

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

-vs-

JAMES MAMMONE, III,

Appellant.

:
: Case No. 10-0576
: Appeal taken from Stark County
: Court of Common Pleas
: Case No. 2009-CR-0859
: **This is a death penalty case**

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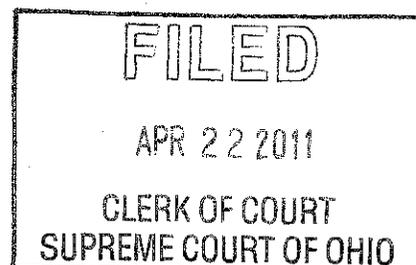


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PREFACE

Appellant James Mammone hereby provides the following key to describe citations to the record made in this brief:

Voir Dire (VD, Vol. ____, p. ____)

Trial Phase (TP, Vol. ____, p. ____)

Penalty Phase (PP, Vol. ____, p. ____)

STATEMENT OF THE FACTS AND CASE

James Mammone was charged with the aggravated murder of Margaret Eakin, with a course of conduct specification, an aggravated burglary specification, and a firearm specification. He was charged with the aggravated murders of Macy Mammone, and James Mammone IV, each with two specifications, course of conduct and child under thirteen. He was charged with aggravated burglary with a firearm specification. He was charged with violating a protection order and attempted arson. The charges generated a vast amount of local publicity. As a result, several jury members had been exposed to pre-trial publicity and had already formed an opinion as to the outcome of the case.

The trial

At trial Marcia Eakin testified about her marriage to James Mammone. (TP, Vol. 5, p. 33). They had two children, Macy and James. (Id. at 34) After a period of time their marriage became troubled. (Id. at 37). In August of 2007 Marcia told Mammone that she wanted to leave the marriage. (Id. at 38) The couple stayed together but began counseling. Mammone was opposed to any discussion of divorce and became threatening about the subject. (Id. at 39) Marcia contacted a lawyer to begin divorce proceedings. (Id. at 40) Mammone learned of this and again threatened her. Marcia obtained a protection order. (Id. at 43) The divorce was finalized in April 2009. (Id. at 44) Pursuant to the final divorce visitation arrangements were made for the children. (Id. at 45) On June 7, 2009 Mammone had his regularly scheduled visitation overnight with the children. (Id. at 51) He picked them up around 4 p.m. Mammone later began texting Marcia. (Id. at 54) Marcia became increasingly alarmed by the type of messages that Mammone was sending. (Id. at 58) She called 911. (Id. at 62) These tapes were

played for the jury. (Id. at 65, 74) Marcia also drove around looking for Mammone and the children. (Id. at 67) 67

Eventually Mammone arrived at Marcia's house. (Id. at 72) He poured gasoline on Harold Carter's truck. He also broke into the house and then left. Marcia later went to the Canton police department. She continued to receive calls from Mammone and he eventually told her that he had killed her mother and the children. (Id. at 78-9)

Mammone was located by police and arrested. (Id. at 96-188) He gave a statement to police describing the preceding events. (Id. at 181) The state also obtained forensic evidence. Dr. Murthy, the coroner, testified as to cause of death of the three victims. (TP, Vol. 6, p. 82). The children both had neck wounds. Mammone's mother in law, Margaret Eakin, had a gunshot wound and blunt force injuries.

Mammone was convicted of all charges.

The penalty phase

At the penalty phase counsel presented a five-hour unsworn statement from Mammone. They also presented testimony from Mammone's parents and Dr. Jeffrey Smalldon. Mammone's statement described his childhood and marriage and the events leading to the deaths of Macy, James and Mrs. Eakin.

Mammone's mother testified that she and his father divorced when Mammone was ten years old. Mammone's father was very abusive, both mentally and physically, to both James and his mother. He also drank excessively. He called his wife names, and called James a "maggot." (PP, Vol. 2, pp. 339-340). He also called him "loser." (PP, Vol. 2 p. 386). He would throw James in his room and tell him to watch him beat his mother. (Id.). As a result Mammone had a bad, almost nonexistent relationship with his father. (PP, Vol. 2, p. 342). When his father called

him names he retreated. (Id.). Because of the abuse he became defensive and would be teased by his uncles. (PP, Vol. 2, p. 343). Mammone was “profoundly” affected by the abuse of his father. (PP, Vol. 2, p. 386). The rejection he experience permanently damaged his self image. (Id.). One manifestation of these difficulties in childhood was problems in school. Mammone was an uneven student. He was viewed as bright but chronically underachieving. (PP, Vol 2, pp. 386-87). He received little encouragement or follow through at home. (Id.).

Dr. Jeffrey Smalldon diagnosed Mammone with a personality disorder not otherwise specified with schizotypal, borderline and narcissistic features. (PP, Vol. 2 pp. 407-08). He also has passive aggressive and obsessive compulsive personality traits. He suffers from episodic alcohol abuse and generalized anxiety disorder. Dr. Smalldon testified that Mammone’s relationship with his wife was highly idealized in his mind. (PP, Vol. 2, p. 390) She was “a moral woman. A woman of God, a good woman...his expectation of her...was that she was going to behave like a heroine out of a Jane Austin novel; correct, prim, proper, moral.” (PP, Vol. 2, p. 391) Their union was “blessed by God.” (Id.) When this idealized union began to crumble, Mammone’s thoughts and behavior spiraled out of control. His deep feelings of insecurity could not cope. (PP, Vol. 2, p. 392-93). Mammone also believed that he killed his children “to restore them to their purity.” (PP, Vol. 2, p. 395). He was acting “as an instrument of moral reghteousness when he took their lives.” (PP, Vol. 2, p. 395). He perceived himself as a devoted father, despite the fact that he took his children’s lives. (PP, Vol. 2, p. 422). He did not try to justify the killing of his mother-in-law to Dr. Smalldon. (PP, Vol. 2, p. 395).

Dr. Smalldon testified that Mammone’s profile on the Minnesota Multiphasic Personality Inventory (MMPI) is a “very unusual profile to obtain from someone who is not psychotic.” He further stated that “if I was given that profile without knowing about, anything about the person

who produced it, I'd say in all likelihood...this person is suffering from a psychotic disorder, schizophrenia or something like it." (PP, Vol. 2, p. 405). Although Dr. Smalldon testified that he did not believe that Mammone was actively psychotic, "his profile includes a number of characteristics that are very infrequently seen in individuals who are not psychotic." (Id.).

These characteristics include very confused, very disordered thinking, and very profound feelings of inner personal alienation. Such individuals are often highly preoccupied with very abstract or odd or occult ideas. They may spend a great deal of time in fantasy; over time the lines separating fantasy and reality become blurred and confusing. (PP, Vol. 2, pp. 405-06). They are rigid in their thinking, and are often preoccupied with persecutory thoughts, thus feeling vulnerable to forces beyond their control. (Id.). Dr. Smalldon testified that there is a genetic and biological component to personality disorders, and that environmental factors also play a role. (PP, Vol. 2, pp. 411-13).

At the conclusion of the penalty phase the jury voted for a sentence of death for each count of aggravated murder. The trial court imposed the death sentence for each count of aggravated murder, and sentenced Mammone on the other counts of the indictment.

ARGUMENT

PROPOSITION OF LAW NO. I

THE CAPITAL DEFENDANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY AN IMPARTIAL JURY ARE VIOLATED BY THE TRIAL COURT'S DENIAL OF A MOTION FOR CHANGE OF VENUE WHERE THERE IS PERVASIVE, PREJUDICIAL PRETRIAL PUBLICITY. U.S. CONST. AMENDS. V, VI, VIII, IX AND XIV; OHIO CONST. ART. I §§ 5 AND 16.

I. Facts.

The small community of Canton and all of Stark County was shocked by the murders of two small children and their maternal grandmother. The additional facts that the children's father stabbed them when he had them for visitation and that their murders were rooted in a bitter divorce made the story even more sensational. Numerous blogs, television broadcasts, radio shows, online chatrooms, and newspaper articles provided extensive coverage of James Mammone's case. (Motion #47, Change of Venue). As a result, defense counsel moved the trial court for a change of venue based on the maelstrom of pretrial publicity. (Motion #47, Change of Venue). The trial court overruled the motion. (TP 11/12/2009, pp. 35-36).

II. Law.

The premium on impartiality is no where greater than in a capital case where a jury must choose between life imprisonment and death if they find the accused guilty of capital murder. See Morgan v. Illinois, 504 U.S. 719, 726-28 (1992) (jurors must be impartial with respect to culpability and punishment in a death penalty case). A biased juror is unable to apply the facts to the law and deliberate under the constitutionally required burden of proof. See In re Winship, 397 U.S. 358 (1970).

In Sheppard v. Maxwell, 384 U.S. 333 (1966), the Supreme Court recognized that pretrial publicity may result in a denial of a defendant's right to due process of law. The Court held that

where: “[T]here is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.” *Id.* at 363. This Court has adopted the Sheppard standard and ruled that a showing of a “mere likelihood” of prejudice will support a venue change. State v. Fairbanks, 32 Ohio St. 2d 34, 37, 289 N.E.2d 352, 355 (1972). Although the court in Fairbanks pointed out that news reports that are factual and without distortion, or which are non-inflammatory in character, do not establish the impossibility of a fair and impartial trial where the jurors are uninformed or undecided, the court mandated that the rigid Sheppard standard of mere likelihood be applied. *Id.*

When faced with trial in a county that has been subjected to extensive publicity about the case such that there is present a likelihood of prejudice, the trial court should transfer the case to another county. See State ex rel. Dayton Newspapers Inc. v. Phillips, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976). The trial judge has a “duty to protect [the accused] from [this type of] inherently prejudicial publicity . . .” that renders the jury unfair in its deliberations. Sheppard, 384 U.S. at 363. Whether it is or is not likely that the Defendant would be convicted in another venue is irrelevant. The right to a fair and impartial jury is fundamental. The denial of that right is a structural error that is never harmless. Arizona v. Fulminante, 499 U.S. 279, 290 (1991).

III. Argument.

In the present case, Mammone was denied a fair trial due to the extensive pretrial publicity surrounding the deaths of his children and mother-in-law. At the Change of Venue hearing, the judge noted that he was concerned about the fact that the Canton Repository published Mammone’s letter detailing what happened in the case and why the murders were committed. (TP 11/12/2009, p. 34).

With the usage of social media, however, Mammone's pretrial exposure was far more pervasive and prejudicial than the Canton Repository article. Defense counsel documented how Mammone was the subject of many daily blogs, online chat rooms, links and twitter feeds in addition to many local radio shows, television broadcasts and newspaper articles. For example, the Canton Repository's website detailed Mammone's prior conviction for domestic violence and readers posted how the Municipal Judge who allowed Mammone to be free should be voted out of office because otherwise he [Mammone] couldn't have committed these murders. (TP 11/12/2009, p. 17). The website also encouraged a dialogue about the case and posted comments such as: "this man deserves no trial, only a fool would consider him not guilty" and "execute, execute, execute him." (TP 11/12/2009). Finally, one blogger noted the escalating rhetoric and warned that social media was going to make it difficult for Mammone to get an unbiased jury in Stark County. (TP 11/12/2009, p. 19). In response, another blogger "educated" people to keep their "verdict" to themselves so that there would not be a change in venue and that way they could serve as juror and executioner. (TP 11/12/2009, p. 20).

The venires were replete with potential jurors who had been extensively prejudiced by media accounts and had formed such strong opinions as to not be able or willing to change their minds. (TP Vol. I, pp. 196-197; 200-202; 203-209; 211; 277-278; 289-290; Vol. II, pp. 113-115; 118; 120; Vol. III, pp. 28; 30-32; 34-35; 131; 153; 174; 241; 245; 268). Numerous jurors also could not serve because children were murdered. And, when jurors explained why they felt they could not be fair (i.e., #621 read Mammone's letter in the Canton Repository and had formed an opinion) the judge "reminded" the jurors several times as a group that they had a "civic duty" to serve and that he "hoped they were not just trying to get out of jury service" and that they really needed "to search their souls" before stating that they felt they were not able to serve. (TP Vol.

I, p. 202, 234). Thus, even where jurors were trying to make an honest assessment the honesty was met with a chilly reception as so many jurors were impacted by the extensive pretrial coverage.

Juror #381 and Juror #384 stated they knew nothing about the Mammone case. (TP Vol. I, p. 274). Several jurors, however, did know quite a bit about the case and formed opinions. Juror #372, Juror #448, Juror #438, and Juror #461 had either heard, read or discussed the case with others. These jurors were allowed to sit based on their "self-assessments" that they could be fair. (TP Vol. I, p. 269; Vol II, pp. 207; 261; Vol. III, p. 28). The eventual jurors had to sit, with prior knowledge of the case, and listen to their panel-mates express how convinced they were as to Mammone's guilt. The result was a jury that was irreparably tainted, not only by their knowledge of the case, but from listening to other innumerable opinions about the case.

Under these circumstances there can be no question that Mammone was denied a fair trial. In addressing one's constitutional right to be tried by a fair and impartial jury, the United States Court of Appeals for the Sixth Circuit stated as follows:

In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. "A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworn." His verdict must be based upon the evidence developed at trial. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies *** "The theory of the law is that a juror who has formed an opinion cannot be impartial." Reynolds v. United States, 98 U.S. 145, 155.

Goins v. McKeen, 605 F.2d 947, 951 (6th Cir. 1979) (quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961)).

In Irvin, the Court held that the Defendant's right to an impartial jury was denied by a presumption of prejudice arising from extensive pretrial publicity. The Court found a presumption of prejudice despite the sincerity of the jurors who stated that they could be "fair and impartial" to the defendant. Id. at 728. In Irvin, the viewpoint of the community was revealed by the media's pretrial coverage, in which the Court found that the "force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County." Id. at 726. See also Rideau v. Louisiana, 373 U.S. 723-27 (1963) (defendant denied due process without change of venue after confession was televised).

Even though almost every juror indicated that they had read, heard or discussed Mammone's case, the trial court maintained its position that Mammone could get a fair trial in Stark County because the jurors stated that they could nonetheless be fair and impartial. Questions requiring jurors' subjective evaluation of their ability to be fair and impartial, however, have consistently been held to be an inadequate basis upon which to assess jurors' qualification. Murphy v. Florida, 421 U.S. 794, 800 (1975); Irvin, 366 U.S. at 728. "[W]hether a juror can render a verdict solely on evidence adduced in the courtroom should not be adjudged on that jurors' own assessment of self-righteousness **without something more.**" Silverthorne v. United States, 400 F.2d 627, 639 (9th Cir. 1968) (emphasis in original).

Similarly, in United States v. Dellinger, 472 F.2d 340, 367 (7th Cir. 1972), the Court stated:

The government's position . . . rest[s] upon an assumption that a general question to the group whether there is any reason they could not be fair and impartial can be relief on to produce a disclosure of any disqualifying state of mind. We do not believe that a prospective juror is so alert to his own prejudices.

As the court in Forsythe v. State, 12 Ohio Misc. 99, 106, 230 N.E.2d 681, 686 (1967) noted, an assumption by the trial judge that a jury could disregard pretrial publicity after being instructed to do so, was a “triumph of faith over experience.” In United States v. Aaron Burr, 25 F. Case 30, Case No. 14 (1807), (1789-1880), Chief Justice Marshall stated:

Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision on the case according to the testimony. He made it clear that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him *** he will listen with more favor to that testimony which confirms, than to that which would change his opinion.

Therefore, Mammone was denied a fair trial because almost every juror had either read, heard, discussed or saw an account of the deaths of the Mammone children and their grandmother. The trial court’s reliance on the jurors’ own self-assessment of their ability to be fair and impartial ignored the reality that these jurors could not set aside their opinions already formed from exposure to numerous and detailed media accounts of the Mammone case.

As in Irvin and Sheppard, prejudice from the weight of the adverse publicity must be presumed in this case. Stark County was saturated with stories concerning every aspect of the Mammone case including publication of the defendant’s prior record and his letter regarding the case and the motivation behind his actions. Further, there was an open and continuous discussion of the case by bloggers as well as the posting of their opinions through the different websites. Mammone’s constitutional guarantees under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 5 and 16 of the Ohio Constitution were violated.

IV. Conclusion.

The pretrial publicity surrounding Mammone's case so infected the jury that he was unable to obtain a fair trial in Stark County. As a result, Mammone's constitutional guarantees under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 5,16 of the Ohio Constitution were violated. Therefore, his convictions and sentences must be vacated and this case must be remanded for a new trial.

PROPOSITION OF LAW NO. II

THE SERVICE OF JURORS AT THE PENALTY PHASE WHO ARE BIASED IN FAVOR OF THE DEATH PENALTY VIOLATES A CAPITAL DEFENDANT'S RIGHTS TO DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND A FAIR AND RELIABLE SENTENCE.. U.S. CONST. AMENDS VIII, XIV; OHIO CONST. ART. I, §§ 9, 10, and 16.

James Mammone was prejudiced because his jury was composed of individuals who were unfairly biased in favor of the death penalty. The presence of these jurors ensured the imposition of the death penalty at the penalty phase.

I. Jurors biased in favor of the death penalty sat on Mammone's jury.

Two jurors sat on Mammone's jury who clearly indicated during voir dire that they could not fairly consider all the possible sentencing options in this case.

Juror Sally Mickley (Juror 418) agreed, in response to a question from defense counsel, that part of her belief system was "an eye for an eye." (VD, Vol. 2, p. 247). The juror further explained that she believed that punishment that fits the crime and an eye for an eye were "basically the same thing." She repeated that her opinion on that had not changed. Although the juror did say that some circumstances should be considered, she again said "if they are of sound mind and went out and did this thing anyhow, then yes, I think that it should be an eye for an eye definitely, and especially where there is small children involved where it sounds like there was [in this case]." (VD, Vol. 2, p. 248).

Juror Michael King (Juror 448), stated that he would have a problem being fair. (VD, Vol. 1, p. 233). He further stated that he believed an "eye for an eye" is in the Bible, and he believed that the death penalty is proper for all cases of aggravated murder. (VD, Vol. 2, pp. 234-35). He stated that he did not believe in prison because it is too much of a burden on other citizens. (VD, Vol. 2, p. 236) Juror King also said that an "eye for an eye" is part of his belief

system. Defense counsel followed with another question, "And for you, you don't necessarily believe in incarceration?" The juror answered, "No. I don't like it because of the fact that it does virtually no good." (VD, Vol. 2, p. 249). The juror again reiterated that that was his firm opinion. The juror stated that he would vote for capital punishment based on his belief system. (VD, Vol. 2, p. 250).

Juror King also said that he had discussed the case extensively with other people and that it would be 'hard to completely throw everything out that you have seen...' (VD, Vol. 2, pp. 209-10) He stated that this case would be difficult because he had a small child of his own. (VD, Vol. 2, p. 211) He believed that this might affect his ability to be fair, and he was equivocal about being able to disregard it. (Id.)

Significantly, during initial challenges for cause, the trial court noted that it had Juror 448 circled as a possible cause for concern. However, there was no challenge for cause from defense counsel at that time. (VD, Vol. 1, p. 321). Later in voir dire, the trial court again expressed concern that Juror 448 had given answers that were "leaning toward the death penalty" but defense counsel did not raise a challenge for cause. Juror King remained on the jury. Defense counsel used all six of their peremptory challenges but did not remove either Mickley or King from the jury. The failure of the trial court to excuse these two jurors for cause was prejudicial to Mammone, as it is apparent from their responses that they would automatically vote for the death penalty once they found Mammone guilty of the facts in this case. Further, it was error for the trial court to deny defense counsel's motion for additional peremptory challenges.

II. Mammone was prejudiced by the denial of an impartial jury.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to have the issue of his guilt determined by a fair and impartial jury. Irvin v. Dowd, 366

U.S. 717 (1961). See also White v. Mitchell, 431 F.3d 517, 537 (6th Cir. 2005). Concomitantly, “[a] juror who would automatically vote for the imposition of the death penalty without weighing the aggravating and mitigating evidence presented must be removed for cause, and a failure of [the] trial court to do so rises to the level of constitutional error...” Id. at 538. Pursuant to Ohio Rev. Code Ann. § 2929.03(D)(2), Ohio “has chosen...to delegate to the jury [the task of determining punishment] in the penalty phase of capital trials in addition to its [federal constitutional] duty to determine guilt or innocence of the underlying crime.” Accordingly, the right to a fair and impartial jury in the penalty phase of a capital case is guaranteed by the Due Process Clause of the Fourteenth Amendment because State law provides for a jury’s determination of punishment. See Morgan v. Illinois, 504 U.S. 719, 726-27 (1992), citing Turner v. Louisiana, 379 U.S. 466 (1965) (“due process alone had long demanded that, if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment.”).

The due process right to a fair and impartial jury is violated when a juror forms an opinion on the merits of a factual issue without regard for the evidence presented. See id. at 729. At the penalty phase of a capital trial, the ultimate issue of fact for the jury is whether the defendant deserves a life sentence. Thus, the United States Supreme Court held in Morgan that the service of a juror who is automatically in favor of the death penalty in every case in which a defendant is guilty of capital murder violates the defendant’s right to an impartial sentencing jury under the Due Process Clause:

Because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such

views. If even one such juror is empanelled and the death sentence is imposed, the state is disentitled to execute the sentence.

