

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 Plaintiff-Appellee, : Case No. 2010-0576
 -vs- : Stark County Case
 No. 2009-CR-0859
 JAMES MAMMONE, III, :
 Defendant-Appellant. : **Death Penalty Case**

DEFENDANT-APPELLANT JAMES MAMMONE'S
 APPLICATION FOR REOPENING

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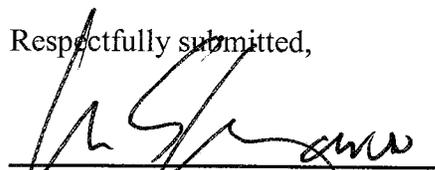
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Appellant James Mammone, III, asks this Court to grant his Application for Reopening under S.Ct. Prac. R. 11, §6(A). See also *State v. Murnahan*, 63 Ohio St. 3d 60, 583 N.E.2d 1204 (1992). This Court should grant this request based on the ineffective assistance of counsel that Mammone received in his first appeal of right (*State v. Mammone*, 2014-Ohio-1942). Mammone sets out his Propositions of Law in the attached Memorandum in Support.

Respectfully submitted,


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Counsel for Appellant Mammone

Memorandum In Support

A. Procedural History

Appellant James Mammone, III, was sentenced to death in Stark County, Ohio on January 22, 2010. His conviction and death sentence were timely appealed to this Court in Case No. 2010-0576. Mammone was represented in his direct appeal by Robert K. Lowe and Shawn P. Welsh, Assistant State Public Defenders, and Angela Miller. On May 14, 2014, this Court issued its decision affirming the judgment of the trial court. *State v. Mammone*, 2014-Ohio-1942. Appellant then filed a motion for reconsideration which was denied on July 23, 2014, starting the 90 day clock for filing a claim of ineffective assistance of appellate counsel. Pursuant to S. Ct. Prac. R. XI(B)(2), Appellant Mammone now timely files his Application to Reopen.

B. Reopening is Required Based on the Following Propositions of Law

The Due Process Clause of the Fourteenth Amendment guarantees the effective assistance of counsel to an indigent defendant on his first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387 (1985). Practice Rule 11, §6(A) establishes the procedure for raising claims of the ineffective assistance of appellate counsel in this Court. See also *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992). Mammone asserts that his due process right to counsel was infringed by the omissions of his appointed counsel in his appeal of right to this Court.

Demonstrating ineffective assistance of appellate counsel requires showing that the issue not presented was clearly stronger than issues that counsel did present. *Franklin v. Anderson*, 434 F.3d 412, 429 (6th Cir. 2006) (quoting *Caver v. Straub*, 349 F.3d 340, 348 (6th Cir. 2003) (quoting *Smith v. Robbins*, 528 U.S. 259, 289 (2000) (internal citations omitted))). In determining whether appellate counsel's performance was deficient under *Strickland's* first

prong, the Sixth Circuit has set out a non-exhaustive list of eleven factors to be reviewed. *Mapes v. Coyle*, 171 F. 3d 408, 427-28 (6th Cir. 1999). The Sixth Circuit made clear that the *Mapes* factors are to be considered in addition to the “prevailing norms of practice as reflected in the [ABA Guidelines] and the like.” *Franklin*, 434 F.3d at 429. If after a review of these and other factors, it appears to the court that the omitted claims are so “significant and obvious” that a competent capital appellate attorney “would almost certainly present [them] on appeal, “the deficient performance prong under *Strickland* is established, and a review of the merits of the omitted claims to establish prejudice is required.” *Greer v. Mitchell*, 264 F.3d 663, 679 (6th Cir. 2001)). See also, *Franklin*, 434 F.3d at 430-31 (finding that appellate “counsel did not meet the ABA standards in their dealings with [defendant] concerning his appeals.”).

To demonstrate prejudice under the second *Strickland* prong, a defendant must show that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 at 694. Here, Mammone was denied the effective assistance of appellate counsel as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the federal Constitution and Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution when his appellate counsel failed to include certain critical claims in Mammone's direct appeal.

Mammone asserts that his appeal should be reopened based on the following Propositions of Law:

Proposition of Law No. I

Presenting And Arguing A Capital Defendant's Mitigation Case Under the Wrong Legal Standard Deprives the Defendant of His Right to a Fair Trial and Sentencing Determination.

Trial counsel rendered ineffective assistance by using the wrong legal standard to present

Appellant's mitigation case, thereby depriving Appellant of his rights to a fair trial and sentencing determination and he was prejudiced. U.S. Const. Amend. VI, XIV. Counsel did not provide objectively reasonable assistance and Appellant was prejudiced as a result of this failure. *Strickland v. Washington*, 466 U.S. 668 (1984). Appellant's rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were violated and he was prejudiced.

From the beginning this was a mitigation case. Appellant gave detailed confessions to the murders. (TP, Vol. 5, pp. 173-180) (See, Appendix, p. 1, hereafter A-1). During guilt phase opening statements, trial counsel told the jurors that they would not be contesting much of the State's evidence. (*Id.* at 30, A-10). During the penalty phase, trial counsel presented Appellant's parents and Dr. Jeffrey Smalldon, and Appellant gave a five-hour unsworn statement.

The linchpin of Appellant's mitigation presentation was Dr. Smalldon who testified that although he did not believe Appellant was actively psychotic, "his profile includes a number of characteristics that are infrequently seen in individuals who are not psychotic." (PP, Vol. 2, 405, A-11). He diagnosed Appellant with a personality disorder not otherwise specified with schizotypal, borderline and narcissistic features. (*Id.* at pp. 407-408, A-13). He further testified that there is a genetic and biological component to personality disorders, and that environmental factors also play a role. (*Id.* at pp. 411-413, A-17).

In its mitigation presentation, counsel argued that Dr. Smalldon's testimony constituted a statutory mitigation factor under R.C. 2929.04(B)(3) which required the jurors to reject a death sentence. (PP, Vol. 2, pp. 481-482, A-20). This section provides:

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

In response, the State pointed out that Dr. Smalldon never testified that Appellant lacked the

capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law. (*Id.* at pp. 487-491, A-22).

Not surprisingly, the jurors rejected Appellant's mitigation argument and recommended that he be sentenced to death, which recommendation was adopted by the trial court. The same conclusion was reached by this Court:

Mammone's mental state is not entitled to any weight under R.C. 2929.04(B)(3). Although Dr. Smalldon testified that Mammone was under extreme emotional distress and was suffering from a severe mental disorder at the time of the murders, there is no evidence that Mammone "lacked substantial capacity to appreciate the criminality of [his] conduct or conform [his] conduct to the requirements of law" at that time. R.C. 2929.04(B)(3). Dr. Smalldon acknowledged as much, and Mammone's own actions – taking steps to avoid detection such as driving the speed limit on infrequently patrolled roads – confirmed that he knew his conduct was criminal. Mammone's mental problems therefore do not qualify as a mitigating factor under 2929.04(B)(3).

State v. Mammone, 2014-Ohio-1942, ¶ 236.

Although this information did not constitute mitigation under (B)(3), it did constitute compelling mitigation under R.C. 2929.04(B)(7), the "catch all" provision. In numerous cases this Court has found that evidence which does not fit into one of the statutory mitigating factors can be considered under (B)(7). *See, e.g., State v. Treesh*, 90 Ohio St.3d 460, 492 (2001) (considering evidence of mental problems under R.C. 2929.04(B)(7) when evidence did not satisfy the criteria of R.C. 2929.04(B)(3)); *State v. Fears*, 86 Ohio St.3d 329, 349 (1999).

However, since trial counsel chose to present and argue this evidence only under (B)(3), the jurors had no reason to consider it under (B)(7). As such, compelling mitigating evidence was not considered by the jurors who were required to determine whether Appellant should live or die. The prejudice to Appellant is apparent since a finding by a single juror that the aggravating factors did not outweigh the mitigating factors beyond a reasonable doubt would preclude the death penalty. *State v. Brooks*, 75 Ohio St.3d 148, 160-161 (1996).

Proposition of Law No. II

A Prosecutor's Suppression of Material Exculpatory Evidence Constitutes Misconduct and Deprives a Capital Defendant of a Fair Trial and Sentencing Determination.

Appellant was arrested around 8:00 or 9:00 a.m. the morning of June 8, 2009. (Nov. 24, 2009, p. 34, A-27). Within 15-20 minutes of arriving at the Canton Police Department, Appellant gave a taped statement to Detective George and Sergeant Baroni. (*Id.* at pp. 37-38, A-30). Around 5:30 p.m. that day he gave blood samples. (TP, Vol. 6, pp. 55, 64, A-32, A-33). Later in the day, urine samples were taken as well. (*Id.* at p. 69, A-34).

In his taped statement Appellant stated that he took Valium and painkillers and drank wine. (Nov. 24, 2009, p. 47, A-35). At a suppression hearing regarding the taped statement, the prosecution presented testimony that Appellant tested negative for all drugs. (*Id.* at p. 69, A-36). Finding that there was “no evidence that [Appellant] was under the influence,” the trial court overruled his motion to suppress statements. (Dec. 15, 2009, pp. 28-29).

In the penalty phase of the trial, Appellant made an unsworn statement in which he repeated his assertion that he had taken “around a dozen pills.” (PP, Vol. 1, p. 285, A-37). In response the prosecution argued that Appellant had lied about taking drugs (PP, Vol. 2, p. 472, A-38), and argued that this demonstrated that Appellant had lied about other matters as well. (TP, Vol. 8, pp. 49-50, A-39).

After trial Appellant obtained the Canton-Stark County Crime Laboratory worksheets for the drug testing of his blood and urine samples. (A-41). These worksheets show that Appellant tested positive for benzodiazepines in both his blood and urine samples. Valium is a benzodiazepine. Appellant was not provided with the results of this testing before or during trial.

