

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Appellee, :
-vs- : Case No. 2014-1035
WILLIE G. WILKS, JR., : *Death Penalty Case*
Appellant :

*On Appeal from the Mahoning County
Court of Common Pleas
Mahoning County, Ohio, Case No. 2013CR00540*

REPLY BRIEF OF APPELLANT WILLIE G. WILKS, JR.

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PREFACE

Appellant has chosen not to respond to all the Propositions of Law after reviewing Appellee's Brief. The Propositions chosen for response were so chosen because Appellant felt that Appellee either misunderstood the thrust of Appellant's argument in the Merit Brief, because Appellee made an erroneous assertion in responding to the Proposition of Law or because new caselaw would impact the Court's determination of the Proposition of Law.

Failure to respond to a Proposition of Law, or to an argument within a Proposition of Law should in no way imply *any concession* on Appellant's part, but instead that Appellant wishes to stand on the Proposition of Law as originally presented in his Merit Brief.

ARGUMENT IN REPLY

PROPOSITION OF LAW NO. I

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, 9, AND 16 OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. II

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.

The essence of the State's argument is that a single eyewitness identifying the appellant as the perpetrator is enough for the convictions to be upheld by this Court under either a sufficiency of the evidence test or under a manifest weight review. (State's Brief, pp. 23, 25)

However, the State's arguments overlook developments in science related to the reliability of eyewitness identification. When a conviction, especially in a death penalty case, relies solely or primarily on eyewitness identification, such a conviction cannot withstand due process analysis under either the federal or Ohio Constitution or a review under the manifest weight doctrine.

Many state and federal courts have recognized the problems related to eyewitness identifications in criminal cases. A recent and useful opinion by the Alaska Supreme Court

contains information applicable to the facts and circumstances of this case. *Young v. Alaska*, 2016 WL 3369222, No. S-15665 (June 17, 2016). *Young* discusses developments in New Jersey, Massachusetts, Connecticut, Hawaii, Oregon, Utah and Wisconsin and decides that it is unnecessary to retest the validity of scientific evidence surrounding eyewitness identifications. *Young* at 39. Indeed, mistaken eyewitness identifications lead to wrongful convictions and is the single greatest source of wrongful convictions. *Young* at 41, footnotes 99 and 100. See www.innocenceproject.org/causes/eyewitness-misidentification.

There is almost nothing more convincing than a live human being in court pointing a finger at the defendant and saying ‘that’s the one.’ *Watkins v. Sowders*, 449 U.S. 341, 352 (1981)(dissenting opinion); *Young* at page 42 and footnote 102.

Yet, the science of human memory has developed over the years. *Young* at 42 and footnote 104. See Elizabeth F. Loftus et al., EXPERT TESTIMONY: CIVIL AND CRIMINAL section 2:2 (5th edition 2014).

There are several factors applicable to this case that can affect the accuracy of an eyewitness identification; in particular, a high level of stress, a focus on the weapon and the duration of the view. *Young* at 55-56.

A high level of stress experienced by the eyewitness may negatively affect the accuracy and memory of an eyewitness and acknowledging the effects of stress may counteract the common misconception that faces seen in highly stressful situations may be ‘burned’ into a witness’s memory. *Young* at 55-56. In this case, both eyewitnesses were under extreme stress with one being shot in the back and scrambling to save his own life. (Tr. 3433-3435) The crime scene was described as chaotic with much screaming and yelling. Mister was described as

hysterical by police officers. (Tr. 2232-3325, 3389) It is hard to imagine a more stressful environment for the two eyewitnesses.

A focus on the weapon used during the crime can impair visual perception and memory. *Young* at 56. The weapons focus effect may combine with other variables to make the reliability of the identification less trustworthy. (Tr. 3433, 3541-3542)

The duration of the view is also an important variable. In this case, the entire incident was very short in duration probably lasting under a minute with neither eyewitness focused solely on the perpetrator. Morales turned and ran into the house and thus had his back turned while being shot in the back and Mister was either upstairs looking out an obstructed window and then running downstairs to find the shooting over, the perpetrator gone and his sister fatally wounded; or Mister may never have been upstairs according to a statement provided to the police by Shantwone Jenkins. (Tr. 3462, Def. Ex. F, Bindover Summary, p. 2)

Whether an eyewitness is certain in his or her identification is of great weight to jurors and judges. *Young* at 65; see footnotes 197-198. However, the relationship between certainty and accuracy is not straightforward. *Young* at 64; footnote 194, *See Gary L. Wells and Elizabeth A. Olsen, Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 283-84 (2003).

The reliability of eyewitness identification is not within the knowledge of an average juror. *Young* at 69; *State v. Gilbert*, 49 A.3d 705, 731 (Conn.2012). Science has established the inherent unreliability of human perception and memory which jurors do not understand. *Young* at 70; footnote 219; *United States v. Brownlee*, 454 F.3d 131, 142 (3rd Cir. 2006).