Id.

In 1885, this Court held:

A person called as a juror in a criminal case, who clearly shows himself, on his voir dire, not to be impartial between the parties, is not rendered competent by saying that he believes himself able to render an impartial verdict, notwithstanding his opinions, although the court may be satisfied that he would render an impartial verdict on the evidence.

Palmer v. State, 42 Ohio St. 596, syl. 3, 1885 Ohio LEXIS 215 (1885). The Palmer principle is not arcane; the United States Supreme Court articulated the same concerns with respect to voir dire under modern death penalty schemes. In Morgan, the Court cautioned that dogmatic inquiries about a juror's ability to be fair and follow the law are inadequate to remedy jurors' bias, "*their protestations to the contrary notwithstanding.*" 504 U.S. at 735 (emphasis added). Jurors in all truth and candor respond that they could be fair, unaware that views they hold would prevent them from doing so. The most important inquiry is not how the juror answers the leading questions "can you be fair" or "can you follow the law," but instead how the juror answers all questions concerning bias.

In State v. Allen, 73 Ohio St. 3d 626, 653 N.E. 2d 675 (1995), this Court held that it will not disturb a trial court's ruling on a challenge for cause if the ruling is "supported by substantial evidence." Allen, 73 Ohio St. 3d at 629, 653 N.E.2d at 681. The Allen trial court noted on the record its assessment of the challenged juror's credibility, and the trial court specifically stated that the challenged juror was unequivocal in her ability to set aside her views and fully understood her responsibility. Id. No such "substantial evidence" is present regarding the jurors in Mammone's case. To the contrary, their responses demonstrate a bias that at least in the case of King was cause for concern to the court. Nevertheless the court failed to take appropriate

action. In Juror King, the court was confronted with a juror who repeatedly indicated that he would hold to his belief in an “eye for an eye” instead of following the instructions of the court and the law of Ohio. Juror Mickley also favored an “eye for an eye” as punishment and had already made up her mind about the facts of this case.

The Sixth Circuit Court of Appeals has held that when a biased juror is not excused a defendant is entitled to habeas relief. See White, 431 F.3d at 537-42. In White, the voir dire transcript indicated that as to the penalty phase, the juror’s statements “went beyond an issue of ability to abandon a preconceived opinion and extended to an eagerness to impose the death penalty in this particular case.” Id. at 539. Subsequently, the prosecutor elicited statements as to whether she would be “willing to attempt” to follow the law. Id. at 540. Although the trial court and this Court on review concluded that the juror was not biased, the Sixth Circuit found that the transcript revealed “highly troubling and contradictory statements” by the juror as to her ability to be fair at the penalty phase. Id. at 541. This was not remedied by the prosecutor’s “impermissibly lax statement of the duty of a juror to set aside her own views and apply the law...” Id. The Sixth Circuit concluded that this Court’s determination that the trial court did not abuse its discretion was contrary to or an unreasonable application of Supreme Court precedent. See also Franklin v. Anderson, 434 F.3d 412, 427 (6th Cir. 2006) (juror so “completely misunderstood the presumption of innocence and burden of proof that she could not have made a fair assessment of the evidence of ... guilt,” rendering her biased); Wolfe v. Brigano, 232 F.3d 499, 503 (6th Cir. 2000) (habeas relief granted based on finding that trial court’s failure to excuse two jurors who were unable to unequivocally state that they would set aside their personal beliefs, was unreasonable). As in the White case the biased jurors in Mammone’s case,

by their invocation of an “eye for an eye” philosophy, demonstrated that they believed that their position was the “true and honest one, thus reflecting an inherent bias.” White, 431 F. 3d at 541.

The trial court had a duty to excuse Mickley and King for cause in light of Morgan. See State v. Johnson, 24 Ohio St. 3d 87, 91, 494 N.E.2d 1061, 1065 (1986) (trial court has duty to protect the rights of the accused). Indeed, the trial court sua sponte dismissed other jurors for cause but inexplicably failed to take action with respect to Mickley and King.

Mammone was prejudiced when the trial court failed to excuse Mickley and King for cause. Accordingly, Mammone’s rights under the Eighth and Fourteenth Amendments and Article I, §§ 9, 10 and 16 of the Ohio Constitution were violated and “the State is disentitled to execute [his death] sentence[s].” See Morgan, 504 U.S. at 729.

PROPOSITION OF LAW NO. III

THE DEFENDANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IS VIOLATED WHEN COUNSEL'S PERFORMANCE IS DEFICIENT TO THE DEFENDANT'S PREJUDICE. U.S. CONST. AMENDS. V, VI, VIII, XIV; OHIO CONST. ART. I, §§ 2, 9, 10, AND 16.

I. Law.

The Sixth Amendment right to counsel applies to the states through the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963). The test for whether that right to counsel has been violated is found in Strickland v. Washington, 466 U.S. 668 (1984). The reviewing court must determine if counsel's performance is deficient. Id. at 687. If counsel's performance is deficient, the reviewing court must determine if the accused was thereby prejudiced. Id. To establish prejudice the accused need not establish outcome determinative error. Id. Instead, the accused is prejudiced when the reviewing court loses confidence in the fairness of the trial. Id.

Strategic choices by appointed counsel are virtually unassailable. Id. at 690. Strickland makes clear, however, that a reasonable investigation of both the facts and the applicable law is required before counsel's choice may be deemed strategic. Id. at 691. Further, under Strickland, appointed counsel in a criminal case has a "duty to advocate the defendant's cause" as well as "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 688. Federal courts have consistently recognized that Strickland's duties to advocate and to employ "skill and knowledge" include the necessity for trial counsel to object or otherwise preserve federal issues for review. See e.g., Gravley v. Mills, 87 F.3d 779, 785 (6th Cir. 1996); Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994). Cf. Freeman v. Lane, 962 F.2d 1252, 1259 (7th Cir. 1992) (appellate counsel ineffective for abandoning viable federal claim; cause and prejudice for default established).

II. Mammone's Sixth Amendment right to counsel was violated by defense counsel's prejudicially deficient performance at all phases of his capital trial.

A. Defense counsel failed to conduct an adequate voir dire of prospective jurors.

Mammone's right to receive effective assistance extended throughout his entire capital trial, including voir dire. Johnson v. Armontrout, 961 F.2d 748, 754-56 (8th Cir. 1992). The Constitution does not dictate catechism for voir dire, but only that the defendant be afforded a fair and impartial jury. Even so, part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. Morgan v. Illinois, 504 U.S. 719, 729 (1992); Dennis v. United States, 339 U.S. 162, 171-172 (1950); State v. Jackson, 107 Ohio St. 3d 53, 64, 836 N.E.2d 1173 (2005); State v. Wilson, 74 Ohio St. 3d 381, 386, 659 N.E.2d 292 (1996).

Voir dire plays a critical function in assuring the criminal defendant that [her] constitutional right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not able to impartially follow the court's instructions and evaluate the evidence cannot be fulfilled.

Morgan, 504 U.S. 729-730; citing Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981).

As such, trial counsel must engage in voir dire questioning to expose those prospective jurors who cannot follow the trial court's instructions and impartially evaluate the evidence. Counsel must also effectively challenge for cause those jurors who cannot follow the law and be impartial.

Voir dire is counsel's opportunity to ensure that a jury will be impartial and indifferent to the extent provided by the Sixth Amendment. Morgan, 504 U.S. at 719; see also O.R.C. § 2945.25; Ohio R. Crim. P. 24(A), (B)(9), (14). Although the content of voir dire does not have to conform to a particular framework, State v. Evans, 63 Ohio St. 3d 231, 247, 586 N.E.2d 1042,

1056 (1992), counsel must cover specific subjects in order to afford the defendant a fair trial. Mu'Min v. Virginia, 500 U.S. 415, 422-23 (1991).

Trying a defendant before a biased jury is akin to providing him no trial at all. It constitutes a fundamental defect in the trial mechanism itself. Thus, counsel had a professional duty under Strickland to afford Mammone an impartial jury.

1. Counsel failed to adequately question and challenge jurors biased in favor of the death penalty.

Two jurors sat on Mammone's jury who clearly indicated during voir dire that they could not fairly consider all the possible sentencing options in this case.

Juror Sally Mickley (Juror 418) agreed, in response to a question from defense counsel, that part of her belief system was "an eye for an eye." (VD, Vol. 2, p. 247). The juror further explained that she believed that punishment that fits the crime and an eye for an eye were "basically the same thing." She repeated that her opinion on that had not changed. Although the juror did say that some circumstances should be considered, she again said "if they are of sound mind and went out and did this thing anyhow, then yes, I think that it should be an eye for an eye definitely, and especially where there is small children involved where it sounds like there was [in this case]." (VD, Vol. 2, p. 248).

Juror Michael King (Juror 448), stated that he would have a problem being fair. (VD, Vol. 1, p. 233). He further stated that he believed an "eye for an eye" is in the Bible, and he believed that the death penalty is proper for all cases of aggravated murder. (VD, Vol. 2, pp. 234-35). He stated that he did not believe in prison because it is too much of a burden on other citizens. (VD, Vol. 2, p. 236) Juror King also said that an "eye for an eye" is part of his belief system. Defense counsel followed with another question, "And for you, you don't necessarily believe in incarceration?" The juror answered, "No. I don't like it because of the fact that it

does virtually no good.” (VD, Vol. 2, p. 249). The juror again reiterated that that was his firm opinion. The juror stated that he would vote for capital punishment based on his belief system. (VD, Vol. 2, p. 250).

Juror King also said that he had discussed the case extensively with other people and that it would be “hard to completely throw everything out that you have seen...” (VD, Vol. 2, pp. 209-10) He stated that this case would be difficult because he had a small child of his own. (VD, Vol. 2, p. 211) He believed that this might affect his ability to be fair, and he was equivocal about being able to disregard it. (Id.)

Defense counsel failed to challenge either of these jurors for cause. Defense counsel used all six of their peremptory challenges but did not remove either Mickley or King from the jury. This was prejudicial to Mammone, as it is apparent from their responses that they would automatically vote for the death penalty once they found Mammone guilty of the facts in this case.

It is defense counsel’s responsibility to conduct an adequate inquiry. Oswald v. Bertrand, 374 F.3d 475, 484 (7th Cir. 2004); see, also, United States v. Barber, 80 F.3d 964, 968 (4th Cir. 1996) (an inquiry is required during voir dire to eliminate prejudice that threatens the fairness of the process or the result). The greater the probability of bias, “the more searching the inquiry needed to make reasonably sure that an unbiased jury is impaneled.” Oswald, 374 F.3d at 480. Trial counsel’s failure to fully inquire of jurors or to raise challenges for cause constituted ineffective assistance. (See Proposition of Law II).

2. Counsel failed to adequately voir dire and challenge jurors as to pretrial publicity.

The community of Canton and all of Stark County was shocked by the murders of two small children and their maternal grandmother. The additional facts that the children’s father

stabbed them when he had them for visitation and that their murders were rooted in a bitter divorce made the story even more sensational. Numerous blogs, television broadcasts, radio shows, online chatrooms, and newspaper articles provided extensive coverage of James Mammone's case. In spite of this, counsel failed to adequately voir dire jurors and challenge them for cause.

Juror #381 and Juror #384 stated they knew nothing about the Mammone case. (VD Vol. I, p. 274). Several jurors, however, did know quite a bit about the case and formed opinions. Juror #372, Juror #448, Juror #438, and Juror #461 had either heard, read or discussed the case with others. These jurors were allowed to sit based on their "self-assessments" that they could be fair. (VD Vol. I, p. 269; Vol II, pp. 207; 261; Vol. III, p. 28). The eventual jurors had to sit, with prior knowledge of the case, and listen to their panel-mates express how convinced they were as to Mammone's guilt. The result was a jury that was irreparably tainted, not only by their knowledge of the case, but from listening to other innumerable opinions about the case. (See Proposition of Law D). This prejudiced Mammone in both the trial and penalty phases of his trial, as he was tried by a jury preordained to find him guilty and sentence him to death.

3. Counsel failed to adequately voir dire jurors as to mitigating factors.

The Eighth Amendment requires the sentencing jury to consider the defendant's character, history and background during the penalty phase of a capital trial. Boyde v. California, 494 U.S. 370, 377-78 (1990); Lockett v. Ohio, 438 U.S. 586, 604 (1978). The jury must also consider the mitigating factors enumerated by statute and any other factors in favor of a sentence less than death. A capital defendant has a constitutional right to conduct an adequate voir dire to determine if prospective jurors can follow the law and consider mitigating evidence to impose a life sentence. Counsel's questions on voir dire must be sufficient to identify

prospective jurors who hold views that would prevent or substantially impair them from performing the duties required of jurors. Morgan, 504 U.S. at 734-735. Concomitantly, O.R.C. § 2929.04(B) sets out the mitigating factors to be considered in sentencing. A jury may not be precluded from considering relevant mitigating factors. Lockett v. Ohio, 438 U.S. 584 (1978).

In Mammone's case, counsel failed to voir dire jurors as to their ability to consider mitigating factors. Instead, the prosecutor repeatedly asked jurors if they could impose the death penalty. (See, for example, VD, Vol. 2, p. 217-18). At times, the trial court stepped in and asked whether jurors could consider mitigation, and then said "[l]et's move this along." (VD, Vol. 2, pp. 255-57, 265). Defense counsel abdicated their duty to ensure a fair and impartial consideration by the jury of mitigating factors.

B. Penalty Phase.

The sentencing phase of a capital trial is likely to be "the stage of the proceeding where counsel can do his or her client the most good." Glenn v. Tate, 71 F.3d 1204, 1207 (6th Cir. 1995) (quoting Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989)). In order to have a reliable sentencing determination the sentencer must focus on the individual characteristics of the defendant and circumstances of the crime. Lockett v. Ohio, 438 U.S. 586 (1978). It is defense counsel's obligation to humanize and personalize their client: to have the jurors see not merely a murderer, but a person in who we see the "diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion). "[T]he preparation and investigation for the penalty phase are different from the guilt phase. The penalty phase focuses not on absolving the defendant from guilt, but rather on the production of evidence to make a case for life. The purpose of investigation is to find witnesses to help humanize the defendant, given that a jury has found him guilty of a capital offense." Marshall v. Hendricks, 307 F.3d 36, 103 (3rd Cir. 2002).

1. Counsel failed to properly investigate and prepare their witnesses.

The effective assistance of counsel includes a duty to properly interview and prepare witnesses to testify at trial. See, Combs v. Coyle, 205 F.3d 269, 288 (6th Cir. 2000) (deficient performance and prejudice where counsel failed to fully investigate witness's testimony prior to trial); Hamblin v. Mitchell, 354 F.3d 482 (6th Cir. 2003).

Defense counsel called Mammone's mother, Gilise, to testify. She stated that Mammone regretted his actions and knew what he did was wrong. (PP, Vol. 2, p. 347). However, on cross examination by the prosecutor, Gilise was questioned about calls she received from Mammone in jail. She was asked, "[a]nd isn't it true that he has maintained all during those conversations that he felt he did what was right? That he has no regrets about it?" And also, "[s]o, do you recall him telling you that she got exactly what she was told she would get? And you agreed with him." When the witness says she didn't agree, the prosecutor followed up with, "You don't recall indicating to him that, yes, it was true, she did make a very costly decision?"

Gilise then says, "That, yeah." (PP, Vol. 2, p. 350). The prosecutor then followed that with this question: "You indicated to him at one point that it shouldn't have been a surprise to her, isn't that right?" Gilise responded, "Well, no. From what he tells me, he's warned her and warned her about it." (PP, Vol. 2, p. 351).

The prosecutor's questions, and Gilise's responses, would have destroyed any sympathy the jurors might have had for her as a witness on behalf of Mammone. Counsel's failure to fully interview and prepare Gilise was prejudicial to Mammone, as it undermined the mitigating value of evidence at the penalty phase. See Hamblin, 354 F.3d at 491 (mitigation witness's negative comments about defendant during penalty phase testimony due to lack of interview and preparation by defense counsel resulted in ineffective assistance of counsel).

Similarly, counsel called Mammone's father as a witness in the penalty phase, despite the fact that he would take the stand and deny the very information that counsel was presenting in mitigation. Mammone Sr. testified that his son and he were "very close and had a great relationship." (PP, Vol. 1, p. 317). He stated that "[a]fter the divorce, he spent almost every weekend with me... and I thought we got along great." (*Id.*). Again later in his testimony, he said "I thought we had a pretty great relationship." (PP, Vol. 1, p. 319). Mammone Sr. denied calling his son a maggot or stupid. (PP, Vol. 1, p. 320). In addition to these denials, Mammone Sr.'s other bizarre and unfocused comments did little to evoke sympathy for the witness or the defendant. Even Dr. Smalldon acknowledged that his interview with the father was "strange." He had no shirt on and offered no handshake as they talked on the front porch. Mammone Sr. was "ambivalent" about his role. He denied any abuse. (PP, Vol. 2, p. 381-84). Mammone Sr.'s testimony undermined the other mitigation evidence presented.

2. Defense counsel allowed Mammone to make a five-hour unsworn statement

In their sentencing memorandum to the trial court, counsel referred to Mammone's "five-hour" statement at the penalty phase. During this statement, the court took two recesses and a lunch break. During the statement, Mammone rambled through "facts" of his life and this offense. At no time did counsel guide or limit the presentation by asking questions. State v. Lynch, 98 Ohio St. 3d 514, 787 N.E. 2d 1185 (2003) (trial court has discretion to allow counsel to ask questions in presenting an unsworn statement); State v. Barton, 108 Ohio St. 3d 402, 412-13, 844 N.E.2d 307 (2006). The court finally said to the defendant, "[w]rap it up, Mr. Mammone." (PP, Vol. 1, pp. 54-307).

Mammone's detailed, yet cold and detached narrative would have been disturbing to jurors, without giving them a context to interpret Mammone's demeanor and comments.

Although Dr. Smalldon later described Mammone's personality disorder, the damage was already done. Nor did Dr. Smalldon address, in his relatively brief testimony, all the disturbing aspects of Mammone's statement, and how it was connected to his severe mental illness. Counsel knew that Mammone was seriously mentally ill, yet they proceeded to present his unsworn statement at the penalty phase.

Counsel abdicated their duty to present a coherent, compelling penalty phase presentation. See, Hamblin, 354 F.3d at 491, 492 (counsel did nothing to help defendant prepare or give statement in penalty phase; judicial standards do not permit the courts to excuse counsel's failure to investigate or prepare because the defendant so requested). Counsel's presentation of Mammone's unsworn statement, their failure to prepare him, or to limit or guide the statement in any way, constituted ineffective assistance. Counsel then gave an ineffectual and superficial closing argument, including comparing Mammone to the Uni-Bomber, another "whacky guy." (PP, Vol. 2, p. 482). Counsel said "I'm not sure, frankly, whether or not you're supposed to believe Lisa [Gilise] Mammone or you're not supposed to believe Lisa Mammone." He called Mammone Sr. "a self-described goofball." Instead of summarizing Dr. Smalldon's testimony for the jurors, counsel said, "But did you really need that?" Counsel concluded, "It's about what's the appropriate sentence for an individual who, such a degree of, my term, craziness." (PP, Vol. 2, 481-86).

Counsel were ineffective at the penalty phase and Mammone was prejudiced. "[T]he label 'strategy' is not a blanket justification for conduct which otherwise amounts to ineffective assistance of counsel." White v. McAninch, 235 F.3d 988, 995 (6th Cir. 2000); Miller v. Anderson, 255 F.3d 455, 458 (7th Cir. 2001) ("The fact that it was a tactic obviously does not immunize it from review in a challenge to the lawyer's effectiveness. Tactics are the essence of

the conduct of litigation; much scope must be allowed to counsel, but if no reason is or can be given for a tactic, the label ‘tactic’ will not prevent it from being used as evidence of ineffective assistance of counsel.”).

C. Failure to object during both phases of Mammone’s capital trial.

Mammone’s counsel were ineffective for failing to object to all instances of prosecutorial misconduct. “One of defense counsel’s most important roles is to ensure that the prosecutor does not transgress [the bounds of proper conduct].” Washington v. Hofbauer, 228 F.3d 689, 709 (6th Cir. 2000). Failure to object, unless it is plain error, may result in an error being waived for appellate review. See Lucas v. O’Dea, 179 F.3d 412, 418-19 (6th Cir. 1998); Grayley v. Mills, 87 F.3d 779, 785 (6th Cir. 1996). Counsel’s failure to object ensured that the impact of the prosecutor’s prejudicial acts were felt full-force.

1. Defense counsel did not object to improper exhibits.

As outlined in Proposition of Law IV the photos of the dead children in their car seats, car seats with blood, sippy cups, child blankets, diapers, sleepers and diaper/overnight bags did not need to be displayed for the jury or repeatedly introduced through four different State’s witnesses. Nor was it necessary to introduce frantic text messages and 911 calls. Nevertheless, this highly inflammatory and prejudicial evidence was presented to the jury. Counsel’s failure to object constituted ineffective assistance.