A. Brady Violation.

The prosecution's failure to disclose evidence favorable to an accused in a criminal

proceeding violates the Due Process Clause where the evidence is material to either guilt or sentencing, regardless of the good or bad faith of the prosecutor. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The Supreme Court has expanded the duty to disclose to include impeachment as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). In order to comply with *Brady*, “the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in this case, including the police.” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

B. Prosecutorial Misconduct.

The prosecution’s elicitation of false testimony from Jay Spencer, the individual who tested Appellant’s blood and urine samples, violated Appellant’s right to a fair trial and sentencing determination. A prosecutor’s presentation of evidence known to be false violates the Fourteenth Amendment. The same result occurs when prosecutors, although not soliciting false evidence, allow false evidence to go uncorrected. *Giglio v. United States*, 405 U.S. 150, 153 (1972). Prosecutors cannot create a materially false impression regarding the facts of the case or the credibility of a witness. The knowing use of false testimony entitles the accused to a new trial “if there is any reasonable likelihood the false testimony could have affected the verdict.” *United States v. Agurs*, 427 U.S. 97, 103-104 (1976); *Napue v. Illinois*, 360 U.S. 264, 271 (1959).

The prosecution’s suppression of material exculpatory evidence, its elicitation of false testimony, and its misrepresentations to the fact finders regarding the significance of the false evidence, deprived Appellant of his right to a fair trial sentencing determination.

Proposition of Law No. III

Failure to Fully Voir Dire an Automatic Death Penalty Juror Constitutes Ineffective Assistance of Counsel and Deprives a Capital Defendant of His Right to a Fair Trial and

Sentencing Determination.

Appellant's trial counsel were also ineffective in failing to adequately voir dire Juror 430, an "automatic death penalty juror," and allowing him to remain on the jury. A juror may be challenged for cause if his views about capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 420 (1985). Counsel's failure permitted a juror to sit on Appellant's jury who would not consider mitigating evidence.

During voir dire, juror Pancoe (Juror 430) indicated that certain "murders require the death penalty." (VD, Vol. 2, pp. 231, 257, A-45, A-46). Juror Pancoe is commonly known as an "automatic death penalty" juror. Once he found Appellant guilty of capital murder, he basically shut his ears to additional evidence.

Under Ohio's death penalty scheme, the jury is instructed to weigh aggravating circumstances against mitigating factors. R.C. 2929.04(B). The jury can only impose the death penalty if the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. (*Id.*) Thus jurors must engage in the statutorily mandated weighing process under Ohio law.

Counsel was ineffective in not questioning this "automatic death penalty" juror regarding whether he could in fact consider the mitigating evidence that would be put before him. Juror 430 did not consider or weigh Appellant's extreme emotional distress, severe mental disorder, physical and verbal abuse by his father, lack of criminal record, ability to adjust to prison, remorse for Mrs. Eakin's death, that he provided for his family, his productivity to the community, and his cooperation with the police. (PP, Vol. 3, pp. 567-571, A-47). Counsel's errors rendered Appellant's trial fundamentally unfair and denied him his constitutional rights

under the United States and Ohio Constitutions.

Proposition of Law No. IV

Failure to Make and Renew Motions and Objections Necessary to Preserve a Defendant's Appellate Rights Constitutes Ineffective Assistance of Counsel and Deprives a Capital Defendant of His Right to a Fair Trial and Sentencing Determination.

Appellant's trial counsel were also ineffective in failing to make and renew motions and objections necessary to preserve his appellate rights. U.S. Const. Amend. VI, XIV. Counsel did not provide objectively reasonable assistance and Appellant was prejudiced as a result of this failure. *Strickland v. Washington*, 466 U.S. 668 (1984). Appellant's rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were violated and he was prejudiced.

For example, Appellant filed a pretrial motion for a change of venue on November 12, 2009, to which he attached copies of articles posted on the *Canton Repository's* website, CantonRep.com, along with comments posted by online readers. At a hearing on the motion, the trial court expressed concern about the Repository's publication of a "confession letter" written by Appellant, but denied the motion as premature. The court left open the issue for further consideration during and after Voir Dire, and at the close of the venue advised Appellant, "I would expect you to refile at any time or reargue your motion for a change of venue." (November 12, 2009, p. 34, A-52). Counsel failed to do so, as a result of which this Court denied Appellant's venue claim based on a limited plain error analysis. *Mammone*, 2014-Ohio-1942, ¶ 69.

Similarly, trial counsel failed to challenge two "automatic death penalty" jurors during voir dire, as a result of which this Court limited its review of this bias claim to plain error. *Mammone*, 2014-Ohio-1942, ¶¶ 79, 84. Appellant's change of venue and bias claims were

compelling, and he was prejudiced by trial counsel's failure to make the objections and arguments necessary to preserve these meritorious claims.

C. Relief Requested

Appellant James Mammone, III, has shown that there are genuine issues regarding whether he was deprived the effective assistance of counsel on appeal, in violation of his right to due process. Mammone requests that his appeal be reopened with full briefing on the merits of these issues. Mammone further requests that an evidentiary hearing conducted on these issues under Practice Rule 11§6(F)(1) and (H).

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Application for Reopening was forwarded by first-class, postage prepaid U.S. Mail to Kathleen O. Tatarsky, Assistant State County Prosecuting Attorney, Stark County Prosecutor's Office, 110 Central Plaza, South, Suite 510, Canton, Ohio, 44702, on the 21st day of October, 2014.



Counsel for Appellant,
James Mammone

Exhibit 1

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:
	: Case No. 2010-0576
Plaintiff-Appellee,	:
	:
v.	: On Appeal from the Court of Common
	: Pleas of Stark County, Ohio
JAMES MAMMONE, III,	: Case No. 2009-CR-0859
	:
Defendant-Appellant.	: THIS IS A DEATH PENALTY CASE

AFFIDAVIT OF WILLIAM S. LAZAROW

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I, William S. Lazarow, after being duly sworn, hereby state as follows:

- 1) I am an attorney licensed to practice law in the state of Ohio since 1972, and am currently engaged in the private practice of law in Columbus, Ohio. I was an Assistant State Public Defender in Ohio from 1989 to 2001 where I was assigned to the Death Penalty Unit. I was also a Deputy Federal Public Defender in the Capital Habeas Units in the Central District of California and District of Arizona from 2002 to 2006. My primary area of practice is capital litigation. I am certified under Sup. R. 20 as appellate counsel and trial co-counsel in capital cases.
- 2) Due to my focused practice of law and my attendance at death-penalty seminars, I am aware of the standards of practice involved in the appeal of a case in which the death sentence was imposed or recommended.
- 3) The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on an appeal as of right. *Evitts v. Lucey*, 469 U.S. 587 (1985).
- 4) The initial responsibility of appellate counsel, once the transcript is filed, is to ensure that the entire record has been filed with this Court. Appellate counsel has a fundamental duty in every criminal case to ensure that the entire record is before the reviewing courts on appeal. Ohio R. App. P. 9(B); Ohio Rev. Code Ann. § 2929.05

(Anderson 1995); *State ex rel. Spirko v. Judges of the Court of Appeals, Third Appellate District*, 27 Ohio St. 3d 13, 501 N.E. 2d 625 (1986).

5) After ensuring that the transcript is complete, counsel must then review the record for purposes of issue identification. This review of the record not only includes the transcript, but also the pleadings and exhibits.

6) For counsel to properly identify issues, they must have a good knowledge of criminal law in general. Most trial issues in capital cases will be decided by criminal law that is applicable to non-capital cases. As a result, appellate counsel must be informed about the recent developments in criminal law when identifying potential issues to raise on appeal. Counsel must remain knowledgeable about recent developments in the law after the merit brief is filed.

7) Since the reintroduction of capital punishment in response to the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the area of capital litigation has become a recognized specialty in the practice of criminal law. Numerous substantive and procedural areas unique to capital litigation have been carved out by the United States Supreme Court. As a result, anyone who litigates in the area of capital punishment must be familiar with these issues in order to raise and preserve them for appellate and post-conviction review.

8) Appellate representation of a death-sentenced client requires recognizing that the case will most likely proceed to the federal courts at least twice: first on petition for Writ of Certiorari in the United States Supreme Court, and again on petition for Writ of Habeas Corpus filed in a federal district court. Appellate counsel must preserve all issues throughout the state court proceedings on the assumption that relief is likely to be sought in federal court. The issues that must be preserved are not only issues unique to capital litigation, but also case-and fact-related issues, unique to the case, that impinge on federal constitutional rights.

9) It is a basic principle of appellate practice that to preserve an issue for federal review, the issue must be exhausted in the state courts. To exhaust an issue, the issue must be presented to the state courts in such a manner that a reasonable jurist would have been alerted to the existence of a violation of the United States Constitution. The better practice to exhaust an issue is to cite directly to the relevant provisions of the United States Constitution in each proposition of law and in each assignment of error to avoid any exhaustion problems in the federal courts.

10) It is important that appellate counsel realize that the capital reversal rate in the state of Ohio is eleven percent on direct appeal and less than one percent in post-conviction. It is my understanding that forty to sixty percent (depending on which of several studies is relied upon) of all habeas corpus petitions are granted. Therefore, appellate counsel must realize that in Ohio, a capital case is very likely to reach federal court and, therefore, the real audience of the direct appeal is the federal court.

11) Based on the foregoing standards, I have identified four propositions of law that should have been presented to this Court by appellate counsel. The propositions of law identified in this application for reopening were either not presented, or not fully presented, to this Court.

Proposition of Law No. I

Presenting And Arguing A Capital Defendant's Mitigation Case Under the Wrong Legal Standard Deprives the Defendant of His Right to a Fair Trial and Sentencing Determination.

12) Trial counsel rendered ineffective assistance by using the wrong legal standard to present Appellant's mitigation case, thereby depriving Appellant of his rights to a fair trial and sentencing determination and he was prejudiced. U.S. Const. Amend. VI, XIV. Counsel did not provide objectively reasonable assistance and Appellant was prejudiced as a result of this failure. *Strickland v. Washington*, 466 U.S. 668 (1984). Appellant's rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were violated and he was prejudiced.