Under either the Ohio or federal Constitutions, this Court must recognize, especially in a capital case, that eyewitness identification alone is not sufficient evidence for a conviction or is against the manifest of the weight of all evidence (or lack thereof) requiring a new trial. We

know through DNA exoneration cases, that 70 percent of the exonerations involved mistaken eyewitness identifications. See www.innocenceproject.org. Many factors can contribute to a mistaken identification; here, the high levels of stress experienced by the eyewitnesses, the focus on the weapon and the short duration of the crime are but a few of the relevant factors. One cannot fault Morales and Mister for attempting to make sense of the violent events resulting in this case. Yet the court system cannot simply take them at their word as did the police and prosecutors. What can't be ignored is the description of two witnesses of the shooter that is completely inconsistent (dreadlocks, no car involved) and that the State conveniently ignores.

Viewing the evidence in a light most favorable to the State does not mean that science and the problems inherent in eyewitness identifications can be ignored. The State is not entitled to benefit from outdated concepts concerning the accuracy and reliability of eyewitness identifications. The law evolves in many cases as science evolves.

If the State were to present a witness that testified under oath that the earth was flat, then this Court is not required to accept such testimony. We know the world is not flat and science proves it. Likewise, just because the state's witness testifies that Wilks is the shooter does not mean this Court must accept such testimony without scrutiny. We have the science that draws that testimony into question and we have no corroboration concerning the identity of the shooter through police investigation. In fact, there is evidence to the contrary through the statements of Shantwone and Antwone Jenkins and their descriptions of the shooter. (Def. Ex. F, Bindover Summary, p.2)

The State presented insufficient evidence concerning the identity of the shooter and the evidence presented is otherwise against the weight of all the evidence.

PROPOSITION OF LAW NO. III

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.

In its brief the State completely ignores the critical function served by the Grand Jury in protecting citizens against unfounded criminal prosecutions. *Branzburg v. Hayes*, 408 U.S. 665, 686-687 (1972); *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

The U.S. Supreme Court decision in *United States v. Williams*, 504 U.S. 36 (1992)(5-4 decision) that the state relies upon is binding only on federal courts. The States are thus free to adopt the position of the dissenting four justices and the appellant encourages this Court to do so as it is the better reasoned decision and would protect Ohio citizens from unfounded prosecutions.

When the identity of the perpetrator is the key issue, the grand jury must be informed of exculpatory evidence in the possession of the prosecutor. The grand jury must be independent and informed. *Wood v. Georgia*, 370 U.S. 375 (1962). The Court's recent Task Force on Grand Juries emphasizes the need for Grand Juries to be independent bodies. Recommendation 2. The essence of a fair grand jury process is that the grand jury make informed decisions. The prosecutor's gamesmanship by failing to disclose exculpatory evidence concerning identity is fundamentally unfair.

The State has completely ignored any standard of professionalism and a prosecutor's ethical duties. See ABA, Prosecution Function, Criminal Justice Standard 3-3.5 and 3-3.6. Relations with Grand Jury and Quality and Scope of Evidence before Grand Jury. This Court has

a duty to enforce some set of standards on the prosecutors under its supervisory powers so that a prosecutor does not abuse its power. See *State ex rel Shoup v. Mitrovich*, 4 Ohio St.3d 220 (1983).

The Ohio Joint Task Force concerning the Administration of the Death Penalty (April 2014) recommended that prosecutors in capital cases be required to provide grand juries with available exculpatory evidence. (Recommendation 38) The United States Attorney's Manual, governing the conduct of federal prosecutors, requires the presentation of available exculpatory evidence to the grand jury. United States Attorneys Manual, 9-11.233. The recently completed Grand Jury Task Force did not address the issue.

PROPOSITION OF LAW NO. IV

PROSECUTOR MISCONDUCT IN THE GRAND JURY PROCEEDINGS DENIED APPELLANT HIS RIGHTS UNDER ARTICLE I, SECTION OF THE OHIO CONSTITUTION AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION.

The appellant stands by his original brief. Suffice it to say that the prosecutorial misconduct involved the prosecutor improperly taking on the role of “fact witness”, “expert witness” and that she allowed misleading and/or false statements to go uncorrected before the Grand Jury. One need only read the 13 pages of Grand Jury transcript to see the improper role of the prosecutor as described in detail in the original brief.

