
In the Supreme Court of Ohio

DEATH PENALTY APPEAL
APPEAL FROM THE STARK COUNTY
COURT OF COMMON PLEAS
CASE NO. 2009-CR-0859

STATE OF OHIO,
Plaintiff-Appellee,
v.
JAMES MAMMONE, III,
Defendant-Appellant

**MERIT BRIEF OF PLAINTIFF-APPELLEE,
THE STATE OF OHIO**

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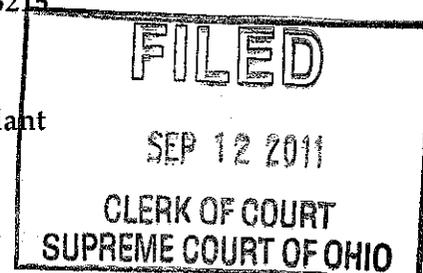


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PREFACE

For the sake of simplicity, the state adopts Mammone's key to describe transcript references:

Voir Dire: VD(Volume) page.

Trial Phase: TP(Volume) page.

Penalty Phase: PP(Volume) page.

Single miscellaneous hearing volumes will be referred to by date and page number.

STATEMENT OF CASE AND FACTS

Summary of Proceedings below.

On June 8, 2009, James Mammone, III murdered his five year-old daughter Macy Mammone and his three year-old son James Mamone IV, and their maternal grandmother, Margaret Eakin.

On June 17, 2009, the Stark County Grand Jury returned an indictment charging Mammone with the aggravated murder of Margaret Eakin, R.C. §2903.01(A) and/or (B), with two death penalty specifications – course of conduct, R.C. §2929.04(A)(5) and aggravated burglary, R.C. §2929.04(A)(7). The count also contained a firearm specification, R.C. §2941.145. For the killing of his children, Macy and James IV, Mammone was charged with aggravated murder with two death penalty specifications, course of conduct, R.C. §2929.04(A)(5) and killing of a child under the age of thirteen, R.C. §2929.04 (A) (9).

Mammone was further charged with two counts of aggravated burglary, R.C. §2911.11(A)(1) and/or (2), each with a firearm specification, violating a protection order, R.C. §2919.27(A)(1) and attempt to commit arson, R.C. §2923.02(A) and R.C. §2909.03(A)(1). Mammone was charged with aggravated murder alternatively as the principal offender or with prior calculation and design, Indictment June 17, 2009.

Mammone pled not guilty to the charges and the matter proceeded to trial by jury in the Stark County Court of Common Pleas, the Hon. John Haas presiding.

Mammone filed seventy-nine pre-trial motions. Included was a motion for a change of venue. After a hearing on the matter, during which Mammone argued saturation of potential jurors with publicity of the murders, the court overruled the motion.

The guilt phase of the trial began on January 11, 2010. The State called sixteen witnesses including Mammone's ex-wife and the mother of his two children, Marcia Eakin. Several exhibits were introduced including the .38 caliber Berretta used to kill Margaret Eakin, the Chicago Cutlery butcher knife used to kill the children and the ax handle with holes drilled and filled with nails Mammone intended to use to cut out the womb of his ex-wife. Mammone chose not to dispute much of the evidence; only the firearm specification included in the aggravated burglary of his ex-wife's apartment.¹

At the conclusion of four days of trial, the jury found Mammone guilty as charged in the indictment.

A separate and subsequent penalty trial was conducted some five days later. The state presented no witnesses. Mammone presented a five hour unsworn statement which began with his childhood and ended with his description of the killings of his children - butchered while sitting in their car seats in the back of his Oldsmobile - and the killing of Margaret Eakin, his former mother in law - shot two times and beaten in her home.

Mammone's parents testified. The penalty phase testimony concluded with Jeffrey Smalldon, Ph.D. who opined that Mammone with an average to superior IQ of 117, had a personality disorder not otherwise specified with schizotypal borderline and narcissistic features.

At the conclusion of this penalty phase, and after two hours of deliberations, the jury found that the aggravating circumstances of the killings outweighed the mitigating circumstances and sentenced Mammone to death for each of the three aggravated murders.

¹VD(I), 16-24.

On January 22, 2010, Mammone returned to the trial court for a sentencing hearing. The trial court independently reviewed the evidence of the aggravating circumstances and the mitigating factors and found that the aggravating circumstances outweighed the mitigating factors. Accordingly, the trial court accepted the jury's recommendations and imposed three consecutive sentences of death; one for each aggravated murder.²

The trial court further sentenced Mammone to ten years for each aggravated burglary and twelve months for attempted arson. The court merged the charge of violating a protection order with one of the aggravated burglary charges and imposed a mandatory three year sentence for each of the three gun specifications. Mammone was ordered to serve the sentences consecutively.

The trial court issued a written opinion pursuant to R.C. §2929.03(F) (App. App. A-13-22).

Mammone now brings this direct appeal.

²Opinion of the Court, Jan. 26, 2010, A-13-22, Appellant's Merit Brief.

The Trial - Guilt Phase

The killings of Macy and James Mammone IV

What greeted the police on Sunday, June 8, 2009 was unimaginable; two children, ages 5 and 3 were dead - their throats slashed - sitting in their car seats in the back of their father's car. Between the children was a dried up bouquet of the wedding flowers carried by their mother, Marcia Eakin, on the day she married Mammone. (TP(V), 204.)

On the floor of the back seat was a Chicago Cutlery knife, its eight inch blade covered with the blood of Macy and James Mammone IV. In the front passenger seat was a wedding photo and a box of ammunition under it. A .38 caliber Beretta was also found on the front seat with the hammer cocked and a live round in the chamber. The magazine of the pistol held three rounds. An ax handle was found in the front with holes drilled through it and nails inserted into the holes. (TP(V)159, 204-217.)

Mammone was removed from the driver's seat of the car and arrested. His children were removed by the coroner, who cut the seat belts from their car seats and placed them in white sheets. Canton paramedics took the children, still strapped in their car seats, to the coroner's office where their autopsies were performed by Stark County Coroner, P. S. S. Murthy, M.D.

Murthy removed the body of Macy from the car seat and first noted two stab wounds; one on her left lower face two inches in length and one on her left upper neck one and one half inches in length. Stab wound number three extended from the right neck to the left neck and measured two and one half inches in length. Marcy's trachea, esophagus and arteries were completely severed. Murthy noted that the depth of the wound was more than four inches and cut "through and through" to the vertebrae. Indeed, the neck wound was so deep that the back of

the car seat was cut. And Murthy noted something else - defensive wounds on the right hand and right leg. The tendons on the right hand were severed consistent with Macy grabbing the knife to prevent injury. Murthy explained that defensive wounds are inflicted when a person is alive and aware of what is happening and attempting to protect themselves from the oncoming assault. Murthy also found two bruises on Macy left knee caused by someone holding the area firmly. (TP(VI), 94-100).

Macy's cause of death was multiple stab wounds of the neck with massive blood loss. (TP(VI), 100).

James Mammone IV died in a similar fashion. Murthy observed a massive deep knife wound extending from James' right neck to the left neck which was four and one half inches deep and two and one half inches in length. His trachea and esophagus were completely severed. The wound went through and through and came out of his left upper back. Murthy also observed a defensive wound on James' right palm consistent with James having grabbed the knife. Murthy also noticed three bruises on James' right knee. James' cause of death, like Macy's, was stab wounds of neck with massive blood loss. (TP(VI), 133-116).

The killing of Margaret Eakin

Edward Roth lived across the street from Margaret and Jim Eakin, the parents of Marcia Eakin, Mammone's ex-wife. Around 5:30 am on June 8, 2008, Roth woke up when he heard arguing, screaming and two gunshots coming from the Eakin home. Roth called 911 and Police Officer Mark Diels was dispatched to the Eakin home. With his weapon drawn, he entered the home through the front door and after clearing the first floor went up the stairs to the second floor. (TP(V) 121-125, 133-136.)

At the top of the second floor, he saw a shell casing by the north wall. He then saw the head of Margaret Eakin covered in blood and broken lamp parts covered in blood. Margaret Eakin appeared to be dead. An ambulance arrived and took her to Aultman Hospital where she was pronounced dead. (TP(V) 137-138.)

The body of Margaret Eakin was taken to the office of the Stark County Coroner and an autopsy was performed by the coroner, Murthy. Murthy observed a gunshot wound on her left upper lip which entered her skull cavity causing extensive injury to her brain. Murthy observed stippling on the left side of her face meaning that the firearm was discharged at close range - six to eight inches. Murthy also observed a gunshot wound to her right upper shoulder which perforated the skin and entered her chest cavity causing massive hemorrhaging. It was Murthy's opinion that both gunshot wounds were fatal. Murthy recovered remnants of a hollow point bullet from the right occipital lobe of Margaret Eakin's brain. The bullet was sent to the crime laboratory and compared to the pistol found in Mammone's Oldsmobile at the time of his arrest. Michael Short of the crime laboratory opined that the bullet was fired from the 38 caliber Berretta pistol found with Mammone.

Murthy observed other injuries; at least twenty blunt force injuries to the left side of her head, cheek and ear. These injuries were caused by a blunt object such as the butt of a gun or a lamp. Margaret Eakin's death was caused by gunshot wounds to the head and trunk accompanied by multiple blunt impact injuries to the head. (TP(VI) 120-131, 217, 228-230.)

Burglary at Marcia Eakin's home

After her divorce from Mammone, Marcia Eakin rented an apartment about a block and one half away from her parents' home on Poplar Avenue. On June 8, 2009 about 5:30 am, she heard a car roar up the driveway of her home on Aultman Avenue in Canton, Ohio. (TP(V) 46, 72.)

She looked out the window in the children's bedroom and saw her ex-husband, Mammone, pouring gasoline over her friend Ben Carter's truck. Carter had spent the night with her. She then heard glass breaking and Mammone was in her apartment. Mammone then went back outside and started throwing things at the window. (TP(V) 74). Mammone explained his intentions were to burn the Ford truck that was in the driveway and then break into his ex-wife's house. Here is Mammone:

...I took a baseball bat. I smashed the screen window and then I also smashed the main door. I reached inside I undid the deadbolt and I undid the normal door latch and reached in and undid the screen door latch and I entered the premises.

Mammone's statement, State's Exhibit 65 at 10.

Mammone took his firearm, a bag full of butcher type knives, a baseball bat and the "weapon" that he had manufactured by drilling holes in an ax handle and inserted nails. His intention was not to kill his ex-wife but only to maim her. He would have, however, killed whoever had the Ford truck. (Mammone's Statement, State's Exhibit 65 at 11).

Mammone did not carry out his plan, however, explaining that he was "cautious" because when his ex-wife left him, she took some firearms. He didn't want to be a "sitting duck." (Mammone's statement, State's Exhibit 65 at 12).

Having failed in setting the truck on fire or carrying out his plan to maim his ex-wife, Mammone left, hoping to find a lighter and return. (Mammone's statement, State's Exhibit 65 at 13)

Meanwhile, Marcia Eakin called 911. Several deputy sheriffs arrived and saw the back door forced open and the door and wood framing pieces laying on the floor. The deputies knew about the shooting on Poplar Avenue, and took Marcia and Carter to the Canton police station (TP(V) at 106).

Mammone confesses and explains his reasons for the killings

After Mammone was arrested in the driveway of his apartment, he was taken to the Canton police station. There, after waiving his rights to any attorney, he gave a taped interview to Detectives Victor George and L. Baroni. Mammone's statement was chilling as he detailed the killings. (TP(V) 174-175.)