13) From the beginning this was a mitigation case. Appellant gave detailed confessions to the murders. (TP, Vol. 5, pp. 173-180) (See, Appendix, p. 1, hereafter A-1). During guilt phase opening statements, trial counsel told the jurors that they would not be contesting much of the State's evidence. (*Id.* at 30, A-10). During the penalty phase, trial counsel presented Appellant's parents and Dr. Jeffrey Smallldon, and Appellant gave a five-hour unsworn statement.

14) The linchpin of Appellant's mitigation presentation was Dr. Smallldon who testified that although he did not believe Appellant was actively psychotic, "his profile includes a number of characteristics that are infrequently seen in individuals who are not psychotic." (PP, Vol. 2, 405, A-11). He diagnosed Appellant with a personality disorder not otherwise specified with schizotypal, borderline and narcissistic features. (*Id.* at pp. 407-408, A-13). He further testified that there is a genetic and biological component to personality disorders, and that environmental factors also play a role. (*Id.* at pp. 411-413, A-17).

15) In its mitigation presentation, counsel argued that Dr. Smallldon's testimony constituted a statutory mitigation factor under R.C. 2929.04(B)(3) which required the jurors to reject a death sentence. (PP, Vol. 2, pp. 481-482, A-20). This section provides:

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

In response, the State pointed out that Dr. Smallldon never testified that Appellant lacked the capacity to appreciate the criminality of his conduct, or to conform his conduct to the

requirements of law. (*Id.* at pp. 487-491, A-22).

16) Not surprisingly, the jurors rejected Appellant's mitigation argument and recommended that he be sentenced to death, which recommendation was adopted by the trial court. The same conclusion was reached by this Court:

Mammone's mental state is not entitled to any weight under R.C. 2929.04(B)(3). Although Dr. Smalldon testified that Mammone was under extreme emotional distress and was suffering from a severe mental disorder at the time of the murders, there is no evidence that Mammone "lacked substantial capacity to appreciate the criminality of [his] conduct or conform [his] conduct to the requirements of law" at that time. R.C. 2929.04(B)(3). Dr. Smalldon acknowledged as much, and Mammone's own actions – taking steps to avoid detection such as driving the speed limit on infrequently patrolled roads – confirmed that he knew his conduct was criminal. Mammone's mental problems therefore do not qualify as a mitigating factor under 2929.04(B)(3).

State v. Mammone, 2014-Ohio-1942, ¶ 236.

17) Although this information did not constitute mitigation under (B)(3), it did constitute compelling mitigation under R.C. 2929.04(B)(7), the "catch all" provision. In numerous cases this Court has found that evidence which does not fit into one of the statutory mitigating factors can be considered under (B)(7). *See, e.g., State v. Treesh*, 90 Ohio St.3d 460, 492 (2001) (considering evidence of mental problems under R.C. 2929.04(B)(7) when evidence did not satisfy the criteria of R.C. 2929.04(B)(3)); *State v. Fears*, 86 Ohio St.3d 329, 349 (1999).

18) However, since trial counsel chose to present and argue this evidence only under (B)(3), the jurors had no reason to consider it under (B)(7). As such, compelling mitigating evidence was not considered by the jurors who were required to determine whether Appellant should live or die. The prejudice to Appellant is apparent since a finding by a single juror that the aggravating factors did not outweigh the mitigating factors beyond a reasonable doubt would preclude the death penalty. *State v. Brooks*, 75 Ohio St.3d 148, 160-161 (1996).

19) This issue was being litigated in other cases at the time of Mammone's trial and appeal and, in my judgment, should have been raised in his appeal.

Proposition of Law No. II

A Prosecutor's Suppression of Material Exculpatory Evidence Constitutes Misconduct and Deprives a Capital Defendant of a Fair Trial and Sentencing Determination.

20) Appellant was arrested around 8:00 or 9:00 a.m. the morning of June 8, 2009. (Nov. 24, 2009, p. 34, A-27). Within 15-20 minutes of arriving at the Canton Police

Department, Appellant gave a taped statement to Detective George and Sergeant Baroni. (*Id.* at pp. 37-38, A-30). Around 5:30 p.m. that day he gave blood samples. (TP, Vol. 6, pp. 55, 64, A-32, A-33). Later in the day, urine samples were taken as well. (*Id.* at p. 69, A-34).

21) In his taped statement Appellant stated that he took Valium and painkillers and drank wine. (Nov. 24, 2009, p. 47, A-35). At a suppression hearing regarding the taped statement, the prosecution presented testimony that Appellant tested negative for all drugs. (*Id.* at p. 69, A-36). Finding that there was “no evidence that [Appellant] was under the influence,” the trial court overruled his motion to suppress statements. (Dec. 15, 2009, pp. 28-29).

22) In the penalty phase of the trial, Appellant made an unsworn statement in which he repeated his assertion that he had taken “around a dozen pills.” (PP, Vol. 1, p. 285, A-37). In response the prosecution argued that Appellant had lied about taking drugs (PP, Vol. 2, p. 472, A-38), and argued that this demonstrated that Appellant had lied about other matters as well. (TP, Vol. 8, pp. 49-50, A-39).

23) After trial Appellant obtained the Canton-Stark County Crime Laboratory worksheets for the drug testing of his blood and urine samples. (A-41). These worksheets show that Appellant tested positive for benzodiazepines in both his blood and urine samples. Valium is a benzodiazepine. Appellant was not provided with the results of this testing before or during trial.

A. Brady Violation.

24) The prosecution’s failure to disclose evidence favorable to an accused in a criminal proceeding violates the Due Process Clause where the evidence is material to either guilt or sentencing, regardless of the good or bad faith of the prosecutor. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The Supreme Court has expanded the duty to disclose to include impeachment as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). In order to comply with *Brady*, “the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in this case, including the police.” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

B. Prosecutorial Misconduct.

25) The prosecution’s elicitation of false testimony from Jay Spencer, the individual who tested Appellant’s blood and urine samples, violated Appellant’s right to a fair trial and sentencing determination. A prosecutor’s presentation of evidence known to be false violates the Fourteenth Amendment. The same result occurs when prosecutors, although not soliciting false evidence, allow false evidence to go uncorrected. *Giglio v. United States*, 405 U.S. 150, 153 (1972). Prosecutors cannot create a materially false impression regarding the facts of the case or the credibility of a witness. The knowing use of false testimony entitles the accused to a new trial “if there is any reasonable likelihood the false testimony could have affected the verdict.” *United States v. Agurs*, 427 U.S. 97,

103-104 (1976); *Napue v. Illinois*, 360 U.S. 264, 271 (1959).

26) The prosecution's suppression of material exculpatory evidence, its elicitation of false testimony, and its misrepresentations to the fact finders regarding the significance of the false evidence, deprived Appellant of his right to a fair trial sentencing determination.

27) This issue was being litigated in other cases at the time of Mammone's trial and appeal and, in my judgment, should have been raised in his appeal.

Proposition of Law No. III

Failure to Fully Voir Dire an Automatic Death Penalty Juror Constitutes Ineffective Assistance of Counsel and Deprives a Capital Defendant of His Right to a Fair Trial and Sentencing Determination.

28) Appellant's trial counsel was also ineffective in failing to adequately voir dire Juror 430, an "automatic death penalty juror," and allowing him to remain on the jury. A juror may be challenged for cause if his views about capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 420 (1985). Counsel's failure permitted a juror to sit on Appellant's jury who would not consider mitigating evidence.

29) During voir dire, juror Pancoe (Juror 430) indicated that certain "murders require the death penalty." (VD, Vol. 2, pp. 231, 257, A-45, A-46). Juror Pancoe is commonly known as an "automatic death penalty" juror. Once he found Appellant guilty of capital murder, he basically shut his ears to additional evidence.

30) Under Ohio's death penalty scheme, the jury is instructed to weigh aggravating circumstances against mitigating factors. R.C. 2929.04(B). The jury can only impose the death penalty if the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. (*Id.*) Thus jurors must engage in the statutorily mandated weighing process under Ohio law.

31) Counsel was ineffective in not questioning this "automatic death penalty" juror regarding whether he could in fact consider the mitigating evidence that would be put before him. Juror 430 did not consider or weigh Appellant's extreme emotional distress, severe mental disorder, physical and verbal abuse by his father, lack of criminal record, ability to adjust to prison, remorse for Mrs. Eakin's death, that he provided for his family, his productivity to the community, and his cooperation with the police. (PP, Vol. 3, pp. 567-571, A-47). Counsel's errors rendered Appellant's trial fundamentally unfair and denied him his constitutional rights under the United States and Ohio Constitutions.

32) This issue was being litigated in other cases at the time of Mammone's trial and appeal and, in my judgment, should have been raised in his appeal.

Proposition of Law No. IV

Failure to Make and Renew Motions and Objections Necessary to Preserve a Defendant's Appellate Rights Constitutes Ineffective Assistance of Counsel and Deprives a Capital Defendant of His Right to a Fair Trial and Sentencing Determination.

33) Appellant's trial counsel was also ineffective in failing to make and renew motions and objections necessary to preserve his appellate rights. U.S. Const. Amend. VI, XIV. Counsel did not provide objectively reasonable assistance and Appellant was prejudiced as a result of this failure. *Strickland v. Washington*, 466 U.S. 668 (1984). Appellant's rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were violated and he was prejudiced.

34) For example, Appellant filed a pretrial motion for a change of venue on November 12, 2009, to which he attached copies of articles posted on the *Canton Repository's* website, *CantonRep.com*, along with comments posted by online readers. At a hearing on the motion, the trial court expressed concern about the Repository's publication of a "confession letter" written by Appellant, but denied the motion as premature. The court left open the issue for further consideration during and after Voir Dire, and at the close of the venue advised Appellant, "I would expect you to refile at any time or reargue your motion for a change of venue." (November 12, 2009, p. 34, A-52). Counsel failed to do so, as a result of which this Court denied Appellant's venue claim based on a limited plain error analysis. *Mammone*, 2014-Ohio-1942, ¶ 69.