Mammone incorporates Proposition of Law No. IV here for brevity for a discussion of the facts and prejudice resulting from this error.

2. Defense counsel did not object to instances of prosecutor misconduct.

The cumulative effect of prosecutor misconduct at the penalty phase of this case violated Mammone’s right to a fair trial and a reliable sentence. However, defense counsel failed to

object to the misconduct committed. Mammone incorporates Proposition of Law No. VI here for brevity for a discussion of the facts and prejudice resulting from this error.

III. Conclusion.

The cumulative effect of the foregoing errors and omissions by trial counsel infringed Mammone's Sixth Amendment right to effective assistance of counsel, and his rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 2, 9, 10 and 16 of the Ohio Constitution.. See Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995) (counsel's errors assessed for cumulative effect on defendant's right to fair trial). His convictions must be reversed and his case remanded for a new trial. Alternatively, his death sentences must be vacated and his case remanded for re-sentencing.

PROPOSITION OF LAW NO. IV

WHEN PROSECUTORS INFEST A CAPITAL TRIAL WITH THE USE OF DISTURBING PHYSICAL EVIDENCE IN SUCH A MANNER THAT IT INFLAMES THE JURY, A CAPITAL DEFENDANT IS DENIED HIS SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS TO A FAIR TRIAL AS GUARANTEED BY THE SIXTH, EIGHTH, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS WELL AS THE OHIO CONST. ART. I §§ 1, 2, 9, 10, 16 AND 20.

1. Introduction.

Assistant Prosecutors Barr and Hartnett were under a clear obligation to conduct themselves impartially during James Mammone's capital trial. The United States Supreme Court has emphasized that the government's attorney bears a special responsibility as a state's duty to prosecute fairly is "as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).

Fair trials allow us to have confidence in the integrity of our justice system. A court must be careful not to allow the state's representatives' desire to win a particular case erode this essential foundation. In the present case, Prosecutors Barr and Hartnett failed to conform to the standards enunciated by the United States Supreme Court and the Supreme Court of Ohio. See State v. Lorraine, 66 Ohio St. 3d 414, 431, 613 N.E.2d 212 (1993) (Wright, J., concurring) ("The right to a fair trial is a hallmark of our democracy and something for which we are rightly proud. It is reprehensible for prosecutors, as agents of our government, to disregard this essential right for any reason."). As a result, Mr. Mammone's convictions and death sentence were obtained in violation of his rights to due process and a fair trial as guaranteed by the Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, as well as Article I, §§ 1,2,9,10,16

and 20 of the Ohio Constitution. Therefore, his conviction and death sentence must be reversed, and this matter must be remanded for a new trial.

2. Prosecutorial Theatrics.

From the start, the extensive publicity and the emotionally charged nature of the case were problematic for the Mammone defense team. The heavy use of social media, including daily blogs and “tweets” sponsored by local papers, ensured that jurors knew well before the trial began that the case involved a bitter divorce, a civil protection order and the deaths of very young children. Indeed, several jurors who were eventually selected were equivocal on being able to set aside the opinion they had already formed on the case and it was clear that the young ages of two of the victims was troubling. (See Propositions of Law I and II). Thus, photos of dead children in their car seats, bloody car seats, sippy cups, child blankets, diapers, sleepers and diaper/overnight bags did not need to be displayed for the jury or repeatedly introduced through four different State’s witnesses.

Without doubt, the prosecution’s efforts to evoke an emotional response from the jury were calculated. From the very brief opening statement, the jurors knew that defense counsel was not disputing the manner in which the victims were killed and, in fact, few State’s witnesses were cross-examined. “We on James behalf will not be contesting much of the evidence and/or facts with respect to this matter.” (TP, Vol. 5, p. 30) Further, the jurors knew Mammone admitted to the murders and defense counsel never disputed the ages or birthdates of the children. (TP, Vol. 5, pp. 29, 189). Regardless, the State utilized several witnesses to repeatedly remind the jurors of the young ages of the victims.

Detective Eric Risner was the first witness to assist in the presentation of graphic evidence. Over the objection of the defense, the prosecution was able to present a picture of the

dead children in their car seats. (TP, Vol. 5, p. 156). The justification for such a graphic photo was “that was the way the crime scene looked.” (TP, Vol. 5, p. 155). The detective, however, had already detailed the crime scene for the jury through his testimony, which was not disputed by the defense (TP, Vol. 5, pp. 154, 158). While “not happy” about photos 2H and 2I, the only limitation the trial court was made was that the picture would not be put up for the television cameras in the courtroom. (TP, Vol. 5, p. 157). Without doubt, it was the shock value that the prosecution was seeking.

Thereafter, Randy Weinch, was also utilized by the State to “detail the crime scene.” Inexplicably, in addition to the weapons, the wedding photo and dried bridal bouquet found in the car, the prosecution found it necessary to display the bloody car seats as well as all of the contents of the children’s diaper bags.¹ (TP, Vol. 5, p. 217) Sippy cups, and numerous items of children’s clothing were just a few of the additional items that were shown to the jury. (TP, Vol. 5, p. 210, 215.) Certainly these items did not hold any probative value as the “dead children in car seats” photo had already been introduced and the scene thoroughly described by a previous officer.

At this point, witnesses had twice been used to introduce graphic evidence regarding the children. The prosecution, however, was not finished. The coroner, Dr. Murthy, and Michael Short, a criminalist from the crime lab, would be utilized re-identify several items to the jury that related exclusively to the children.

Dr. Murthy, over defense counsel’s objection, was allowed to detail for the jury photos of the dead children that were placed up on the screen. Notably, defense counsel did not object to

¹ To the extent that Mammone’s counsel did not fully object to the introduction of irrelevant yet inflammatory evidence, Mammone was denied the effective assistance of counsel in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as Article I, Sections 2, 9, 10 and 16 of the Ohio Constitution.

the content of Dr. Murthy's testimony – just several graphic pictures of each of the children. (TP, Vol. 6, pp. 76-77). Thus, in addition to the explicit testimony, the jury was able to view several pictures of the children one-by-one as the coroner circled each of their stab wounds. (TP, Vol. 6, pp. 93-103; 113-116). And, although the coroner previously testified the children's bodies were still in their car seats at the time of the autopsies, the car seats were re-introduced as the prosecution again wanted to know if that was "how the children came to the coroner" – i.e., dead bodies still strapped in their car seats. (TP, Vol. 6, pp. 91, 107-108). And, once again, the children's belongings were reviewed with the coroner in detail: sippy cups; children's clothing; baby blankets; diapers; sleepers and hair ribbons, even though these items held no probative value whatsoever. (TP, Vol. 6, pp. 135-137). The repeated introduction of these items was not relevant to any fact of consequence under Ohio R. Evid. 401 and Evid. R. 402 and was in error. The car seats were identified as where the children were at the time of their death and the clothing was simply items they had with them due to Mammone's visitation time. See State v. Jackson, 107 Ohio St. 3d 53, 71, 836 N.E.2d 1173 (2005) ("The trial court's admission of Jayla Grant's bloodstained clothes, however, was an error. ... "Her father merely identified these items as clothing Jayla had been wearing when she was shot. Thus, the clothes were not relevant to any fact of consequence.").

Michael Short was the last witness utilized to introduce disturbing and emotional physical evidence. Even though the bloody car seats had already been discussed twice, they were brought forward again. (TP, Vol. 6, p. 240) Mr. Short, who was introduced as a firearms expert, inexplicably also testified about children's car seats. Short did not need to point out that the car seats were "saturated with apparent blood" - the jury already heard this testimony from earlier witnesses. (TP, Vol. 6, p. 240). All of this irrelevant testimony was highly emotionally charged

and further inflamed the passions of a jury which had already heard pretrial media accounts of the murder and which was already predisposed to vote for the death penalty. (See Propositions of Law I and II).

In State v. Keenan, 66 Ohio St. 3d 402, 409, 613 N.E.2d 203, 209-210 (1993), this Court held:

To be sure, any capital trial generates strong emotions . . . And so we have consistently held the prosecution is entitled to some latitude and freedom of expression . . . Realism compels us to recognize that criminal trials cannot be squeezed dry of all feeling.

But it does not follow that prosecutors may deliberately saturate trials with emotion. We have previously announced that a conviction based solely on the inflammation of fears and passions, rather than proof of guilt, requires reversal.

(Citations and internal quotations omitted). Excessively emotional arguments and courtroom stunts such as those employed by the prosecutors in this case deny due process. Their histrionic approach to this case crossed the line that separates permissible fervor from a denial of a fair trial.

It is incomprehensible that a prosecutor would engage in such conduct knowing that there was compelling evidence to support a conviction. It is equally perplexing why a trial judge would watch these events but not take care to ensure that a trial that already had been tried in the media was not further compromised with this type of emotional pandering. And, it is inexplicable that trial counsel could sit and watch much of the prosecutor's vitriolic performance and not cast an objection on the record. See Proposition of Law No. III . Nonetheless, this is exactly what happened during Mammone's capital trial.

3. There was no probative value to the graphic photos, disturbing physical evidence or the numerous texts and 911 calls.

Autopsy photos of dead children, a photo of dead children in their car seats, blood soaked car seats, children's clothing, diapers, and frantic texts and 911 calls regarding the children all constituted inflammatory victim impact evidence, which is always improper at the trial phase. State v. Tyler, 50 Ohio St. 3d 24, 35, 553 N.E.2d 576 (1990). None of this evidence was relevant to any fact that was of consequence to the determination of whether the state had proven beyond a reasonable doubt that Mammone had committed these crimes. See State v. Fautenberry, 72 Ohio St. 3d 435, 440, 650 N.E.2d 878 (1995). Indeed, the jury knew from the outset that Mammone was not contesting much at the trial phase at all. (TP, Vol. 5, p. 30).

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Ohio R. Evid. 401. Ohio R. Evid. 402 provides in part: “Evidence that is not relevant is not admissible.”

- (A) Exclusion Mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.
- (B) Exclusion Discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

Ohio R. Evid. 403.

Over objections, the trial court admitted the photo of the dead children in their car seats and the autopsy photos. With no objections, however, the bloody car seats and other disturbing physical evidence relating to the children came before the jury repeatedly through four different State's witnesses. And, even without objections from the defense, the trial court was “worried about the cumulative nature” of the numerous text messages sent back and forth between

Mammone and his ex-wife and Mammone and his friend. (TP, Vol. 6, p. 12). Further, the court could not see the relevance of the messaging. (TP, Vol. 6, 12). Finally, the court was concerned that the content of the constant text messaging was purely prejudicial and cumulative given the statements Mammone made. (TP, Vol. 6, p. 13). The concern, however, was short-lived as the trial court allowed the numerous and frantic texts and the 911 calls to be played and read for the jury in their entirety. The admission of any of these items did not tend to “make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ohio R. Evid. 401. Not only did the defense not contest these facts, Mammone’s statements to police officers were played for the jury. Because the evidence was not probative, it was not relevant, and, therefore, it was not admissible. The danger or unfair prejudice arising from the introduction of this irrelevant yet highly inflammatory evidence substantially outweighed any minimally probative value any of these items may have had to the issues.

This Court has in capital cases imposed a stricter test for the admissibility of gruesome photographs, requiring only that the probative value be outweighed by the danger of material prejudice. State v. Maurer, 15 Ohio St. 3d 239, 473 N.E.2d 768 (1984), par. 7 syllabus. Under this stricter standard, courts must limit the photographs so that they are not cumulative or repetitive and so that they only demonstrate the actual injuries sustained by the victim in order to minimize the risk of material prejudice at either the trial or the penalty phase. State v. Morales, 32 Ohio St. 3d 252, 257-59, 513 N.E.2d 267 (1987); State v. Thompson, 33 Ohio St. 3d 1, 9, 514 N.E.2d 407 (1987); State v. Davie, 80 Ohio St. 3d 311, 318, 686 N.E.2d 245 (1997).

The same test must be applied in this situation where the state improperly introduced highly inflammatory evidence. The photos of the dead bodies of the children in their car seats,

autopsy photos, bloody car seats, clothing, frantic text messages and 911 calls had absolutely no probative value to the questions at issue in the trial: i.e., whether the state had proven beyond a reasonable doubt that James Mammone committed these crimes. Permitting the introduction of this evidence had no legitimate evidentiary purpose and merely inflamed the jury and unnecessarily reminded the jury of the age and helplessness of the victims, improper considerations for the jury at the trial phase. The improper evidence also had a carry over effect to the penalty phase. As such, the improper introduction of this evidence denied James Mammone a fair trial and due process. His convictions and sentences must be vacated and the case remanded for a new trial.

PROPOSITION OF LAW NO. V

THE SHOCKING AND GRUESOME PHOTOGRAPHS ADMITTED AT TRIAL DEPRIVED JAMES MAMMONE OF DUE PROCESS, A FAIR TRIAL AND A RELIABLE SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, §§ 2, 9, 10 AND 16 OF THE OHIO CONSTITUTION.

The standard used to determine whether gruesome photographic evidence is admissible in a capital case is stricter than the standard used in noncapital cases under Evidence Rule 403. State v. Morales, 32 Ohio St. 3d 252, 258, 513 N.E.2d 267, 274 (1987). Under the Ohio Rules of Evidence the opponent of the evidence carries the burden to demonstrate that the probative value of the photographic evidence is “substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.” Ohio R. Evid. 403(A). Additionally, photographs may be excluded under the Rules of Evidence if the opponent of the photographs persuades the Court that the “probative value [of the photographs] is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.” Ohio R. Evid. 403(B).

In capital cases, however, the burden shifts to the proponent of the evidence to demonstrate that the probative value of “each photograph” outweighs the “danger of prejudice” to the defendant. Morales, 32 Ohio St.3d at 258. In addition to that burden, the proponent of the gruesome photographs must also establish that the photographs are neither repetitive nor cumulative. Id. at 259. See also State v. DePew, 38 Ohio St. 3d 275, 281, 528 N.E.2d 542, 549 (1988); State v. Maurer, 15 Ohio St. 3d 239, 473 N.E.2d 768 (1984).

As the standard in Maurer and Morales is designed to protect the capital defendant from the danger of prejudice, the defendant need not establish actual prejudice. Morales, 32 Ohio St.3d at 258. Thus, the Maurer and Morales standard is in concert with capital jurisprudence

from the United States Supreme Court that strives to make the trial phase in the capital case as sound and reliable as possible. See Beck v. Alabama, 447 U.S. 625, 630 (1980).

In Mammone's case, defense counsel filed a pretrial objection to the repetitive and gruesome photographs that were to be used at trial. (See Motion #71, Motion to Exclude Photos of Deceased). Defense counsel also repeatedly objected to the photos of the dead children in their car seats and their autopsy photos. (TP Vol. V, p. 155; Vol. VI, p. 76; Vol. VII, p. 63-64). Despite these objections, the jury was repeatedly shown the gruesome photographs, which surely inflamed the passions of lay jurors wholly unaccustomed to seeing any pictures of dead bodies.

Photos of the body during an autopsy are especially inflammatory and, here, the photos were of very young children. Further, several jurors that served expressed that the fact children were involved would be an issue for them and others stated they had "already formed an opinion" about the widely publicized case but would work "to set it aside." (TP Vol. II, pp. 207, 218, 242, 261; Vol. III, p. 28 (Jurors #448; #418; #461)). The photos of the dead children in their car seats and the autopsy photos were completely unnecessary – the details of what transpired that evening were repeatedly and clearly testified to by different witnesses. The purported purpose of these pictures was to demonstrate "how the crime scene looked" and the cause of death, although this was obvious and could be proven in a less gruesome manner by the testimony of the coroner and police officers alone. (TP Vol. V, p. 155; Vol. VI, p. 77). Under the Maurer and Morales standard, the exhibits should have been excluded from evidence as cumulative. See 32 Ohio St. at 259, 513 N.E.2d at 274.

The gruesome photographs of the children were also unnecessary because defense did not dispute cause of death for any of the victims. Rather, the central issue at trial and the focus of defense counsel's case was mitigation. (TP Vol. V, p. 30). Whatever marginal utility these

photographs may arguably have had was offset by the prejudicial impact they undoubtedly had on the jurors and Mammone's right to a fair trial.

The jury must have felt "horror and outrage" when they viewed the photographs at the trial phase. See State v. Thompson, 33 Ohio St. 3d 1, 15, 514 N.E.2d 407, 420 (1987). Those photographs were inflammatory and they appealed to the juror's emotions. They created an unacceptable risk that the jurors would convict Mammone out of their feelings of anger and revulsion. Moreover, unlike DePew in which the photographs were kept to an "absolute minimum of two for each victim." DePew, 38 Ohio St.3d at 282, 528 N.E.2d at 551. Here, the State used two different witnesses to introduce the same car seat photos and also introduced several autopsy photos of the children through the coroner. The photographs had weak probative value, and they were cumulative and repetitive.

Nevertheless, the admission of gruesome photographs may be harmless error at the trial phase when the evidence of guilt is overwhelming as to each element of the offense. See Thompson, 33 Ohio St.3d 15, 514 N.E.2d at 420. See also, In re Winship, 397 U.S. 358 (1970). On direct appeal, constitutional error is harmless only if the State proves it to be harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 26 (1967). Even when the admission of gruesome photographs is harmless at trial, the use of improper photographs by the State at trial may have a prejudicial "carry over" effect on the jury's penalty phase determinations. See Thompson, 33 Ohio St.3d at 15, 514 N.E.2d at 421. This is especially true when the photographs are linked to inflammatory arguments by the State at the penalty phase. Id. at 15, 514 N.E.2d at 420-21. Last, the State's use of "unduly prejudicial" evidence in a capital case violates the defendant's right to due process. See Payne v. Tennessee, 501 U.S. 808, 825, 111 S.Ct. 2597, 2608 (1991).

The photographs of the dead children in their car seats and the numerous autopsy photos were irrelevant, unnecessary, cumulative, repetitive, and they created a danger to James Mammone. Their admission at the trial phase violated Mammone's right to due process and had a "carry over" prejudicial effect on the mitigation phase. U.S. Const. amend. XIV. Mammone is therefore entitled to a new trial. Alternatively, his death sentence must be vacated under O.R.C. § 2929.06(B).

PROPOSITION OF LAW NO. VI

A CAPITAL DEFENDANT IS DENIED HIS SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS TO A FAIR TRIAL WHEN A PROSECUTOR COMMITS ACTS OF MISCONDUCT DURING THE SENTENCING PHASE OF HIS CAPITAL TRIAL. THE RESULTING SENTENCE IS ARBITRARY AND UNRELIABLE. U.S. CONST. AMENDS. VI, VIII, XIV; OHIO CONST. ART. I, §§ 9, 16, 20.

The prosecutor has a unique role at a criminal trial. The prosecutor must ensure guilt is punished, but also that justice is done. State v. Lott, 51 Ohio St. 3d 160, 165, 555 N.E.2d 293, 300 (1990) (citing Berger v. United States, 295 U.S. 78, 88 (1935)). Thus, “he may strike hard blows, [but] he is not at liberty to strike foul ones.” Id. It is incumbent upon the prosecutor to eschew foul blows that destroy a defendant’s right to a fair trial.

The test for prosecutorial misconduct is whether the remarks were improper and , if so, whether they prejudicially affected the accused’s substantial rights. State v. Smith, 14 Ohio St. 3d 13, 14, 470 N.E.2d 883 (1984). The touchstone of the analysis “is the fairness of the trial, not the culpability of the prosecutor.” Smith v. Phillips, 455 U. S. 209, 219 (1982). Further, claims of prosecutorial misconduct are considered for their cumulative effect on the defendant’s trial. See Darden v. Wainwright, 477 U.S. 168, 181 (1986). See also Berger, 295 U.S. at 89 (“we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential.”) This Court has recognized the necessity of considering the cumulative effect of prosecutorial misconduct. State v. Fears, 86 Ohio St. 3d 329, 715 N.E.2d 136, 158 (1999) (Moyer, C.J., dissenting) (citing State v. Keenan, 66 Ohio St. 3d 402, 613 N.E.2d 203, 209-10 (1993); State v. Liberatore, 69 Ohio St. 2d 583, 433 N.E.2d 561, 566-67 (1982)).

I. Misconduct in the penalty phase

Dr. Smalldon

During the penalty phase cross examination of Dr. Smalldon, the prosecutor repeatedly commented upon Dr. Smalldon's failure to submit a written report. He questioned:

"I'm one of those prosecutors that calls you?"

and again,

"And do you recall why I told you I called you on the phone?"

and continued,

"Because you didn't write a report, right?"

"In child custody cases and all that stuff, you usually write reports, right?"

Dr. Smalldon responded,

"Yeah if I'm appointed by the Court."

The prosecutor persisted,

Q. You were appointed by the Court in this case, right?

A. I was retained by defense counsel.

Q. But you didn't write a report?

(PP, Vol. 2 pp. 424-25).