First, he killed his children, Macy and James Mammone IV by slitting their throats while they were strapped in their car seats.³ Mammone stabbed the children in the parking lot of the church where he married his ex wife - 4-5 times per child. Mammone described the butcher knife he used, "...it was a standard butcher knife.... it's a Chicago Cutlery brand ...with a wood handle and I believe 8" would be the length of the blade and it was one where it starts thin and it get fairly larger as it goes...." When asked why he didn't use the gun he explained: "noise was a factor and also I wasn't sure how dependable the gun was gonna be as far as jamming goes and also I believe that the magazine six plus one in the chamber and I only had one magazine for the

³Although Mammone claimed the children were asleep, later evidence revealed they fought for their lives.

firearm and I wanted to make sure that I was conserving rounds for what may be ahead of me.” (State’s Exhibit 65 at 16).

Then, Mammone drove straight to his mother in law’s house, broke into the home and went upstairs where his in-laws slept. He found his mother-in-law in the guest bedroom and shot her hitting her in the chest. When the gun jammed, he used the pistol to hit her in the head. When the pistol, covered in blood, slipped out of his hands, he hit her with a lamp. Not stopping, he unjammed the pistol and shot her again. In all, Mammone hit his mother- in- law with the pistol and a lamp at least a dozen times and shot her two times with the pistol. (State’s Exhibit 65 at 6).

After killing his two children and Margaret Eakin, Mammone traveled to his ex-wife’s home with a very specific plan. Here is Mammone:

I had determined in my mind exactly what I wanted to do to here.

.....

Um, it was, you’ll find in my car, I’ve got uh hickory, I think it’s like a shovel handle or an ax handle and I put nails through it, I think about 16 of ‘em. I was going to um beat her over her uterus area so she couldn’t conceive children. I was planning on taking a baseball bat and breaking her ankles with it because that was a fear that she had from a movie she had seen once. I was going to cut out her tongue for not speaking to me.

State’s Exhibit 65 at 21.

When asked why he killed his mother in law, Mammone explained saying, “[B]ecause she’s my wife’s best friend and taken care of the children and is just uh, I mean that’s just a major blow to my wife to not have her mother.” (State’s Exhibit 65 at 17). When asked

why he killed his children, Mammone explained that his motive was to hurt his ex-wife and because he would not accept his children growing up in a household where both parents were not present day in and day out. (State's Exhibit 65 at 22).

After the killings, Mammone drove to the police station in Independence, Ohio. Mammone claimed he went into "another state of consciousness" and came to approximately 8:30 a.m. He called his aunt and told her he was going to go back to Canton and turn himself in. He called his uncle, a senior security officer at a hospital, thinking he could arrange to go to the hospital where the children could be placed in bags. Then he devised a better plan - he would go to his apartment, switch cars and leave the children in the Oldsmobile so somebody could come and get them - he didn't want his mom or aunt to see the children. (State's Exhibit 65 at 29).

Mammone was arrested in the Oldsmobile with his dead children in the back seat when he returned to his apartment.

The Trial - Penalty Phase

Mammone's unsworn statement

Mammone gave a five-hour unsworn statement beginning with his earliest childhood memories and ending with the events at issue. His main focus was his anger towards Marcia for walking away from their marriage and his nearly year-long planning to exact revenge for her audacity. Mammone portrayed himself as the victim of a less than ideal childhood and marriage which justified his murderous actions.

Dr. Jeffery Smalldon

Smalldon completed a forensic psychological evaluation of Mammone. He met with Mammone seven times for a total of approximately 20 hours and administered numerous cognitive and neuropsychological tests. Smalldon also interviewed Mammone's parents, his aunt and uncle, two mental health professionals who had treated Mammone in 2007 and 2008 and Mammone's divorce attorney. (PP(I) 376-378, 397.)

Smalldon opined that at the time of the offenses, Mammone was experiencing "extreme emotional distress" and was "suffering from a severe mental disorder." Nonetheless, Smalldon concluded that Mammone was sane and the symptoms associated with his personality disorder were not so severe that they prevented him from knowing the wrongfulness of his actions. (PP(I) 374.)

Smalldon diagnosed Mammone with a personality disorder not otherwise specified with three features: schizotypal, borderline and narcissistic. His testing revealed, however, that Mammone did not suffer any type of brain impairment and is not insane, bipolar, delusional, schizophrenic or an alcoholic. Mammone is in fact, of above average to superior intelligence, possessing a full scale IQ of 117. (PP(I) 400-402, 416, 426-431.)

Mammone's Parents

Mammone's parents, James Mammone II and Gilise "Lisa" Mammone also testified on his behalf.

Lisa Mammone indicated that she divorced Mammone's father when Mammone was ten years old. She testified that the senior Mammone was mentally and physically abusive to her and a heavy drinker. Conversely, however, Lisa indicated that Mammone's maternal and paternal

grandparents adored him and his grandfather Mammone was a significant role model in Mammone's life. She described her son's relationship with his children, characterizing him as a wonderful and doting father. (PP(I) 340-346.)

Mammone's father did not recall being abusive towards his wife and son, but admitted he often blacked out when he drank. He further testified that after the divorce, Mammone spent every weekend with him. He therefore felt they had a great relationship. He admitted that he and Mammone had a distant relationship after Mammone attained adulthood, but felt it was because Mammone did not want to see him. (PP(I) 313, 317, 320.)

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.
CONSTITUTION AMENDMENTS V, VI, VIII, IX AND XIV;
OHIO CONSTITUTION ARTICLE I SECTION 5 AND 16.**

In his first proposition of law, Mammone complains that pretrial publicity in this case was so pervasive as to warrant a change of venue. He asserts that the trial court thus abused its discretion when it denied his motion for a change of venue.

Applicable Law

A change of venue is appropriate only when it “appears that a fair and impartial trial cannot be held in the court in which the action is pending.”⁴ A denial of a motion for a change of venue is reviewed under an abuse of discretion standard.⁵ Abuse of discretion connotes more than an error of law or judgment. Rather it implies that the decision was unreasonable, arbitrary or unconscionable.⁶

An appellant who argues that pretrial publicity has denied him a fair trial must ordinarily show that one or more jurors were actually biased.⁷ If the record on voir dire establishes

⁴Crim.R. 18(B).

⁵*State v. Maurer* (1984), 15 Ohio St.3d 239, 250-251, 473 N.E.2d 768, 780.

⁶*Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, 1142.

⁷*State v. Treesh* (2001), 90 Ohio St.3d 460, 464, 739 N.E.2d 749, 759.

prospective jurors have been exposed to pretrial publicity but affirmed they would judge the defendant solely on the law and the evidence presented at trial, it is not error to empanel such jurors.⁸ Prejudice may be presumed in rare cases where the pretrial publicity is sufficiently prejudicial and inflammatory and saturated the community where the trial was held.⁹

Cases of presumed prejudice are rare, and the voir dire process is the best way to determine bias on the part of potential jurors.¹⁰ Nonetheless, Mammone contends that prejudice should be assumed in his case. He argues he could not obtain a fair trial in Stark County based on the media attention he attracted before trial by sending a letter to the Canton Repository, and that the paper subsequently published. He further complains of public comment on online news articles, the case becoming the subject of daily blogs, radio shows, television broadcasts, online chat rooms and twitter feeds.

But where news reports are factual and noninflammatory in character, the possibility of a fair trial is not precluded.¹¹ Mammone does not identify any news accounts that were nonfactual but faults the media for publishing his prior conviction for domestic violence. He further complains that there was open and continuous discussion of the case by bloggers on various websites and that their comments were inflammatory.

⁸*State v. Maurer* (1984), 15 Ohio St.3d 239, 251-252, 473 N.E.2d 768, 781.

⁹*State v. Yarbrough*, 95 Ohio St.3d 227, 2002 -Ohio- 2126, 767 N.E.2d 216 at ¶86

¹⁰See *State v. Lundgren* (1995), 73 Ohio St.3d 474, 479, 653 N.E.2d 304, 313-314; *State v. Swiger* (1966), 5 Ohio St.2d 151,164, 214 N.E.2d 417, 427, 34 O.O.2d 270.

¹¹*State v. Fairbanks* (1972), 32 Ohio St.2d 34, 37, 289 N.E.2d 352, 355.

In support of his argument, Mammone relies in part on the United States Supreme Court case of *Sheppard v. Maxwell* (1966), 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, where the Court granted habeas corpus relief to a defendant convicted of murder in a jurisdiction inundated with publicity implying or proclaiming the defendant guilty prior to and during the trial. The court held that nothing can prevent the press from reporting on a trial, “[b]ut where there 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.”¹² The United States Supreme Court has held that to presume prejudice, the pretrial publicity must so deeply pervade the trial process that it prevents potential jurors from being capable of removing their personal bias about the defendant.¹³

But the facts in *Sheppard* are distinguishable from the present case. In that case, the press was permitted access to the crime scene and published photos along with lurid and inflammatory stories both before and during trial. The press attended and photographed a public inquest called by the county coroner as well as the jury viewing of the crime scene. A pool of only 75 prospective jurors were called for duty. The names and addresses of all veniremen were published and as a result, each prospective juror received anonymous letters and telephone calls, as well as calls from friends, regarding the case. During trial, testimony of witnesses was published daily. Further, despite this persistent, extensive and inflammatory media coverage, the *Sheppard* jurors were not sequestered. The court did little to control the courtroom, permitting

¹²*Sheppard v. Maxwell* (1966), 384 U.S. 333, 363, 86 S.Ct. 1507, 16 L.Ed.2d 600.

¹³See *Sheppard v. Maxwell*; *Irvin v. Dowd* (1961), 366 U.S. 717, 81 S.Ct.1639, 6 L.Ed.2d 751; and *Rideau v. Louisiana* (1963), 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663.

the media to dominate the court room and create what the Supreme Court referred to as a “carnival atmosphere.”¹⁴

Here, there is no evidence of similar sensationalism. The court maintained decorum among media and spectators in the courtroom and in every aspect of the proceedings. A pool of 338 potential jurors were patiently and thoroughly questioned on voir dire. (Transcript of hearing, December 22, 2009 at 59.) After the jury was impaneled, jurors were consistently cautioned by the court to avoid reading, watching or listening to any news about the trial.

During Mammone’s hearing on his motion for a change of venue, while the trial court noted that the Canton Repository’s decision to publish Mammone’s letter was troublesome, it concluded that publicity on the case was not so pervasive as to forego attempting to seat a jury. (Motions Hearing November 12, 2009, 28-35.)

Voir Dire is the Best Test

Indeed, it has long been the law in Ohio that “a careful and searching voir dire provides the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality.”¹⁵ The mere fact that there has been extensive pretrial publicity and exposure to prospective jurors does not necessarily mean that a fair and unbiased jury cannot be chosen and that a change of venue is mandated.¹⁶ There is no requirement that prospective jurors

¹⁴*Sheppard*, 384 U.S. 333 at 340-345, 358-359.

¹⁵*State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961 911 N.E.2d 242, ¶59 quoting *State v. Bayless* (1976), 48 Ohio St.2d 73, 98, 2 O.O.3d 249, 357 N.E.2d 1035.

¹⁶See *State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504, ¶ 30, *cert. denied* (2005), 546 U.S. 851; *State v. White*, 82 Ohio St.3d 16, 21, 1998-Ohio-363, 693 N.E.2d 772, 777-778, *cert. denied* (1998), 525 U.S. 1057 (noting that it will be rare for a court to presume prejudice from pretrial publicity). See also *Nebraska Press Assn. v. Stuart* (1976), 427

be completely ignorant of the facts and issues of a particular case.¹⁷ Thus, a careful and searching voir dire is the appropriate and adequate vehicle for determining whether prospective jurors can put aside whatever they have been exposed to about the case and judge the case solely on the facts and law presented to them at trial.¹⁸

Publicity was not so pervasive as to warrant a change of venue

In this case, a careful and searching voir dire established that the pretrial publicity did not so deeply pervade the trial process that it prevented potential jurors from being capable of removing their personal bias about Mammone and fairly considering the evidence presented at trial.