35) Similarly, trial counsel failed to challenge two "automatic death penalty" jurors during voir dire, as a result of which this Court limited its review of this bias claim to plain error. *Mammone*, 2014-Ohio-1942, ¶¶ 79, 84. Appellant's change of venue and bias claims were compelling, and he was prejudiced by trial counsel's failure to make the objections and arguments necessary to preserve these meritorious claims.

36) This issue was being litigated in other cases at the time of Mammone's trial and appeal and, in my judgment, should have been raised in his appeal.

CONCLUSION

37) Based on my evaluation of the record and understanding of the law, I believe that if these propositions of law had been properly presented for review, this Court would have granted relief. Also, those errors would have been preserved for federal review.

48) Therefore, James Mammone, III, was prejudiced as a direct result of the deficient performance of her appellate counsel on her direct appeal to this Court.

Further Affiant sayeth naught.



WILLIAM S. LAZAROW
Counsel for Appellant
James Mammone, III

Sworn to and subscribed before me
this 20th day of October, 2014.



Notary Public



Jennifer H. Mason
Notary Public, State of Ohio
My Commission Expires 11-28-15

- 1 him up and I said I am going to help you,
2 stand up for me. He turned his head,
3 looked at me and says okay, Victor,
4 whatever you want. So I lifted him up.
5 Brought him back to that stone wall and I
6 sat him about six or eight feet from his
7 uncle and I allowed them to talk.
- 8 Q. You stood there while that happened?
- 9 A. Yes.
- 10 Q. What happened after that?
- 11 A. Well, from there I assisted a couple other
12 officers. We were trying to cover up the
13 back of the window of the vehicle.
- 14 Q. Could you see into the vehicle?
- 15 A. Yes.
- 16 Q. And were you able to see the children?
- 17 A. Yes, I did.
- 18 Q. After you assisted in the beginning I guess
19 of the processing of this scene, where did
20 you go?
- 21 A. From there I -- we took Mr. Mammone back to
22 headquarters and I also went back there.
- 23 Q. And did you interview the Defendant, James
24 Mammone?
- 25 A. Yes, myself and Sergeant Baroni

- 1 interviewed.
- 2 Q. Where did that take place at the police
3 department?
- 4 A. We have a small interview room in the back
5 of our Detective Bureau, it's about seven
6 by ten-foot carpeted room, has a table in
7 there with four chairs.
- 8 Q. Do you know, approximately, when this
9 interview would have taken place? Let me
10 ask another question first. Prior to
11 interviewing him did you advise him of his
12 Constitutional rights?
- 13 A. Yes, we did.
- 14 Q. What we call the Miranda waiver?
- 15 A. That's correct.
- 16 Q. Did he agree to speak to you and waive
17 those rights?
- 18 A. Yes, he did.
- 19 Q. Did you have him execute a document
20 indicating that?
- 21 A. Yes, he signed a Form 18 that our
22 department has which is a notice of
23 Constitutional rights.
- 24 Q. I'm going to show you what's been marked as
25 State's Exhibit 32. Does that appear to be

- 1 that waiver form?
- 2 A. Yes, it does.
- 3 Q. Does it indicate a time on the bottom that
- 4 you were advising him of that, that you and
- 5 Detective Baroni advised him?
- 6 A. Yes, 9:24 a.m.
- 7 Q. Once he agreed to speak to you, who was
- 8 present in that room with you and Mr.
- 9 Mammone?
- 10 A. Just Sergeant Baroni.
- 11 Q. Just the three of you?
- 12 A. Correct.
- 13 Q. Was Mr. Mammone restrained in any way
- 14 during this interview?
- 15 A. No, he was not.
- 16 Q. He was not handcuffed?
- 17 A. No.
- 18 Q. Was he offered food or beverages?
- 19 A. Yes, I got him some water and offered what
- 20 we had in there, was some chips or
- 21 crackers, something of that nature.
- 22 Q. While you spoke with James Mammone did he
- 23 appear to have any difficulty understanding
- 24 you or Sergeant Baroni?
- 25 A. No, not at all.

- 1 Q. Based upon your training and experience as
2 a police officer did he present any
3 indications that he was under the influence
4 of drugs or alcohol at that time?
- 5 A. No, he did not.
- 6 Q. Did you learn his age?
- 7 A. Yes.
- 8 Q. How old was he at that time?
- 9 A. Thirty-five, I believe.
- 10 Q. Was the interview recorded?
- 11 A. Yes, it was recorded.
- 12 Q. In its entirety?
- 13 A. Yes.
- 14 Q. Once the interview was completed did you
15 have an opportunity to review the recording
16 of the interview?
- 17 A. Yes, I did.
- 18 Q. I guess my question is were you able to
19 determine from your review of that
20 recording whether the recording equipment
21 was functioning properly and did, in fact,
22 record the entire interview accurately?
- 23 A. Yes. It's recorded on a digital recorder
24 and immediately when I was done with that
25 interview and we were done speaking with

1 him, I took the recorder and it was
2 downloaded into a main data base. It's a
3 system we call on base. All of the files
4 for every case goes in there, all the
5 recordings. And eventually it's typed up.
6 But after I put it in I start to play it
7 over again to listen to it. I did not
8 listen to it in its entirety that
9 particular day, but I did start it. It did
10 download.

11 Q. You have had an opportunity to listen to it
12 since then?

13 A. Yes, I did.

14 Q. I'm going to show you what's been marked as
15 State's Exhibit 13. Is that a disc of the
16 recording?

17 A. Yes, it is.

18 Q. And, again, based upon your review of that
19 it does truly and accurately depict the
20 entire conversation that you had with James
21 Mammone on the morning of June 8, 2009?

22 A. That's correct.

23 Q. There don't appear to be any insertions,
24 deletions, changes to it?

25 A. No.

1 MS. HARTNETT: Your Honor, at this
2 time I would ask the Court's indulgence for
3 an opportunity to play the recording.

4 MS. JOHNSON: May we approach?

5 THE COURT: You may.

6 - - - - -
7 (A conference was held at the
8 bench outside the hearing of the
9 jury.)

10 - - - - -
11 MS. JOHNSON: For purposes of the
12 record, we would renew the motion to
13 suppress.

14 THE COURT: The motion is
15 overruled for the same reasons as stated in
16 my ruling on the motion to suppress
17 previously heard by the Court. You may
18 proceed subject to the objection.

19 MS. HARTNETT: Judge, we have
20 marked for purposes of the record as
21 State's Exhibit 65 a transcript of the
22 recording. Obviously, we are not moving to
23 admit that and it will not go back to the
24 jury.

25 THE COURT: 65.

1 MR. BARR: Yes, State's
2 Exhibit 65. We are just leaving it with
3 the court reporter for appellate purposes.

4 THE COURT: Has he testified he
5 reviewed this?

6 MS. JOHNSON: There were
7 inaccuracies in it.

8 MS. HARTNETT: We could go through
9 it.

10 THE COURT: Well, the fact of the
11 matter is that are you not planning on a
12 transcript being admitted into evidence and
13 going back to the jury?

14 MR. BARR: No.

15 MS. HARTNETT: The quality of the
16 recording is sufficient that you can
17 understand accurately by listening to it I
18 mean.

19 THE COURT: So they don't need the
20 transcript.

21 MS. HARTNETT: To follow along.

22 THE COURT: So we are doing this
23 just for the record so for the record for
24 any reviewing body, while what I understand
25 this pretty closely monitors it, the real

1 deal is the tape itself and the actual
2 words and this is just for convenience and
3 should not be substituted for the actual
4 recording. Very good.

5 - - - - -
6 (Thereupon, the sidebar conference
7 ended.)

8 - - - - -
9 THE COURT: Ladies and gentlemen,
10 you're about to listen to a tape that is
11 approximately one hour in length.
12 Accordingly, while she is setting this up
13 number one, you may want to stand and
14 stretch if you didn't while I was having a
15 sidebar conference. For those in the back
16 of the courtroom, I am just allowing you to
17 know that as well.

18 Certainly you're free to leave
19 during the playing of it. But it will be
20 approximately an hour. At the conclusion
21 of it depending on where we are with the
22 testimony we will probably take a quick
23 recess.

24 - - - - -
25 (Thereupon, Exhibit 13 was

1 played without the reporter
2 recording it.)

3 - - - - -
4 THE COURT: Counsel approach then,
5 please.

6 - - - - -
7 (A conference was held at the
8 bench outside the hearing of the
9 jury.)

10 - - - - -
11 THE COURT: We will take a recess
12 now.

13 MS. HARTNETT: That's fine.

14 THE COURT: It is going to be some
15 time with him I assume. And before we go
16 back on the record after the recess I want
17 you to think about the photographs, because
18 even if we change the big monitors, the
19 smaller ones that are at counsel's table,
20 those are very visible, to the extent that
21 counsel wants to be able to see those
22 themselves. So something to think about.

23 - - - - -
24 (Thereupon, the sidebar conference
25 ended.)

1 burglary and the specifications, one count
2 of violating a protection order and one
3 count of attempted arson and at the
4 conclusion of this case, after you have
5 heard all this evidence, we will ask you to
6 find him guilty as charged because the
7 evidence proves this case beyond a
8 reasonable doubt. Thank you.

9 THE COURT: Thank you, counsel.
10 Defense.

11 MR. LOWRY: Good morning again,
12 ladies and gentlemen of the jury. My name
13 is Derek Lowry and I as well as Tammi
14 Johnson represent the Defendant, James
15 Mammone, III. As the judge has informed
16 you, the State bears the burden of proof
17 beyond a reasonable doubt during both
18 phases of this trial. The State having the
19 burden has the option of calling as many or
20 as few witnesses, present as many or as few
21 pictures and other evidence as they deem
22 necessary to accomplish that. We on James
23 behalf will not be contesting much of the
24 evidence and/or facts with respect to this
25 matter.

1 related symptoms.

2 Ah, the profile that Mr. Mammone
3 produced is a, is, is a very unusual
4 profile to obtain from someone who is not
5 psychotic.