The prosecutor questioned Dr. Smalldon regarding his failure to submit reports in death penalty cases, implying that his failure to do so was improper and suggesting the prosecutor had to go so far as to call him about it. Similarly, the prosecutor in State v. Fears alluded during cross-examination of the psychologist to the psychologist's failure to write a report. State v. Fears, 86 Ohio St. 3d 329, 334, 715 N.E.2d 136, 145. During closing arguments, the prosecutor

stated, “[h]e was reluctant to give up what was in his file. He was reluctant to tell us what the defendant had told him. He was unwilling to give us his notes and unwilling to write a report.”

Id. This Court concluded that the prosecutor’s comments were improper. The prosecutor’s comments in this case were highly prejudicial to Mammone, as Dr. Smalldon was the most significant and credible witness presented in the penalty phase, and improperly undermining his testimony to the jury deprived Mammone of the impact of compelling mitigating evidence.

Closing Argument

In closing argument the prosecutor argued that revenge against Marcia Eakin was an aggravating circumstance in this case. The prosecutor asked the jury, “[n]ow what are the aggravating circumstances that you have to weigh against those mitigating factors?” He then talked about Mammone going to Margaret Eakin’s house and that “he wanted Margaret alone and as he told police, because that would be a major blow [sic] to Marcia.” The prosecutor continued, “[a]nd in his letter to Marcia, My motivation was to hurt you—talking about killing Margaret. My motivation was to hurt you and bring forth the despair one feels when the whole family is taken from them.” The prosecutor added, “[a]nd his purpose was to kill Margaret Eakin, that 57-year-old former kindergarten teacher who made the holidays so special for James.” The prosecutor then talked about Macy and James, killed by the “same driving force, to hurt Marcia. Those are the aggravating circumstances that you now must weigh against the mitigating factors.” (PP, Vol. 2, pp. 473-76).

Although the prosecutor may rebut mitigating evidence presented by the defendant, the prosecutor may not argue non-statutory aggravating circumstances. In this case, the prosecutor’s comments went beyond the scope of proper rebuttal and were misleading to the jury. It is improper for prosecutors to make a comment that the nature and circumstances of the offense are

“aggravating circumstances.” State v. Wogenstahl, 75 Ohio St. 3d 344, 662 N.E.2d 311 (1996), par. 2 of syll. The aggravating circumstances are limited to the factors set out in O.R.C. § 2929.04(A), specified in the indictment and proved beyond a reasonable doubt. Id. at 351, 662 N.E. 2d at 318. By arguing non-statutory aggravating circumstances, the prosecutor improperly tipped the scales in favor of death.

II. Conclusion.

The prosecutor committed egregious errors during the sentencing phase of Mammone’s capital trial. See State v. Thompson, 33 Ohio St. 3d 1, 15, 514 N.E.2d 407, 420 (1987). These errors “cannot be ignored or overlooked.” Id. at 14, 514 N.E.2d at 420. The prosecutor’s misconduct, taken together with the presence of jurors biased in favor of the death penalty, and the introduction of irrelevant and inflammatory evidence in the trial phase , so infected Mammone’s trial as to result in a deprivation of his rights to due process. (See Propositions of Law I, II, IV and V). The State’s misconduct during the sentencing phase of Mammone’s trial deprived him of a reliable sentence as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution, as well as Article I, §§ 9, 16 and 20 of the Ohio Constitution. Mammone's sentence must be vacated and this case remanded.

PROPOSITION OF LAW NO. VII

THE SENTENCE OF DEATH IMPOSED ON MAMMONE WAS UNRELIABLE AND INAPPROPRIATE. U.S. CONST. AMENDS. VIII AND XIV; OHIO CONST. ART. I, §§ 9 AND 16 AND O.R.C. § 2929.05.

A. Introduction

James Mammone was convicted of three counts of aggravated murder involving the deaths of Margaret Eakin, Macy Mammone and James Mammone, IV. Each count of aggravated murder carried two capital specifications. Mammone was sentenced to death for each victim.

Ohio Revised Code § 2929.05(A) requires this Court to determine the appropriateness of the death penalty in each capital case it reviews. The statute directs the appellate courts to “affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.”

Id. The statute requires this Court to make an independent review of the record and decide for itself, without any deference given to the determinations below, whether it believes that this defendant should be sentenced to death. State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984); State v. Maurer, 15 Ohio St. 3d 239, 473 N.E.2d 768 (1984). The record in this case merits the independent conclusion by this Court that the death sentences are not appropriate for James Mammone.

B. Mitigation Evidence

This Court has frequently described a mitigating factor as one that “lessens the moral culpability of the offender or diminishes the appropriateness of death as the penalty.” State v. DePew, 38 Ohio St. 3d 275, 292, 528 N.E.2d 542, 560 (1988), quoting State v. Steffen, 31 Ohio St. 3d 111, 129, 509 N.E.2d 383, 399 (1987). Although this was a shocking and tragic crime

there are factors that mitigate against the death sentences imposed in this case. This evidence was presented at trial and in the Sentencing Memorandum filed by counsel.

1. Mammone was suffering from extreme emotional distress and a severe mental disorder.

Mammone was under extreme emotional distress and suffering from a severe mental disorder at the time of the aggravated murders. O.R.C. § 2929.04(B)(3). At the time of the commission of this offense Mammone, because of a mental disease or defect lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. State v. Fitzpatrick, 102 Ohio St. 3d 321, 810 N.E.2d 927 (2004); State v. Sheppard, 84 Ohio St. 3d 230, 703 N.E.2d 286 (1998); State v. Loza, 71 Ohio St. 3d 61, 641 N.E.2d 1082 (1994).

Dr. Jeffrey Smalldon testified that Mammone was suffering from a severe mental disorder at the time of this offense. (PP, Vol. 2, p. 374) He diagnosed Mammone with a personality disorder not otherwise specified with schizotypal, borderline and narcissistic features. (PP, Vol. 2 pp. 407-08). He also has passive aggressive and obsessive compulsive personality traits. He suffers from episodic alcohol abuse and generalized anxiety disorder. His personality disorder skews his thought processes. This includes profound but distorted religious beliefs. The murders of Macy and James occurred at a church that Mammone described as sacred ground. He viewed his marriage as sacred, and bringing up children in a broken home as a violation of their "purity".

Dr. Smalldon testified that Mammone's relationship with his wife was highly idealized in his mind. (PP, Vol. 2, p. 390) She was "a moral woman. A woman of God, a good woman....his expectation of her...was that she was going to behave like a heroine out of a Jane Austin novel;

correct, prim, proper, moral.” (PP, Vol. 2, p. 391) Their union was “blessed by God.” (Id.) When this idealized union began to crumble, Mammone’s thoughts and behavior spiraled out of control. His deep feelings of insecurity could not cope. (PP, Vol. 2, p. 392-93). Mammone also believed that he killed his children “to restore them to their purity.” (PP, Vol. 2, p. 395). He was acting “as an instrument of moral righteousness when he took their lives.” (PP, Vol. 2, p. 395). He perceived himself as a devoted father, despite the fact that he took his children’s lives. (PP, Vol. 2, p. 422). He did not try to justify the killing of his mother-in-law to Dr. Smalldon. (PP, Vol. 2, p. 395).

Dr. Smalldon testified that Mammone’s profile on the Minnesota Multiphasic Personality Inventory (MMPI) is a “very unusual profile to obtain from someone who is not psychotic.” He further stated that “if I was given that profile without knowing about, anything about the person who produced it, I’d say in all likelihood...this person is suffering from a psychotic disorder, schizophrenia or something like it.” (PP, Vol. 2, p. 405). Although Dr. Smalldon testified that he did not believe that Mammone was actively psychotic, “his profile includes a number of characteristics that are very infrequently seen in individuals who are not psychotic.” (Id.).

These characteristics include very confused, very disordered thinking, and very profound feelings of inner personal alienation. Such individuals are often highly preoccupied with very abstract or odd or occult ideas. They may spend a great deal of time in fantasy; over time the lines separating fantasy and reality become blurred and confusing. (PP, Vol. 2, pp. 405-06). They are rigid in their thinking, and are often preoccupied with persecutory thoughts, thus feeling vulnerable to forces beyond their control. (Id.). Mammone’s lengthy unsworn statement at the penalty phase demonstrates the obsessive and distorted thinking in which he was engaging.

Dr. Smalldon testified that there is a genetic and biological component to personality disorders, and that environmental factors also play a role. All of these factors exist in the life and nature of James Mammone. (PP, Vol. 2, pp. 411-13).

2. Mammone's history and background is mitigating

In his unsworn statement, Mammone described the devastating impact of his history, background, and mental problems. His father was rejecting and abusive. This instilled in him a deep sense of insecurity. He placed all his unrealistic hopes in his marriage to Marcia Eakin and found refuge in an extreme religious viewpoint. As his marriage disintegrated so did his ability to control his own thoughts and actions.

Mammone's mother testified that his parents divorced when he was ten years old. Mammone's father was very abusive, both mentally and physically, to both James and his mother. He also drank excessively. He called his wife names, and called James a "maggot." (PP, Vol. 2, pp. 339-340). He also called him "loser." (PP, Vol. 2 p. 386). He would throw James in his room and tell him to watch him beat his mother. (*Id.*). Mammone Sr. abandoned his family because he had no interest in his son or his grandchildren. In fact, Dr. Smalldon testified that Mammone Sr. told him "I don't see what the big deal is about children. Teenagers can have one. Hillbillies can have ten, fish have a million. I don't see what the big deal is." (PP, Vol. 2, p. 384). He also told Dr. Smalldon that he didn't like to be around people and didn't usually leave his house. Other people only want to talk about "soup." (*Id.*). This cold and callous outlook from Mammone's primary father figure had a disastrous outcome for a son who needed healthy guidance and attention.

As a result Mammone had a bad, almost nonexistent relationship with his father. (PP, Vol. 2, p. 342). When his father called him names he retreated. (*Id.*). Because of the abuse he

became defensive and would be teased by his uncles. (PP, Vol. 2, p. 343). Mammone was “profoundly” affected by the abuse of his father. (PP, Vol. 2, p. 386). The rejection he experience permanently damaged his self image. (*Id.*). One manifestation of these difficulties in childhood was problems in school. Mammone was an uneven student. He was viewed as bright but chronically underachieving. (PP, Vol 2, pp. 386-87). He received little encouragement or follow through at home. (*Id.*). He also became passive and reclusive in his relationships with other people. (PP, Vol. 2, pp. 389-90).

Mammone did start working at the age of 16 and worked continuously, except for a short period of time in 2007. His jobs included Mary’s Restaurant, insurance sales and real estate appraisals. He also worked delivering pizzas when he decided to go back to college. Mammone “worked hard and provided for his family.” (Trial Court Opinion, p. 6). In college he was placed on the “President’s List” for academic achievement. Evidence demonstrates that prior to this crime he was a devoted father and a productive member of his community. State v. Leonard, 104 Ohio St. 3d 54, 818 N.E.2d 229 (2004); State v. Brewer, 48 Ohio St. 3d 50, 64, 549 N.E.2d 491 (1990).

3. Mammone lacks a significant criminal history.

This Court should consider and give weight to Mammone’s lack of a criminal history. This evidence is mitigating under O.R.C. § 2929.04(B)(5) and is entitled to weight in this Court’s consideration. State v. White, 85 Ohio St. 3d 433, 709 N.E.2d 140 (1999); State v. Palmer, 80 Ohio St. 3d 543, 687 N.E.2d 685 (1997). Mammone was convicted of domestic violence, a misdemeanor of the fourth degree, but he has no other criminal convictions or juvenile adjudications. He also demonstrated adjustment to incarceration while at the Stark County Jail awaiting trial in this matter. Mammone could thus adapt well to life in prison. There

is no danger that he would commit a similar crime while in prison. State v. Leonard, supra; State v. Madrigal, 87 Ohio St. 3d 378, 397, 721 N.E.2d 52 (2000).

4. Other evidence relevant to sentencing

Finally, this Court must consider any other mitigation evidence that would be relevant to whether Mammone should be sentenced to death. O.R.C. § 2929.04(B)(7).

Mammone repeatedly expressed remorse regarding the aggravated murder of Margaret Eakin. (PP, Vol. 2, p. 388). State v. Hughbanks, 99 Ohio St. 3d 365, 792 N.E.2d 1081 (2003).

He has never denied that he committed these crimes. In fact, within hours of his arrest he spoke with police and gave a detailed statement. He voluntarily submitted to DNA, blood and urine tests. State v. Newton, 108 Ohio St. 3d 13, 840 N.E.2d 593 (2006); State v. Mink, 101 Ohio St. 3d 350, 805 N.E.2d 1067 (2004).

C. Weighing aggravating circumstances against mitigating factors.

This Court must independently examine the mitigating factors and decide for itself whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. O.R.C. § 2929.05. This Court must confine its consideration of the arguments in favor of death to proven aggravating circumstances for each count of aggravated murder. Furthermore, when, as in the present case, the defendant is convicted of more than one count of aggravated murder, only the aggravating circumstances related to a given count may be considered in assessing the penalty for that count. State v. Cooney, 46 Ohio St. 3d 20, 544 N.E.2d 895, para. 3, syl. (1989). Although the crimes in the present case were horrific, the evidence demonstrates that the crimes were the product of a delusional mental illness. For this reason, Mammone's culpability is reduced.

4. Conclusion.

Our law requires “a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual.” Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). This is true even when the actions of the capital defendant demonstrate the most egregious form of inhumanity. The humane and principled ruling in this case requires vacating Mammone's death sentence because it is unreliable and inappropriate.

PROPOSITION OF LAW NO. VIII

JAMES MAMMONE IS SERIOUSLY MENTALLY ILL. THEREFORE, HIS DEATH SENTENCE IS IN VIOLATION OF HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Mammone is a person with a serious mental illness, which he suffered from at the time of the offense and which continues to afflict him presently. His serious mental illness renders him no more culpable for his crime than a juvenile or a mentally retarded person would be, but mentally retarded and juvenile offenders are categorically exempted from being executed under the Constitution. Accordingly, Mammone's execution despite his serious mental illness would violate the Cruel and Unusual Punishment Clause of the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

The Constitution requires that certain categories of persons be exempted from execution when they are less morally culpable for their crimes. Mentally retarded persons are not subject to the death penalty "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses . . ." Atkins v. Virginia, 536 U.S. 304, 306 (2002). These impairments can also "jeopardize the reliability and fairness of capital proceedings." Id. at 306-07. The exemption from execution also applies to juveniles, as they are less mature, have an underdeveloped sense of maturity, are "more vulnerable or susceptible to negative influences and outside pressures," and their characters are not as well formed as adults. Roper v. Simmons, 543 U.S. 551 (2005). The traditional justifications for the death penalty, retribution and deterrence, are not served by the execution of juveniles, as these "differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." Id. at 1196. Similarly, a severe mental illness may render a defendant less morally culpable for his offense.

Mammone was suffering from a severe mental illness

Dr. Jeffrey Smalldon testified that Mammone was suffering from a severe mental disorder at the time of this offense. (PP, Vol. 2, p. 374). He diagnosed Mammone with a personality disorder not otherwise specified with schizotypal, borderline and narcissistic features. (PP, Vol. 2 pp. 407-08). He also has passive aggressive and obsessive compulsive personality traits. His personality disorder skews his thought processes. This includes profound but distorted religious beliefs. The murders of Macy and James occurred at a church that Mammone described as sacred ground. He viewed his marriage as sacred, and bringing up children in a broken home as a violation of their "purity".

Dr. Smalldon testified that Mammone's relationship with his wife was highly idealized in his mind. (PP, Vol. 2, p. 390) She was "a moral woman. A woman of God, a good woman....his expectation of her...was that she was going to behave like a heroine out of a Jane Austin novel; correct, prim, proper, moral." (PP, Vol. 2, p. 391) Their union was "blessed by God." (Id.) When this idealized union began to crumble, Mammone's thoughts and behavior spiraled out of control. His deep feelings of insecurity could not cope. (PP, Vol. 2, p. 392-93). Mammone also believed that he killed his children "to restore them to their purity." (PP, Vol. 2, p. 395). He was acting "as an instrument of moral righteousness when he took their lives." (PP, Vol. 2, p. 395). He perceived himself as a devoted father, despite the fact that he took his children's lives. (PP, Vol. 2, p. 422). He did not try to justify the killing of his mother-in-law to Dr. Smalldon. (PP, Vol. 2, p. 395).

Dr. Smalldon testified that Mammone's profile on the Minnesota Multiphasic Personality Inventory (MMPI) is a "very unusual profile to obtain from someone who is not psychotic." He further stated that "if I was given that profile without knowing about, anything about the person

who produced it, I'd say in all likelihood...this person is suffering from a psychotic disorder, schizophrenia or something like it." (PP, Vol. 2, p. 405). Although Dr. Smalldon testified that he did not believe that Mammone was actively psychotic, "his profile includes a number of characteristics that are very infrequently seen in individuals who are not psychotic." (*Id.*).

These characteristics include very confused, very disordered thinking, and very profound feelings of inner personal alienation. Such individuals are often highly preoccupied with very abstract or odd or occult ideas. They may spend a great deal of time in fantasy; over time the lines separating fantasy and reality become blurred and confusing. (PP, Vol. 2, pp. 405-06). They are rigid in their thinking, and are often preoccupied with persecutory thoughts, thus feeling vulnerable to forces beyond their control. (*Id.*). Dr. Smalldon testified that there is a genetic and biological component to personality disorders, and that environmental factors also play a role. All of these factors exist in the life and nature of James Mammone. (PP, Vol. 2, pp. 411-13).

Conclusion

The justifications of deterrence and retribution are inapplicable to Mammone, as his serious mental illness, and its devastating impact on his thought processes, reasoning, and insight, leaves him out of touch with reality and diminishes his level of culpability.

Under the Eighth Amendment's "evolving standards of decency," the State of Ohio could not execute Mammone if he were mentally retarded, or if he had committed the offense before the age of eighteen. It could not do so because the deficits associated with mild mental retardation, or the documented immaturity and lack of responsibility in juveniles, would render him less morally culpable. Mammone is not mentally retarded and was thirty five years old when he committed his offense, but he was suffering from a serious mental illness. Like mild

mental retardation and being a juvenile, serious mental illness reduces Mammone's moral culpability for the crime of capital murder.

This Court should find no principled distinction between executing Mammone and executing an offender with comparable deficits due to mental retardation or lack of maturity.

This Court should vacate James Mammone's death sentence.

PROPOSITION OF LAW NO. IX

OHIO'S DEATH PENALTY LAW IS UNCONSTITUTIONAL. OHIO REV. CODE §§ 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. 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.

The Eighth Amendment to the Constitution and Article I, § 9 of the Ohio Constitution prohibit the infliction of cruel and unusual punishment. The Eighth Amendment's protections are applicable to the states through the Fourteenth Amendment. Robinson v. California, 370 U.S. 660 (1962). Punishment that is "excessive" constitutes cruel and unusual punishment. Coker v. Georgia, 433 U.S. 584 (1977). The underlying principle of governmental respect for human dignity is the Court's guideline to determine whether this statute is constitutional. See Furman v. Georgia, 408 U.S. 238 (1972) (Brennan, J., concurring); Rhodes v. Chapman, 452 U.S. 337, 361 (1981); Trop v. Dulles, 356 U.S. 86 (1958). The Ohio scheme offends this bedrock principle in the following ways.

1. **Arbitrary and unequal punishment.**

The Fourteenth Amendment's guarantee of equal protection requires similar treatment of similarly situated persons. This right extends to the protection against cruel and unusual punishment. Furman, 408 U.S. at 249 (Douglas, J., concurring). A death penalty imposed in violation of the Equal Protection guarantee is a cruel and unusual punishment. See id. Any arbitrary use of the death penalty also offends the Eighth Amendment. Id.

Ohio's capital punishment scheme allows the death penalty to be imposed in an arbitrary and discriminatory manner in violation of Furman and its progeny. Prosecutors' virtually uncontrolled indictment discretion allows arbitrary and discriminatory imposition of the death

penalty. Mandatory death penalty statutes were deemed fatally flawed because they lacked standards for imposition of a death sentence and were therefore removed from judicial review. Woodson v. North Carolina, 428 U.S. 280 (1976). Prosecutors' uncontrolled discretion violates this requirement.

Ohio's system imposes death in a racially discriminatory manner. Blacks and those who kill white victims are much more likely to get the death penalty. While African-Americans comprise about 12% of Ohio's population, nearly half of Ohio's death row inmates are African-American. See Ohio Public Defender Commission Statistics, July 14, 2006; see also The Report of the Ohio Commission on Racial Fairness, 1999. While 4 Caucasians were sentenced to death for killing African-Americans (or an African-American), 45 African-Americans sit on Ohio's death row for killing a Caucasian. Ohio Public Defender Commission Statistics, July 14, 2006. Ohio's statistical disparity is tragically consistent with national findings. The General Accounting Office found victims' race influential at all stages, with stronger evidence of racial influence involving prosecutorial discretion in the charging and trying of cases. Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities, U.S. General Accounting Office, Report to Senate and House Committees on the Judiciary (February 1990). In short, Ohio law fails to assure against race discrimination playing a role in capital sentencing.