Before individual questioning by the court and counsel, all prospective jurors in this matter completed questionnaires regarding pre-trial publicity. Of the twelve seated, jurors 381, 384 and 418 knew nothing about the case. (VD(I) 274-275, VD(II) 205-206.)

Mammone specifically attacks the pretrial knowledge of four jurors: 372, 438, 448 and 461. It should be noted that Mammone challenged none of these jurors for cause nor did he renew his motion for a change of venue at the conclusion of voir dire. (VD(I) 321-322, VD(II) 268 and VD(III) 79-80, VD(IV) 67.)

U.S. 539, 554 (noting that “pretrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial”).

¹⁷See *State v. Thompson* (1987), 33 Ohio St.3d 1, 5, 514 N.E.2d 407, 412. See also *Irvin v. Dowd* (1961), 366 U.S. 717, 722.

¹⁸See, e.g., *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 31, cert. denied (2006), 548 U.S. 912; *Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504, at ¶ 31; *State v. Maurer* (1984), 15 Ohio St.3d 239, 252, 473 N.E.2d 768, 781-782, cert. denied (1985), 472 U.S. 1012. See also *Patton v. Yount* (1984), 467 U.S. 1025, 1035.

On her questionnaire, Juror 372 indicated she had read about the case in the paper. Under questioning by the state, 372 indicated that although she had formed some preliminary opinions, she could put those opinions aside and consider the case from both sides. She further indicated she could be fair to both the state and the defense. Juror 372 acknowledged that the press does not always get things right and assured the court that she would decide the case based solely on the evidence presented in the court room. (VD(I) 269-271.)

Juror 438's questionnaire indicated she had read some articles about the case, but had formed no opinions. (VD(II) at 207.) She was not questioned further by either side.

Juror 448 indicated that his wife and co-workers had discussed the case with him and they had expressed some opinions. Juror 448, however, had formed no opinion based on these contacts. Further, he indicated that these discussions would not effect his ability to be fair and impartial. (VD(II) 208-212.)

Juror 461 indicated she had read the letter that Mammone wrote to the Canton Repository and that the Repository had subsequently published and had formed some opinions based on that letter. 461 also indicated, however that she understood that the letter may not be evidence in the case. She assured the court that she would base her opinion solely on what she heard in the court room and only what she heard in the courtroom. (VD(III) 28-29.)

Mammone complains that he was denied a fair trial because “almost every juror” had heard about, read about or discussed the case. Even if that were true, that fact does not require the presumption of prejudice leap that Mammone asks this Court to make. Mammone was entitled to an impartial jury, not jurors that had never heard about his case.

The trial judge was in the best position to evaluate each juror's demeanor and fairness.¹⁹ Jurors 372, 438, 448 and 461 all assured the court and counsel that they could set aside any pre-formed opinions and sit as fair and impartial jurors. Mammone complains that these declarations are insufficient, but yet the United States Supreme court in *Irvin v. Dowd* (1961), 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751, recognized that to require anything more is to set an impossible standard. Jurors are not required to be "totally ignorant of the facts and issues involved...It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court...[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits."²⁰ Although *Irvin* was decided more than 40 years ago, this statement rings especially true today in our era of instant internet news access and online communication. Voluminous media reports and the online conversations Mammone complains of are an inescapable result of modern technology and evolving methods of communication.

In short, "[p]rominence does not necessarily produce prejudice, and juror *impartiality*...does not require *ignorance*."²¹ A presumption of prejudice is applicable only in the extreme case and Mammone has not established that this is such a case. Moreover he has failed

¹⁹*State v. Lundgren* (1995) 73 Ohio St.3d 474, 480, 653 N.E.2d 304, 314.

²⁰*Irvin v. Dowd* (1961), 366 U.S. 717, 722-723, 81 S.Ct. 1639, 1642-1643, 6 L.Ed.2d 751, *Reynolds v. United States*, (1879) 98 U.S. 145, 155-156, 25 L.Ed. 244.

²¹*Skilling v. U.S* (2010), 130 S.Ct. 2896, 2914-15, 177 L.Ed.2d 619, emphasis original, citing *Irvin v. Dowd*, (1961) 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751.

to demonstrate that one or more jurors was actually biased. What is more, Mammone's letter to the Canton Repository was his own doing. He should not now benefit from his own misstep. The trial court did not err in denying Mammone's motion for a change of venue and the first proposition of law should be rejected.

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 RIGHT TO DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND A FAIR AND RELIABLE SENTENCE. U.S. CONSTITUTION AMENDMENTS VIII, XIV; OHIO CONSTITUTION ARTICLE I, SECTIONS 9, 10 AND 16.

Introduction

In his second proposition of law, Mammone argues that he did not receive a fair trial because two jurors - Juror 418 and Juror 448 - were biased in favor of the death penalty by expressing opinions rejecting other forms of punishment. Mammone's argument fails for two reasons. First, Mammone did not challenge for cause Jurors 418 and 448 and his arguments cannot meet the plain error standard.²² Second, the jurors both insisted they would follow the law regarding capital sentencing and could set aside any opinion they might hold and decide the case on the evidence.

Standard of Review

The standard for determining whether a prospective juror should be excluded for cause due to her or her views on capital punishment is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt* (1985), 469 U. S. 412, 414. A trial court's judgment concerning whether a juror should be excluded for cause is owed deference by reviewing courts because "[t]he trial court is in a superior position to assess demeanor, a factor critical in assessing

²²VD(II), 270-271.

the attitude and qualifications of potential jurors.” *Uttecht v. Brown* (2007), 551U.S. 1, 127 S. Ct. 2218 167 Led 2d 1014. “[A] trial court’s ruling on a challenge for cause will not be disturbed on appeal unless it is manifestly arbitrary and unsupported by substantial testimony, so as to constitute an abuse of discretion.” *State v. Williams*, 79 Ohio St. 3d 1, 17-18, 2007-Ohio- 407, 679 N.E.2d 646, 654. Even when a juror shows a predisposition in favor of imposing the death penalty, a trial judge does not abuse his discretion in denying a challenge for cause if the juror states that he will follow the law and the court’s instructions. *State v. Jackson*, 107 Ohio St.3d 53, 61, 2005-Ohio-5981, 836 N.E.2d 1173; *State v. Mack*, 73 Ohio St.3d 502, 503, 1995-Ohio-273, 653 N.E.2d 329 (1995). “Clearly a juror who is incapable of signing a death verdict demonstrates substantial impairment in his ability to fulfill his duties.” *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶34.

Juror 448 insisted he would follow the law on capital sentencing

Juror 448 was among the second batch of prospective jurors to be voir dired by the trial court and defense counsel. When asked by the trial judge whether any of those jurors were “religiously, morally or otherwise against the death penalty,” Juror 448 responded:

[448] I have some religious problems with it, but I would want to follow your orders. I agree the State has the authority to do that.

[COURT] And so if appropriate, you could do it as a juror?

[448] I would think so, do my best.

VD(II), 200.

Again, under questioning from the state, Juror 448 insisted he would follow the

law, explaining “[I] would try to do my best to, you know, make my decision based on the evidence” and set aside any personal opinions.²³

The state continued to press Juror 448 on his religious beliefs regarding the death penalty:

[BARR] Juror 448, you expressed that you have – you support it but you’re not sure due to your religious views if you could do it?

[JUROR 448] Correct.

[BARR] Does your church take the position?

[JUROR 448] Our church in general leans towards being passivist; yeah, but I myself, I support the State’s right to the death penalty. I believe that an eye for an eye is in the Bible, and that’s just kind of the way I feel sometimes, but due to my background and the way I was raised and this and that, I am kind of torn; although, I would, like I said, I want to honor the law of the land.

VD(II), 235.

Some period later, Juror 448 again insisted he could follow the law with respect to mitigating factors:

[BARR] And that’s what I’m looking for. Like I said, there is no correct answers, okay, but I just need to know can you consider the mitigating factors that are presented.

[JUROR 448] Yes, Sir

[BARR] The mitigating factors, as I explained, are things that might cause you to consider a sentence less than death?

[JUROR 448] It does. The rule of the law of the land, I would consider it.

[BARR] So you’ll follow the Judge’s instructions?

[JUROR 448] Yes, sir.

²³VD(II), 210

VD(II), 236-237.

Still, under questioning by Mammone, Juror 448 expressed a view favored by Mammone the age of the victims - two children - did not deserve a greater punishment than the killing of an adult:

[JUROR 448] Right. I don't believe in, you know, a younger person or older person is of less or more value. When we look at killing someone, if it's your wife who is 45 years old or if it's my child who is two years old, they are just as important to each of us.

And for me to say okay. Well, this person killed a child, he is more guilty than a guy who killed someone's wife who is 50 years old. That's my...

[LOWRY] And that's all I'm asking for.

VD(II), 250-251.

And finally, upon further questioning by the trial judge, Juror 448 indicated that he could follow the law - he was not just giving it "lip service."²⁴

Juror 418 insisted she would consider the circumstances before imposing death.

Juror 418 was out of town when the killings occurred and knew nothing about the case.²⁵

Under questioning by the state, Juror 418, after expressing some confusion regarding reasonable doubt, indicated she could, under appropriate circumstances, impose the sentence of death.²⁶ Still, Juror 418 expressed the opinion that she would consider the mitigating circumstances, saying:

²⁴VD(II), 265.

²⁵VD(II), 206.

²⁶VD(II), 238-239.

Well, I also put on there that there could possibly be circumstances that I would know nothing, you know. I mean sometimes a person has a mental issue, you know, they go wild and do something. I think those type of things, you know, should come into consideration.

So I'm not firm on that. I think that sometimes there are circumstances that you need to think about, but if the person is of sound mind and went out and just decided to kill a whole bunch of people, then we all know, we all know that you can't go out and kill somebody without expecting some type of consequences, and so they should have thought about this before they did it.

And 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.

.....

But this person that's in the courtroom as far as I'm concerned, he's innocent right now.

VD(II), 248.

Due deference must be given to trial court

Mammone never moved to excuse Juror 418 or Juror 448 for cause. And the trial court independently evaluated whether the jurors could follow the law, even asking Juror 448 whether his expressions of being able to follow the law were truly his intention and not just lip service. The *Witt* standard is simply not met here where there is no evidence that Jurors 418 or 448 would consider no less than the death penalty. Mammone's reading of the views of Jurors 418 and 448 is misplaced.

Indeed, early on, Juror 448 expressed some misgivings about the death penalty, stating that his church took a more "passivist" approach, but continued that he could support the "law of the land."

As for Juror 418, she clearly expressed the view that mitigating circumstances might militate against death.

Both jurors stated they would follow the law and the court's instructions. While both jurors finally concluded they were not opposed to the death penalty and would be able to vote for such a sentence, they both stated they would follow the law and consider mitigating circumstances. This Court should give deference to the trial court's opinion that both jurors could follow the law and the instructions of the trial court. *State v. Cornwell*, 86 Ohio St.3d 560, 564, 1999-Ohio-125, 715 N.E.2d 1144, 1149 ("Deference must be paid to the trial judge who sees and hears the juror.")

True, a defendant has a constitutional right to exclude for cause any prospective juror who will automatically vote for the death penalty. *Morgan v. Illinois* (1992), 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L.Ed. 2d 492. But here, there is no such evidence. Both jurors opined that they would consider the circumstances. Based on the totality of the voir dire, the trial court properly concluded that Jurors 418 and 448 would consider mitigating factors in accordance with instructions and not automatically vote for death. This is all that Mammone was entitled to.