6 Ah, if I was given that profile
7 without knowing about, anything about the
8 person who produced it, I'd say in all
9 likelihood, ah, this person is suffering
10 from a psychotic disorder, schizophrenia or
11 something like it.

12 I don't believe that Mr. Mammone
13 is actively psychotic; however, ah, his
14 profile includes a number of
15 characteristics that are very infrequently
16 seen in individuals who are not psychotic.

17 Ah, typically individuals who
18 produce profiles of that kind and who are
19 not actively psychotic have very confused,
20 very disordered thinking. Ah, they have
21 very profound feelings of inner personal
22 alienation. They are often highly
23 preoccupied with very abstract or odd or
24 even sometimes occult ideas, ah, of a kind
25 that most of the people around them would

1 view as very strange or very odd and
2 eccentric. Ah, they are often people who
3 spend a great deal of their time in fantasy
4 and for whom over time the lines separating
5 their fantasies and reality become blurred
6 and very confusing to them.

7 Ah, they are often, ah, highly,
8 ah, rigid and perseverative -- and by
9 perseverative, I, I mean sort of rigid,
10 just unwavering in their thinking patterns,
11 very indecisive. Ah, they are often
12 preoccupied with persecutory thoughts.
13 They view the world as a highly threatening
14 place and they view themselves as highly
15 vulnerable to forces that they feel unable
16 to control.

17 Q. So you concluded that James is not
18 psychotic, correct?

19 A. Correct.

20 Q. And -- is that a yes or no question, in
21 general?

22 A. Ah, it's not always. Ah, I mean, psychosis
23 exists on a continuum. Ah, disordered
24 thinking of a kind that sometimes results
25 in diagnosis of psychosis, occurs on a

1 continuum. So an individual with some of
2 the characteristics that are found in
3 psychotic people -- confused sense of
4 identity, ah, very confused disordered
5 thinking, ah, deficits in terms of their
6 emotional responding, the events that occur
7 in their lives, highly distorted ideas
8 about relationships -- if at this end of
9 the continuum is someone who's
10 schizophrenic and over here is a well
11 functioning, well adaptive person, ah, a
12 person might be located at this point on
13 the continuum, not psychotic, but close
14 enough to the psychotic end to be said to
15 be exhibiting a lot of the symptoms that
16 are associated with psychotic disorders.

17 Q. Okay.

18 Based on everything that you've
19 learned during your seven months of work,
20 have you arrived at a diagnosis for James?

21 A. Yes.

22 Q. And what is your diagnosis?

23 A. Ah, my primary diagnosis is personality
24 disorder not otherwise specified with
25 schizotypal -- that's S-C-H-I-Z-O-T-Y-P-L --

1 borderline and narcissistic features. That
2 would be my primary diagnosis.

3 Ah, I would also include, for
4 descriptive purposes, the presence of both
5 passive aggressive and obsessive compulsive
6 personality traits.

7 I would diagnose him, ah, with
8 alcohol abuse episodic by history. I don't
9 believe he's an alcoholic or even that he
10 regularly used alcohol, but there was
11 clearly a pattern of episodic alcohol abuse
12 by history.

13 And then generalized anxiety
14 disorder. Again, by history.

15 Q. And do you believe your diagnostic
16 impression of James is consistent with what
17 you've learned from his prior treaters?

18 A. Yes. In fact, the generalized anxiety
19 disorder which I said was by history, ah,
20 that was the diagnosis that was, ah, given
21 to Mr. Mammone by Dr. Dennis Ward, ah, who
22 saw him towards the end of 2007.

23 Ah, I think I mentioned before
24 that I spoke with both Dr. Dennis Ward and,
25 ah, with, ah, Caroline Buck, another, ah,

1 counselor who had seen him.

2 And when I spoke with, ah, Dr.
3 Ward, ah, he had a few interesting things
4 to say.

5 And I also received a set of his
6 records, as well as Miss Buck's records, so
7 I was able to read those.

8 Ah, Dr. Ward --

9 MR. BARR: Objection.

10 THE COURT: Sustained.

11 BY MS. JOHNSON:

12 Q. Okay. Your diagnosis was consistent,
13 however, correct?

14 A. Yes.

15 Q. What do psychologists mean when they speak
16 of somebody having a personality disorder?

17 A. Um, I think the most important first thing
18 to be said about that is the way that term
19 is used by mental health professionals
20 shouldn't be confused with kind of our
21 day-to-day use of someone having a bad
22 personality, or you know, somebody's
23 difficult, or hard to get along with. It
24 doesn't mean that.

25 It means something very different.

1 And I always think a good way to begin, ah,
2 to come to an understanding of what's
3 implied by personality disorder is sort of
4 to begin with sort of your overall sense of
5 yourself and all of the components that
6 unable you to function effectively in the
7 world in your day-to-day life; ah, how you
8 handle your relationships; ah, how you deal
9 with the frustrations that you encounter;
10 ah, how you experience things emotionally,
11 and how you express your emotions; ah, how
12 you handle conflict; ah, all of those
13 things that if you sort of breakdown your
14 own day-to-day functioning make up who you
15 are, those are the things that are often
16 highly impaired, ah, in individuals who
17 have personality disorders of various
18 kinds.

19 The term "personality disorder"
20 refers to an enduring pattern of inner
21 experience and behavior that deviates
22 markedly from an individual's culture or
23 society and that is manifest in two of the
24 following four areas: Ah, cognition, or
25 thinking, ah, clarity of thinking.

1 Second area is emotions or
2 affective responding, how the person deals
3 with things at an emotional level; third
4 major area is the inner personal context,
5 how they handle their relationships; and
6 the fourth area impulsivity or ability to
7 control their impulses and tolerate
8 frustration.

9 And kind of the cardinal feature
10 after personality disorder is its
11 inflexibility, its chronic nature, the fact
12 that it's present across a wide range of
13 domains in the person's life, and the fact
14 that it results in significant, ah,
15 distress or maladjustment in most areas of
16 their life.

17 Q. Are there research findings pointing to a
18 genetic component --

19 A. Ah, what --

20 Q. -- for development of a personality
21 disorder?

22 A. Lots of them. I mean, the accepted
23 understanding among psychologists now --
24 because there is huge amount of research
25 pointing to, ah, a biological or genetic

1 predisposition to the development of
2 personality disorders. Ah, oftentimes
3 that's at least one component.

4 Q. Do environmental factors play a role?

5 A. Absolutely.

6 Q. Are there any specific environmental
7 factors that are identified as risk
8 factors?

9 A. There is a number of question -- there are.
10 And there are a number of questions that
11 it's always useful to ask in looking at
12 developmental factors that may have
13 contributed to an adult's development of a
14 personality disorder, because these are all
15 factors that the research has very clearly
16 pointed to as important determinants.

17 One question to ask is what was
18 the quality of the child's attachment and
19 bonding with primary care giving, ah,
20 figures in child's infancy and early child
21 hood.

22 Another important question is was
23 there in the child's environment sufficient
24 stimulation and structured enrichment or
25 learning experiences to, ah, you know,

1 enable the child to maximize his or her
2 potential.

3 Another, ah, important question
4 is, ah, was the child raised in a stable
5 nurturing home environment with parental
6 figures both physically and emotionally
7 available to the child.

8 Ah, a fourth question is what was
9 the quality of modeling that the child was
10 exposed to growing up, by the most
11 significant parental figures in his or her
12 life.

13 Another important question to ask
14 was limit setting and discipline handled in
15 a consistent or inconsistent manner
16 throughout the child's, ah, upbringing.

17 Ah, yet another factor is, ah, did
18 the child perceive the home environment,
19 ah, as a safe place or were there present
20 in the home, ah, factors that caused the
21 child to view it as unsafe, or threatening
22 in some way and maybe contribute to the
23 child's sense of, ah, himself as unsafe in
24 the world outside the home as well.

25 Ah, yet another question, ah, it's

1 Mitigating factors is anything you believe
2 weighs in favor of a life sentence,
3 basically.

4 Now there are some specific ones
5 the judge will talk to you about, including
6 James' lack of a significant prior record.

7 As you heard, up until June of
8 2008, when he would have been, what, 35
9 years old, 34 1/2 years old, James hadn't
10 committed any crime.

11 One of the factors that you may
12 consider involves James' mental disease or
13 defect, in, in legal terms.

14 And I submit to you that the
15 evidence is clear that James suffers from a
16 severe psychological disorder.

17 I mean, you heard Dr. Smalldon
18 this morning testify about that. But did
19 you really need that? I mean, let's be
20 honest with one another.

21 The man committed the acts that he
22 committed. He then calmly talked to the
23 police immediately thereafter and,
24 incredibly, admitted, in the tone and tenor
25 of just like went to the store and had, you

1 know, a time getting groceries.

2 Did you really need a psychologist
3 to tell you he suffers from a severe
4 psychological disorder?

5 And can people with severe
6 psychological disorders do things in normal
7 life? Of course they can. Of course, they
8 can.

9 I mean, the uni-bomber was one of
10 the smartest guys around, according to what
11 they say. And yet he was pretty, my term,
12 whacky.

13 The decision you are required to
14 make is whether or not the state proved
15 that the aggravating circumstances
16 outweigh. Outweigh. And each of you must
17 decide that for yourselves.

18 Any one of you individually who
19 decides that the state has not proven that
20 the aggravating circumstance outweighs
21 mitigating factors -- any mitigating
22 factors or all of them together -- means
23 the jury decides a life sentence. A life
24 imprisonment. Day for day for day for day
25 for the rest of his life.

1 circumstances do outweigh any mitigating
2 factors. We have that obligation. And we
3 have met that obligation in this case.

4 Miss Johnson said can't talk about
5 the way that it happened, that we stood
6 here and told you we want you to think
7 about the way it happened.

8 He sat there and told you. Their
9 evidence. In the mitigation, in this, this
10 phase, he talked about the way it happened,
11 not us.

12 This case is not about the
13 uni-bomber.

14 This case is about James Mammone,
15 III. He made choices, he carried out a
16 course of conduct. That's what it's about.