In this case, the prosecutor that presented the case to the grand jury and who improperly acted as a “fact witness” and “expert witness” also tried the case in Common Pleas Court. Thus, there was an unusual situation where the prosecutor acted as a witness before the grand jury and the prosecutor before the petit jury. Such misconduct is fundamentally unfair and a violation of Due Process under the Fourteenth Amendment of the Federal Constitution and Art. I section 10 of the Ohio Constitution. It is unacceptable for the prosecutor to have a “dual position” as witness and prosecutor. See *Williams v. Pennsylvania*, 579 U.S. ___, 136 S.Ct 1899, 1906 (June 9, 2016); *In re Murchison*, 349 U.S. 133 (1955). “A prosecutor may bear responsibility for any number of critical decisions, including what charges to bring, whether to extend a plea bargain, and which witnesses to call.” *Williams*, 136 S.Ct. at 1907. “As an initial matter, there can be no doubt that the decision to pursue the death penalty is a critical choice in the adversary process. Indeed, after a defendant is charged with a death-eligible crime, whether to ask a jury to end the defendant’s life is one of the most serious discretionary decisions a prosecutor can be called upon to make.” *Williams*, 136 S.Ct. at. 1907 “*The importance of this decision and the profound*

consequences it carries make it evident that a responsible prosecutor would deem it to be a most significant exercise of his or her official discretion and professional judgment.” Id. (emphasis added)

While the issue in *Williams* concerned whether a prosecutor in a capital case could later sit as a state Supreme Court Justice on the same case, the concerns about the “dual position” a prosecutor may play are nonetheless applicable here. Normally, the grand jury prosecutor does not act as a witness whether be an “expert” witness or “fact” witness. But here, the prosecutor did both. (Grand Jury Tr. pp. 12-14, p. 3 (under seal)) Then, the same prosecutor conducted the trial and personally asked the jury to impose a death sentence. (Tr. 4259, 4271) Such a “dual position” is fundamentally unfair and a violation of Due Process under both the Ohio and federal constitutions. There is certainly an appearance of impropriety if not an actual impropriety given the unusual “dual position” the prosecutor played in this case. A new trial is in order.

PROPOSITION OF LAW NO. V

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.

Appellant Wilks argues in his Merit Brief that he was denied a public trial by the *de facto* closure of the jury room (not courtroom) for individual voir dire and the closure of the courtroom for jury instructions in the penalty phase.

The Appellee State responds that the “record unequivocally demonstrates that the jury room remained opened.” (State Br. p. 40) But this is not true. There is nothing in the record to indicate where in proximity to the courtroom was the jury room. The comments of the court and the defense counsel only indicated that the door to the jury room was open, there was nothing that discussed how that access would occur. Were there signs indicating that the proceedings were taking place in the jury room and where the jury room was located?

You almost get a sense when reading the comments of the defense lawyers that they were holding their breath hoping no one came in the jury room. They were able to get a closure by making it difficult for people to find where the proceedings were being held. The fact that not one person made their way to the jury room during a four-week period when the proceedings were taking place in the jury room is indicative of the fact that the public did not feel welcome.

A member of the public, who is seeking to observe a public trial proceeding would not know that they would have to hunt down those proceedings. If they knew the proceedings were in Judge Lou D’Apolito’s courtroom and found it empty, they were denied access unless there was someone to show them where to go, or signs to alert them that the proceedings were somewhere else.

The State further argues that the defense are the ones who wanted the proceedings to be conducted in that manner. But as pointed out in the Merit Brief, there was no consultation with Mr. Wilks that would indicate that he understood he was giving up his right to a public trial and he agreed to do so.

The trial court is charged with the responsibility of making sure that the defendant receives a fair trial *and* a public trial. Therefore, it was up to the trial court to determine if the procedure used, even if suggested by the defense, actually violated the First or Sixth Amendments.

The trial court was still obligated to engage in the *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) analysis, and he failed to do so.

Appellant Wilks also challenged that the courtroom was closed during the penalty phase jury instructions. In response, the State boldly states: “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.)” State’s Br. p. 41. This statement would seem to indicate that the record actually noted that no spectators either left the courtroom or were denied access to the courtroom, but no such demonstration was noted. Unless a person tried to get into the courtroom and caused such a ruckus that it was noted in the record, it would be unlikely that the record would make any reflection. If someone was outside the courtroom and wanted to get, they would be told by the Sheriff that they could not enter the courtroom and that would not appear in the record.

What is clear, is that the court indicated that no one was going to get into the courtroom during a certain time period. The State fails to cite to any caselaw that would indicate that you have to prove that someone was denied entry before the denial of a public trial error can be

found. What we know “unequivocally” is that the trial court said the courtroom would be closed. The court just indicated that the doors would be locked without any reasoning or justification.

The trial court’s “locking of the doors” violated Mr. Wilks right to a public trial.

PROPOSITION OF LAW NO. VI

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.