Mammone's second proposition of law should be overruled.

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. CONSTITUTION AMENDMENTS V, VI, VIII, XIV; OHIO CONSTITUTION ARTICLE I, SECTION.

Introduction

Mammone's third proposition of law consists of a series of complaints alleging ineffective assistance of trial counsel in the guilt phase and the penalty phase. Mammone's complaints during the guilt phase center around alleged voir dire errors and objections not made. His complaints during the penalty phase include failure to properly investigate and prepare mitigation evidence, a subject more properly raised in Mammone's petition for post-conviction relief. Mammone's arguments fail where the record reveals his trial counsel adequately identified and advanced what little facts there were in Mammone's favor.

General principles governing ineffective assistance of counsel claims

The legal principles that govern claims of ineffective assistance of counsel are well known to this Court as established in *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed. 2d 674 and *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. To establish ineffective assistance, the defendant must prove that (1) trial counsel's performance fell below an objective standard of reasonableness, and (2) the substandard performance actually prejudiced the defendant. "To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's error, the

result of the trial would have been different.” Reversal is warranted only where a defendant demonstrates that there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.”²⁷

Finally, trial counsel’s performance is scrutinized with deference, making every effort to eliminate the distorting effect of hindsight and evaluate the conduct from counsel’s perspective at the time. *Bell v. Cone* (2002), 535 U.S. 685, 698, 122 S.Ct. 1843, 152 L.Ed 2d 914.

Alleged Claims of Ineffective Assistance During Guilt Phase of Trial

1. Failure to weed out jurors in favor of the death penalty

Mammone again claims that Jurors 418 and 448 demonstrated during questioning in voir dire that they would automatically apply the death penalty if Mammone was found guilty of the killings, ignoring any other sentencing options. Mammone faults his trial counsel for not removing the jurors for cause.

True enough, trial counsel did not challenge either juror for cause. Yet, the record demonstrates that such conduct may very well have been trial strategy as both jurors expressed opinions that were favorable to Mammone’s strategy. The strategy of trial counsel, during voir dire, was to soften the impact of Mammone’s heinous crimes - the killing of his two children by slashing their throats. As such, counsel questioned the jurors on the premise that the killing of children should not receive a greater weight than the killing of adults. Juror 448 got it. And Juror 448 expressed reservations about the death penalty, indicating he was “kind of torn” based on his religious beliefs.²⁸

²⁷*State v. Bradley*, supra, paragraph three of syllabus.

²⁸TP(II), 234.

So too, Juror 418 demonstrated traits that were favorable to the defense. She was out of town when the killings occurred and knew nothing about the case.²⁹ Juror 418 also expressed that there could be circumstances when the death penalty would not be appropriate - like a mental issue, “they go wild and do something.”³⁰ Indeed, the very penalty phase defense that Mammone touted..

What is more, the trial court would not have removed either juror for cause. Example - Juror 412 expressed even more onerous beliefs about “eye for an eye” saying “...as long as there is a fair trial and convicted, I do believe eye for an eye, but like I said...I would look at other punishments too, but maybe more, tend to lean towards an eye for an eye.”³¹ Juror 412 also opined that the death penalty is appropriate in all cases where someone is convicted of aggravated murder, that he would always vote for the death penalty.³²

Counsel’s motion to have Juror 412 removed for cause was denied and counsel exercised a peremptory challenge to remove the juror.³³

In sum, Jurors 418 and Juror 448 expressed views that were favorable to Mammone’s strategy - that the killing of children should receive no more weight than the killing of an adult and that mental issues may militate against the death penalty. Moreover, it is pure speculation to

²⁹VD(II), 205.

³⁰VD(II), 248.

³¹VD(II), 243.

³²VD(II), 322. Juror 412 later agreed to follow the law and consider other sentencing options.

³³VD(II), 268, 270.

conclude that a motion for cause would have resulted in their removal. *State v. Cornwell*, 86 Ohio St.3d 560, 569, 1999-Ohio-125, 715 N.E.2d 1144, 1153 (“we will not second-guess trial strategy decisions such as those made in voir dire.” *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104 ¶217 (“Such speculation is insufficient to establish ineffective assistance.”))

“Trial counsel, who saw and heard the jurors, were in the best position to determine the extent to which prospective juror should be questioned.” *State v. Cunningham*, 105 Ohio St. 3d 197, 215, 2005-Ohio-7007, 824 N.E. 2d 504, 525.

2. Failure to weed out jurors irreparably tainted by pre trial publicity

Mammone claims that his trial counsel failed to effectively weed out jurors irreparably tainted by pre trial publicity, repeating the claim of proposition No. I. Yet, each of the jurors of which Mammone complains told the court they could set aside their knowledge of the case and decide it based on the evidence presented. In other words, they could be fair and impartial.

Moreover, Mammone fails to cite a single instance that shows his jury was contaminated by pre-trial publicity. Mammone admitted to the killings of his mother- in- law and children, told the jury he did it and in an unsworn five hour statement told them why he did it. There is no showing that the jury convicted him and sentenced him to death based on pre-trial publicity. Given the nature of the evidence presented, Mammone fails to show deficient performance or prejudice.

3. Failure to voir dire jurors about mitigating factors

Mammone again claims ineffective assistance in voir dire and proposes that proper questions were not asked about potential mitigating factors. This argument also fails.

As this Court has held, it is trial counsel who is in the best position to determine the extent to which prospective jurors should be questioned. *State v. Cunningham*, 105 Ohio St. 3d 197, 215, 2005-Ohio-7007, 824 N.E. 2d 504, 525. Moreover, this Court has found that “the conduct of voir dire by defense counsel does not have to take a particular form, nor do specific questions have to be asked.” *State v. Braden*, 98 Ohio St.3d 354, 373, 785 N.E.2d 439, 461 (2003).

Moreover, Mammone’s claims are contradicted by the record. Not only did Mammone’s counsel conduct a voir dire on the mitigating factors, but the trial court and the state did as well. Indeed, because of the questioning by all three entities, the jurors were well educated in the concept of mitigating factors. And the truth be told, there were a dearth of mitigating factors here.

[BARR] Mitigating factors will be defined by the Court. But briefly they are factors about any about an individual or an offense that weight in favor of a decision that a life sentence rather than a death sentence is appropriate. Everybody still with me?

....

So now you know. It’s not just the death penalty. There is a potential for four punishments here.

So I want to ask you some questions now that you know all of that.

VD(II), 216-217

At another point, Mammone’s counsel questioned the jurors about mitigation:

[LOWRY] What about the background about the individual charged? Would that – who the person was, what type of childhood he had; is that something that you could consider as far as a mitigating factor?

VD(II), 253.

Even so, the trial court assisted Mammone's counsel when a juror required some assistance:

[COURT] Well, counsel, let's move on. You know, this is very difficult because you're dealing with this in a hypothetical form. You haven't heard heard the testimony.

What we're really getting at here is whether or not you can follow the law as a juror. And if, in fact, the aggravating factors, which would be in this this case that there was multiple murders and two under the age of 13, those aggravating factors; the law says that if those aggravating factors outweigh in your minds anything in mitigation offered by the Defense against the imposition of the death penalty, you shall impose the death penalty.

So you, number one, have to agree that you could follow that law and impose the death penalty if that were proven, and number two, you have to indicate that you would fairly consider factors in mitigation no matter how you felt about the offenses that took place, because the murders themselves are not the aggravating factors, and that's a hard concept.

But what we're looking for as jurors who will say Judge, counsel, we will, in fact, consider factors in mitigation. We will not just automatically vote for the death penalty or automatically say we're not going to impose the death penalty. We're going to follow the law and do our job. It comes down to that.

VD(II), 255-256.

Mammone's claim that the state repeatedly asked jurors if they could impose the death penalty is simply not supported by the record. As an example, when questioning Juror 501, the state asked whether the juror could listen to the mitigating factors and consider those mitigating factors.³⁴

[BARR] So you're not going to go back there and just say hey, we found this guy guilty; the only thing that we can do now is sentence him to death?

[JUROR 501] No, sir.

³⁴VD(III), 123.

VD(III), 124.

Indeed, when Juror 565 said that she would automatically consider the death penalty and not life sentences, the state challenged her for cause.³⁵

In sum, the strategy of Mammone's trial counsel may very well have been to let the trial court and the state explain the concept of mitigating factors. Not only has Mammone failed to demonstrate deficient performance in the voir dire questioning of jurors but he has failed to show prejudice where the record demonstrates the jurors were fully aware of the concept of mitigating factors.

None of Mammone's claims of ineffective assistance during the guilt phase were ineffective at all or rose to the level of a violation of the Sixth Amendment. Mammone's claims that trial counsel handled voir dire poorly are not supported by examples of improper questioning. Moreover, Mammone fails to show prejudice. The evidence in the record establishes that a systematic and proper voir dire was conducted. Jurors 372, 465, 448, 381, 384, 438, 502, 430, 474, 482, 461, 456, and 418 were chosen as jurors. Jurors 510, 415, 525, 521, 482, 487 were chosen as alternate jurors. All jurors opined they could follow the law, would not automatically vote the death penalty, would listen to the evidence presented at trial and consider mitigating circumstances. Mammone's claims of ineffective assistance at the guilt phase should be overruled.

³⁵VD(II), 259, 281.

Alleged Claims of Ineffective Assistance During Penalty Phase of Trial

1. Alleged failure to properly investigate and prepare the testimony of Mammone's parents.

Mammone first complains that the testimony of his parents, Gilise “Lisa” Mammone and James Mammone Jr. were a disaster. Instead of generating sympathy for Mammone, he claims they generated nothing more than contempt. Mammone blames this state of affairs on the failures of his trial counsel to “investigate” and “prepare” their testimony.

In this direct appeal, of course, there is no way to know this, as such an argument is more appropriate for a post conviction relief petition. Based on the record before this court, Mammone’s claims are nothing but speculation. And Mammone fails to show prejudice.

In arguing that trial counsel failed to properly investigate and prepare, Mammone relies on just two cases, *Hamblin v. Mitchell*, CA6, 345 F.3d 482, (Ohio) 2003 and *Combs v. Coyle* 205 F.3d 269, CA6 (Ohio), 2000. Those cases are unavailing.

First, both cases were before the federal courts after their direct appeals were exhausted in a venue where evidence outside the record was available. In *Hamblin*, trial counsel in an affidavit admitted that he did nothing in preparation for the penalty phase of the trial, acknowledged a lack of strategy and presented the jury with no mitigating evidence. *Hamblin*, supra at 490.

Likewise in *Combs*, a habeas corpus review, the defendant’s trial counsel testified that he was “surprised” when defendant’s expert witness testified that alcohol did not affect the defendant’s ability to form intent.

Here, there is no such evidence that his counsel did not interview his parents before they testified at the mitigation hearing, no evidence that they never received an explanation of mitigation or received a “half ass explanation of mitigation.” c.f. *Foust v. Houk*, ____ F.3d ____, C.A. 6, (Ohio) 2011 WL 3715155 .

Mammone claims that any sympathy generated by his mother’s testimony was destroyed when she testified, during cross examination, that Mammone had “no regrets” about the killing of his children and that his ex-wife got exactly what she deserved. There is no evidence, however, that this testimony was due to lack of preparation or investigation by his counsel. Still, this testimony was merely cumulative. The jury heard Mammone’s statement to law enforcement in which he explained his motivation. The jury heard Mammon’s unsworn statement during the penalty phase in which he expressed no remorse for the killing of his children. And even after sentencing, Mammone expressed no regrets for the killing of his children saying “....I just want to say I do feel that I – you know, I killed them, I had a reason to kill them and I don’t, I haven’t changed my mind about that.”³⁶

Mammone also faults his counsel for failing to interview and prepare his father. Again, this is pure speculation. And his father’s bizarre and strange behavior gave the jury a first hand opportunity to view the background in which he was raised.