17 Purposeful killings of two or more
18 people. Individuals under the age of 13,
19 during the commission of an aggravated
20 burglary. That's what it's about.

21 And she can use her own terms to
22 describe him.

23 But, ladies and gentlemen, the
24 mitigating factor that she's referring to
25 you will be instructed on. And it

1 indicates, the Judge will tell you it's
2 whether at the time of committing the
3 offense the offender, because of a mental
4 disease or defect, lacked substantial
5 capacity to appreciate the criminality of
6 the offender's conduct or to conform the
7 offender's conduct to the requirements of
8 the law.

9 You have no evidence of that.

10 Dr. Smalldon is a qualified
11 individual. We're not disputing his
12 qualifications.

13 But he didn't tell you that he
14 lacked the capacity to conform or
15 appreciate the criminality. He didn't tell
16 you that, ladies and gentlemen.

17 He told you about this, this
18 personality disorder.

19 I submit to you many of us have
20 some of those traits, non-specified traits
21 of personality disorders, whether it be
22 obsessive compulsive or passive aggressive
23 or narcissistic tendency.

24 But his, his obsession was with
25 Marcia, not with this, solely based on

1 these, the religious tenants that he held.

2 He told you it was about him. It
3 was about how he was being treated.

4 He wanted to conform his testimony
5 -- or his statement to you yesterday to, to
6 suggest that oh, he just couldn't bear how
7 his children were being treated, who was
8 caring for them.

9 He knew who was caring for them,
10 the same people who were caring for them
11 before, just not him as much.

12 He wanted to conform it in that
13 way. Everything he said yesterday was his
14 way of telling you that you can't possibly
15 know the pain she inflicted on me when she
16 left, when she broke that covenant to God.

17 It convenient for him to, to cloak
18 himself in this religious kind of a, of a
19 vein. He wants to, to use that, but he
20 wants to use the, those type of tenants
21 that suit him.

22 He leaves out many others.
23 You know, there is religious tenants and
24 their sayings about better to have a
25 millstone around your neck and to be

1 drowned than to harm the hair on a head of
2 a child, but oh, he's not thinking of that.

3 Of course thou shalt not kill.

4 What about vengeance is mine?

5 He decided vengeance would be his,
6 because that's what he did when he engaged
7 in a course of conduct that involved the
8 purposeful killing of two or more.

9 It only had to have two. Even if
10 he had just killed the children and not
11 carried out the third, you still have that
12 course of conduct. And I submit to you
13 that that is sufficient to outweigh any
14 mitigation, but here you have three.

15 The mental personality disorder or
16 the traits that he had, no one told you
17 that they excused his conduct, or that they
18 caused his conduct in any way.

19 That instruction that you will be
20 read doesn't say that he lacked that
21 capacity or ability to conform on some
22 occasions. It doesn't qualify it as a
23 sometimes.

24 He didn't lack that. He made a
25 choice.

1 Look at those text messages again,
2 when you're back there.

3 He says at one point, Point of no
4 return, no jail for me.

5 Point of no return. He made a
6 choice.

7 Nothing in those instructions
8 about the mitigation aspect of any type of
9 personality disorder says, Oh, well,
10 someone with a personality disorder cannot
11 be sentenced to death.

12 That's for you to weigh in the
13 scheme of this, against those aggravating
14 circumstances, which I submit to you,
15 ladies and gentlemen, are heavy, heavy in
16 this case.

17 Miss Johnson wants you to reflect
18 upon the testimony that he was put down as
19 a child, that his, his father was an odd
20 individual and that there may have been
21 some abuse and he was certainly, ah, you
22 know, called some names.

23 But everyone who testified here in
24 this phase acknowledged he had loving
25 relationships in his life. He had his

1 ready then to proceed to the Motion
2 Number 79, which is the Evidentiary
3 Hearing on the Motion of the Defendant to
4 Suppress Statements Attributed to Him in
5 Violation of His Constitutional Rights.

6 MR. LOWRY: Your Honor, just to
7 make clear, there had been some
8 discussion. This motion that was filed on
9 November 12 specifically deals with the
10 statement that was made on or about
11 June 8, 2009. That was the statement that
12 we're challenging here today.

13 THE COURT: All right. Thank
14 you.

15
16 VICTOR GEORGE,

17 Who, after being first duly
18 sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MS. HARTNETT:

21 Q. Detective, go ahead and state your name
22 and spell your last name, please.

23 A. Victor George, G-E-O-R-G-E.

24 Q. And you are a detective with the Canton
25 Police Department?

- 1 A. That's correct.
- 2 Q. And how long have you been employed in
3 that capacity?
- 4 A. Approximately four years now.
- 5 Q. How long have you been a police officer?
- 6 A. I'm in my 20th year.
- 7 Q. All with the City of Canton?
- 8 A. Yes.
- 9 Q. Through your duties then specifically as a
10 Detective with the City of Canton Police
11 Department, have you become -- did you
12 become involved in the investigation of
13 the deaths of Margaret Eakin, Macy Mammone
14 and James Mammone, IV?
- 15 A. Yes, I did.
- 16 Q. And, are you aware of when the Defendant
17 in this case, James Mammone, III, was
18 taken into custody?
- 19 A. Yes.
- 20 Q. And do you know approximately when that
21 occurred?
- 22 A. It was in the morning hours. I want to
23 say 8, 9:00, if memory serves me right. I
24 don't know the exact time.
- 25 Q. On June 8, 2009?

- 1 A. Yes.
- 2 Q. And were you, in fact, present when he was
3 taken into custody?
- 4 A. Just after he was placed in handcuffs, I
5 showed up; yes.
- 6 Q. At any point did you have the opportunity
7 to have a conversation with Mr. Mammone or
8 take any type of statements from him?
- 9 A. Yes. After he was transported to the
10 police department, at that time myself and
11 Sergeant Baroni took a taped statement
12 from him.
- 13 Q. He was arrested where?
- 14 A. It was at his apartment in the 1400 block
15 of Fulton.
- 16 Q. In the City of Canton?
- 17 A. That's correct.
- 18 Q. All right. And he was then transported
19 from that location to the police
20 department?
- 21 A. Correct.
- 22 Q. And that's when you and Sergeant Baroni
23 had a conversation with him?
- 24 A. Yes.
- 25 Q. And you said it was at the Canton Police

1 Department?

2 A. Yes.

3 Q. Was it in a, what you would refer to as an
4 interview room?

5 A. Yes. It's an interview room that we have
6 in the back of our Detective Bureau. It's
7 a room that's approximately 7 x 10. It
8 has carpeted floors with a table and about
9 three chairs in it.

10 Q. And was the conversation that you and
11 Detective Baroni had with the Defendant,
12 was it recorded?

13 A. Yes, it was.

14 Q. And was it recorded in its entirety?

15 A. Yes.

16 Q. Have you had an opportunity to review
17 that, a tape or a disk of that recording
18 in order to determine that it did capture
19 the entire thing?

20 A. Yes, I have.

21 Q. Do you know approximately how long
22 Mr. Mammone and you and Detective Baroni
23 had been at the station before you began
24 to have this conversation?

25 A. I don't believe it was much more than

1 about 15 or 20 minutes after he was
2 brought in.

3 Q. Okay. Were you conversing with him prior
4 to recording?

5 A. No.

6 Q. Was he advised of his constitutional
7 rights at any point?

8 A. Yes. He was at the very beginning of the
9 recording.

10 Q. Was he advised of them prior to actually
11 even beginning the recording?

12 A. Sergeant Baroni read them to him prior to
13 turning the tape on, and then he read them
14 to him again and asked if he understood
15 them again.

16 Q. So they were actually read from a form?

17 A. Yes.

18 Q. I'm going to show you what I've marked as
19 State's Exhibit 1. Do you recognize that?

20 A. Yes. This is our Departmental Form 18.
21 It's a Notice of Constitutional Rights.

22 Q. Okay. And can you read what the form
23 says?

24 A. It says, "I am a police officer. I warn
25 you that anything that you say will be

1 was going to not allow the blood test?

2 A. Correct.

3 Q. So if he had not consented the blood test
4 probably wouldn't have been done at that
5 time, correct? The jail was going to
6 refuse to allow the blood test?

7 A. Yes, sir.

8 Q. Mr. Mammone stepped in and said I'll
9 consent and give you a blood sample?

10 A. Correct.

11 MR. LOWRY: No further questions,
12 Your Honor.

13 THE COURT: Redirect?

14 MR. BARR: One question, Your
15 Honor.

16 REDIRECT EXAMINATION

17 BY MR. BARR:

18 Q. Officer Clary, do you recall approximately
19 what time that blood was eventually drawn?

20 A. Around 5:30 p.m.

21 MR. BARR: Thank you.

22 THE COURT: Recross?

23 MR. LOWRY: No, Your Honor.

24 THE COURT: Ladies and gentlemen,
25 do any of you have a question of this

1 Exhibit 61B, the blood of James Mammone?

2 A. In my testing it was -- I considered it
3 negative for any drugs that I was testing
4 for.

5 Q. Mr. Spencer, I want to ask you a
6 hypothetical question. I want you to
7 assume for this question that an individual
8 indicated that about 9:00 p.m. on June 7th
9 of 2009 they ingested a Valium, that then
10 after about 5:50 a.m. on June 8th they
11 ingested approximately a dozen pain
12 killers, that that individual's blood was
13 drawn at approximately 5:30 and 6:00 p.m.
14 on June 8th, 2009, and properly stored
15 until it reached -- by that I mean
16 refrigerated in the proper method -- until
17 it reached your laboratory. Assuming all
18 those facts, sir, when you tested it on
19 June 8th, 2009, would you expect to find
20 evidence of drugs in his system?

21 A. So the first you said 9:00 p.m. and I
22 missed the drug.

23 Q. Valium, single Valium.

24 A. And then that was nine -- so 5:50 a.m. the
25 next morning, pain killers.

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BY MR. BARR:

Q. Mr. Spencer, once that blood is drawn and placed into a freezer and properly stored until you tested it on the 10th, does that affect the -- what you might find when you test it on the 10th as long it maintained its constant temporary?