Appellant Wilks challenged the removal a Hispanic male for cause. In *Powers v. Ohio*, 499 U.S. 400 (1991) the Court began its opinion as follows:

Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life. Congress recognized this over a century ago in the Civil Rights Act of 1875, which made it a criminal offense to exclude persons from jury service on account of their race. See 18 U.S.C. § 243. In a trilogy of cases decided soon after enactment of this prohibition, our Court confirmed the validity of the statute, as well as the broader constitutional imperative of race neutrality in jury selection. See *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880); *Virginia v. Rives*, 100 U.S. 313, 25 L.Ed. 667 (1880); *Ex parte Virginia*, 100 U.S. 339, 25 L.Ed. 676 (1880). In the many times we have confronted the issue since those cases, we have not questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts. Despite the clarity of these commands to eliminate the taint of racial discrimination in the administration of justice, allegations of bias in the jury selection process persist.

The State argues that both parties agreed that prospective juror Guzman should be removed from the jury, but that does not remove the error of removing a person from the jury who is Hispanic and can read and write the English language.

An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race. Mr. Wilks has standing to vindicate the right of the prospective juror not to be discriminated against. *Powers*, at 410.

Mr. Wilks set forth examples in his Merit Brief to illustrate that other prospective jurors who answered questions on the jury questionnaires or in individual voir dire in a similar fashion were not excused for cause. The jury questionnaire and the colloquy with the juror failed to indicate that the juror could not understand the proceedings that were about to take place. The trial court's comment that "on some other jury he might be fine" belied their reasoning to excuse him. In all cases tried in our judicial system there are legal terms as well as terms of art relating to the case being tried. Nothing would indicate that other case would somehow be a better vehicle for jury service than the Mr. Wilks case.

Contrary to the State's argument, the record does not indicate that Mr. Guzman did not speak or understand the English language. His answers in the questionnaire and in voir dire were appropriate responses to the questions asked.

The State's final argument is that an erroneous excusal for cause cannot form the basis of a reversal, is not persuasive. The cases cited by the State are all cases in which it was argued that a juror was erroneously removed for cause based upon their views on capital punishment. That is a different issue.

The Equal Protection clause is implicated whenever state action is predicated upon race, alienage, or national origin. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). That is because: "These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *Id.*

Here, as in the *Batson v. Kentucky*, 476 U.S. 79 (1986) line of cases, the error is in the exclusion of a potential juror based on his or her race or ethnicity. The statutory prohibition on

discrimination in the selection of jurors, 18 U.S.C. § 243, enacted pursuant to the Fourteenth Amendment's Enabling Clause, makes race neutrality in jury selection a visible, and inevitable, measure of the judicial system's own commitment to the commands of the Constitution. The courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in that prohibition. See *Peters v. Kiff*, 407 U.S., at 507, 92 S.Ct., at 2170-2171 (WHITE, J., concurring in judgment); see also *id.*, at 505, 92 S.Ct., at 2169-2170 (opinion of MARSHALL, J.).

The excusal of Mr. Guzman was error.

PROPOSITION OF LAW NO. VII

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.

1. Victim Character Evidence

Contrary to the State's characterization, the character evidence testimony of Traniece Wilkins was not isolated, or a passing reference, it was the substance of her testimony. The problem with this kind of testimony is that it places the defense in a very precarious position. Certainly the defense does not want to attack the character of the victim, but in a situation like presented here, the victim was portrayed in a very positive light, when there are certainly unanswered questions about why she had other person's identification in her purse and carried a pellet gun.

The admission of the victim character evidence was not relevant, as that term is defined by Evidence Rule 403(A). And even if there was some relevance, it was outweighed by the prejudice it engendered.

The state argues that the defense did not object to Traniece's testimony. However, the Defense filed a motion prior to the start of trial to exclude victim impact evidence and the defense questioned at sidebar if that was going to be the whole state's case, to rely on sympathy. "But the other issue is, you know, we filed a motion that victim impact is improper in a trial phase, and they have been using a lot of victim impact, which doesn't really bring how this occurred. It's not proper." (Tr. 3408, see also Vol. II, Doc. 97)

2. Jessica Shields and Coroner Testimony

Once again the State misses the point. The State argues that evidence relating to the facts of the offense is clearly admissible. (State’s Br. P. 48) But this does not tell the whole story, there are evidence rules in place to exclude evidence that is more prejudicial, than probative. For example, gruesome photographs of the victims relate to the facts of the case, but this Court has held that if the probative worth of the evidence does not outweigh the danger of prejudice to the defendant, it must be excluded. *State v. Morales*, 32 Ohio St. 3d 252, 257-58, 513 N.E.2d 267, 273 (1987).

Officer Shields’s emotional testimony concerning the “most gruesome scene” and “brains were all over the place” was not relevant to the facts. Her testimony, particularly as a member of law enforcement, should have been more tailored to the facts rather than her own emotional description.