³⁶PP(III), 578

2. Alleged failure to curb Mammone's unsworn statement

Next, Mammone claims his counsel was ineffective in allowing him to make a five hour unsworn statement.³⁷ This argument has no merit.

R.C. §2929.03(D)(1) permits a capital defendant to make an unsworn statement during the penalty phase of the trial.³⁸ The statute does not set forth the presentation procedure and this Court has held that it does not mandate a question and answer format. *State v. Lynch*, 98 Ohio St.3d, 514, 2003-Ohio-2284, 787 N.E.2d 1186. (holding that trial court did not violate defendant's constitutional right by denying his request to use a question and answer format in presenting his unsworn statement); accord, *State v. Barton*, 108 Ohio St.3d 402, 2006-Ohio-1324, 844 N.E.2d 307.

Mammone, with an IQ of 117, gave a detailed, coherent, organized unsworn statement that began with his childhood, his marriage, the birth of his children and his beliefs that his children were better off dead rather than raised in a home with one parent absent.³⁹

Smalldon, sitting in the courtroom at the time, used the statement to illustrate his primary diagnosis of Mammone - personality disorder not otherwise specified with schizotypal borderline and narcissistic features - a severe personality disorder.⁴⁰

³⁷Appellant's Brief at 26 states: "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."

³⁸R.C. §2929.03(D)(1) provides: "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."

³⁹PP(I), 54

⁴⁰PP(II), 407.

Mammone fails to demonstrate how his counsel committed a serious error in allowing Mammone to give his unsworn statement. Indeed, it is highly likely that Mammone himself pressed upon his counsel to make the statement.

Mammone also fails to prove prejudice. First, the statement allowed the jury to see first hand the personality disorder later described by Smalldon. Second, the statement, for the most part, was nothing more than a more detailed version of the confessional statement given by Mammone to law enforcement and played for the jury during the guilt phase of his trial.

Potpourri of ineffective assistance claims

In this argument, Mammone lists areas in which its counsel was ineffective centering around their failure to object to various items of evidence and testimony. The state incorporates by reference its response to proposition of law Number IV. Mammone cannot demonstrate that the remainder of his claims of ineffective assistance were ineffective at all, let alone rose to the level of a violation of the Sixth Amendment.

On the other side, moreover, was the evidence of the killings of his children and ex-mother-in-law. Mammone's confession and statements made clear and he never denied that he killed his children by slitting their throats while they were sitting in their car seats. He expressed no remorse for the killings. As to Margaret Eakin, he admitted to beating her and shooting her and his intention was to cause his ex-wife the pain and grief that she deserved for breaking up the family. Nor did he arrive at the killings on a whim: He planned them and took several steps to ensure their success. The jury found, in a two hour span, that the six aggravating circumstances - killing of children under the age of 13, aggravated burglary and course of conduct killings -

outweighed the mitigating factors, not because of any ineffectiveness on the part of his experienced trial counsel, but because of Mammone's own acts.

Mammone's Proposition of Law No. III should be overruled.

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 CONSTITUTION ARTICLE I, SECTION 1, 2, 9, 10, 16 AND 20.

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. CONSTITUTION AMENDMENTS VI, VIII, XIV; OHIO CONSTITUTION ARTICLE I, SECTION 9, 16, 20.

Introduction

Mammone's proposition of law Nos. IV and VI raise claims of prosecutorial misconduct both in the guilt phase (No. IV) and the penalty phase (No. VI). He insists that prosecutorial misconduct so infected his trial with unfairness as to result in a denial of due process. According to Mammone, prosecutorial misconduct ranged from the use of photos to closing argument in the penalty phase. These arguments, however, fail.

General law governing claims of prosecutorial misconduct.

The law governing prosecutorial misconduct is well-settled - while the prosecutor is entitled latitude to strike hard blows, he must nonetheless not strike foul ones. The United States

Supreme Court, in the familiar passage from *Berger*, explained the role of the prosecutor in a criminal prosecution:

....[H]e is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed he should do so. But while he may strike hard blows, he is not a liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States (1935), 295 U.S. 78, 88, 55 S.Ct 629, 79 L.Ed 1314. See also *State v. Lott* (1990), 51 OhioSt.3d 160, 555 N.E. 2d 293, *cert. denied* (1990), 498 U.S. 1017 (“These comments apply with equal force to Ohio prosecuting attorneys.”)

Challenged conduct of the prosecutor is reviewed in the context of the entire trial. This review thus necessitates a review of the evidence and its strengths and weaknesses relative to the defendant’s guilt. Corrective measures, such as curative instructions given by the trial court are also considered. *State v. Keenan* (1993), 66 Ohio St.3d 402, 410, 613 N.E.2d 209 (“we consider the effect the misconduct had on the jury in the context of the entire trial...One factor relevant to the due-process analysis is whether the misconduct was an isolated incident in an otherwise properly tried case.)

The test for prosecutorial misconduct is whether the prosecutor’s remarks or questions were improper, and if so, whether they prejudicially affected substantial rights of the accused. *State v. Treesh*, 90 Ohio St.3d 460, 480-481, 2001-Ohio-4, 739 N.E.2d 749. The focus of that inquiry is on the fairness of the trial, not the culpability of the prosecutor. *State v. Bey*, 85 Ohio St.3d 487, 493, 1999-Ohio-283, 709 N.E.2d 484. Given the nature of a trial, particularly a capital trial, there is no such thing as an error-free perfect trial. And the Constitution does not guarantee

such a trial. *United States v. Hasting* (1983), 461 U.S. 499, 508-509, 103 S.Ct.1974, 76 L.Ed.2d 96. There are a myriad of safeguards provided to assure a fair trial. Corrective measures such as the giving of curative instructions to the jury is just one of those measures.

Certain conduct of a prosecutor, however, is generally improper. For example, a prosecutor may not express a personal opinion about the credibility of a witness or the guilty of the defendant. Such assertions constitute vouching for the witness and is improper.⁴¹

Similarly, a prosecutor may not pose a question to a witnesses to put before a jury information that is not supported by the evidence. *State v. Gillard*, 40 Ohio St.3d 226, 533, N.E.2d 272. (prosecutor needs a good faith basis to support a question); *State v. Hicks*, Cuyahoga App. No. 95144, 2011-Ohio-3578 (conviction overturned where prosecutor posed question to a witness regarding defense conduct with no evidence to support the question). *State v. Lott*, supra (prosecutors must avoid insinuations and assertions calculated to mislead the jury).

Likewise, it is improper for a prosecutor to make arguments that incite a jury to convict based upon public demand and community outrage, or to consider public opinion in rendering its verdict. Reminders, however, that the community has a right and an expectation that the jury will do its duty are not improper.⁴²

Finally, alleged acts of prosecutorial misconduct that are not objected to at trial are waived on appeal, subject to plain error analysis under Crim.R. 52(B). Under this standard, the

⁴¹*State v. Liberatore* (1982), 69 Ohio St.2d 583, 589, 23 O.O.3d 489, 433 N.E.2d 561.

⁴²See, e.g., *State v. Hicke* (1989), 43 Ohio St.3d 72, 76, 538 N.E.2d 1030, 1035-1036, cert. denied (1990), 494 U.S. 1038 (“The people in this community have the right to expect that you will do your duty.’ This statement was proper. It was the jury’s duty to convict if the evidence proves guilt beyond a reasonable doubt.”).

improper conduct will not constitute plain error unless, but for the conduct, the outcome of the trial clearly would have been otherwise. As this Court has consistently stated, “[n]otice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.”⁴³

Where the defendant has objected to the conduct of the prosecutor, the standard of review is whether comments prejudicially affected the defendant’s substantial rights. The reviewing court must conclude that absent the offending conduct of the prosecutor, the jury would not have found the defendant guilty beyond a reasonable doubt. In other words, the outcome of the trial would have been different. *State v. Hicks*, supra (...a defendant’s substantial rights cannot be prejudiced where the remaining evidence, standing alone, is so overwhelming that it constitutes defendant’s guilt, and the outcome of the case would have been the same regardless of evidence admitted erroneously) citing *State v. Williams* (1988), 38 Ohio St.3d 346, 349-350, 528 N.E.2d 910. This is a particularly tough standard for Mammone to meet, given that he confessed to the killings of his children, Macy and James Mammone IV and the killing of his ex mother-in-law, Margaret Eakin. More than that, he admitted to the gruesome killings in his unsworn statement to the jury and expressed no remorse for the killing of his children.

Alleged Acts of Prosecutorial Misconduct in the Guilt Phase.

1. Alleged Prosecutorial Theatrics

Mammone faults the prosecutor for introducing evidence that he claims was nothing more than an attempt to evoke an emotional response from the jury. Mammone specifically points to

⁴³*State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 8094, at paragraph three of the syllabus.

photographs introduced that showed bloody car seats, contents of diaper bags, items of children's clothing and autopsy pictures of the stab wounds on the children. Mammone points to the fact that he did not dispute his killing of the children for the proposition that the state did not have to introduce this evidence. Mammone asks this Court to adopt a new standard - when there is compelling, undisputed evidence to support a conviction, the state commits prosecutorial misconduct when it introduces evidence that portrays the crime scene as the defendant left it. In this case, this bloodied bodies of his children with their throats slashed strapped in the car seats designed to protect them.⁴⁴

Constitutional jurisprudence leaves no room for this position. The State must prove, no matter what the accused concedes, that the accused is guilty beyond a reasonable doubt. It is not the state who placed the children's belongings and wedding items at the scene of the killings - it is Mammone himself. There is nothing wrong, to be sure, with the state displaying photographs of the scene of the killings. The state is not obligated to remove from the scene the items that Mammone placed there.

Mammone cites the testimony of Eric Risner, Randy Weirich, the coroner and Michael Short for his misconduct claim. Yet, all of these witnesses had relevant testimony to provide the jury. Eric Risner was first responder who arrested Mammone at his home. After Mammone was handcuffed and removed from the Oldsmobile, Risner looked in and saw the dead bodies of the children in their car seats. Risner was entitled to testify to what he saw. As for the photographs, the state was careful to choose only one photograph that showed the children as Risner first saw them. The photograph was not placed on the monitor for the jury's viewing but only

⁴⁴Mammone does not complain of the evidence of the crime scene of Margaret Eakin.

authenticated by the officer.⁴⁵ As noted by the trial court, “[T]he photograph is necessary as to what he observed and is not unduly prejudicial given the totality of the testimony.”

Randy Weirich collected evidence, took photographs and processed crime scenes for the Canton Police Department. Weirich also took photographs of Mammone and swabbed his hands. Notably, Mammone did not object to his testimony and thus this court must apply a plain error standard. Weirich’s testimony was necessary not only to identify the crime scenes but as an important component in the chain of custody.

As to the coroner, it was necessary for the state to prove that the deaths were homicides - the causes of death. A limited number of autopsy photographs were introduced through the coroner; seven for the autopsy of Macy; six for the autopsy of James IV and eight for the autopsy of Margaret Eakin.⁴⁶ As noted by the trial court, “[N]otwithstanding somebody has admitted to it, there must be a demonstration with regard to the issue of cause.”⁴⁷

Mammone did not object to the testimony of Short and his limited discussion of defects on the “Roundabout car seat saturated with apparent blood” did not change the outcome of the trial.⁴⁸

⁴⁵TP(V), 157.