A. No, I don't believe so. If something -- that's why we freeze samples as we do. The freezing as is anything you do, you put in your freezer at home preserves it for -- extends the life of it; not necessarily preserves it indefinitely, but extends the life of it. And so we are talking about a 24 hour, 48 hour period for testing that would preserve it. Actually probably the best way of preserving it we could do.

MR. BARR: Thank you, sir.

THE COURT: Cross-examination?

MR. LOWRY: No, Your Honor.

THE COURT: Ladies and gentlemen, do any of you have a question you wish to ask of this witness? Would you write it out, make sure your juror number is on it,

1 A. We don't have a procedure in that, sir,
2 but he read him the form. He agreed to
3 speak with us, and then immediately we put
4 the tape on and went over the rights
5 again.

6 Q. Were you present during the first reading
7 of the rights?

8 A. Yes, I was.

9 Q. And did Mr. Mammone verbalize that he
10 understood those rights prior to the tape
11 coming on?

12 A. He did.

13 Q. During the course of the interrogation you
14 were able to ascertain that Mr. Mammone
15 indicated that he had taken some
16 prescription Valium and other painkillers,
17 correct?

18 A. That's correct.

19 Q. Did you also learn that he had consumed
20 some wine in the early morning hours of
21 June the 8th, do you recall?

22 A. It's possible. I don't recall off the top
23 of my head but it's possible.

24 Q. And what tests, specific tests -- I should
25 ask are you ADAP certified in the

1 questions from the State?

2 MS. HARTNETT: Very briefly.

3 - - - - -
4 FURTHER REDIRECT EXAMINATION

5 BY MS. HARTNETT:

6 Q. Detective, did he seem willing to tell you
7 what happened?

8 A. Yes.

9 Q. Seemed like he wanted to give you details?

10 A. Yes. Like I stated, when we started off
11 with the interview, most of the content
12 came from him. Our questioning was just
13 to clarify his story.

14 Q. And you've already indicated that you
15 didn't observe any signs of intoxication.
16 Are you aware of whether or not blood was
17 taken from the Defendant in order to
18 determine whether he had anything in his
19 system at some point that day?

20 A. Yes. Later that day there was, I think,
21 urine was taken; if memory serves me.

22 Q. All right. And are you aware of whether
23 or not he did or did not have any evidence
24 of blood or alcohol in his system?

25 A. I believe it was negative.

1 carry out with it, because when I see her,
2 she, she controls me.

3 So, that's that.

4 So, I got out of the neighborhood
5 and I drove by Canton Baptist Temple, where
6 I went to church as a child, and kept going
7 out that way. Wasn't sure what I was going
8 to do

9 And I started driving out towards
10 the Jackson area and I went by Tam
11 O'Shanter Golf Club and out that way and I
12 was just taking roads that I was real
13 familiar with and, and roads that I didn't
14 think were heavily policed, because I just
15 wanted to figure out what my course of
16 action was going to be.

17 Ah, I had not considered suicide.
18 But I also definitely did not plan on
19 living through the morning. And I saw that
20 that blue pill bottle that I had was
21 sitting on my seat and I opened it up and I
22 took the handful. There was probably
23 around a dozen pills in there. And I did
24 eat them. I finished them off with the
25 wine. I'm very ignorant as to pills and

1 there.

2 Even though he wasn't sworn in,
3 you judge his credibility in the same way
4 you judge other witnesses.

5 He writes a letter telling Marcia
6 he took a few pills

7 Tells the police he took one pill.

8 You know, the truth always remains
9 constant.

10 He tells you, I didn't pick the
11 church. We just happened to be there.

12 But then he writes in his letter
13 to Marcia he picked the church because I
14 wanted the children to die on sacred
15 ground. I wanted them to die where they
16 were baptized, where I sat --

17 MS. JOHNSON: Objection, Your
18 Honor.

19 THE COURT: Sustained.

20 Disregard the comment.

21 MR. BARR: And then the biggest
22 credibility issue of all, yesterday, and to
23 the police, he says they were asleep. And
24 you know that's not true.

25 What is more credible, what he

1 years.

2 And I think that point is made by
3 the fact that that's the one phone call
4 that he kept because it shocked him I
5 believe he said when he heard the tenor of
6 the statement in there from his friend,
7 James.

8 The final particular piece of
9 evidence I'd ask you and facts in this case
10 I would ask to consider is that the State
11 in their case in chief argued and brought
12 in an expert to testify to one specific
13 portion of James's statement that he was
14 lying about. The medication. That he had
15 not taken those pills.

16 And in James's confession
17 statement to the police he indicates that
18 after all the crimes were committed he took
19 multiple pain killers. If he was going to
20 be shot by the police that that would take
21 the edge off.

22 I would ask you to remember that
23 while the State tried to prove him a liar
24 with that particular piece of his
25 statement, but yet wants you to believe

1 everything else he said. Their own expert
2 in the end could not testify to a
3 reasonable degree of certainty that he
4 could not have taken medication.

5 I, too, thank you for your time
6 and attention with respect to this matter.
7 As I had stated in my opening statement, we
8 would not and did not contest many of the
9 facts or evidence in this case. I would
10 ask you to remember your oath and to listen
11 to the instructions as the judge provides
12 them to you. That each of you when
13 rendering a decision must individually
14 render that decision both in this phase and
15 in the sentencing phase of this matter.
16 The instructions would read that it is your
17 individual decision to make. But that when
18 reaching those there is 12 individual
19 decisions that reach and come up with a
20 unanimous decision.

21 James has not contested many of
22 these matters from the beginning. When
23 questioned by the police he was truthful
24 and informed them of what occurred. And we
25 would, again, ask you to render decisions

LABORATORY NO. _____

SUSPECT(S) JAMES MAMMONE, III

CASE NO. 2009-04445

COMPLAINANT MARGARET EAKIN

POLICE DEPT. CANTON PD

LOCATION 315 POPLAR AVE NW

BUREAU ID

OFFENSE HOMICIDE

COLLECTED BY K CLARY #214

TO-LAB BY Kevin Clary

LABORATORY EXAMINATION(S) REQUESTED:

DATE 6-9-09 TIME 9am

CHEMICAL ANALYSIS

REC'D BY 1 JFC

LIST EVIDENCE

FOR LAB USE ONLY

A. 1 VIAL BLOOD
 MAMMONE, JAMES

A. Neg drug in parcel

B. 1 VIAL SERUM

B. Refers to 118417-1

COPIES TO:
 LAB FILE
 CASE FILE
 DET. BUR.
 JUV. BUR.
 VICE/CIU
 I.D. BUR.
 TRAFFIC BUR.
 PATROL DIV.
 METRO NARC.
 CANTON FIRE DEPT.
 CANAL FULTON P.D.
 UNIONTOWN P.D.

COUNTY PROS.
 SHERIFF
 MASSILLON POLICE
 ALLIANCE P.D.
 N. CANTON P.D.
 LOUISVILLE P.D.
 CORONER
 PERRY TWP. P.D.
 O.S.P., MASSILLON
 F.B.I., CANTON
 JACKSON TWP. P.D.
 HARTVILLE P.D.
 MINERVA P.D.

EVIDENCE EXAMINED BY JM

DATE 6/10/09 TIME 3P

EVIDENCE RETURNED TO _____

DATE _____ TIME _____

S/ _____

1/2

EB 6/22/09
 BT 6/22/09

CSCCL ALCOHOL CONTENT/TOXICOLOGY WORKSHEET

CASE # 09-7445 DEPT. CPD ANALYST [Signature]

Lab # 118417 Date/Time Opened/Analyst: 6/9/09 1030A

tape sealed other _____ Initial/Date: 6-8-09 R. Clary

envelope plastic bag other _____

Containing: Plastic Cup/Tube Gray Top Red Top Other: _____

Sec Urine Blood Coroner Condition of Sample: good / see

Name: MAMMONE, JAMES

Alcohol Content Analyst: _____ Batch Date: _____ Result: _____

Toxicology

Analyst/Date: 6/9/09

ONTRAK Teststik: BE + / - THC + / -

Toxi-Lab System: A Other: _____ All Stages Negative

STAGE 1: _____

STAGE 2: _____

STAGE 3: _____

STAGE 4: _____

Immunoassay (ELIZA): Yes No All Assays Negative ^(checked)

Benzoyllecognine _____ Tetrahydrocannabinol _____ Opiates _____ Propoxyphene _____

Methadone _____ Fentanyl _____ Carisoprodol _____ Amphetamines _____ Methamphetamine _____

Barbiturates _____ Tricyclic Antidepressants _____ Benzodiazepines +

Suspected Drug (s) Detected: none (Prescription -> check serial 118417)

Sample applied to GC/MS for Confirmation: Yes No

Detected/Confirmed by PE GC/MS: Yes (See Attached Sheets) No

Quantitation: Yes No Drug Quantitated: _____ Batch Date: _____

Sample Name: _____ ng/ml (dilution) _____ = (result) _____ ng/ml

Sample Name: _____ ng/ml (dilution) _____ = (result) _____ ng/ml

Ion Ratios: Calibration ion _____ / _____ Qualifier ions _____ / _____

Sample: _____

Control: _____

Independent Control: _____

Sealed on date: Blood 6/10/09 Returned to: Holst / ps -> CPD

Page 2 of 2 See Back

CSCCL Tox Form #1
3/10/2008 (Revision #01)

LABORATORY NO. 118421

SUSPECT(S) James Mammone III

CASE NO. 2009-07445

COMPLAINANT Margaret J. Eakin

POLICE DEPT. Canton

LOCATION 315 Poplar Ave NW

BUREAU Detective

OFFENSE Death Investigation

COLLECTED BY Francis Cross (SCSO)

LABORATORY EXAMINATION(S) REQUESTED:

TO LAB BY Lee S. Liu Sgt. E. Kiser #43

Drug Screen

DATE 06/09/2009 TIME 1045 AM

REC'D BY M

LIST EVIDENCE

FOR LAB USE ONLY

A. (1) Plastic bag
 containing a urine
 sample.
 ICN # 109960

A. neg drug in mail

B. Mammone, James
 6/8/09
 850g

B.