The State did not respond to the argument concerning the coroner’s testimony. The prosecutor’s question regarding damage to the victim’s head at a closer range elicited the response: “Oh, wow. Well, Counselor, frankly, the gunshot wound would have -- would have taken her head.” (Tr. 3745) The State had to have known when the question was asked that that was the response she would be given.

On direct appeal, constitutional error is harmless only if *the prosecution* proves it to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 26 (1967). When the record on direct appeal establishes constitutional error, the burden is on the State to prove that the error is harmless beyond a reasonable doubt. *Id.* “The harmless error standard is even more stringent when applied to errors committed at the penalty phase of a capital trial. ‘The question . . . is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved beyond a reasonable doubt that the

error complained of did not contribute to the verdict obtained.” *State v. Fears*, 86 Ohio St. 3d 329, 354, 715 N.E.2d 136, 158 (1999) (Moyer, C.J., dissenting) (quoting *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988)).

The State failed to meet its burden in this case.

PROPOSITION OF LAW NO. IX

DEFECTIVE JURY INSTRUCTIONS DEPRIVED THE APPELLANT OF DUE PROCESS AND FUNDAMENTAL FAIRNESS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The State concedes that the trial court “misspoke” when instructing the jury concerning the procedure to be followed in moving to the lesser-included offenses. (State’s Br. P. 53)

The State’s argument seems to be that if a jury instruction was correct in other places of the instructions, then we can assume the jury followed the correct instruction. But no such inference can take place.

And the error occurred in the most important count, the aggravated murder. Had the jury been correctly instructed, they would have found Mr. Wilks not guilty if the state failed to prove any one element of the aggravated murder charge. The jury would not have moved on to the capital specification.

The state completely ignores the argument that structural error took place under *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). Further, the State fails to respond to the similar case cited by appellant from Kansas, i.e. *Miller v. State*, 318 P.3d 155 (Kan. 2014). Finally, the State did not address counsel’s ineffectiveness under *Strickland* and *Rivera v. Illinois*, 556 U.S. 148, 160 (2009); *Washington v. Recuenco*, 548 U.S. 212, 218-19 (2006).

The error here was not harmless. Juries are assumed to have followed the instructions of the court. *State v. Loza*, 71 Ohio St.3d 61, 75 (1994); *Parker v. Randolph*, 442 U.S. 62 (1979). The lack of overwhelming evidence of guilt here combined with the flawed jury instruction on count one requires a new trial.

PROPOSITION OF LAW NO. XII

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.

The State boldly states that “this Court has *never required* a trial court to hold an evidentiary hearing before ordering a defendant be restrained.” (State’s Br. P. 68, emphasis in original) However, in *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶247 the Court did hold that a trial court errs when it orders a defendant to wear a stun belt without sufficient justification in the record. And in *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, ¶92, the Court found: “[t]he trial court granted the state’s request on shackling without first conducting a hearing to consider whether evidence showed that shackling was necessary. We continue to emphasize that prior to ordering a defendant to wear restraints, the trial court should hold a hearing on the matter. *Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, at ¶ 82. *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, ¶92.”

The trial court failed to discuss any other devices that might have been used, or a limitation on the use of the restraints, for example the restraints could have been used only when the verdict was read at the end of the jury deliberations. Since, according to the trial court, Mr. Wilks displayed exemplary conduct during the course of the trial phase, until the reading of the verdict, there was no reason to assume that he would not act appropriately during the penalty phase.

The trial court abused its discretion in ordering Mr. Wilks shackled when he was on trial for his life.

PROPOSITION OF LAW NO. XVII

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.

In *Bobby v. Van Hook*, 130 S.Ct 13, 16 (2009), the United States Supreme Court acknowledged that the American Bar Association Guidelines for the Appointment of Counsel in Death Penalty Cases (ABA Guidelines) are guides, to be used when assessing the performance of defense counsel. It is often very difficult to properly assess ineffective assistance of counsel on direct appeal. For this reason, many courts will not address the issue on direct appeal, waiting until the issue is raised in post-conviction to address it. See, *State v. Hunter*, 2006–NMSC–043, ¶ 30, 140 N.M. 406, 143 P.3d 168. (“[H]abeas corpus proceedings are the preferred avenue for adjudicating ineffective assistance of counsel claims, because the record before the trial court may not adequately document the sort of evidence essential to a determination of trial counsel’s effectiveness.” *Id.* (internal quotation marks and citation omitted)). Thus, we have held that an evidentiary hearing in most cases “may be necessary.” *Id.* (internal quotation marks and citation omitted)); *Corzo v. State*, 806 So.2d 642 (Fl. App. 2002) “Because of the strict rules limiting claims for ineffective assistance of counsel on direct appeal, the appellate courts typically reject the issue as both premature and requiring evidence beyond the appellate record. Accordingly, unless a direct appeal is affirmed with a written opinion that expressly addresses the issue of ineffective assistance of counsel, an affirmance on direct appeal should rarely, if ever, be treated as a procedural bar to a claim for ineffective assistance of counsel on a postconviction motion.”); *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007) (“Claims of ineffective assistance of

counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question.”)