⁴⁶TP(VI), 90, 106, 118.

⁴⁷TP(VI), 79.

⁴⁸TP(VI), 240.

2. Alleged introduction of irrelevant evidence

Mammone again complains that the following evidence was not relevant in his trial for the murders of his children: autopsy photos of dead children, dead children in car seats, blood soaked car seats, children's clothing, diapers and frantic texts and 911 calls. Mammone claims such evidence was not relevant and therefore not admissible because he did not contest their murders. Mammone again requests that this Court adopt a new standard - when the defendant admits to the crime, evidence of the crime is not admissible at trial and is irrelevant.⁴⁹

Such a preposterous notion has not been accepted by any court and should not now.

Mammone's argument is not that the prosecutor committed misconduct, but that the trial court abused its discretion in admitting the evidence. The admission or exclusion of relevant evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.⁵⁰ The trial court was careful to limit the evidence at trial. Given that the evidence of guilt was overwhelming, the prosecutor was careful to pick and choose those items that were necessary to prove its case beyond a reasonable doubt.

Alleged Prosecutorial Misconduct During Penalty Phase

1. Comments of failure of Smalldon to submit a written report

Mammone accuses the prosecutor of misconduct in his questioning of Smalldon, a psychologist hired by Mammone's team to explain his murderous acts. Mammone likens the prosecutor's acts of asking about a report to *State v. Fears*, 86 Ohio St.3d 329, 334, 1999-Ohio-

⁴⁹Again, Mammone does not complain of the evidence involving the murder of Margaret Eakin.

⁵⁰*State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus.

111, 715 N.E.2d 136, 145. *Fears*, however, is no help to Mammone. In *Fears*, the prosecutors asked for the interview notes of Smalldon. The trial court ruled that the state could not receive these notes. Still, the prosecutor made several comments in front of the jury about Smalldon's unwillingness to write a report and share his notes. This Court found that because the trial court overruled the state's request for Smalldon's notes, the prosecutor should not have made these comments. Nevertheless, this Court found the error harmless and affirmed the conviction and capital sentence of *Fears*.

Here, the prosecutor's questioning of Smalldon regarding his failure to write reports was permissible and not an act of misconduct. The prosecutor did not ignore a previous ruling of the trial court and was entitled to cross examine Smalldon on all relevant matters affecting bias and credibility, Evid.R. 611(B). The brief exchange regarding a written report drew no objection from Mammone's trial counsel and he cannot demonstrate that, but for the exchange, the outcome of the trial would have been different.⁵¹

2. Allegedly arguing non-statutory aggravating factors during closing argument

Mammone argues that during closing, the prosecutor argued, impermissibly, non-statutory aggravating circumstances. Mammone's counsel did not object to the remarks and therefore this court must analyze them under the plain error rule. *State v. Wade* (1978), 53 Ohio St.2d 182, 7 O.O.3d 362, 373 N.E.2d 1244 paragraph one of the syllabus (a claim of error in a criminal case cannot be predicated upon the improper remarks of counsel during his argument at trial which were not objected to, unless such remarks serve to deny the defendant a fair trial).

⁵¹PP(II), 425.

Aggravating circumstances are limited to those factors set forth in R.C. §2929.04(A)(1) through (9) that are specified in the indictment and proved beyond a reasonable doubt. *State v. Wogenstahl* (1996), 75 Ohio St.3d 344, 351, 662 N.E.2d 311, 318. Here, the indictment alleged aggravated burglary, course of conduct specifications and the killing of children under thirteen.

The prosecutor did not argue non-statutory aggravating circumstances. *State v. Wogenstahl*, supra (terror of victim), *State v. Combs* (1991), 62 Ohio St.3d 278, 283, 581 N.E.2d 1071, 1077 (suffering and mental anguish the victim endured). The prosecutor argued that the killing of Margaret Eakin was planned as a part of a course of conduct to hurt his ex-wife.

Not only were the comments proper but Mammone suffered no prejudice as a result of them. There was overwhelming evidence of his guilt and Mammone cannot demonstrate that without the remarks the outcome of the trial would have been different.

Mammone's accusations of prosecutorial misconduct are without merit and propositions of law Numbers IV and VI should be summarily overruled.

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, SECTION 2, 9, 10 AND
16 OF THE OHIO CONSTITUTION.**

In his fifth assignment of error, Mammone complains that the trial court erred in admitting photos of Macy and James as they were found in their car seats at the crime scene and autopsy photos of the children. The record demonstrates, however, that the photos were neither repetitive nor cumulative, the trial court properly balanced the probative versus prejudicial value of each photo and limited the number and manner of presentation of the photos. In fact, Mammone personally thanked the court for the discretion it exercised in regard to the display of the autopsy photos of the children. (PP (III) at 578.) His argument thus fails.

Standard of Review

In capital cases, photographs, even if gruesome, are admissible as long as 1) they are relevant and of probative value in assisting the trier of fact in determining the issues or are illustrative to the testimony and other evidence; 2) the probative value of each photograph substantially outweighs the danger of unfair prejudice to the accused and 3) are not repetitive or cumulative.⁵² The trial court's balancing of probativeness and prejudice is reviewed under an

⁵²Evid.R. 403, *State v. Morales* (1987), 32 Ohio St.3d 252, 257, 513 N.E.2d 267; see also *State v. Maurer* (1984), 15 Ohio St.3d 239, 473 N.E.2d 768, paragraph seven of the syllabus.

abuse of discretion standard and appellant must show he has been materially prejudiced.⁵³

Photographs illustrating the type of injury suffered by the victim and those corroborating the testimony of the coroner have sufficient probative weight to overcome potential prejudice.⁵⁴

Analysis

There were 499 photos available to the state. Of those, the state selected 64. (Transcript of motions hearing December 15, 2009 at 30.)

Mammone specifically takes issue with the photos of his murdered children as he left them in their car seats and the autopsy photos of each child.

There were 34 photos of Mammone's car with the children inside. The state selected two of those photos. The coroner took 69 photographs during James' autopsy and the state selected six. During Macy's autopsy, the coroner took 103 photos. Of those the state selected seven. (*Id* at 36-37.)

Macy

State's exhibits 6A through 6G are Macy's autopsy photos. The coroner, Dr. Murthy, identified these exhibits as those he took during the autopsy. (TP(VI) at 90.)

State's exhibit 6A is of Macy as she appeared on arrival at the coroner's office, still strapped in her car seat. This photo was not shown to the jury during Dr. Murthy's testimony. Instead, Dr. Murthy explained to the jury how Macy was brought to his office. (TP(VI) at 91.)

⁵³*State v. Slagle* (1992), 65 Ohio St.3d 597, 601-602, 605 N.E.2d 916, 923; *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, 38 O.O.2d 298, 302, 224 N.E.2d 126, 130.

⁵⁴*State v. Moore* (1998) 81 Ohio St.3d 22, 32, 689 N.E.2d 1, 12.

State's exhibit 6B showed knife wounds 1, 2 and 3 inflicted to Macy's lower left face and upper left neck. Murthy explained that these wounds severed Macy's esophagus and trachea and subsequently caused her to bleed out and drown in her own blood. State's exhibit 6E depicted the exit wound of the knife blade. State's exhibit 6D showed a cluster of three wounds to the left neck. (TP(VI) 93-96.)

State's exhibit 6C is Macy's right hand which shows her nearly severed fingers. Dr. Murthy explained these are defense wounds – a result of Macy's attempt to protect herself. 6F shows another defense wound on Macy's right leg. 6G shows finger-shaped bruises on Macy's left leg. Dr. Murthy explained these bruises were consistent with someone holding that area firmly. (TP(VI) 96-101).

James IV

State's exhibits 5A - 5F are the autopsy photos of James. (TP(VI) 107). Three were published during the coroner's testimony. State's exhibit 5E showed a knife wound extending from right to left neck, four and a half inches deep which severed both the esophagus and trachea causing James to bleed out and drown in his own blood. State's exhibit 5F showed the exit of that wound. State's exhibit 5B showed a defensive wound on James' right palm. (TP(VI) 112-114).

Mammone Cannot Demonstrate an Abuse of Discretion

True enough, the autopsy photographs submitted by the State show the bloody corpses of both children and each wound inflicted and are therefore gruesome.⁵⁵ But this was Mammone's

⁵⁵*State v. DePew* (1998) 38 Ohio St.3d 275, 281, 528 N.E.2d 542, 550 (The term "gruesome" in the context of photographic evidence should, in most cases, be limited to depictions of actual bodies or body parts.)

handiwork. Moreover, each photograph was professionally explained in its entirety by Dr. Murthy as it related to the nature of the injuries, the cause of the injuries and his opinion as to the cause of each child's death. The photos thus supported and clarified Dr. Murthy's testimony. Additionally, the photos were neither repetitive nor cumulative because each photo depicted a different wound and was introduced only during Dr. Murthy's testimony. Finally, the photos were probative of Mammone's intent and purpose and the manner and circumstances of each child's death. The coroner's photos were therefore relevant, more probative than prejudicial and were not repetitive.

Crime Scene Photos

Mammone also complains that the photos of the children as they were found at the crime scene were unnecessary. Per his transcript references, he appears to take issue with State's Exhibits 2H and 2I. State's Exhibit 2H shows James IV as he was found at the scene and 2I shows Macy as she was found at the scene. These photos were relevant because they depicted what Detective Risner and Crime Scene Officer Randy Weirich observed upon their arrival at the scene. Further they illustrated Weirich's testimony and gave the jury an "appreciation of the nature and circumstances of the crime."⁵⁶ These photos were not published during Risner's testimony. Rather, Risner merely authenticated the photos. (TP(V) 155-159.)

Analysis Remains the Same

Mammone maintains that because the photos depicted deceased children they were especially inflammatory. But simply because the crime scene and autopsy photos were of

⁵⁶*State v. Trimble* 122 Ohio St.3d 297, 2009 -Ohio- 2961, 911 N.E.2d 242, ¶136, quoting *State v. Evans* (1992) 63 Ohio St.3d 231, 251, 586 N.E.2d 1042, 1058.

children does not change the analysis regarding their admissibility.⁵⁷ Mammone further complains that the photos of the children were and unnecessary because he did not dispute the cause of death. But this fact did not relieve the State of its obligation to prove the charges against Mammone, including the purposeful killing of his children. Further, even if Mammone had stipulated to the cause of death, his stipulation would not have automatically rendered the autopsy photographs inadmissible.⁵⁸

The crime scene and autopsy photos of Macy and James presented by the state at trial were more probative than prejudicial, were limited in number, and contrary to Mammone's claims were neither repetitive nor cumulative. Their admission was therefore not error.

Finally, even if the photos admitted at trial could somehow be construed as more prejudicial than probative, cumulative and repetitive, any error in the admission of the photos was harmless and did not affect any substantial right because the evidence against Mammone was overwhelming.⁵⁹ Mammone confessed his crimes in detail to law enforcement and the jury heard his recorded confession at trial.

The fifth proposition of law is without merit and should be overruled.

⁵⁷See *State v. Vrabel*, 99 Ohio St.3d 184, 2003 -Ohio- 3193, 790 N.E.2d 303 ¶¶69-70 and *State v. Trimble* 122 Ohio St.3d 297, 2009 -Ohio- 2961, 911 N.E.2d 242, ¶133.

⁵⁸*State v. Maurer*, (1984) 15 Ohio St.3d 239, 265, 473 N.E. 2d 768, 792.

⁵⁹*State v. Lundgren* (1995) 73 Ohio St.3d 474, 486, 653 N.E.2d 304, 318, Evid.R. 103 and Crim.R. 52(A).