Due process prohibits the taking of life unless the state can show a legitimate and compelling state interest. Commonwealth v. O'Neal, 339 N.E.2d 676, 678 (Mass. 1975) (Tauro, C.J., concurring); State v. Pierre, 572 P.2d 1338 (Utah 1977) (Maughan, J., concurring and dissenting). Moreover, where fundamental rights are involved, personal liberties cannot be broadly stifled "when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479,

488 (1960). To take a life by mandate, the State must show that it is the “least restrictive means” to a “compelling governmental end.” O’Neal II, 339 N.E.2d at 678.

The death penalty is neither the least restrictive nor an effective means of deterrence. Both isolation of the offender and retribution can be effectively served by less restrictive means. Society’s interests do not justify the death penalty.

2. Unreliable sentencing procedures.

The Due Process and Equal Protection Clauses prohibit arbitrary and capricious procedures in the State’s application of capital punishment. Gregg v. Georgia, 428 U.S. 153, 188, 193-95 (1976); Furman, 408 U.S. at 255, 274. Ohio’s scheme does not meet those requirements. The statute does not require the State to prove the absence of any mitigating factors or that death is the only appropriate penalty.

The statutory scheme is unconstitutionally vague, which leads to the arbitrary imposition of the death penalty. The language “that the aggravating circumstances ... outweigh the mitigating factors” invites arbitrary and capricious jury decisions. “Outweigh” preserves reliance on the lesser standard of proof by a preponderance of the evidence. The statute requires only that the sentencing body be convinced beyond a reasonable doubt that the aggravating circumstances were marginally greater than the mitigating factors. This creates an unacceptable risk of arbitrary or capricious sentencing.

Additionally, the mitigating circumstances are vague. The jury must be given “specific and detailed guidance” and be provided with “clear and objective standards” for their sentencing discretion to be adequately channeled. Gregg; Godfrey v. Georgia, 446 U.S. 420 (1980).

Ohio courts continually hold that the weighing process and the weight to be assigned to a given factor are within the individual decision-maker’s discretion. State v. Fox, 69 Ohio St. 3d

183, 193, 631 N.E.2d 124, 132 (1994). Giving so much discretion to juries inevitably leads to arbitrary and capricious judgments. The Ohio open discretion scheme further risks that constitutionally relevant mitigating factors that must be considered as mitigating [youth or childhood abuse, Eddings v. Oklahoma, 455 U.S. 104 (1982); mental disease or defect, Penry v. Lynaugh, 492 U.S. 302 (1989) *rev'd on other grounds Penry v. Johnson*, 532 U.S. 782 (2001); level of involvement in the crime, Enmund v. Florida, 458 U.S. 782 (1982); or lack of criminal history (Delo v. Lashley, 507 U.S. 272 (1993))] will not be factored into the sentencer's decision. While the federal constitution may allow states to shape consideration of mitigation, *see Johnson v. Texas*, 509 U.S. 350 (1993), Ohio's capital scheme fails to provide adequate guidelines to sentencers and fails to assure against arbitrary, capricious, and discriminatory results.

Empirical evidence is developing in Ohio and around the country that, under commonly used penalty phase jury instructions, juries do not understand their responsibilities and apply inaccurate standards for decision. *See Cho, Capital Confusion: The Effect of Jury Instructions on the Decision To Impose Death*, 85 J. Crim. L. & Criminology 532, 549-557 (1994), and findings of Zeisel discussed in Free v. Peters, 12 F.3d 700 (7th Tex. Appx. Cir. 1993). This confusion violates the federal and state constitutions. Because of these deficiencies, Ohio's statutory scheme does not meet the requirements of Furman and its progeny.

3. Defendant's right to a jury is burdened.

The Ohio scheme is unconstitutional because it imposes an impermissible risk of death on capital defendants who choose to exercise their right to a jury trial. A defendant who pleads guilty or no contest benefits from a trial judge's discretion to dismiss the specifications "in the interest of justice." Ohio R. Crim. P. 11(C)(3). Accordingly, the capital indictment may be

dismissed regardless of mitigating circumstances. There is no corresponding provision for a capital defendant who elects to proceed to trial before a jury.

Justice Blackmun found this discrepancy to be constitutional error. Lockett v. Ohio, 438 U.S. 586, 617 (1978) (Blackmun, J., concurring). This disparity violated United States v. Jackson, 390 U.S. 570 (1968), and needlessly burdened the defendant's exercise of his right to a trial by jury. Since Lockett, this infirmity has not been cured and Ohio's statute remains unconstitutional.

4. Mandatory submission of reports and evaluations.

Ohio's capital 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. O.R.C. § 2929.03(D)(1). This mandatory submission prevents defense counsel from giving effective assistance and prevents the defendant from effectively presenting his case in mitigation.

5. O.R.C. § 2929.04(A)(7) is constitutionally invalid when used to aggravate O.R.C. § 2903.01(B) aggravated murder.

"[T]o avoid [the] constitutional flaw of vagueness and over breadth under the Eighth Amendment, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence of a defendant as compared to others found guilty of (aggravated) murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). Ohio's statutory scheme fails to meet this constitutional requirement because O.R.C. § 2929.04(A)(7) fails to genuinely narrow the class of individuals eligible for the death penalty.

O.R.C. § 2903.01(B) defines the category of felony-murderers. If any factor listed in O.R.C. § 2929.04(A) is specified in the indictment and proved beyond a reasonable doubt the defendant becomes eligible for the death penalty. O.R.C. §§ 2929.02(A) and 2929.03.

The scheme is unconstitutional because the O.R.C. § 2929.04(A)(7) aggravating circumstance merely repeats factors that distinguish aggravated felony-murder from murder. O.R.C. § 2929.04(A)(7) repeats the definition of felony-murder as alleged, which automatically qualifies the defendant for the death penalty. O.R.C. § 2929.04(A)(7) does not reasonably justify the imposition of a more severe sentence on felony-murderers. But, the prosecuting attorney and the sentencing body are given unbounded discretion that maximizes the risk of arbitrary and capricious action and deprivation of a defendant's life without substantial justification. The aggravating circumstance must therefore fail. Zant, 462 U.S. at 877.

As compared to other aggravated murderers, the felony-murderer is treated more severely. Each O.R.C. § 2929.04(A) circumstance, when used in connection with O.R.C. § 2903.01(A), adds an additional measure of culpability to an offender such that society arguably should be permitted to punish him more severely with death. But the aggravated murder defendant alleged to have committed during the course of a felony is automatically eligible for the death penalty — not a single additional proof of fact is necessary.

The killer who kills with prior calculation and design is treated less severely, which is also nonsensical because his blameworthiness or moral guilt is higher and the argued ability to deter him less. From a retributive stance, this is the most culpable of mental states. Comment, The Constitutionality of Imposing the Death Penalty for Felony Murder, 15 Hous. L. Rev. 356, 375 (1978).

Felony-murder also fails to reasonably justify the death sentence because this Court has interpreted O.R.C. § 2929.04(A)(7) as not requiring that intent to commit a felony precede the murder. State v. Williams, 74 Ohio St. 3d 569, 660 N.E.2d 724, syl. 2 (1996). The asserted state interest in treating felony-murder as deserving of greater punishment is to deter the commission of felonies in which individuals may die. Generally courts have required that the killing result from an act done in furtherance of the felonious purpose. Id., referencing the Model Penal Code. Without such a limitation, no state interest justifies a stiffer punishment. This Court has discarded the only arguable reasonable justification for the death sentence to be imposed on such individuals, a position that engenders constitutional violations. Zant, 462 U.S. 862. Further, this Court's current position is inconsistent with previous cases, thus creating the likelihood of arbitrary and inconsistent applications of the death penalty. See e.g., State v. Rojas, 64 Ohio St. 3d 131, 592 N.E.2d 1376 (1992).

Equal protection of the law requires that legislative classifications be supported by, at least, a reasonable relationship to legitimate State interests. Skinner v. Oklahoma, 316 U.S. 535 (1942). The State has arbitrarily selected one class of murderers who may be subjected to the death penalty automatically. This statutory scheme is inconsistent with the purported State interests. The most brutal, cold-blooded, and premeditated murderers do not fall within the types of murder that are automatically eligible for the death penalty. There is no rational basis or any State interest for this distinction and its application is arbitrary and capricious.

6. O.R.C. §§ 2929.03(D)(1) and 2929.04 are unconstitutionally vague.

O.R.C. § 2929.03(D)(1)'s reference to "the nature and circumstances of the aggravating circumstance" incorporates the nature and circumstances of the offense into the factors to be weighed in favor of death. The nature and circumstances of an offense are, however, statutory

mitigating factors under O.R.C. § 2929.04(B). O.R.C. § 2929.03(D)(1) makes Ohio's death penalty weighing scheme unconstitutionally vague because it gives the sentencer unfettered discretion to weigh a statutory mitigating factor as an aggravator.

To avoid arbitrariness in capital sentencing, states must limit and channel the sentencer's discretion with clear and specific guidance. Lewis v. Jeffers, 497 U.S. 764, 774 (1990); Maynard v. Cartwright, 486 U.S. 356, 362 (1988). A vague aggravating circumstance fails to give that guidance. Walton v. Arizona, 497 U.S. 639, 653 (1990), *vacated on other grounds* Ring v. Arizona, 536 U.S. 584 (2002); Godfrey, 446 U.S. at 428. Moreover, a vague aggravating circumstance is unconstitutional whether it is an eligibility or a selection factor. Tuilaepa v. California, 512 U.S. 967 (1994). The aggravating circumstances in O.R.C. § 2929.04(A)(1)-(8) are both.

O.R.C. § 2929.04(B) tells the sentencer that the nature and circumstances of the offense are selection factors in mitigation. Moreover, because the nature and circumstances of the offense are listed only in O.R.C. § 2929.04(B), they must be weighed only as selection factors in mitigation. See State v. Wogenstahl, 75 Ohio St. 3d 344, 356, 662 N.E.2d 311, 321-22 (1996). However, the clarity and specificity of O.R.C. § 2929.04(B) is eviscerated by O.R.C. § 2929.03(D)(1); selection factors that are strictly mitigating become part and parcel of the aggravating circumstance.

Despite wide latitude, Ohio has carefully circumscribed its selection factors into mutually exclusive categories. See O.R.C. § 2929.04(A) and (B); Wogenstahl, 75 Ohio St. 3d at 356, 662 N.E.2d at 321-22. O.R.C. § 2929.03(D)(1) makes O.R.C. § 2929.04(B) vague because it incorporates the nature and circumstances of an offense into the aggravating circumstances. The sentencer cannot reconcile this incorporation. As a result of O.R.C. § 2929.03(D)(1), the "nature

and circumstances” of any offense become “too vague” to guide the jury in its weighing or selection process. See Walton, 497 U.S. at 654. O.R.C. § 2929.03(D)(1) therefore makes O.R.C. § 2929.04(B) unconstitutionally arbitrary.

O.R.C. § 2929.03(D)(1) is also unconstitutional on its face because it makes the selection factors in aggravation in O.R.C. § 2929.04(A)(1)-(8) “too vague.” See Walton, 497 U.S. at 654. O.R.C. § 2929.04(A)(1)-(8) gives clear guidance as to the selection factors that may be weighed against the defendant’s mitigation. However, O.R.C. § 2929.03(D)(1) eviscerates the narrowing achieved. By referring to the “nature and circumstances of the aggravating circumstance,” O.R.C. § 2929.03(D)(1) gives the sentencer “open-ended discretion” to impose the death penalty. See Maynard, 486 U.S. at 362. That reference allows the sentencer to impose death based on (A)(1)-(8) plus any other fact in evidence arising from the nature and circumstances of the offense that the sentencer considers aggravating. This eliminates the guided discretion provided by O.R.C. § 2929.04(A). See Stringer v. Black, 503 U.S. 222, 232 (1992).

7. Proportionality and appropriateness review.

Ohio Revised Code §§ 2929.021 and 2929.03 require data be reported to the courts of appeals and to the Ohio Supreme Court. There are substantial doubts as to the adequacy of the information received after guilty pleas to lesser offenses or after charge reductions at trial. O.R.C. § 2929.021 requires only minimal information on these cases. Additional data is necessary to make an adequate comparison in these cases. This prohibits adequate appellate review.

Adequate appellate review is a precondition to the constitutionality of a state death penalty system. Zant, 462 U.S. at 879; Pulley v. Harris, 465 U.S. 37 (1984). The standard for review is one of careful scrutiny. Zant, 462 U.S. at 884-85. Review must be based on a comparison of

similar cases and ultimately must focus on the character of the individual and the circumstances of the crime. Id.

Ohio's statutes' failure to require the jury or three-judge panel recommending life imprisonment to identify the mitigating factors undercuts adequate appellate review. Without this information, no significant comparison of cases is possible. Absent a significant comparison of cases, there can be no meaningful appellate review. See State v. Murphy, 91 Ohio St. 3d 516, 562, 747 N.E.2d 765, 813 (2001) (Pfeifer, J., dissenting) ("When we compare a case in which the death penalty was imposed only to other cases in which the death penalty was imposed, we continually lower the bar of proportionality. The lowest common denominator becomes the standard.")

The comparison method is also constitutionally flawed. Review of cases where the death penalty was imposed satisfies the proportionality review required by O.R.C. § 2929.05(A). State v. Steffen, 31 Ohio St. 3d 111, 509 N.E.2d 383, syl. 1 (1987). However, this prevents a fair proportionality review. There is no meaningful manner to distinguish capital defendants who deserve the death penalty from those who do not.

This Court's appropriateness analysis is also constitutionally infirm. O.R.C. § 2929.05(A) requires appellate courts to determine the appropriateness of the death penalty in each case. The statute directs affirmance only where the court is persuaded that the aggravating circumstances outweigh the mitigating factors and that death is the appropriate sentence. Id. This Court has not followed these dictates. The appropriateness review conducted is very cursory. It does not "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Spaziano v. Florida, 468 U.S. 447, 460 (1984).

The cursory appropriateness review also violates the capital defendant's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution. The General Assembly provided capital appellants with the statutory right of proportionality review. When a state acts with significant discretion, it must act in accordance with the Due Process Clause. Evitts v. Lucey, 469 U.S. 387, 401 (1985). The review currently used violates this constitutional mandate. An insufficient proportionality review violates Mammone's liberty interest in O.R.C. § 2929.05 that is protected by the Due Process Clause.

8. Ohio's statutory death penalty scheme violates international law.

International law binds each of the states that comprise the United States. Ohio is bound by international law whether found in treaty or in custom. Because the Ohio death penalty scheme violates international law, Mammone's capital convictions and sentences cannot stand.

8.1 International law binds the State of Ohio.

"International law is a part of our law[.]" The Paquete Habana, 175 U.S. 677, 700 (1900). A treaty made by the United States is the supreme law of the land. Article VI, United States Constitution. Where state law conflicts with international law, it is the state law that must yield. See Zschernig v. Miller, 389 U.S. 429, 440 (1968); Clark v. Allen, 331 U.S. 503, 508 (1947); United States v. Pink, 315 U.S. 203, 230 (1942); Kansas v. Colorado, 206 U.S. 46, 48 (1907); The Paquete Habana, 175 U.S. at 700; The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815); Asakura v. Seattle, 265 U.S. 332, 341 (1924). In fact, international law creates remediable rights for United States citizens. Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987).

8.2 Ohio's obligations under international charters, treaties, and conventions.

The United States' membership and participation in the United Nations (U.N.) and the Organization of American States (OAS) creates obligations in all fifty states. Through the U.N. Charter, the United States committed itself to promote and encourage respect for human rights and fundamental freedoms. Art. 1(3). The United States bound itself to promote human rights in cooperation with the U.N. Art. 55-56. The United States again proclaimed the fundamental rights of the individual when it became a member of the OAS. OAS Charter, Art. 3.

The U.N. has sought to achieve its goal of promoting human rights and fundamental freedoms through the creation of numerous treaties and conventions. The United States has ratified several of these including: the International Covenant on Civil and Political Rights (ICCPR) ratified in 1992, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) ratified in 1994, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) ratified in 1994. Ratification of these treaties by the United States expressed its willingness to be bound by these treaties. Pursuant to the Supremacy Clause, the ICCPR, the ICERD, and the CAT are the supreme laws of the land. As such, the United States must fulfill the obligations incurred through ratification. Former President Clinton reiterated the United States' need to fulfill its obligations under these conventions when he issued Executive Order 13107. In pertinent part, the Executive Order states:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and bearing in mind the obligations of the United States pursuant to the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination on All Forms of Racial Discrimination (CERD), and other relevant treaties concerned with the protection and promotion

of human rights to which the United States is now or may become a party in the future, it is hereby ordered as follows:

Section 1. Implementation of Human Rights Obligations.

(a) It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD.

Ohio is not fulfilling the United States' obligations under these conventions. Rather, Ohio's death penalty scheme violates each convention's requirements and thus must yield to the requirements of international law. (See discussion infra Subsection 1).

8.2.1 Ohio's statutory scheme violates the ICCPR's and ICERD's guarantees of equal protection and due process.

Both the ICCPR, ratified in 1992, and the ICERD, ratified in 1994, guarantee equal protection of the law. ICCPR Art. 2(1), 3, 14, 26; ICERD Art. 5(a). The ICCPR further guarantees due process via Articles 9 and 14, which includes numerous considerations: a fair hearing (Art. 14(1)), an independent and impartial tribunal (Art. 14(1)), the presumption of innocence (Art. 14(2)), adequate time and facilities for the preparation of a defense (Art. 14(3)(a)), legal assistance (Art. 14(3)(d)), the opportunity to call and question witnesses (Art. 14(3)(e)), the protection against self-incrimination (Art. 14(3)(g)), and the protection against double jeopardy (Art. 14(7)). However, Ohio's statutory scheme fails to provide equal protection and due process to capital defendants as contemplated by the ICCPR and the ICERD.

Ohio's statutory scheme denies equal protection and due process in several ways. It allows for arbitrary and unequal treatment in punishment. (See discussion infra § 1). Ohio's sentencing procedures are unreliable. (See discussion infra § 2). Ohio's statutory scheme fails to provide individualized sentencing. (See discussion infra § 1, 2). Ohio's statutory scheme

burdens a defendant's right to a jury. (See discussion infra § 3). Ohio's requirement of mandatory submission of reports and evaluations precludes effective assistance of counsel. (See discussion infra § 4). O.R.C. § 2929.04(B)(7) arbitrarily selects certain defendants who may be automatically eligible for death upon conviction. (See discussion infra § 5). Ohio's proportionality and appropriateness review is wholly inadequate. (See discussion infra § 7). As a result, Ohio's statutory scheme violates the ICCPR's and the ICERD's guarantees of equal protection and due process. This is a direct violation of international law and of the Supremacy Clause of the Constitution.

8.2.2 Ohio's statutory scheme violates the ICCPR's protection against arbitrary execution.

The ICCPR speaks explicitly to the use of the death penalty. The ICCPR guarantees the right to life and provides that there shall be no arbitrary deprivation of life. Art. 6(1). It allows the imposition of the death penalty only for the most serious offenses. Art. 6(2). Juveniles and pregnant women are protected from the death penalty. Art. 6(5). Moreover, the ICCPR contemplates the abolition of the death penalty. Art. 6(6).

However, several aspects of Ohio's statutory scheme allow for the arbitrary deprivation of life. Punishment is arbitrary and unequal. (See discussion infra § 1). Ohio's sentencing procedures are unreliable. (See discussion infra § 2). Ohio's statutory scheme lacks individualized sentencing. (See discussion infra § 1, 2). The (A)(7) aggravator maximizes the risk of arbitrary and capricious action by singling out one class of murderers who may be eligible automatically for the death penalty. (See discussion infra § 5). The vagueness of O.R.C. §§ 2929.03(D)(1) and 2929.04 similarly render sentencing arbitrary and unreliable. (See discussion infra § 6). Ohio's proportionality and appropriateness review fails to distinguish those who deserve death from those who do not. (See discussion infra § 7). As a result, executions in Ohio

result in the arbitrary deprivation of life and thus violate the ICCPR's death penalty protections. This is a direct violation of international law and a violation of the Supremacy Clause.

8.2.3 Ohio's statutory scheme violates the ICERD's protections against race discrimination.

The ICERD, speaking to racial discrimination, requires that each state take affirmative steps to end race discrimination at all levels. Art. 2. It requires specific action and does not allow states to sit idly by when confronted with practices that are racially discriminatory. However, Ohio's statutory scheme imposes the death penalty in a racially discriminatory manner. (See discussion infra § 1). A scheme that sentences blacks and those who kill white victims more frequently and which disproportionately places African-Americans on death row is in clear violation of the ICERD. Ohio's failure to rectify this discrimination is a direct violation of international law and of the Supremacy Clause of the United States Constitution.

8.2.4 Ohio's statutory scheme violates the ICCPR's and the CAT's prohibitions against cruel, inhuman or degrading punishment.