This Court too has acknowledged the difficulty in assessing a claim on direct appeal. In *State v. Madrigal*, 87 Ohio St.3d 378, 390-391 (2000) this Court determined that if an issue cannot be decided without information **that is not in the record of the case**, the Court should defer any ruling on the issue and allow it to be addressed in post-conviction proceedings.

An example of this conundrum is counsel’s failure to ensure that Mr. Wilks received a public trial. The State is quick to point out that it was at defense counsel’s request, based on the record, that the individual voir dire of the jurors be held in the jury room. The State goes on to point out that the “record unequivocally demonstrates that the jury room remained open and accessible to the public during the individual voir dire proceedings” (State’s Br. P. 97) But the record shows no such thing, and the post-conviction petition in this case presents a much different scenario than what is painted by the State. See, *State v. Wilks*, Mahoning County Case No. 2013 CR 540, Post-Conviction Petition (Jan. 21, 2016), at pp. 10-11. With supporting affidavits, the petition shows that persons were kept from the jury room during the individual voir dire.

Therefore, instead of engaging in presumptions, not supported by the record, if the claim or sub-claim cannot be determined based on the record on appeal, the claim should be deferred until post-conviction.¹

¹ Appellate counsel is often faced with the question of whether to present the claim now, on direct appeal, or reserve the claim to be raised later in post-conviction. Those waters can become murky when the issue is present in the direct appeal record of the case, such as failure to make an objection, failure to use a peremptory challenge, or failure to call an expert witness, but the answers are often off the record as to why counsel may have made those choices. Yet, the State will later claim waiver if the issue is in the record and not presented on direct appeal, in spite of the lack support that can only come off the record.

PROPOSITION OF LAW NO. XIX

OHIO'S DEATH PENALTY LAW IS UNCONSTITUTIONAL. OHIO REV. CODE ANN. §§ 2903.01, 2929.02, 2929.021, 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.

During the briefing of this case, the United States Supreme Court issued its decision in *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616 (2016), which held that Florida's capital sentencing laws violated the Sixth Amendment right to trial by jury because it required the judge, not a jury, to make the factual determinations necessary to support a sentence of death. Due to the similarities between Florida's capital sentencing laws and Ohio's, Wilks submits that pursuant to *Hurst*, this Court should find Ohio's capital sentencing unconstitutional and therefore dismiss the capital components of this case.

In *Walton v. Arizona*, 497 U.S. 639, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990), the Supreme Court held that Arizona's sentencing scheme was compatible with the Sixth Amendment because the additional facts found by the judge qualified as sentencing considerations, not "elements of the offense of capital murder." *Id.*, at 649. Within ten years, the analysis of Sixth Amendment right to jury trial and jury findings shifted. In a line of cases which resulted in much of Ohio's felony sentencing statutes to be ruled unconstitutional, the Supreme Court focused upon the impact of judicial fact finding in sentencing and how in many instances current protocols were contrary to the Sixth Amendment. See, *Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed.2d 435, 120 S.Ct. 2348 (2000); *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) the Court held that State sentencing statute procedure which permitted the judge to make factual finding to impose a sentence higher than the statutory maximum did not comply

with the Sixth Amendment. The following term, the Court held in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) that the *Apprendi* and *Blakely* decisions applied to the United States Sentencing Guidelines; under the Sixth Amendment, any fact other than a prior conviction that was necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict had to be admitted by a defendant or proved to a jury beyond a reasonable doubt.

In this case, the statutory maximum sentence for aggravated murder is life in prison. Death can only be imposed upon specific factual findings, which under Ohio's capital punishment statutory scheme are facts determined by the judge. Accordingly, Ohio's capital punishment statutory scheme violates the Sixth Amendment. *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616 (2016).

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the Court held that the Sixth Amendment does not permit a defendant to be "exposed . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.*, at 483. *Apprendi* held that this prescription controlled even if the State characterizes the additional findings made by the judge as "sentencing factors." *Id.*, at 492. Thus, *Apprendi*, made clear that any fact that which expose the defendant "to a greater punishment than that authorized by the jury's guilty verdict" must be submitted to a jury. In *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) the Court addressed the issue in the context of capital punishment and held that the Sixth Amendment's jury trial guarantee, made applicable to the states by the Fourteenth Amendment, required that the aggravating factor determination be entrusted to the jury. The Court concluded that the *Walton* decision and the *Apprendi* decision were irreconcilable because a capital defendant was entitled to the same Sixth Amendment protections extended to defendants generally. Because Arizona's enumerated aggravating factors operated as the functional equivalent of an element of a greater offense, an enhancement above the standard sentence for the offense, the Sixth Amendment required that they be found by a

jury. The Court overruled *Walton* to the extent that it allowed a sentencing judge to find an aggravating circumstance necessary for imposition of the death penalty.