- COPIES TO: COUNTY PROS.
- LAB FILE SHERIFF
- CASE FILE MASSILLON POLICE
- DET. BUR. ALLIANCE P.D.
- JUV. BUR. N. CANTON P.D.
- VICE/CIU LOUISVILLE P.D.
- LD. BUR. CORONER
- TRAFFIC BUR. PERRY TWP. P.D.
- PATROL DIV. O.S.P., MASSILLON
- METRO NARC. F.B.I., CANTON
- CANTON FIRE DEPT. JACKSON TWP. P.D.
- CANAL FULTON P.D. HARTVILLE P.D.
- UNIONTOWN P.D. MINERVA P.D.

EVIDENCE EXAMINED BY JS
 DATE 6/10/09 TIME 2:57
 EVIDENCE RETURNED TO _____
 DATE _____ TIME _____

1/34

BT 6/22/09
 RB 6/22/11

CSCCL ALCOHOL CONTENT/TOXICOLOGY WORKSHEET

CASE # 09-7445 DEPT. CPD ANALYST G

Lab # 118421 Date/Time Opened/Analyst: 6/9/09 11:30A G

tape sealed other _____ Initial/Date: E. Limer 6/8/09

envelope plastic bag other _____

Containing: Plastic Cup/Tube Gray Top Red Top Other: _____

Urine Blood Coroner Condition of Sample: good

Name: JAMES MAMMONE

Alcohol Content Analyst: _____ Batch Date: _____ Result: _____

Toxicology

Analyst/Date: G 6/9/09

ONTRAK Teststik: BE + 10 THC 8/10
Toxi-Lab System: A Other: _____ All Stages Negative none

STAGE 1: _____
STAGE 2: _____
STAGE 3: _____
STAGE 4: _____

Immunoassay (ELIZA): Yes No All Assays Negative Stacy & Brian
Benzoyllecognine _____ Tetrahydrocannabinol _____ Opiates _____ Propoxyphene _____
Methadone _____ Fentanyl _____ Carisoprodol _____ Amphetamines _____ Methamphetamine _____
Barbiturates _____ Tricyclic Antidepressants _____ Benzodiazepines +

Suspected Drug (s) Detected: Bezos

Sample applied to GC/MS for Confirmation: Yes No - not confirmed on GC/MS

Detected/Confirmed by PE GC/MS: Yes (See Attached Sheets) No

Quantitation: Yes No Drug Quantitated: _____ Batch Date: _____

Sample Name: _____ ng/ml (dilution) _____ = (result) _____ ng/ml

Sample Name: _____ ng/ml (dilution) _____ = (result) _____ ng/ml

Ion Ratios: Calibration ion _____ / _____ Qualifier ions _____ / _____

Sample: _____ GC/MS report

Control: _____

Independent Control: _____

Sealed on date: 6/9/09 Returned to: H. Hill / Sgt - Retire CPD

Page 2 of 2 See Back

1 murders, something like that, you know, I
2 know that there is different murders, and
3 not all murders require the death penalty
4 but certain ones do. And if it is proven
5 to be that, then I believe that it needs
6 to be that.

7 MR. BARR: So in this case
8 you've heard me talk about the
9 specifications?

10 JUROR NO. 430: Uh-huh.

11 MR. BARR: And if we prove
12 those to you beyond a reasonable doubt in
13 the first phase, and then we prove to you
14 beyond a reasonable doubt that they
15 outweigh the mitigating factors, then you
16 can consider imposing the death penalty in
17 this case?

18 JUROR NO. 430: I can consider
19 it, yes, sir.

20 MR. BARR: Thank you very much.

21 And Juror 433, you're kind of
22 along the same lines. You said when the
23 crime is severe enough to warrant.

24 Again, the same question. You
25 understand the specifications here make

1 JUROR NO. 450: Yes.

2 THE COURT: All right. Let's
3 move this along.

4 MR. LOWRY: Thank you.

5 Juror Number 430, going back to
6 you indicated, and I know you and the
7 Prosecutor talked about the cold blooded
8 and the Manson cases.

9 Can you -- the Judge had just
10 gone through with respect to following the
11 law with respect to the aggravating
12 factors, prove beyond a reasonable doubt
13 outweigh the mitigating factors; can you
14 agree to follow that law as he instructed
15 it and not look at the crime itself when
16 rendering that decision?

17 JUROR NO. 430: Try to
18 understand your question. I guess,
19 yeah -- well, let me just tell you how I
20 feel.

21 MR. LOWRY: Please.

22 JUROR NO. 430: Like I told the
23 other attorney, you know, there are
24 circumstances that do require the death
25 penalty, and there are circumstances that

1 his grandmother, Margaret Eakin, was the
2 victim of aggravated murder at the hands of
3 the defendant, James Mammone, III.

4 These are the aggravating
5 circumstances to be weighed against any
6 factors in mitigation of the imposition of
7 the death penalty. And the Court has not
8 considered any victim impact evidence in
9 making its decision.

10 Mitigating factors.

11 It's important to remember that
12 mitigating factors are factors about an
13 individual or an offense that weigh in
14 favor of a decision that a life sentence
15 rather than a death sentence is
16 appropriate. They are not excuses or
17 justification for the offenses.

18 One, the defendant's lack of a
19 significant criminal record. The defendant
20 was convicted of domestic violence, a
21 misdemeanor of the fourth degree, but there
22 was no other criminal conviction or
23 juvenile adjudication.

24 This mitigating factor was given
25 substantial weight because it, along with

1 his adjustment to incarceration while at
2 the Stark County Jail awaiting trial in
3 this matter, are strong indicators that the
4 defendant would adapt well to prison life.

5 Two, the defendant expressed
6 regrets regarding the aggravated murder of
7 Margaret Eakin. He did express regret
8 concerning the aggravated murder of
9 Margaret Eakin and accordingly, his remorse
10 is a mitigating factor and is given minimal
11 weight by the Court.

12 Three, the defendant was, the
13 defendant was under extreme emotional
14 distress and suffering from a severe mental
15 disorder at the time of the aggravated
16 murders of Margaret Eakin, Macy Mammone and
17 James Mammone, IV.

18 While the testimony of Jeffrey
19 Smalldon is clear that any symptoms
20 associated with the disorder were not so
21 severe as to bring into question the
22 defendant's sanity at the time of the
23 offenses or his competency to stand trial,
24 the disorder is a mitigating factor given
25 substantial weight by the Court.

1 Dr. Smalldon's primary diagnosis
2 of the defendant was a personality disorder
3 not otherwise specified, with schizotypal,
4 borderline and narcissistic features.
5 Dr. Smalldon also referenced passive
6 aggressive and obsessive compulsive
7 personality traits, as well as alcohol
8 abuse episodic by history.

9 All these conditions and traits
10 were given substantial weight as mitigating
11 factors.

12 The defendant's work history. The
13 defendant started working at the age of 16
14 and worked continuously, except for a short
15 period of time during 2007. His jobs
16 included Mary's Restaurant, insurance
17 sales, and real estate appraisals. The
18 defendant even continued to work as a pizza
19 deliverer while he was going back to
20 college. The defendant worked hard and
21 provided for his family.

22 The defendant did well in college,
23 being placed on the President's list for
24 academic achievement.

25 These are mitigating factors and

1 were given substantial weight by the Court.

2 The history, character and
3 background of the defendant. Starting at
4 about age five and continuing 'til about
5 age of ten, when his father left their
6 home, the defendant was subjected to
7 physical and psychological abuse by his
8 father and, further, witnessed his mother
9 being subjected to physical and mental
10 abuse by his father. The defendant was
11 referred to as a loser and a maggot.

12 On the other hand, the defendant
13 was loved by his mother and grandparents
14 and had an especially close relationship
15 with his grandfather Mammone.

16 As a result of his parents being
17 divorced when he was ten, the defendant
18 grew up at times in a single-parent home
19 and, subsequently, in a home with his
20 mother and a stepfather until he left that
21 home when he was 18 years of age.

22 He was also subjected to both his
23 father and his grandfather abusing alcohol.
24 This abuse of alcohol influenced his
25 father's behavior in particular and all

1 these factors concerning his childhood and
2 formative years are mitigating factors
3 given substantial weight by the Court.

4 The Court has also considered all
5 the other statutory factors and the
6 additional mitigating factors raised by the
7 defense in the defendant's sentencing
8 memorandum, including his cooperation with
9 the police, all of which are given some
10 weight.

11 The nature and circumstances of
12 the offense are not aggravating factors to
13 be considered, nor were they considered as
14 mitigating factors.

15 As indicated, the Court has not
16 considered any victim impact evidence in
17 this matter, nor has any been presented to
18 the Court at this point in time.

19 The Court has also considered the
20 statements of counsel and the statement of
21 the defendant and all other matters
22 appropriate under Ohio law.

23 The Court has not combined the
24 aggravating circumstances, but only
25 considered the aggravating circumstances as

1 if they have had some exposure that they
2 are the type of person who can set that
3 aside and only weigh the evidence in the
4 case, or is it so ingrained in them that
5 the possibility of a fair trial is it has
6 been lost and due process denied if the
7 Court would have this matter go forward
8 here in Stark County.

9 Clearly I am troubled by the fact
10 that there was this exposure of many of
11 our citizens to the Defendant's statement.

12 And I would add that the Rideau
13 case said it doesn't matter how it got
14 there, whether the Sheriff sent it as in
15 that particular case. What's involved is
16 the fact of the exposure of the public to,
17 quote, in essence of somewhat of a
18 confession.

19 I have gone on, but the bottom
20 line is this. You have made your record.
21 You can supplement your record.

22 Clearly I would expect you to
23 refile at any time or reargue your motion
24 for a change of venue.

25 This isn't one of those times