PROPOSITION OF LAW NO. VII

**THE SENTENCE OF DEATH IMPOSED ON MAMMONE
WAS UNRELIABLE AND INAPPROPRIATE. U.S.
CONSTITUTION AMENDMENTS VIII AND XIV; OHIO
CONSTITUTION ARTICLE I, SECTIONS 9 AND 16 AND
O.R.C. §2929.05.**

In his seventh proposition of law, Mammone contends that three death sentences are inappropriate in his case. The death sentences in this case, however, were amply warranted under the facts of this case, and are therefore appropriate.

R.C. §2929.05(A) requires this Court to independently review a sentence of death for each count of aggravated murder. For each count, the statute directs this court to determine 1) whether the evidence supports the jury's finding of aggravating circumstances, 2) whether the aggravating circumstances outweigh the mitigating factors and 3) whether the sentence of death is proportionate to those affirmed in other similar cases.

Mammone challenges only the appropriateness of his death sentences. He claims his culpability is reduced and thus sentences of death inappropriate because the murder of his children and their grandmother were the result of his alleged delusional mental illness. He further claims a sentence of death is inappropriate because his history and background are mitigating, he lacks significant criminal history, expressed remorse over killing Margaret and was co-operative with law enforcement. The aggravating circumstances in this case, however, outweigh the mitigating factors and the sentences of death are therefore appropriate.

Aggravating Circumstances

Mammone was convicted of the aggravated murder of Margaret Eakin with a course of conduct specification and a felony murder (burglary) specification. For each child, Mammone was convicted of aggravated murder with a course of conduct specification and a child under thirteen specification. He received a sentence of death for each victim.

Mammone's personality disorder should be given little weight under R.C 2929.04(B)(3)

In support of his claim that sentences of death are inappropriate in his case, Mammone relies most heavily on his mitigating claim that pursuant to R.C. §2929.04(B)(3), at the time of the offenses, he was unable to conform his conduct to the requirements of law or to appreciate the criminality of his conduct due to extreme emotional distress and mental disease or defect. The record, however, does not support such a conclusion.

Mammone's expert, Dr. Jeffery Smalldon, testified that Mammone was unquestionably competent to stand trial, knew the difference between right and wrong and was not insane. (PP(II) 374.) Further, Smalldon agreed that Mammone is not brain damaged, bipolar, delusional, schizophrenic or hearing voices. He is of above average intelligence and is not an alcoholic. (PP (II) 401-403, 426-427.)

Rather, Mammone has a personality disorder. Smalldon diagnosed Mammone with "personality disorder not otherwise specified" with "schizotypal, borderline and narcissistic features." He further testified that Mammone was experiencing "extreme emotional distress" over his divorce. However, at no point in his testimony did Smalldon opine that this diagnosis impacted Mammone's ability to conform his behavior to the requirements of law, and in fact

acknowledged just the opposite – Mammone’s diagnosis did not render him incapable of conforming his behavior to the requirements of law. (PP(II) 374, 395, 407-408, 431.)

Further, Mammone’s own actions contradict his current claim that he was unable to conform his conduct to the requirements of law. The record reflects that Mammone knew that what he was doing was wrong and took steps to avoid detection. In his statement to police he indicated he used a knife instead of a gun to kill his children because “noise was a factor.” He used a car that was unfamiliar to those who knew him and who he knew would eventually be looking for him and the children. After killing his children and his mother-in-law, Mammone first drove through the Jackson Township area because “I thought I was, I was driving in areas that I thought there would be no police cruisers in case my car being (sic) identified...I just felt that was a pretty safe way to go.” Then, during his subsequent drive to Independence, Mammone made sure he drove “within the boundaries of the speed limits because up there, they will pull you over if your (sic) barely going over.” (State’s exhibit 65 at 16, 19 and 26.)

Mammone was also aware that his conduct would result in an indefinite period of incarceration. According to Mammone, his drive to Independence was originally undertaken with the intent to turn himself in, but then he recalled hearing “some guys talking about how you don’t want to go to jail in Summit County. They, they’re it takes them a long time to process like the court dates and they just, they just said everything drags and it doesn’t get taken care of as much. Which in my situation I don’t think it matters anyway.” (Id at 28.) Thus Mammone was not only aware of the wrongfulness of his actions, but also the implications of his actions.

Even if Mammone experienced emotional distress over the end of his marriage, the events at issue here took place more than a year after he and Marcia went their separate ways and Mammone's actions were planned acts of revenge.⁶⁰ Further, this court has noted that a personality disorder "...does not constitute a "mental disease or defect within the meaning of 2929.04(B)(3)."⁶¹ Finally, this Court has also "normally accorded little weight to "personality disorders" as a mitigating "other factor" under R.C. §2929.04(B)(7)" and should continue to afford little weight in this instance.⁶²

Under either 2929.04(B)(3) or 2929.04(B)(7), therefore, Mammone's emotional distress and personality disorder claims should be given little to no weight.⁶³

History and Background

Mammone next argues his less than ideal childhood, work history and lack of significant criminal record are mitigating.

⁶⁰See *State v. Turner* 105 Ohio St.3d 331, 2005 -Ohio- 1938, 826 N.E.2d 266 at ¶95, *State v. Short* --- N.E.2d ----, 2011 2011 -Ohio- 3641 at ¶ 159, and State's exhibit 65 at 16.

⁶¹*State v. Seiber* (1990) 56 Ohio St.3d 4, 8, 564 N.E.2d 408, 416 (anti-social personality disorder); *State v. Van Hook* (1988), 39 Ohio St.3d 256, 263, 530 N.E.2d 883, 889–890 (borderline personality disorder)

⁶²*State v. Taylor* (1997) 78 Ohio St.3d 15, 33, 676 N.E.2d 82, 98-99.

⁶³See *State v. Short* --- N.E.2d ----, 2011 -Ohio- 3641 at ¶157-159, *State v. Frazier*, 115 Ohio St.3d 139, 179, 2007-Ohio-5048, 873 N.E.2d 1263, 1305.

Childhood

In his unsworn statement, Mammone described his father as rejecting, and mentally and physically abusive. Mammone's mother testified that his Mammone's father referred to him as "maggot." Smalldon testified that Mammone's father referred to Mammone as "loser." (PP(II) at 340 and 386).

But yet Mammone's statement and the testimony of others also established that Mammone has enjoyed the love and support of his mother, Lisa Mammone as well as his grandparents. Lisa described Mammone as a "wonderful little boy" and further testified that she "couldn't have asked for a better child." Lisa further testified that both sets of grandparents loved and nurtured Mammone his entire life and that his paternal grandfather was a significant role model in Mammone's life. Per Mammone's own statement, he also managed to form a "decent" relationship with his father after his mother and father divorced. (PP(I) at 59, 72; PP(II) at 341-343.)

Although Mammone's less than perfect childhood may be a mitigating factor, this Court has "seldom given decisive weight to a defendant's unstable or troubled childhood."⁶⁴ Indeed, Mammone's somewhat difficult childhood was idyllic compared to other cases this Court has examined and given no decisive weight.⁶⁵ This factor should therefore not be given substantial weight.

⁶⁴*State v. Perez*, 124 Ohio St.3d 122, 2009 -Ohio- 6179, 920 N.E.2d 104 at ¶245 quoting *State v. Hale*, 119 Ohio St.3d 188, 2008-Ohio-3426, 892 N.E.2d 86 at ¶265

⁶⁵See *State v. Lang*, --- N.E.2d ----, 2011 WL 3862536, 2011 -Ohio- 4215, ¶331; *State v. Ketterer*, 111 Ohio St.3d 70, 2006 -Ohio- 5283, 855 N.E.2d 48, ¶199

Work History, Cooperation & Lack of Significant Criminal Record

Mammone's work history, cooperation and lack of a significant criminal record are all factors normally accorded some weight.

With the exception of a short period of time, Mammone worked continuously from age 16 through the events at issue here. Further, he surrendered without incident and was cooperative with law enforcement. This court has given these factors consideration under the "catch all" mitigating factor 2929.04(B)(1)(7).⁶⁶

Mammone has one previous criminal infraction – a conviction for domestic violence. While this Court has normally afforded a minimal criminal history significant weight,⁶⁷ it should be noted here that the victim of the domestic violence in that case was also the object of Mammone's vengefulness in this case. In *State v. Mundt* 115 Ohio St.3d 22, 2007-Ohio- 4836, 873 N.E.2d 828, this court assigned little weight to a lack of criminal history because "...Mundt's prior conviction was for domestic violence, and the instant case also involves violence against a member of Mundt's household." *Id.* at ¶207-208. Similarly here, the sanctions meted out for Mammone's domestic violence conviction obviously had no impact on Mammone. His lack of significant criminal history should not, therefore, be given substantial weight.

⁶⁶See *State v. Short* --- N.E.2d ----, 2011 -Ohio- 3641 at ¶160.

⁶⁷See *State v. Hoffner* 102 Ohio St.3d 358, 2004 -Ohio- 3430811 N.E.2d 48 at ¶115; *State v. White* (1999) 85 Ohio St.3d 433, 454, 709 N.E.2d 140, 160.

Remorse for the Murder of Margaret Eakin

Mammone also points to his statements to Smalldon alleging his remorse for murdering Margaret as a mitigating factor pursuant to R.C. §2929.04(B)(7). The evidence presented during the guilt phase of the trial however, undermines his claim.

After completing the murders, Mammone left a voice message telling his friend Hull that he had accomplished what he had set out to do, that being to exact revenge on his ex-wife in the grandest fashion. Mammone told Hull:

Oh shit, brother, shit, no regrets, no regrets. I said it when I got locked up fucking 358 days ago that she fucking has to die and unfortunately as fucking sick as it sounds I concluded after a while that she took my family from me and the fucking way to really get her is to take her mom and kids from her.

State's Exhibit 67 at 4.

Moreover, following his call to Hull, Mammone called Marcia to inform her that he had killed her mother: "I shot your mom in the face. I bashed her in the head with a lamp...that bitch put up a good fight."⁶⁸

These are hardly words of remorse. Rather, per his own statements, Mammone viewed his mother-in-law and his children as mere pawns to be used to carry out his plan of vengeance. Mammone's claim of remorsefulness should therefore be given no weight.

⁶⁸(TT)I at 78.

Conclusion

In this case, the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. This case is factually similar to *State v. Trimble* 122 Ohio St.3d 297, 2009 -Ohio- 2961, 911 N.E.2d 242, in that two or more people were murdered, including a child. In *Trimble*, this Court noted that a course of conduct involving the murder of two or more people “constitutes a grave aggravating circumstance” and the “child murder specification is entitled to great weight because it involves the murder of a young and vulnerable victim.”⁶⁹

So too here. Mammone was convicted of three course of conduct specifications and two child murder specifications. Although Mammone’s mitigating factors may be entitled to some weight, nothing raised in mitigation can eclipse the weight of the aggravating circumstances in this case. Mammone’s sentences of death should therefore be affirmed.

⁶⁹*State v. Trimble*, 122 Ohio St.3d 297, 2009 -Ohio- 2961, 911 N.E.2d 242 at ¶328. See also *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, 797 N.E.2d 948, at ¶ 91; *State v. Hessler* 90 Ohio St.3d 108, 130, 2000 -Ohio- 30, 734 N.E.2d 1237, 1257.

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.**

In his eighth proposition of law, Mammone contends his execution would constitute cruel and unusual punishment because he “is a person with a serious mental illness.” He argues he is no more culpable for his crimes than a mentally retarded person or a juvenile, relying on *Atkins v. Virginia* (2002) 536 U.S. 304, 122 S.Ct.2242, 153 LEd 2d 335 and *Roper v. Simmons* (2005) 543 U.S. 551, 125 S.Ct.1183, 161 L.Ed 2d 1, respectively. But prohibitions against the imposition of capital punishment are not based upon mental illness, but rather mental capacity.⁷⁰ The record here is devoid of any evidence that Mammone lacked the mental capacity to appreciate the nature of his crimes or the punishment he faces for those crimes.