This past term, the United States Supreme Court issued *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616 (2016), which held that Florida’s capital sentencing laws violated the Sixth Amendment right to trial by jury because it required the judge, not a jury, to make the factual determinations necessary to support a sentence of death. Like Ohio’s capital punishment structure, in Florida a jury provided a recommendation to the judge with regard to punishment, but notwithstanding the recommendation, Florida law required the judge to determine whether sufficient aggravating circumstances existed. Due to the similarities between Florida’s capital sentencing laws and Ohio’s, Wilks submits that pursuant to *Hurst*, this Court should find Ohio’s capital sentencing unconstitutional and therefore dismiss the capital components of this case.

In Florida, first-degree murder is a capital felony, but the maximum sentence a capital defendant may receive based solely on that conviction is life imprisonment. Fla. Stat. §775.082(1). The defendant will receive the death penalty only after an additional sentencing proceeding “results in findings by the court that such person shall be punished by death.” *Id.* Otherwise, the defendant is punished by life imprisonment without parole. *Id.*

Accordingly, after *Hurst* was found guilty of first-degree murder, the judge conducted an evidentiary hearing before the jury. *Hurst*, 136 S.Ct. at 620. At the conclusion of the evidentiary hearing, the jury rendered an “advisory sentence” of death without specifying the factual basis of its recommendation. *Id.* Under Florida law, the trial court must give the jury’s recommendation “great weight,” but must independently weigh the aggravated and mitigating circumstances before entering a sentence of life imprisonment or death. *Id.* The trial court in *Hurst* did this, and imposed a death sentence. *Id.*

On post-conviction review, the Florida Supreme Court vacated the sentence for reasons

that are not relevant here. *Id.* At Hurst’s re-sentencing hearing, a jury again recommended death and the judge so sentenced, basing its decision on the independent findings of aggravating circumstances as well as the jury’s recommendation. *Id.*

The United States Supreme Court accepted certiorari of Hurst’s appeal to resolve the tension between *Ring v. Arizona*, *supra* and its earlier decisions, *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) concluding that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury, and *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) which held that Florida’s sentencing structure did not violate the Sixth or Eighth Amendment concluding that the jury’s sentencing recommendation in a capital case is only advisory and that the trial court is to conduct its own weighing of the aggravating and mitigating circumstances notwithstanding the recommendation the jury. Just a few years later, in *Ring*, the Supreme Court held that the Sixth Amendment requires a jury to find any fact necessary to qualify a capital defendant for a death sentence. *Hurst*, 136 S. Ct. at 621. Although *Ring* had not expressly overruled the *Hildwin* and *Spaziano*, cases which approved the constitutionality of Florida’s capital sentencing scheme, *Ring*’s holding seemed to compel such an outcome. *Hurst* laid the confusion to rest, holding that Florida’s law “violates the Sixth Amendment in light of *Ring*.” *Id.* at 620.

Justice Sotomayor explained in her 8-1 majority opinion that like Arizona, the state whose sentencing scheme was at issue in *Ring*, “Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts.” *Id.* at 622. Justice Sotomayor continued: “Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is

immaterial.” *Id.* Because “the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole,” and because “a judge increased Hurst’s authorized punishment based on her own factfinding,” the Court held that “Hurst’s sentence violates the Sixth Amendment.” *Id.*

In so holding, the Court rejected Florida’s argument that the jury’s recommendation necessitated the finding of an aggravating circumstance, noting “the Florida sentencing statute does not make a defendant eligible for death until ‘findings *by the court* that such person shall be punished by death.’” *Id.* (quoting Fla. Stat. § 775.082(1)) (emphasis in opinion). Because “[t]he trial court *alone* must find ‘the facts . . . [t]hat sufficient aggravating circumstances exist’ and ‘[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances,’” the Court found that a Florida jury’s function is solely advisory and does not satisfy the constitutional standard outlined by *Ring*. *Id.* (quoting § 921.141(3)) (emphasis in original).

Ohio’s death-penalty sentencing scheme is similar to Florida’s in several significant ways. Pursuant to R.C. 2929.03(B), a jury in an Ohio capital case must find the defendant guilty or not guilty of the principal charge and then it must also determine “whether the offender is guilty or not guilty of each specification.” The jury is instructed that each aggravating circumstance “shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification.” *Id.*

If the jury finds a defendant guilty of both the charge and one or more of the specifications, then, like in Florida, a sentencing hearing is conducted where:

The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the

offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender.