The ICCPR prohibits subjecting any person to torture or to cruel, inhuman, or degrading treatment or punishment. Art. 7. Similarly, the CAT requires that states take action to prevent torture, which includes any act by which severe mental or physical pain is intentionally inflicted on a person for the purpose of punishing him for an act committed. See Art. 1-2. As administered, Ohio's death penalty inflicts unnecessary pain and suffering, see discussion infra § I, in violation of both the ICCPR and the CAT. Thus, there is a violation of international law and the Supremacy Clause.

8.2.5 Ohio's obligations under the ICCPR, the ICERD, and the CAT are not limited by the reservations and conditions placed on these conventions by the Senate.

While conditions, reservations, and understandings accompanied the United States' ratification of the ICCPR, the ICERD, and the CAT, those conditions, reservations, and understandings cannot stand for two reasons. Article II, § 2 of the United States Constitution provides for the advice and consent of two-thirds of the Senate when a treaty is adopted. However, the Constitution makes no provision for the Senate to modify, condition, or make reservations to treaties. The Senate is not given the power to determine what aspects of a treaty the United States will and will not follow. Their role is to simply advise and consent.

Thus, the Senate's inclusion of conditions and reservations in treaties goes beyond that role of advice and consent. The Senate picks and chooses which items of a treaty will bind the United States and which will not. This is the equivalent of the line item veto, which is unconstitutional. Clinton v. City of New York, 524 U.S. 417, 438 (1998). The Supreme Court specifically spoke to the enumeration of the president's powers in the Constitution in finding that the president did not possess the power to issue line item vetoes. Id. If it is not listed, then the President lacks the power to do it. See id. Similarly, the Constitution does not give the power to the Senate to make conditions and reservations, picking and choosing what aspects of a treaty will become law. Thus the Senate lacks the power to do just that. Therefore, any conditions or reservations made by the Senate are unconstitutional. See id.

The Vienna Convention on the Law of Treaties further restricts the Senate's imposition of reservations. It allows reservations unless: they are prohibited by the treaty, the treaty provides that only specified reservations, not including the reservation in question, may be made, or the reservation is incompatible with the object and purpose of the treaty. Art. 19(a)-(c). The ICCPR specifically precludes derogation of Articles 6-8, 11, 15-16, and 18. Under the Vienna

Convention, the United States' reservations to these articles are invalid under the language of the treaty. See id. Further, the ICCPR's purpose is to protect the right to life and any reservation inconsistent with that purpose violates the Vienna Convention. Thus, United States reservations cannot stand under the Vienna Convention as well.

8.2.6 Ohio's obligations under the ICCPR are not limited by the Senate's declaration that it is not self-executing.

The Senate indicated that the ICCPR is not self-executing. However, the question of whether a treaty is self-executing is left to the judiciary. Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985) (Restatement (Second) of Foreign Relations Law of the United States, Sec. 154(1) (1965)). It is the function of the courts to say what the law is. See Marbury v. Madison, 5 U.S. 137 (1803).

Further, requiring the passage of legislation to implement a treaty necessarily implicates the participation of the House of Representatives. By requiring legislation to implement a treaty, the House can effectively veto a treaty by refusing to pass the necessary legislation. However, Article 2, § 2 excludes the House of Representatives from the treaty process. Therefore, declaring a treaty to be not self-executing gives power to the House of Representatives not contemplated by the United States Constitution. Thus, any declaration that a treaty is not self-executing is unconstitutional. See Clinton, 524 U.S. at 438.

8.3 Ohio's obligations under customary international law.

International law is not merely discerned in treaties, conventions and covenants. International law "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law." United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820).

Regardless of the source “international law is a part of our law[.]” The Paquete Habana, 75 U.S. at 700.

The judiciary and commentators recognize the Universal Declaration of Human Rights (DHR) as binding international law. The DHR “no longer fits into the dichotomy of ‘binding treaty’ against ‘non-binding pronouncement,’ but is rather an authoritative statement of the international community.” Filartiga, 630 F.2d at 883 (internal citations omitted); see also William A. Schabas, The Death Penalty as Cruel Treatment and Torture (1996).

The DHR guarantees equal protection and due process (Art. 1, 2, 7, 11), recognizes the right to life (Art. 3), prohibits the use of torture or cruel, inhuman or degrading punishment (Art. 5) and is largely reminiscent of the ICCPR. Each of the guarantees found in the DHR are violated by Ohio’s statutory scheme. (See discussion infra §§ 1-8). Thus, Ohio’s statutory scheme violates customary international law as codified in the DHR and cannot stand.

However, the DHR is not alone in its codification of customary international law. Smith directs courts to look to “the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law” in ascertaining international law. 18 U.S. (5 Wheat.) at 160-61. Ohio should be cognizant of the fact that its statutory scheme violates numerous declarations and conventions drafted and adopted by the United Nations and the OAS, which may, because of the sheer number of countries that subscribe to them, codify customary international law. See id. Included among these are:

1. The American Convention on Human Rights, drafted by the OAS and entered into force in 1978. It provides numerous human rights guarantees, including: equal protection (Art. 1, 24), the right to life, (Art. 4(1)), prohibition against arbitrary deprivation of life (Art. 4(1)),

imposition of the death penalty only for the most serious crimes (Art. 4(2)), no re-establishment of the death penalty once abolished (Art. 4(3)), prohibits torture, cruel, inhuman or degrading punishment (Art. 5(2)), and guarantees the right to a fair trial (Art. 8).

2. The United Nations Declaration on the Elimination of All Forms of Racial Discrimination proclaimed by U.N. General Assembly resolution 1904 (XVIII) in 1963. It prohibits racial discrimination and requires that states take affirmative action in ending racial discrimination.

3. The American Declaration of the Rights and Duties of Man adopted by the Ninth International Conference of American States in 1948. It includes numerous human rights guarantees: the right to life (Art. 1), equality before the law (Art. 2), the right to a fair trial (Art. 16), and due process (Art. 26).

4. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the U.N. General Assembly in Resolution 3452 (XXX) in 1975. It prohibits torture, defined to include severe mental or physical pain intentionally inflicted by or at the instigation of a public official for a purpose including punishing him for an act he has committed, and requires that the states take action to prevent such actions. Art. 1, 4.

5. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty adopted by the U.N. Economic and Social Council in Resolution 1984/50 in 1984. It provides numerous protections to those facing the death penalty, including: permitting capital punishment for only the most serious crimes, with the scope not going beyond intentional crimes with lethal or other extremely grave consequences (1), requiring that guilt be proved so as to

leave no room for an alternative explanation of the facts (4), due process, and the carrying out of the death penalty so as to inflict the minimum possible suffering (9).

6. The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, adopted and proclaimed by the U.N. General Assembly in Resolution 44/128 in 1989. This prohibits execution (Art. 1(1)) and requires that states abolish the death penalty (Art. 1(2)).

These documents are drafted by the people Smith contemplates and are subscribed to by a substantial segment of the world. As such they are binding on the United States as customary international law. A comparison of the §§ 1-9 clearly demonstrates that Ohio's statutory scheme is in violation of customary international law.

9. Conclusion.

Ohio's death penalty scheme fails to ensure that arbitrary and discriminatory imposition of the death penalty will not occur. The procedures actually promote the imposition of the death penalty and, thus, are constitutionally intolerable. Ohio Revised Code §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution and Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution and international law. Mammone's death sentence must be vacated.²

² In State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), this Court upheld this death penalty statute and this Court may, therefore, reject this claim on its merits if it disagrees with Mammone's federal constitutional arguments. State v. Poindexter, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988).

CONCLUSION

For each of the foregoing reasons, this Court must reverse James Mammone's convictions and remand for a new trial. Alternatively, his death sentences must be vacated and his case remanded for a new penalty phase hearing.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MERIT BRIEF OF APPELLANT JAMES MAMMONE AND APPENDIX TO MERIT BRIEF were forwarded by first-class, postage prepaid, U.S. Mail to Kathleen Tatarsky and Renee Watson, Assistant Prosecuting Attorneys, Stark County, 110 Central Plaza South, Suite 510, Canton, Ohio 44702, on this 22nd day of April, 2011



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#341819

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

:

Appellee,

: Case No. 10-0576

-vs-

: Appeal taken from Stark County
Court of Common Pleas

JAMES MAMMONE, III,

: Case No. 2009-CR-0859

Appellant.

: **This is a death penalty case**

APPENDIX TO MERIT BRIEF OF APPELLANT JAMES MAMMONE, III

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Counsel For Appellee

Counsel For Appellant

In The Supreme Court of Ohio
2010 APR -8 AM 10:51

State of Ohio,	:	
Appellee,	:	Case No. 10-0576
-vs-	:	Appeal taken from Stark County Court of Common Pleas
James Mammone, III,	:	Case No. 2009-CR-0859
Appellant.	:	This is a death penalty case

Notice of Appeal of Appellant James Mammone, III

John D. Ferrero – 0018590
Prosecuting Attorney

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Counsel For Appellant

FILED
APR 08 2010
CLERK OF COURT
SUPREME COURT OF OHIO

In The Supreme Court of Ohio

State of Ohio,

Appellee,

-vs-

James Mammone, III,

Appellant.

: Case No.

: Appeal taken from Stark County
Court of Common Pleas

: Case No. 2009-CR-0859

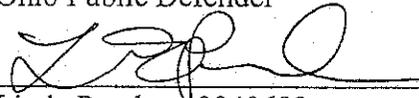
: **This is a death penalty case**

Notice of Appeal

Appellant James Mammone hereby gives notice of appeal to the Supreme Court of Ohio from the decision and judgment entry of the Stark County Court of Common Pleas, entered on February 16, 2010. See Exhibit A. This is a capital case and the date of the offense is June 8, 2009. See Supreme Court Rule of Practice XIX, § 1(A).

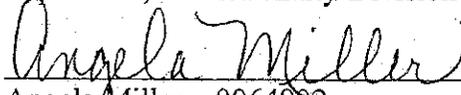
Respectfully submitted,

Office of the
Ohio Public Defender



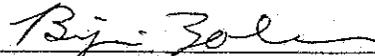
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Counsel For Appellant

Certificate of Service

I hereby certify that a true copy of the foregoing Notice of Appeal of Appellant James Mammone, III was forwarded by first-class, postage prepaid U.S. Mail to John D. Ferrero, Prosecuting Attorney, Stark County, 110 Central Plaza South, Suite 510, Canton, Ohio 44702, on this 2nd day of April, 2010.



Linda Prucha -- 0040689
Supervisor, Death Penalty Division

Counsel For Appellant

TRACY S. TEBBOLD
CLERK OF COURTS
STARK COUNTY, OHIO

2010 FEB 16 AM 10:47

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

STATE OF OHIO,

CASE NO. 2009CR0859

Plaintiff,

JUDGE JOHN G. HAAS

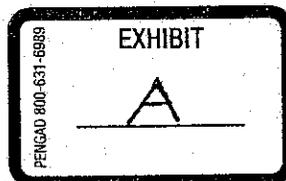
vs.

JUDGMENT ENTRY
PRISON SENTENCE IMPOSED

JAMES MAMMONE, III,

Defendant.

This day, January 20, 2010, came the defendant, **JAMES MAMMONE, III**, in the custody of the Sheriff, accompanied by his counsel, Tammi Johnson and Derek Lowry, Esq., having heretofore been found guilty on January 14, 2010 by a jury of the crimes of Aggravated Murder, 1 Ct. [R.C. 2903.01(B)] (Death) (With Two Death Specifications) [R.C. 2929.04(A)(5) and 2929.04(A)(7)] and (Firearm Specification) [R.C. 2941.145]; Aggravated Burglary, 1 Ct. [R.C. 2911.11(A)(1) and/or (A)(2)] (F1) (With Firearm Specification) [R.C. 2941.145]; Aggravated Murder, 2 Cts. [R.C. 2903.01(A) and/or (C)] (Death) (With Two Death Specifications) [R.C. 2929.04(A)(5) and 2929.04(A)(9)]; Aggravated Burglary, 1 Ct. [R.C. 2911.11(A)(2)] (F1) (With Firearm Specification) [R.C. 2941.145]; Violating a Protection Order, 1 Ct. [R.C.



2919.27(A)(1)](F3) and Attempt to Commit an Offense (Arson),
1 Ct. [R.C. 2923.02(A)][R.C. 2909.03(A)(1)](F5) as charged
in counts one through seven of the Indictment, and being
duly convicted thereon.

The Jury, after finding the defendant guilty beyond a
reasonable doubt of the six aggravating circumstances as
stated in the Indictment, proceeded to a sentencing hearing
pursuant to R.C. 2929.03 on January 19, 2010.

On January 20, 2010, the jury after due deliberation,
unanimously found that the aggravating circumstances as to
each count of Aggravated Murder outweighed the mitigating
factors by proof beyond a reasonable doubt, and recommended
the sentence of death be imposed upon the defendant for each
count of Aggravated Murder as charged in the indictment.

The Court, after receiving the recommendation of the
jury, proceeded to final sentencing on January 22, 2010.

Whereupon the Court was duly informed in the premises
on the part of the State of Ohio, by the Prosecuting
Attorney, and on the part of the defendant, by the defendant
and his counsel, and thereafter the Court asked the
defendant whether he had anything to say as to why judgment
should not be pronounced against him, and the defendant,
after briefly addressing the Court, and showing no good and

sufficient reason why sentence should not be pronounced, the Court thereupon pronounced sentence pursuant to R.C. 2929.03(F). The defendant was afforded his rights under Crim. Rule 32, and the Court imposed consecutive sentences of death regarding Counts One, Three and Four of the indictment, which sentences are set forth in the opinion of the Court filed January 26, 2010, which is incorporated by reference herein, and attached hereto.

Regarding the remaining counts and specifications of which the defendant has been found guilty, the Court has considered the record, oral statements of defendant, and all the facts and evidence adduced at trial, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors Ohio Revised Code Section 2929.12.

The Court finds that the defendant has been convicted of Aggravated Burglary, 1 Ct. [R.C. 2911.11(A)(1) and/or(A)(2)](F1)(With Firearm Specification) as set forth in Count Two, a felony subject to presumption in favor of prison under division (D) of section 2929.13 of the Ohio Revised Code.

The Court finds that the defendant has been convicted of Aggravated Burglary, 1 Ct. [R.C. 2911.11(A)(2)](F1)(With

Firearm Specification) as set forth in Count Five, felony subject to presumption in favor of prison under division (D) of section 2929.13 of the Ohio Revised Code.

The Court finds that the defendant has been convicted of Violating a Protection Order, 1 Ct. [R.C. 2919.27(A)(1)](F3) subject to division (C) of section 2929.13 of the Ohio Revised Code and that a prison term is consistent with the purposes and principles of sentencing in Revised Code Section 2929.11.

The Court further finds that the defendant has been convicted of Attempt to Commit an Offense (Arson), 1 Ct. [R.C. 2923.02(A)][R.C. 2909.03(A)(1)](F5) subject to division (B) of section 2929.13 of the Ohio Revised Code.

The Court further finds that the defendant has been convicted of a firearm specification to Count One [Aggravated Murder, 1 Ct. 2903.01(B)], which specification shall be merged into the firearm specification to Count Two for sentencing purposes.

The Court finds that the defendant has been convicted of or plead guilty to a felony and/or a misdemeanor as listed in division (D) of R.C. 2901.07 and hereby ORDERS that a sample of defendant's DNA be collected pursuant to Ohio Revised Code Section 2901.07.

For reasons stated on the record, and after consideration of the factors under Revised Code 2929.12, the Court also finds that prison is consistent with the purposes of Revised Code section 2929.11 and the defendant is not amenable to an available community control sanction regarding Counts Two, Five, Six and Seven of the indictment.

IT IS THEREFORE ORDERED that the defendant shall be committed to the Lorain Correctional Institution for a prison term of ten (10) years on the charge of Aggravated Burglary, 1 Ct. [R.C. 2911.11(A)(1) and/or (A)(2)](F1) as contained in Count Two of the Indictment, and

IT IS FURTHER ORDERED that the defendant shall serve a mandatory and consecutive prison term of three (3) years actual incarceration pursuant to R.C. 2929.14(D)(1) on the Firearm Specification to Count Two [Aggravated Burglary, 1 Ct. 2911.11(A)(1) and/or (A)(2)] [R.C. 2941.145], and

Upon release from prison, the defendant is ordered to serve a mandatory period of five (5) years of post-release control with respect to Count Two, pursuant to R.C. 2967.28(B). This period of post-release control was imposed as part of defendant's criminal sentence with respect to Count Two at the sentencing hearing, pursuant to R.C. 2929.19. If the defendant violates the conditions of post-

release control, the defendant will be subject to an additional prison term of up to one-half of the stated prison term as otherwise determined by the Parole Board, pursuant to law.

IT IS FURTHER ORDERED that the defendant shall be committed to the Lorain Correctional Institution for a prison term of ten (10) years on the charge of Aggravated Burglary, 1 Ct. [R.C. 2911.11(A)(2)](F1) as contained in Count Five of the Indictment, and

IT IS FURTHER ORDERED that this defendant shall serve a mandatory sentence pursuant to 2929.14(D)(1) of three (3) years actual incarceration for Firearm Specification to Count Five (Aggravated Burglary), 1 Ct. [R.C. 2911.11(A)(2)], prior to and consecutive with the sentence imposed for Aggravated Burglary, 1 Ct. [R.C. 2911.11(A)(2)], and

IT IS FURTHER ORDERED that the defendant shall serve the above sentence consecutive to all other counts, and

Upon release from prison, the defendant is ordered to serve a mandatory period of five (5) years of post-release control with respect to Count Five, pursuant to R.C. 2967.28(B). This period of post-release control was imposed as part of defendant's criminal sentence with respect to Count Five, at

the sentencing hearing, pursuant to R.C. 2929.19. If the defendant violates the conditions of post-release control, the defendant will be subject to an additional prison term of up to one-half of the stated prison term as otherwise determined by the Parole Board, pursuant to law.

IT IS FURTHER ORDERED that the sentence for Count Six (Violating a Protection Order, 1 Ct. [R.C. 2919.27(A)(1)] (F3) shall be merged into Count Five, and

IT IS FURTHER ORDERED that the defendant shall be committed to the Lorain Correctional Institution for a prison term of twelve (12) months on the charge of Attempt to Commit an Offense (Arson), 1 Ct. [R.C. 2923.02(A)] [R.C. 2909.03(A)(1)] (F5) as contained in Count Seven, and

IT IS FURTHER ORDERED that the defendant shall serve the above sentence consecutive with all other counts, and

Upon release from prison, the defendant is ordered to serve an optional period of up to three (3) years of post-release control with respect to Count Seven at the discretion of the Parole Board, pursuant to R.C. 2967.28(B). This period of post-release control was imposed as part of defendant's criminal sentence with respect to Count Seven at the sentencing hearing, pursuant to R.C. 2929.19. If the defendant violates the conditions of post-release control,

the defendant will be subject to an additional prison term of up to one-half of the stated prison term as otherwise determined by the Parole Board, pursuant to law.

IT IS FURTHER ORDERED that the terms of post-release control imposed in this sentence shall be served concurrently, as required by R.C. 2967.28(F)(4)(c).

IT IS FURTHER ORDERED that the defendant shall serve the death sentences imposed in the Court's separate entry filed January 26, 2010 (incorporated by reference and attached hereto) in Counts One, Three and Four consecutive to each other, and consecutive to all other counts of the Indictment.

THE COURT FURTHER ORDERS that such sentence is hereby ORDERED to be carried out on June 8, 2010 or as otherwise modified by a later court date, and

THE FURTHER ORDERED that the defendant be remanded to the custody of the Stark County Sheriff's Department to be transported to the appropriate State Penal Institution to carry out the above imposed sentence, and

Defendant is therefore ordered conveyed to the custody of the Ohio Department of Rehabilitation and Correction.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this defendant is entitled to jail time credit which will be

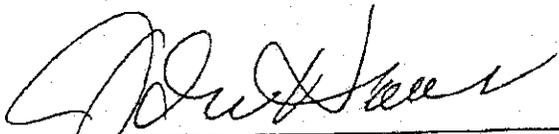
calculated by the Sheriff and the number of days inserted in a certified copy of an order which shall be forwarded to the institution at a later date, and

IT IS HEREIN ORDERED that the defendant shall pay the costs of prosecution for which the Court herein renders a judgment against the defendant for such costs, and

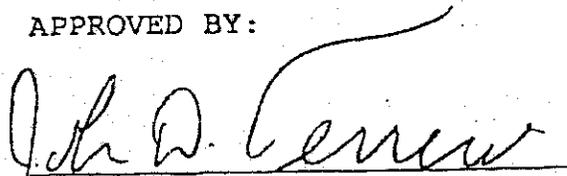
The Court, pursuant to Ohio Revised Code Section 120.36, hereby ORDERS that if the defendant requested or was provided representation by the Stark County Public Defender there is hereby assessed a \$25.00 non-refundable application fee, and

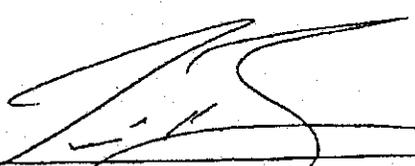
WHEREUPON, the Court explained to the defendant his rights to appeal according to Criminal Rule 32.