In *Atkins v. Virginia* (2002), 536 U.S. 304, 122 S.Ct. 2242,153 LEd 2d 335, the United States Supreme Court held that the Eighth Amendment prohibits the State from inflicting a penalty of death upon a prisoner who is a mentally retarded. The Court found support from a consensus of the American public, legislators, scholars, and judges who have debated the issue. The Court found that because of their disabilities in areas of reasoning, judgment, and control of their impulses, a mentally retarded person does not act with the level of moral culpability that characterizes the most serious adult criminal conduct.⁷¹

⁷⁰See *State v. Scott* (2001), 92 Ohio St.3d 1, 2-5, 784 N.E.2d 11, 12-13.

⁷¹*Atkins v. Virginia* (2002), 536 U.S. 304, 306-307, 122 S.Ct. 2242, 2244,153 LEd 2d 335.

In *Roper v. Simmons* (2005) 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed 2d 1 the United States Supreme Court forbade the imposition of the death penalty on offenders who were under the age of 18 when their capital crime was committed. The Court's ruling recognized "three general differences between juveniles under 18 and adults" which "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Id.*, 543 U.S. at 569, 125 S.Ct. at 1195. The Court cited these characteristics as a lack of maturity and an underdeveloped sense of responsibility, increased vulnerability to negative influences and outside pressures, including peer pressure and more transitory and less fixed personality traits and character. *Id.* at 543 U.S.569-70; 125 S.Ct. at 1195.

But the reasons behind forbidding the execution of a mentally retarded or juvenile convict do not apply to Mammone. Mammone is not mentally retarded and he was 35 years old when he committed his crimes. Mammone is in fact, of above average intelligence, possessing a full scale IQ of 117. Moreover, Smalldon administered a long list of tests on Mammone all of which failed to uncover any type of brain impairment. (PP(II) 400-403)

Rather, Mammone was diagnosed with a "personality disorder not otherwise specified" with "schizotypal, borderline and narcissistic features." (PP(II) 407-408.) As discussed in the seventh proposition of law, this Court has noted that a personality disorder "...does not constitute a "mental disease or defect..."⁷² But even if a personality disorder can be construed as "serious mental illness" as characterized by Mammone, the Eighth Amendment does not prohibit imposition of the death penalty upon mentally ill offenders.

⁷²*State v. Seiber* (1990) 56 Ohio St.3d 4, 8, 564 N.E.2d 408, 416 (anti-social personality disorder); *State v. Van Hook* (1988), 39 Ohio St.3d 256, 263, 530 N.E.2d 883, 889-890 (borderline personality disorder)

For example, in *State v. Scott* (2001), 92 Ohio St.3d 1, 748 N.E.2d 11, Scott argued that the ban on cruel and unusual punishment contained in the Eighth Amendment prohibited the State from executing a person with a severe mental illness, such as in Scott's case, schizophrenia. This Court disagreed, noting "Scott cited no authority, and we are not aware of any authority, that supports Scott's claim that the prohibitions against cruel and unusual punishment of the Eighth Amendment and the Ohio constitution preclude the execution of mentally ill persons *who understand their crimes and the capital punishment they face.*" *Id.* at 2, emphasis added. This court later rejected similar claims in *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d.1032, ¶154-158 and *State v. Ketterer*, 111 Ohio St.3d 70, 2006 -Ohio- 5283, 855 N.E.2d 48, ¶ 176.

Here, Mammone's own expert, Jeffery Smalldon, testified that Mammone was unquestionably competent to stand trial, knew the difference between right and wrong and was not insane. (PP(II) 374.) Further, Smalldon agreed that Mammone is not brain damaged, bipolar, delusional, schizophrenic or hearing voices. He has no substance abuse issues, is of above average intelligence, had no prior diagnosis of mental illness and is not actively psychotic. (PP (II) 401-405, 426-427.) Rather, Smalldon's diagnosis is that Mammone has a personality disorder. As discussed in Mammone's seventh proposition of law, Smalldon testified that this diagnosis did not impact Mammone's ability to conform his behavior to the requirements of law. Further, Mammone's own statements and actions prove he was aware of the wrongfulness of his actions as he took steps to avoid detection and demonstrated his knowledge of the consequences he faced for his actions. (PP(II) 374, 407-408, 431 and State's exhibit 65 at 16, 19, 26 and 28.)

Mammone has made no showing that he lacked the capacity to understand either the nature of his crimes or the punishment for those crimes. Therefore, even if Mammone has a form of personality disorder, the record demonstrates his capacity to understand capital punishment and why he was sentenced to the same. The eighth proposition of law is without merit and should be overruled.

PROPOSITION OF LAW NO. IX

OHIO'S DEATH PENALTY LAW IS UNCONSTITUTIONAL. OHIO REVISED CODE SECTIONS 2903.01, 2929.02, 2929.021, 2929.022, 12929.023, 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. CONSTITUTION AMENDMENTS V, VI, VIII AND XIV; OHIO CONSTITUTION ARTICLE I, SECTIONS 2, 9, 10 AND 16. FURTHER, OHIO'S DEATH PENALTY STATUTE VIOLATES THE UNITED STATES' OBLIGATIONS UNDER INTERNATIONAL LAW.

Mammone's final proposition of law is a collection of constitutional arguments challenging Ohio's death penalty. All of these arguments have been raised by other capital defendants and rejected by this Court. This Court should continue to follow earlier precedent as well as the clear and unambiguous precedent of the United States Supreme Court and reject each of Mammone's claims.

Mammone's claims are not new, and he offers no new arguments to support his claims which have not previously been raised by other capital defendants and rejected by this Court. His claims are:

(1) Ohio's death-penalty statutory scheme violates the United States and Ohio constitutional prohibitions against arbitrary and unequal punishment. See *State v. Ferguson* (2006), 108 Ohio St.3d 451, 464, 844 N.E.2d 806, 819; *State v. Jenkins* (1984), 15 Ohio St.3d 164, 169-170, 473 N.E.2d 264; *State v. Steffen* (1987), 31 Ohio St.3d 111, 124-125, 509 N.E.2d 383.

(2) Ohio's death-penalty scheme is unconstitutional because of unreliable sentencing procedures. See *State v. Esparza* (1988), 39 Ohio St.3d 8, 12-13, 529 N.E.2d 192; *State v. Stumpf* (1987), 32 Ohio St.3d 95, 104, 512 N.E.2d 598; *State v. Jenkins* (1984), 15 Ohio St.3d at 172-173, 473 N.E.2d 264.

(3) Ohio's death-penalty scheme is unconstitutional because it imposes an impermissible risk of death on capital defendants who choose to exercise their right to a jury trial. See *State v. Buell* (1986), 22 Ohio St.3d 124, 138, 489 N.E.2d 795, citing *State v. Nabozny* (1978), 54 Ohio St.2d 195, 8 O.O.3d 181, 375 N.E.2d 784, paragraph one of the syllabus.

(4) Ohio's death-penalty statutes are unconstitutional because R.C. §2929.03(D)(1) requires submission of defense-requested pre-sentence investigations (PSI) and mental-health evaluations to the judge or jury. This argument is inapplicable to Mammoné's case because he waived his right to a PSI mental-health evaluation before sentencing. (TT(VIII) 154-155). Moreover, this Court has previously rejected these arguments. See *State v. Ferguson* (2006), 108 Ohio St.3d 451, 465, 844 N.E.2d 806, 820, citing *State v. Buell*, (1986) 22 Ohio St.3d at 138, 489 N.E.2d 795.

(5) R.C. §2929.04(A)(7), the felony-murder aggravating circumstance, is constitutionally invalid because it repeats the definition of felony murder set forth in R.C. 2903.01(B). See *State v. Jenkins*, (1984) 15 Ohio St.3d at 178, 473 N.E.2d 264; see, also, *State v. Henderson*, (1988) 39 Ohio St.3d at 28-29, 528 N.E.2d 1237; *Coe v. Bell* (C.A.6, 1998), 161 F.3d 320, 349-350.

(6) The language in R.C. §2929.03(D)(1) is unconstitutionally vague because it gives the sentencer unfettered discretion to weigh a statutory mitigating factor (see R.C. 2929.04(B): “the nature and circumstances of the offense”) as an aggravator. See *State v. McNeill* (1998), 83 Ohio St.3d 438, 453, 700 N.E.2d 596, citing *Tuilaepa v. California* (1994), 512 U.S. 967, 973-980, 114 S.Ct. 2630, 129 L.Ed.2d 750.

(7) Ohio's death-penalty proportionality review and appropriateness review are constitutionally flawed. See *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 23; *State v. Steffen*, 31 Ohio St.3d 111, 31 OBR 273, 509 N.E.2d 383, paragraph one of the syllabus.

(8) Ohio's death-penalty statutes violate international law and treaties to which the United States is a party. See *State v. Issa* (2001), 93 Ohio St.3d 49, 69, 752 N.E.2d 904; *State v. Bey* (1999), 85 Ohio St.3d 487, 502, 709 N.E.2d 484, and *State v. Fry*, 125 Ohio St.3d 163, 2010 -Ohio- 1017, 199, 926 N.E.2d 1239, 1278.

As evidenced by each case cite, all of Mammone's claims have been repeatedly rejected by this Court and the United States Supreme Court. Based on this clear precedent, this Court should once again reject these claims.

The final proposition of law should be overruled.

CONCLUSION

This Court should overrule the nine propositions of law, and affirm the judgment of conviction and sentences of death entered by the Stark County Court of Common Pleas.

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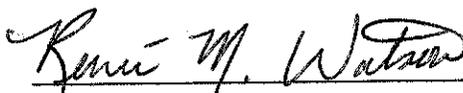
Counsel for Appellee

PROOF OF SERVICE

A copy of the foregoing BRIEF OF APPELLEE was sent by ordinary U.S. mail, postage prepaid, this 12th day of September, 2011, to LINDA E. PRUCHA and ANGELA MILLER, counsel for defendant-appellant, at The Office of the Ohio Public Defender - 250 East Broad Street, Suite 1400, Columbus, Ohio 43215 and 500 s. Front St. #102, Columbus, Ohio 43215.



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Baldwin's Ohio Revised Code Annotated Currentness
Rules of Criminal Procedure (Refs & Annos)
Current selection **Crim.R. 52** Harmless error and plain error

EXHIBIT A

(A) Harmless error

Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) Plain error

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

CREDIT(S)

(Adopted eff. 7-1-73)

Current selection **Crim.R. 18** Venue and change of venue

(A) General venue provisions

The venue of a criminal case shall be as provided by law.

(B) Change of venue; procedure upon change of venue

Upon the motion of any party or upon its own motion the court may transfer an action to any court having jurisdiction of the subject matter outside the county in which trial would otherwise be held, when it appears that a fair and impartial trial cannot be held in the court in which the action is pending.

...

CREDIT(S)

(Adopted eff. 7-1-73)

Baldwin's Ohio Revised Code Annotated Currentness
Ohio Rules of Evidence (Refs & Annos)
Full text of all sections at this level Article VI. Witnesses

Current selection **Evid.R. 611** Mode and order of interrogation and presentation

(A) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(B) Scope of cross-examination. Cross-examination shall be permitted on all relevant matters and matters affecting credibility.

(C) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

CREDIT(S)

(Adopted eff. 7-1-80; amended eff. 7-1-07)