R.C. 2929.03(D)(1). During this sentencing hearing, the defendant has the burden of introducing evidence of any mitigating factors, but the prosecution has the ultimate burden of “proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.” *Id.*

At the conclusion of the sentencing hearing, if the jury unanimously finds that the prosecutor has met this burden, “the jury shall *recommend* to the court that the sentence of death be imposed on the offender.” R.C. 2929.03(D)(2) (Emphasis added). This finding is not required to be rendered in writing and does not set forth the factual findings underlying the jury’s recommendation.² Once an Ohio jury makes a death-sentence recommendation, then, like in Florida, the Ohio trial court must independently consider “the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section.” R.C. 2929.03(D)(3). The trial court can then sentence a defendant to death if it finds “by proof beyond a reasonable doubt . . . that the aggravating circumstances the offender was found guilty

² In Florida, the jury’s recommendation does not need to be unanimous. *Hurst*, 136 S. Ct. at 620. Nevertheless, the point is that, like in Florida, Ohio juries make a recommendation to the trial court for imposing a death sentence without any specific factual findings.

of committing outweigh the mitigating factors.” *Id.* As in Florida, the Ohio trial court, when it imposes a death sentence, shall:

state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.

R.C. 2929.03(F). In sum, a jury in Ohio has the responsibility of finding that one or more aggravating circumstances exist as part of the verdict at the capital defendant’s trial; however, that is not the completion of the capital sentencing process. Rather, under Ohio law, the jury must then conduct a weighing process after the sentencing hearing. Once the weighing process is complete, the jury may make a death-sentence *recommendation* to the trial court. Because the Court in *Hurst* emphasized the language in the Florida statute that defined the jury’s decision as advisory in nature, Ohio’s scheme that similarly classifies a jury’s decision as a recommendation violates the Sixth Amendment right to trial by jury. Like *Hurst*, the judge makes the final decision after obtaining the jury’s non-specific recommendation. In *Hurst*, the Court broadly criticized the Florida scheme because the jury ““does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances. A Florida trial court no more has the assistance of a jury’s findings of fact with respect to sentencing issues than does a trial judge in Arizona.”” *Hurst*, 136 S. Ct. at 622 (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)). The Court’s opinion not only pointed out the absence of factual findings about the existence of mitigating or aggravating factors, but also the absence of any findings about the weighing of those factors. *Id.* Similarly, the Ohio statute does not require the jury to make any specific findings of fact about mitigating factors, nor does it ask the jury to make any specific findings about their balancing of the mitigating and aggravating factors. Therefore, the judge must implement a sentence without those critical findings which the Sixth Amendment mandates

are within the province of the jury alone. Absent those factual findings, and given the advisory nature of the jury's sentencing determination, the Ohio death penalty scheme suffers from the same constitutional deficiencies as the scheme in Florida and should be invalidated.

On June 20, 2016, Judge William R. Finnegan, relying on the *Hurst* decision, ruled Ohio's death penalty unconstitutional. *State of Ohio v. Mason*, Marion County Court of Common Pleas Case No. 93 CR 153

In the Hurst case, the United States Supreme Court held the Florida statute to be unconstitutional because the Florida statute required not the jury but the judge to make the critical findings necessary to impose the death penalty. The fact that Florida provided an advisory jury is immaterial. The court found that the maximum penalty that could be imposed was unconstitutionally increased by the judge's own fact-finding. *Hurst v. Florida, Id.*, at 619.

* * *

Hurst vs. Florida makes clear that the Sixth Amendment requires that the specific finding authorizing the imposition of the death penalty be made by the jury. The Ohio death penalty statute applicable in this case has no provision for the jury to make specific findings relating to the weighing of aggravating and mitigating factors. As a result, the Ohio death penalty statute applicable in this case violates the Sixth Amendment as interpreted in Hurst vs. Florida.

Id. at 21, 49. Thus under Ohio's current death penalty statute, death may not be imposed as a penalty because the judge and not a jury makes the findings necessary for imposition of the death in violation of the Sixth Amendment.

CONCLUSION

For all the reasons set forth in the merit brief and in this reply brief, the convictions and death sentence must be vacated. Depending on the issue that the Court chooses to grant relief, either Mr. Wilks should be discharged or a new trial should be granted. Alternatively, on the issues relating to the penalty phase, the death sentence must be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Brief of Appellant was forwarded by e-mail service to Paul Gaines (pgains@mahoningcountyoh.gov) and Ralph M. Rivera (rrivera@mahoningcountyoh.gov) this 27th. day of July, 2016.

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