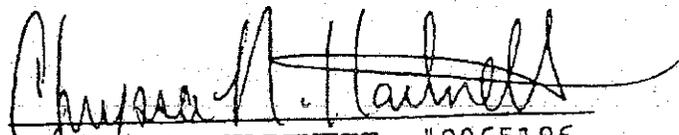
IT IS SO ORDERED.


FOR: HON. JOHN G. HAAS, JUDGE

APPROVED BY:


JOHN D. FERRERO, #0018590
PROSECUTING ATTORNEY


DENNIS E. BARR, #0020126
CHIEF, CRIMINAL DIVISION
ASSISTANT PROSECUTING ATTORNEY


CHRYSSA N. HARTNETT, #0065106
ASST. CHIEF, CRIMINAL DIVISION
ASSISTANT PROSECUTING ATTORNEY

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

FILED
JAN 26 2010
NANCY S. REINHOLD
STARK COUNTY OHIO
CLERK OF COURTS

STATE OF OHIO,)	Case No. 2009CR0859
)	JUDGE HAAS
Plaintiff)	<u>OPINION OF THE COURT</u>
-vs-)	PURSUANT TO O.R.C.
)	SECTION 2929.03(F)
JAMES MAMMONE, III,)	
Defendant)	

On January 14, 2010, the defendant, James Mammone, III, was convicted of three counts of aggravated murder involving the killings of Margaret Eakin, Macy Mammone and James Mammone, IV. The Jury also convicted the defendant of two specifications, referred to as capital specifications, with regard to each of the three counts of aggravated murder. Those capital specifications became aggravating circumstances for purposes of the sentencing consideration.

On January 20, 2010, the jury found beyond a reasonable doubt that the aggravating circumstances for each count of aggravated murder outweighed the mitigating factors for that count of aggravated murder and recommended the sentence of death for each of the three counts of aggravated murder. Pursuant to Ohio Revised Code Section 2929.03(D)(3) the Court conducted a sentencing hearing on January 22, 2010.

The Court, having independently reviewed the evidence appropriate to the sentencing hearing, the arguments of counsel, the statement of the defendant and the sentencing memorandum filed by the defendant, found that the State had proven

beyond a reasonable doubt that the aggravating circumstances for each separate count of aggravated murder outweighed any mitigating factors for each separate count of aggravated murder and accordingly imposed three separate sentences of death on the defendant. The defendant had declined to have a pre-sentence investigation or mental examination.

The Court, after reviewing said evidence, statements and testimony, was called upon to make an independent determination as to whether or not the jury's recommendation that the sentence of death be imposed for each of the three counts of aggravated murder should be followed and the sentence of death therefore imposed for one or more of the counts.

The defendant was convicted of three counts of aggravated murder, each with two aggravating circumstances. The penalty for each count of aggravated murder was determined separately. The Court separately considered the aggravating circumstances related to each count of aggravated murder and weighed the same against any mitigating factors in determining the penalty for each specific count of aggravated murder. In making the decision, the Court recognized that the aggravated murders themselves were not aggravating circumstances and did not consider the aggravated murders or the nature and circumstances of the aggravated murders as aggravating circumstances in weighing the aggravating circumstances against any mitigating factors for each specific count of aggravated murder.

Margaret Eakin:

The aggravating circumstances related to the aggravated murder of Margaret Eakin were as follows:

1) The aggravated murder of Margaret Eakin was committed as part of a course of conduct involving the purposeful killing of two or more persons.

2) The aggravated murder of Margaret Eakin was committed while the defendant was committing Aggravated Burglary, and the defendant was the principal offender in the commission of aggravated murder of Margaret Eakin.

The aggravated burglary which led to the aggravated murder of Margaret Eakin was committed in her home in the early morning hours while she was alone and still in bed. The purpose of the defendant in trespassing into the home of Margaret Eakin was to commit her aggravated murder.

The aggravated murder of Margaret Eakin took place moments after the defendant had taken the lives of his two children, Macy and James, IV.

Macy Mammone:

The aggravating circumstances related to the aggravated murder of Macy Mammone were as follow:

1) The aggravated murder of Macy Mammone was committed as a course of conduct involving the purposeful killing of two or more persons by the defendant.

2) Macy Mammone was under thirteen years of age at the time of her aggravated murder by the defendant and the defendant was the principal offender in the commission of the aggravated murder of Macy Mammone.

Macy Mammone was five years old at the time of her aggravated murder. Within moments of her death, her brother, James Mammone, IV was killed by the defendant and thereafter their grandmother Margaret Eakin was the victim of aggravated murder by the defendant James Mammone, III.

James Mammone, IV:

The aggravating circumstances related to the aggravated murder of James Mammone, IV were as follows:

- 1) The aggravated murder of James Mammone, IV was committed as a course of conduct involving the purposeful killing of two or more persons by the defendant.
- 2) James Mammone, IV was under thirteen years of age at the time of his aggravated murder by the defendant and the defendant was the principal offender in the commission of the aggravated murder of James Mammone, IV.

James Mammone, IV was three years old at the time of his aggravated murder. Just prior to his being the victim of aggravated murder, his sister Macy Mammone was the victim of aggravated murder and thereafter, within moments, his grandmother Margaret Eakin was the victim of aggravated murder at the hands of the defendant James Mammone, III.

These were the aggravating circumstances for each separate count of aggravated murder which were separately weighed against any factors in mitigation of the imposition of the death penalty for each count of aggravated murder and the Court has not considered any victim impact evidence in making it's decision. The Court did

not combine the aggravated circumstances but treated each count of aggravated murder and the aggravating circumstances related to each count separately.

MITIGATING FACTORS

- 1) The defendant's lack of a significant criminal record. The defendant was convicted of domestic violence, a misdemeanor of the fourth degree, but there was no other criminal conviction or juvenile adjudication. This mitigating factor was given substantial weight because it along with his adjustment to incarceration while at the Stark County Jail awaiting trial in this matter, were strong indicators that the defendant could adapt well to prison life.
- 2) The defendant expressed regrets regarding the aggravated murder of Margaret Eakin. This remorse was a mitigating factor and was given minimal weight by the Court as it related to the aggravated murder of Margaret Eakin.
- 3) The defendant was under extreme emotional distress and suffering from a severe mental disorder at the time of the aggravated murders of Margaret Eakin, Macy Mammone and James Mammone, IV. While the testimony of Jeffrey Smalldon is clear that any symptoms associated with the disorder were not so severe as to bring into question the defendant's sanity at the time of the offenses or his competency to stand trial, the disorder was a mitigating factor given substantial weight by the Court. Dr. Smalldon's primary diagnosis of the defendant was a personality

disorder, not otherwise specified, with Schizotypal, Borderline and Narcissistic features. Dr. Smalldon also referenced passive-aggressive and obsessive-compulsive personality traits as well as alcohol abuse, episodic by history. All these conditions and traits were given substantial weight as mitigating factors.

- 4) The defendant's work history. The defendant started working at the age of 16 and worked continuously, except for a short period of time during 2007. His jobs included, Mary's Restaurant, insurance sales and real estate appraisals. The defendant even continued to work as a pizza deliverer while he was going back to college. The defendant worked hard and provided for his family. The defendant did well in college being placed on the "President's List" for academic achievement. These were mitigating factors and were given substantial weight by the Court.
- 5) The history, character and background of the defendant. Starting at about age five and continuing until about the age of ten when his father left their home, the defendant was subjected to physical and psychological abuse by his father and further witnessed his mother being subjected to physical and mental abuse by his father. The defendant was referred to as a "loser" and a "maggot". On the other hand, the defendant was loved by his mother and grandparents and had an especially close relationship with his grandfather Mammone. As a result of his parents being

divorced when he was ten, the defendant grew up at times in a single parent home and subsequently in a home with his mother and a stepfather until he left that home when he was eighteen years of age. He was also subjected to both his father and his grandfather abusing alcohol. This abuse of alcohol influenced his father's behavior in particular and all of these factors concerning his childhood and formative years were mitigating factors given substantial weight by the Court.

The Court has also considered all the other statutory factors and the additional mitigating factors raised by the defense in the defendant's sentencing memorandum including his cooperation with the police. All of which were given some weight. The nature and circumstance of the offense were not aggravating factors to be considered by the Court nor were they considered as mitigating factors. The Court has not considered any victim impact evidence in this matter nor was any presented to the Court. The Court has also considered the statements of counsel and the statement of the defendant and all other matters appropriate under Ohio law. The Court did not combine the aggravating circumstances but only considered the aggravating circumstances as to each specific count of aggravated murder in making the Court's decisions.

MARGARET EAKIN

The Court weighed the specific aggravating circumstances related to the aggravated murder of Margaret Eakin against the mitigating factors set forth herein to determine whether or not the State of Ohio had proven beyond a reasonable doubt

that the specific aggravating circumstances related to the aggravated murder of Margaret Eakin outweighed any and all of the factors in mitigation that had been presented to this Court. After deliberation, the Court found that the aggravating circumstances specifically proven by proof beyond a reasonable doubt involving the aggravated murder of Margaret Eakin did outweigh the mitigating factors beyond a reasonable doubt. The Court found that the evidence of mitigating factors paled in comparison to the aggravating circumstances.

The aggravated burglary culminating in the aggravated murder of Margaret Eakin took place in the early morning hours when the defendant knew that the victim would be alone in her home and while she was still in bed. The defendant's purpose was clear – to kill his ex-wife's best friend – her mother. The fact it was part of his greater plan, his course of conduct in killing his two children, amounted to great weight being given to the aggravating circumstances. In combining the weight given to the mitigating factors, the greater weight of the aggravating circumstances of the aggravated murder of Margaret Eakin was clear beyond a reasonable doubt.

It was therefore the sentence of this Court that James Mammone, III be sentenced to death for the aggravated murder of Margaret Eakin.

MACY MAMMONE

The Court weighed the specific aggravating circumstances related to the aggravated murder of Macy Mammone against the mitigating factors as set forth herein and found that the State of Ohio had proven beyond a reasonable doubt that the aggravated circumstances involving the aggravated murder of Macy Mammone outweighed the mitigating factors beyond a reasonable doubt. The Court found that

the evidence of mitigating factors paled in comparison to the aggravating circumstances of Macy Mammone's aggravated murder.

The fact that Macy Mammone was only five years old at the time of her aggravated murder and that her death occurred as part of the defendant's course of conduct in killing his son and mother in law within minutes of each other, resulted in great weight being given to the aggravating circumstances of her aggravated murder. In combining the weight given to all of the mitigating factors, the greater weight of the aggravating circumstances of the aggravated murder of Macy Mammone was clear beyond a reasonable doubt.

It was therefore the sentence of this Court that James Mammone, III be sentenced to death for the aggravated murder of Macy Mammone.

JAMES MAMMONE, IV

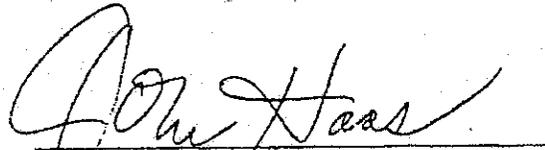
The Court weighed the specific aggravating circumstances related to the aggravated murder of James Mammone, IV against the mitigating factors set forth herein and found that the State of Ohio had proven beyond a reasonable doubt that the aggravated circumstances involving the aggravated murder of James Mammone, IV outweighed the mitigating factors beyond a reasonable doubt. The Court found that the evidence of in mitigating factors paled in comparison to the aggravating circumstances of James Mammone, IV's aggravated murder.

The fact that James Mammone, IV was only three years old at the time of his aggravated murder and that his death occurred as part of the defendant's course of conduct in killing his daughter and mother in law within minutes of each other, resulted in great weight being given to the aggravating circumstances of his

aggravated murder. In combining the weight given to all of the mitigating factors, the greater weight of the aggravating circumstances of the aggravated murder of James Mammone, IV was clear beyond a reasonable doubt.

It was therefore the sentence of this Court that James Mammone, III be sentenced to death for the aggravated murder of James Mammone, IV.

The defendant was ordered conveyed to the appropriate state institution where he will be placed on death row. The Court has set the date of his execution for June 8, 2010 or said date as may be established by a Court of competent jurisdiction. The Court will appoint appropriate due process counsel to handle his appeal in this matter. The opinion will be filed with the Stark County Clerk of Courts as well as with the Clerk of the Supreme Court of Ohio. Court costs to be taxed to the defendant pursuant to Ohio law.


HON. JOHN G. HAAS

Copies to:

Stark County Prosecutor's Office
John D. Ferrero
Dennis Barr
Chryssa Hartnett
Atty. Tammi Johnson
Atty. Derek Lowry

ARTICLE I, SECTION 1, OHIO CONSTITUTION

§ 1 RIGHT TO FREEDOM AND PROTECTION OF PROPERTY.

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

SECTION 2, ARTICLE I, OHIO CONSTITUTION

§ 2 RIGHT TO ALTER, REFORM, OR ABOLISH GOVERNMENT, AND REPEAL SPECIAL PRIVILEGES.

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

SECTION 5, ARTICLE I, OHIO CONSTITUTION

§ 5 TRIAL BY JURY; REFORM IN CIVIL JURY SYSTEM.

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

SECTION 9, ARTICLE I, OHIO CONSTITUTION

§ 9 BAILABLE OFFENSES; OF BAIL, FINE, AND PUNISHMENT.

All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great and a person who is charged with a felony where the proof is evident or the presumption great and who poses a potential serious physical danger to a victim of the offense, to a witness to the offense, or to any other person or to the community. Excessive bail shall not be required; excessive fines shall not be imposed; and cruel and unusual punishments shall not be inflicted.

SECTION 10, ARTICLE I, OHIO CONSTITUTION

§ 10 TRIAL OF ACCUSED PERSONS AND THEIR RIGHTS; DEPOSITIONS BY STATE AND COMMENT ON FAILURE TO TESTIFY IN CRIMINAL CASES.

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

SECTION 16, ARTICLE I, OHIO CONSTITUTION

§ 16 REDRESS IN COURTS.

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

SECTION 20, ARTICLE I, OHIO CONSTITUTION

§ 20 POWERS RESERVED TO THE PEOPLE.

This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people.

AMENDMENT V, UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI, UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT VIII, UNITED STATES CONSTITUTION

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX, UNITED STATES CONSTITUTION

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV, UNITED STATES CONSTITUTION

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE II, UNITED STATES CONSTITUTION

Section 1.

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representatives from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:--
"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3.

He shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4.

The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE VI, UNITED STATES CONSTITUTION

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The Senators and Representatives before mentioned; and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

LEXSTAT ORC 2903.01

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2903. HOMICIDE AND ASSAULT
HOMICIDE

Go to the Ohio Code Archive Directory

ORC Ann. 2903.01 (2011)

§ 2903.01. Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape.

(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.

(D) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.

(E) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:

- (1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.
- (2) It is the offender's specific purpose to kill a law enforcement officer.

(F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in *section 2929.02 of the Revised Code*.

(G) As used in this section:

- (1) "Detention" has the same meaning as in *section 2921.01 of the Revised Code*.
- (2) "Law enforcement officer" has the same meaning as in *section 2911.01 of the Revised Code*.

LEXSTAT ORC 2929.02

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR MURDER

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ORC Ann. 2929.02 (2011)

§ 2929.02. Penalties for aggravated murder or murder

(A) Whoever is convicted of or pleads guilty to aggravated murder in violation of *section 2903.01 of the Revised Code* shall suffer death or be imprisoned for life, as determined pursuant to *sections 2929.022 [2929.02.2], 2929.03, and 2929.04 of the Revised Code*, except that no person who raises the matter of age pursuant to *section 2929.023 [2929.02.3] of the Revised Code* and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) (1) Except as otherwise provided in division (B)(2) or (3) of this section, whoever is convicted of or pleads guilty to murder in violation of *section 2903.02 of the Revised Code* shall be imprisoned for an indefinite term of fifteen years to life.

(2) Except as otherwise provided in division (B)(3) of this section, if a person is convicted of or pleads guilty to murder in violation of *section 2903.02 of the Revised Code*, the victim of the offense was less than thirteen years of age, and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the court shall impose an indefinite prison term of thirty years to life pursuant to division (B)(3) of *section 2971.03 of the Revised Code*.

(3) If a person is convicted of or pleads guilty to murder in violation of *section 2903.02 of the Revised Code* and also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information that charged the murder, the court shall impose upon the offender a term of life imprisonment without parole that shall be served pursuant to *section 2971.03 of the Revised Code*.

(4) In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to the offender or to the dependents of the offender, or will prevent the offender from making reparation for the victim's wrongful death.

(D) (1) In addition to any other sanctions imposed for a violation of *section 2903.01* or *2903.02 of the Revised Code*, if the offender used a motor vehicle as the means to commit the violation, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of *section 4510.02 of the Revised Code*.

(2) As used in division (D) of this section, "motor vehicle" has the same meaning as in *section 4501.01 of the Revised Code*.

LEXSTAT ORC 2929.021

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ORC Ann. 2929.021 (2011)

§ 2929.021. Notice to supreme court of indictment charging aggravated murder; plea

(A) If an indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of *section 2929.04 of the Revised Code*, the clerk of the court in which the indictment is filed, within fifteen days after the day on which it is filed, shall file a notice with the supreme court indicating that the indictment was filed. The notice shall be in the form prescribed by the clerk of the supreme court and shall contain, for each charge of aggravated murder with a specification, at least the following information pertaining to the charge:

- (1) The name of the person charged in the indictment or count in the indictment with aggravated murder with a specification;
- (2) The docket number or numbers of the case or cases arising out of the charge, if available;
- (3) The court in which the case or cases will be heard;
- (4) The date on which the indictment was filed.

(B) If the indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of *section 2929.04 of the Revised Code* and if the defendant pleads guilty or no contest to any offense in the case or if the indictment or any count in the indictment is dismissed, the clerk of the court in which the plea is entered or the indictment or count is dismissed shall file a notice with the supreme court indicating what action was taken in the case. The notice shall be filed within fifteen days after the plea is entered or the indictment or count is dismissed, shall be in the form prescribed by the clerk of the supreme court, and shall contain at least the following information:

- (1) The name of the person who entered the guilty or no contest plea or who is named in the indictment or count that is dismissed;
- (2) The docket numbers of the cases in which the guilty or no contest plea is entered or in which the indictment or count is dismissed;
- (3) The sentence imposed on the offender in each case.

LEXSTAT ORC 2929.022

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ORC Ann. 2929.022 (2011)

§ 2929.022. Determination of aggravating circumstances of prior conviction

(A) If an indictment or count in an indictment charging a defendant with aggravated murder contains a specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of *section 2929.04 of the Revised Code*, the defendant may elect to have the panel of three judges, if the defendant waives trial by jury, or the trial judge, if the defendant is tried by jury, determine the existence of that aggravating circumstance at the sentencing hearing held pursuant to divisions (C) and (D) of *section 2929.03 of the Revised Code*.

(1) If the defendant does not elect to have the existence of the aggravating circumstance determined at the sentencing hearing, the defendant shall be tried on the charge of aggravated murder, on the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of *section 2929.04 of the Revised Code*, and on any other specifications of an aggravating circumstance listed in division (A) of *section 2929.04 of the Revised Code* in a single trial as in any other criminal case in which a person is charged with aggravated murder and specifications.

(2) If the defendant does elect to have the existence of the aggravating circumstance of a prior conviction listed in division (A)(5) of *section 2929.04 of the Revised Code* determined at the sentencing hearing, then, following a verdict of guilty of the charge of aggravated murder, the panel of three judges or the trial judge shall:

(a) Hold a sentencing hearing pursuant to division (B) of this section, unless required to do otherwise under division (A)(2)(b) of this section;

(b) If the offender raises the matter of age at trial pursuant to *section 2929.023 [2929.02.3] of the Revised Code* and is not found at trial to have been eighteen years of age or older at the time of the commission of the offense, conduct a hearing to determine if the specification of

the aggravating circumstance of a prior conviction listed in division (A)(5) of *section 2929.04 of the Revised Code* is proven beyond a reasonable doubt. After conducting the hearing, the panel or judge shall proceed as follows:

(i) If that aggravating circumstance is proven beyond a reasonable doubt or if the defendant at trial was convicted of any other specification of an aggravating circumstance, the panel or judge shall impose sentence according to division (E) of *section 2929.03 of the Revised Code*.

