentence investigations, including mental examinations).

5. **R.C. 2929.03(D)(1) AND R.C. 2929.04
ARE NOT UNCONSTITUTIONALLY VAGUE.**

This Court recently rejected the argument that R.C. 2929.03(D)(1) and R.C. 2929.04 are unconstitutionally vague. *See Kirkland*, 140 Ohio St.3d at 89.

Specifically, this Court rejected the argument that R.C. 2929.03(D)(1) was unconstitutionally vague based on *Tuilaepa v. California*, 512 U.S. 967, 973-980, 114 S.Ct. 2630, 2635-2639 (1994), and *State v. Gumm*, 73 Ohio St.3d 413, 416-423, 653 N.E.2d 253, 259-264 (1995). *See State v. McNeil*, 83 Ohio St.3d 438, 453, 1998 Ohio 293, 700 N.E.2d 596. “*Gumm* clarified that the ‘nature and circumstances of the aggravating circumstances’ referred to in R.C. 2929.03(D)(1) are separate and distinct from the ‘nature and circumstances of the offense’ referred to in 2929.04(B).” *McNeil*, 83 Ohio St.3d citing 453, *Gumm*, at 73 Ohio St.3d at 416-423, and citing *State v. Wogenstahl*, 75 Ohio St.3d 344, 352-355, 662 N.E.2d 311, 318-321 (1996), and *Hill*, 75 Ohio St.3d at 199-201.

As for R.C. 2929.04, this Court has consistently rejected the argument that R.C. 2929.04 are unconstitutionally vague. *See Kirkland*, 140 Ohio St.3d at 89, citing *State v. Chinn*, 85 Ohio St.3d 548, 567-568, 709 N.E.2d 1166 (1999); *accord State v. Newton*, 108 Ohio St.3d 13, 33-34, 2006 Ohio 81, 840 N.E.2d 593, citing *State v. Stojetz*, 84 Ohio St.3d 452, 464, 1999 Ohio 464, 705 N.E.2d 329.

Likewise, this Court has rejected Defendant’s argument that the burden of proof in capital cases must be proof beyond all doubt rather than reasonable doubt. *See Davis*, 116 Ohio St.3d at 435, citing *Jenkins*, paragraph eight of the syllabus.

6. OHIO’S CAPITAL PUNISHMENT STATUTES THAT REQUIRES THIS COURT TO REVIEW A DEATH SENTENCE FOR PROPORTIONALITY AND APPROPRIATENESS ALLOWS FOR ADEQUATE APPELLATE REVIEW.

This Court has “consistently held that the proportionality review required by R.C. 2929.05(A) is satisfied by a review of cases in which the death penalty has been imposed.” *State v. Jones*, 135 Ohio St.3d 10, 50, 2012 Ohio 5677, 984 N.E.2d 948, citing *State v. Scott*, 101 Ohio St.3d 31, 2004 Ohio 10, 800 N.E.2d 1133, ¶ 51, *State v. LaMar*, 95 Ohio St.3d 181, 2002 Ohio 2128, 767 N.E.2d 166, ¶ 23, and *Steffen*, at paragraph one of the syllabus; *accord Kirkland*, 140 Ohio St.3d at 90.

Further, R.C. 2929.05(A) does not result in a cursory review by appellate courts. *See State v. Mammone*, 139 Ohio St.3d 467, 507, 2014 Ohio 1942, 13 N.E.3d 1051, citing *Jones*, 135 Ohio St.3d at 50; *Steffen*, 31 Ohio St.3d at 123-124; *Buell*, 22 Ohio St.3d at 137.

7. **OHIO'S CAPITAL PUNISHMENT SCHEME
DOES NOT VIOLATE INTERNATIONAL LAW.**

This Court recently rejected a nearly identical argument when it concluded that Ohio's death-penalty statutes do not violate international laws and treaties that the United States is a party. *See Pickens*, 141 Ohio St.3d at 511, citing *State v. Issa*, 93 Ohio St.3d 49, 69, 2001 Ohio 1290, 752 N.E.2d 904, and *Phillips*, 74 Ohio St.3d at 103-104; *accord Jackson*, 107 Ohio St.3d at 82.

Therefore, Defendant's death sentence must stand, because Ohio's death-penalty statutes are constitutional pursuant to state, federal, and international law, and Ohio's capital punishment scheme ensures that the death penalty is not imposed in an arbitrary or discriminatory manner.

Defendant's nineteenth proposition of law is meritless and must be overruled.

Conclusion

WHEREFORE, State of Ohio-Appellee hereby requests that this Honorable Court Overrule Defendant-Appellant Willie G. Wilks' Propositions of Law and Deny his request for relief, allowing his conviction and death sentence to stand.

Respectfully Submitted,

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MAHONING COUNTY PROSECUTOR BY:

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Certificate of Service

I certify that a copy of the State of Ohio's Answer Brief was sent via **Electronic Mail** to counsel for Defendant, **Kathleen McGarry, Esq.**, and **John P. Parker, Esq.**, at kate@kmcgarrylaw.com and johnpparker@earthlink.net on June 17, 2016.

So Certified,

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