(ii) If that aggravating circumstance is not proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance, except as otherwise provided in this division, the panel or judge shall impose sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender. If that aggravating circumstance is not proven beyond a reasonable doubt, the defendant at trial was not convicted of any other specification of an aggravating circumstance, the victim of the aggravated murder was less than thirteen years of age, and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the panel or judge shall sentence the offender pursuant to division (B)(3) of *section 2971.03 of the Revised Code* to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(B) At the sentencing hearing, the panel of judges, if the defendant was tried by a panel of three judges, or the trial judge, if the defendant was tried by jury, shall, when required pursuant to division (A)(2) of this section, first determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of *section 2929.04 of the Revised Code* is proven beyond a reasonable doubt. If the panel of judges or the trial judge determines that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of *section 2929.04 of the Revised Code* is proven beyond a reasonable doubt or if they do not determine that the specification is proven beyond a reasonable doubt but the defendant at trial was convicted of a specification of any other aggravating circumstance listed in division (A) of *section 2929.04 of the Revised Code*, the panel of judges or the trial judge and trial jury shall impose sentence on the offender pursuant to division (D) of *section 2929.03 and section 2929.04 of the Revised Code*. If the panel of judges or the trial judge does not determine that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of *section 2929.04 of the Revised Code* is proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance listed in division (A) of *section 2929.04 of the Revised Code*, the panel of judges or the trial judge shall terminate the sentencing hearing and impose sentence on the offender as follows:

(1) Subject to division (B)(2) of this section, the panel or judge shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the victim of the aggravated murder was less than thirteen years of age and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the panel or judge shall sentence the offender pursuant to division (B)(3) of *section 2971.03 of the Revised Code* to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

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ORC Ann. 2929.023 (2011)

§ 2929.023. Defendant may raise matter of age

A person charged with aggravated murder and one or more specifications of an aggravating circumstance may, at trial, raise the matter of his age at the time of the alleged commission of the offense and may present evidence at trial that he was not eighteen years of age or older at the time of the alleged commission of the offense. The burdens of raising the matter of age, and of going forward with the evidence relating to the matter of age, are upon the defendant. After a defendant has raised the matter of age at trial, the prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the defendant was eighteen years of age or older at the time of the alleged commission of the offense.

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ORC Ann. 2929.03 (2011)

§ 2929.03. Imposing sentence for aggravated murder

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of *section 2929.04 of the Revised Code*, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose sentence on the offender as follows:

(1) Except as provided in division (A)(2) of this section, the trial court shall impose one of the following sentences on the offender:

(a) Life imprisonment without parole;

(b) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;

(c) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(d) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(e) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (A)(1)(a) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of *section 2971.03 of the Revised Code* to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be served pursuant to that section.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to *section 2971.03 of the Revised Code*.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of *section 2929.04 of the Revised Code*, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to *section 2929.023 [2929.02.3] of the Revised Code*, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) (1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of *section 2929.04 of the Revised Code*, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to *section 2929.023 [2929.02.3] of the Revised Code*, the trial court shall impose sentence on the offender as follows:

(a) Except as provided in division (C)(1)(b) of this section, the trial court shall impose one of the following sentences on the offender:

(i) Life imprisonment without parole;

(ii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;

(iii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iv) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(v) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (C)(1)(a)(i) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of *section 2971.03 of the Revised Code* to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to *section 2971.03 of the Revised Code*.

(2) (a) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of *section 2929.04 of the Revised Code* and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be one of the following:

(i) Except as provided in division (C)(2)(a)(ii) or (iii) of this section, the penalty to be imposed on the offender shall be death, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(ii) Except as provided in division (C)(2)(a)(iii) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of death or life imprisonment without parole on the offender pursuant to division (C)(2)(a)(i) of this section, the penalty to be imposed on the offender shall be an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be imposed pursuant to division (B)(3) of *section 2971.03 of the Revised Code* and served pursuant to that section.

(iii) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the penalty to be imposed on the offender shall be death or life imprisonment without parole that shall be served pursuant to *section 2971.03 of the Revised Code*.

(b) A penalty imposed pursuant to division (C)(2)(a)(i), (ii), or (iii) of this section shall be determined pursuant to divisions (D) and (E) of this section and shall be determined by one of the following:

(i) By the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury;

(ii) By the trial jury and the trial judge, if the offender was tried by jury.

(D) (1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to *section 2929.023 [2929.02.3] of the Revised Code* and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to *section 2947.06 of the Revised Code*. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. 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. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of *section 2929.04 of the Revised Code* and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the 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.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of the following:

(a) Except as provided in division (D)(2)(b) or (c) of this section, to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(b) Except as provided in division (D)(2)(c) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the jury does not recommend a sentence of life imprisonment without parole pursuant to division (D)(2)(a) of this section, to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of *section 2971.03 of the Revised Code* and served pursuant to that section.

(c) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, to life imprisonment without parole.

If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, life imprisonment with parole eligibility after serving thirty full years of imprisonment, or an

indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of *section 2971.03 of the Revised Code*, the court shall impose the sentence recommended by the jury upon the offender. If the sentence is an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment imposed as described in division (D)(2)(b) of this section or a sentence of life imprisonment without parole imposed under division (D)(2)(c) of this section, the sentence shall be served pursuant to *section 2971.03 of the Revised Code*. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of 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, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Except as provided in division (D)(3)(b) of this section, one of the following:

(i) Life imprisonment without parole;

(ii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(iv) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (D)(3)(a)(i) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of *section 2971.03 of the Revised Code* to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to *section 2971.03 of the Revised Code*.

(E) If the offender raised the matter of age at trial pursuant to *section 2929.023 [2929.02.3] of the Revised Code*, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of *section 2929.04 of the Revised Code*, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Except as provided in division (E)(2) of this section, one of the following:

(a) Life imprisonment without parole;

(b) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(c) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(d) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (E)(2)(a) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of *section 2971.03 of the Revised Code* to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to *section 2971.03 of the Revised Code*.

(F) The court or the panel of three judges, when it imposes sentence of death, 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. The court or panel, when it imposes life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of *section 2929.04 of the Revised Code* it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G) (1) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the supreme court.

LEXSTAT ORC 2929.04

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*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR MURDER

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ORC Ann. 2929.04 (2011)

§ 2929.04. Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to *section 2941.14 of the Revised Code* and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or a person in line of succession to the presidency, the governor or lieutenant governor of this state, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of this state, or a candidate for any of the offices described in this division. For purposes of this division, a person is a candidate if the person has been nominated for election according to law, if the person has filed a petition or petitions according to law to have the person's name placed on the ballot in a primary or general election, or if the person campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in *section 2921.01 of the Revised Code*, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:

(a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.

(b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or 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.

(6) The victim of the offense was a law enforcement officer, as defined in *section 2911.01 of the Revised Code*, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding.

(9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.

(10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to *section 2929.023 [2929.02.3] of the Revised Code* or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed pursuant to divisions (D)(2) and (3) of *section 2929.03 of the Revised Code* by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

LEXSTAT ORC 2929.05

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*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR MURDER

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ORC Ann. 2929.05 (2011)

§ 2929.05. Appellate review of death sentence

(A) Whenever sentence of death is imposed pursuant to *sections 2929.03 and 2929.04 of the Revised Code*, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall review upon appeal the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They also shall review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

A court of appeals that reviews a case in which the sentence of death is imposed for an offense committed before January 1, 1995, shall file a separate opinion as to its findings in the case with the clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever information is required by the clerk of the supreme court.

(B) The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall give priority over all other cases to the review of judgments in which the sentence of death is imposed and, except as otherwise provided in this section, shall conduct the review in accordance with the Rules of Appellate Procedure.

(C) At any time after a sentence of death is imposed pursuant to *section 2929.022 [2929.02.2]* or *2929.03 of the Revised Code*, the court of common pleas that sentenced the offender shall vacate the sentence if the offender did not present evidence at trial that the offender was not eighteen years of age or older at the time of the commission of the aggravated murder for which the offender was sentenced and if the offender shows by a preponderance of the evidence that the offender was less than eighteen years of age at the time of the commission of the aggravated murder for which the offender was sentenced. The court is not required to hold a hearing on a motion filed pursuant to this division unless the court finds, based on the motion and any supporting information submitted by the defendant, any information submitted by the prosecuting attorney, and the record in the case, including any previous hearings and orders, probable cause to believe that the defendant was not eighteen years of age or older at the time of the commission of the aggravated murder for which the defendant was sentenced to death.

LEXSTAT ORC 2929.06

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR MURDER

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ORC Ann. 2929.06 (2011)

§ 2929.06. Resentencing after sentence of death or life imprisonment without parole is set aside, nullified, or vacated

(A) If a sentence of death imposed upon an offender is set aside, nullified, or vacated because the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under the standards imposed by *section 2929.05 of the Revised Code*, is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of death that is set forth in *sections 2929.03 and 2929.04 of the Revised Code* is unconstitutional, is set aside, nullified, or vacated pursuant to division (C) of *section 2929.05 of the Revised Code*, or is set aside, nullified, or vacated because a court has determined that the offender is mentally retarded under standards set forth in decisions of the supreme court of this state or the United States supreme court, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall impose upon the offender a sentence of life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that is determined as specified in this division. If division (D) of *section 2929.03 of the Revised Code*, at the time the offender committed the aggravated murder for which the sentence of death was imposed, required the imposition when a sentence of death was not imposed of a sentence of life imprisonment without parole or a sentence of an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (A) or (B)(3) of *section 2971.03 of the Revised Code* and served pursuant to that section, the court shall impose the sentence so required. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court shall impose sentence, shall be the same sentences of life imprisonment that were available under

division (D) of section 2929.03 or under *section 2909.24 of the Revised Code* at the time the offender committed the offense for which the sentence of death was imposed. Nothing in this division regarding the resentencing of an offender shall affect the operation of *section 2971.03 of the Revised Code*.

(B) Whenever any court of this state or any federal court sets aside, nullifies, or vacates a sentence of death imposed upon an offender because of error that occurred in the sentencing phase of the trial and if division (A) of this section does not apply, the trial court that sentenced the offender shall conduct a new hearing to resentence the offender. If the offender was tried by a jury, the trial court shall impanel a new jury for the hearing. If the offender was tried by a panel of three judges, that panel or, if necessary, a new panel of three judges shall conduct the hearing. At the hearing, the court or panel shall follow the procedure set forth in division (D) of *section 2929.03 of the Revised Code* in determining whether to impose upon the offender a sentence of death, a sentence of life imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment. If, pursuant to that procedure, the court or panel determines that it will impose a sentence other than a sentence of death, the court or panel shall impose upon the offender one of the sentences of life imprisonment that could have been imposed at the time the offender committed the offense for which the sentence of death was imposed, determined as specified in this division, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that is determined as specified in this division. If division (D) of *section 2929.03 of the Revised Code*, at the time the offender committed the aggravated murder for which the sentence of death was imposed, required the imposition when a sentence of death was not imposed of a sentence of life imprisonment without parole or a sentence of an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (A) or (B)(3) of *section 2971.03 of the Revised Code* and served pursuant to that section, the court or panel shall impose the sentence so required. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court or panel shall impose sentence, shall be the same sentences of life imprisonment that were available under division (D) of section 2929.03 or under *section 2909.24 of the Revised Code* at the time the offender committed the offense for which the sentence of death was imposed.

(C) If a sentence of life imprisonment without parole imposed upon an offender pursuant to *section 2929.021 [2929.02.1] or 2929.03 of the Revised Code* is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of life imprisonment without parole that is set forth in *sections 2929.03 and 2929.04 of the Revised Code* is unconstitutional, the trial court that sentenced the offender shall conduct a hearing to resentence the offender to life imprisonment with parole eligibility after serving twenty-five full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(D) Nothing in this section limits or restricts the rights of the state to appeal any order setting aside, nullifying, or vacating a conviction or sentence of death, when an appeal of that nature otherwise would be available.

(E) This section, as amended by H.B. 184 of the 125th general assembly, shall apply to all offenders who have been sentenced to death for an aggravated murder that was committed on or after October 19, 1981, or for terrorism that was committed on or after May 15, 2002. This section, as amended by H.B. 184 of the 125th general assembly, shall apply equally to all such offenders sentenced to death prior to, on, or after March 23, 2005, including offenders who, on March 23, 2005,

are challenging their sentence of death and offenders whose sentence of death has been set aside, nullified, or vacated by any court of this state or any federal court but who, as of March 23, 2005, have not yet been resentenced.

LEXSTAT ORC 2945.25

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2945. TRIAL
JURY TRIAL

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ORC Ann. 2945.25 (2011)

§ 2945.25. Causes of challenging of jurors

A person called as a juror in a criminal case may be challenged for the following causes:

- (A) That he was a member of the grand jury that found the indictment in the case;
- (B) That he is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial;
- (C) In the trial of a capital offense, that he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case. A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard.
- (D) That he is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted, or to the defendant;
- (E) That he served on a petit jury drawn in the same cause against the same defendant, and that [petit]* jury was discharged after hearing the evidence or rendering a verdict on the evidence that was set aside;
- (F) That he served as a juror in a civil case brought against the defendant for the same act;

(G) That he has been subpoenaed in good faith as a witness in the case;

(H) That he is a chronic alcoholic, or drug dependent person;

(I) That he has been convicted of a crime that by law disqualifies him from serving on a jury;

(J) That he has an action pending between him and the state or the defendant;

(K) That he or his spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against him;

(L) That he is the person alleged to be injured or attempted to be injured by the offense charged, or is the person on whose complaint the prosecution was instituted, or the defendant;

(M) That he is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney of any person included in division (L) of this section;

(N) That 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;

(O) That he otherwise is unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in this section shall be determined by the court.

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OHIO RULES OF COURT SERVICE
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Ohio Rules Of Criminal Procedure

Ohio Crim. R. 11 (2011)

Review Court Orders which may amend this Rule.

Rule 11. Pleas, Rights Upon Plea

(A) Pleas.

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas.

With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under *Crim. R. 32*.

(C) Pleas of guilty and no contest in felony cases.

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to *Crim. R. 44* by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses.

In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to *Crim. R. 44* by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses.

In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty.

The counsel provisions of *Crim. R. 44(B)* and (C) apply to division (E) of this rule.

(F) Negotiated plea in felony cases.

When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea.

If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity.

The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

LEXSTAT OHIO CRIM R 24

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*** RULES CURRENT THROUGH APRIL 1, 2011 ***
*** ANNOTATIONS CURRENT THROUGH JULY 1, 2010 ***

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 24 (2011)

Review Court Orders which may amend this Rule.

Rule 24. Trial Jurors

(A) Brief introduction of case.

To assist prospective jurors in understanding the general nature of the case, the court, in consultation with the parties, may give jurors a brief introduction to the case.

(B) Examination of prospective jurors.

Any person called as a prospective juror for the trial of any cause shall be examined under oath or upon affirmation as to the prospective juror's qualifications. The court may permit the attorney for the defendant, or the defendant if appearing *pro se*, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the state and defense to supplement the examination by further inquiry. Nothing in this rule shall limit the court's discretion, with timely notice to the parties at anytime prior to trial, to allow the examination of all prospective jurors in the array or, in the alternative, to permit individual examination or each prospective juror seated on a panel, prior to any challenges for cause or peremptory challenges.

(C) Challenge for cause.

A person called as a juror may be challenged for the following causes:

- (1) That the juror has been convicted of a crime which by law renders the juror disqualified to serve on a jury.
- (2) That the juror is a chronic alcoholic, or drug dependent person.
- (3) That the juror was a member of the grand jury that found the indictment in the case.
- (4) That the juror served on a petit jury drawn in the same cause against the same defendant, and the petit jury was discharged after hearing the evidence or rendering a verdict on the evidence that was set aside.

(5) That the juror served as a juror in a civil case brought against the defendant for the same act.

(6) That the juror has an action pending between him or her and the State of Ohio or the defendant.

(7) That the juror or the juror's spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against the juror.

(8) That the juror has been subpoenaed in good faith as a witness in the case.

(9) That the juror is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

(10) That the juror is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted; or to the defendant.

(11) That the juror is the person alleged to be injured or attempted to be injured by the offense charged, or the person on whose complaint the prosecution was instituted, or the defendant.

(12) That the juror is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney, of any person included in division (B)(11) of this rule.

(13) That English is not the juror's native language, and the juror's knowledge of English is insufficient to permit the juror to understand the facts and the law in the case.

(14) That the juror is otherwise unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in division (B) of this rule shall be determined by the court.

(D) Peremptory challenges.

In addition to challenges provided in division (C) of this rule, if there is one defendant, each party peremptorily may challenge three prospective jurors in misdemeanor cases, four prospective jurors in felony cases other than capital cases, and six prospective jurors in capital cases. If there is more than one defendant, each defendant peremptorily may challenge the same number of prospective jurors as if the defendant was the sole defendant.

In any case where there are multiple defendants, the prosecuting attorney peremptorily may challenge a number of prospective jurors equal to the total peremptory challenges allowed all defendants. In case of the consolidation of any indictments, informations, or complaints for trial, the consolidated cases shall be considered, for purposes of exercising peremptory challenges, as though the defendants or offenses had been joined in the same indictment, information, or complaint.

(E) Manner of exercising peremptory challenges.

Peremptory challenges shall be exercised alternately, with the first challenge exercised by the state. The failure of a party to exercise a peremptory challenge constitutes a waiver of that chal-

lenge, but does not constitute a waiver of any subsequent challenge. However, if all parties, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

A prospective juror peremptorily challenged by either party shall be excused.

Nothing in this rule shall limit the court's discretion to allow challenges under this division or division (D) of this rule to be made outside the hearing of prospective jurors.

(F) Challenge to array.

The prosecuting attorney or the attorney for the defendant may challenge the array of petit jurors on the ground that it was not selected, drawn or summoned in accordance with law. A challenge to the array shall be made before the examination of the jurors pursuant to division (A) of this rule and shall be tried by the court.

No array of petit jurors shall be set aside, nor shall any verdict in any case be set aside because the jury commissioners have returned such jury or any juror in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return.

(G) Alternate jurors.

(1) Non-capital cases.

The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew. Each party is entitled to one peremptory challenge in addition to those otherwise allowed if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled, and three peremptory challenges if five or six alternative jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by this rule may not be used against an alternate juror.

(2) Capital cases.

The procedure designated in division (G)(1) of this rule shall be the same in capital cases, except that any alternate juror shall continue to serve if more than one deliberation is required. If an alternate juror replaces a regular juror after a guilty verdict, the court shall instruct the alternate juror that the juror is bound by that verdict.

(H) Control of juries.

(1) Before submission of case to jury.

Before submission of a case to the jury, the court, upon its own motion or the motion of a party, may restrict the separation of jurors or may sequester the jury.

(2) After submission of case to jury.**(a) Misdemeanor cases.**

After submission of a misdemeanor case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors.

(b) Non-capital felony cases.

After submission of a non-capital felony case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors during any period of court adjournment or may require the jury to remain under the supervision of an officer of the court.

(c) Capital cases.

After submission of a capital case to the jury, the jury shall remain under the supervision of an officer of the court until a verdict is rendered or the jury is discharged by the court.

(3) Separation in emergency.

Where the jury is sequestered or after a capital case is submitted to the jury, the court may, in an emergency and upon giving cautionary instructions, allow temporary separation of jurors.

(4) Duties of supervising officer.

Where jurors are required to remain under the supervision of an officer of the court, the court shall make arrangements for their care, maintenance and comfort.

When the jury is in the care of an officer of the court and until the jury is discharged by the court, the officer may inquire whether the jury has reached a verdict, but shall not:

(a) Communicate any matter concerning jury conduct to anyone except the judge or;

(b) Communicate with the jurors or permit communications with jurors, except as allowed by court order.

(I) Taking of notes by jurors.

The court, after providing appropriate cautionary instructions, may permit jurors who wish to do so to take notes during a trial. If the court permits the taking of notes, notes taken by a juror may be carried into deliberations by that juror. The court shall require that all juror notes be collected and destroyed promptly after the jury renders a verdict.

(J) Juror questions to witnesses.

The court may permit jurors to propose questions for the court to ask of the witnesses. If the court permits jurors to propose questions, the court shall use procedures that minimize the risk of prejudice, including all of the following:

(1) Require jurors to propose any questions to the court in writing;

(2) Retain a copy of each proposed question for the record;

(3) Instruct the jurors that they shall not display or discuss a proposed question with other jurors;

(4) Before reading a question to a witness, provide counsel with an opportunity to object to each question on the record and outside the hearing of the jury;

- (5) Read the question, either as proposed or rephrased, to the witness;
- (6) Permit counsel to reexamine the witness regarding a matter addressed by a juror question;
- (7) If a question proposed by a juror is not asked, instruct the jurors that they should not draw any adverse inference from the court's refusal to ask any question proposed by a juror.

LEXSTAT OHIO EVID R 401

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Ohio Rules Of Evidence

Article IV Relevancy And Its Limits

Ohio Evid. R. 401 (2011)

Review Court Orders which may amend this Rule.

Rule 401. Definition of "Relevant Evidence"

"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.

LEXSTAT OHIO EVID R 402

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Ohio Rules Of Evidence
Article IV Relevancy And Its Limits

Ohio Evid. R. 402 (2011)

Review Court Orders which may amend this Rule.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio. Evidence which is not relevant is not admissible.

LEXSTAT OH EVID R 403

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Ohio Rules Of Evidence
Article IV Relevancy And Its Limits

Ohio Evid. R. 403 (2011)

Review Court Orders which may amend this Rule.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Undue Delay

(A) Exclusion mandatory.

Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(B) Exclusion discretionary.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.