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In the Supreme Court of Ohio

ORIGINAL

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

DEATH PENALTY CASE

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

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**PLAINTIFF-APPELLEE RESPONSE TO  
APPLICATION FOR REOPENING**

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Appellant James Mammone applies to reopen his direct appeal pursuant to S.Ct. Prac. R 11, §6(A) and *State v. Murnahan*, 63 Ohio St.3d 60, 583 N.E.2d 1204 (1992). For the reasons that follow, his application should be denied.

### STATEMENT OF THE CASE AND FACTS

In January 2010, James Mammone III, applicant here, was convicted of murdering his five year old daughter, Macy, his three year old son James IV and their maternal grandmother, Margaret Eakin. For these egregious crimes, he received the death penalty.

Following his convictions, Mammone filed a direct appeal with this Court raising nine propositions of law including 1) the trial court allegedly erred when it denied his motion for a change of venue; 2) that jurors 418 and 448 were unfairly biased in favor of the death penalty 3) ineffective assistance of counsel based on alleged failure to weed out jurors biased in favor of the death penalty, jurors allegedly irreparably tainted by pre-trial publicity and alleged failure to voir dire jurors about mitigating factors; 4) prosecutorial misconduct in the guilt phase; 5) prosecutorial misconduct in the penalty phase; 6) alleged trial court error 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; 7) that sentences of death were not warranted in his case; 8) that his execution would constitute cruel and unusual punishment because he “is a person with a serious mental illness,” and finally 9) a collection of constitutional arguments challenging Ohio’s death penalty.

On May 14, 2014, this Court rejected Mammone’s nine propositions of law and affirmed Mammone’s convictions and sentence. *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051. Mammone filed a motion for reconsideration, which was denied on July 23,

2014. He then filed a petition for writ of certiorari in the United States Supreme Court on October 23, 2014. *State v. Mammone*, Case No. 14-6832.

Mammone also filed a motion for post-conviction relief with the trial court on May 27, 2011. On December 14, 2011, the trial court dismissed Mammone's petition for post-conviction relief and granted the state's motion for summary judgement. Mammone appealed and the Fifth District Court of Appeals affirmed on August 6, 2012. *State v. Mammone*, 5<sup>th</sup> Dist. No. 2012CA00012, 2012-Ohio-3546. Mammone appealed to this Court, *State v. Mammone*, Case No. 2-12-1598. That matter remains pending.

Mammone now files a timely motion to reopen his initial appeal pursuant to S.Ct.Prac.R. 11, §6(A) and *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992) challenging the assistance of his appellate counsel.

#### *Applicable Law*

The two-pronged analysis of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) is the appropriate standard by which to assess whether an applicant has raised a genuine issue as to the ineffectiveness of appellate counsel. *State v. Reed*, 74 Ohio St.3d 534, 535, 660 N.E.2d 456, 458 (1996). To show ineffective assistance of appellate counsel, Mammone must prove that his counsel was deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had counsel presented that claim on appeal. *State v. Bryant-Bey*, 97 Ohio St.3d 87, 776 N.E.2d 480, 2002-Ohio-5450.

The U.S. Supreme Court has upheld the appellate advocate's prerogative to decide strategy and tactics by selecting what she thinks are the most promising arguments out of all possible contentions. The Court noted, "Experienced advocates since time beyond memory have

emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.” *Jones v. Barnes*, 463 U.S. 745, 77 L.Ed.2d 987, 103 S. Ct. 3308, 3313 (1983).

Moreover, even if a petitioner establishes that his counsel made an error that was professionally unreasonable under all of the circumstances, he must still establish prejudice – but for the unreasonable error there is a reasonable probability that the results of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

Here, Mammone claims that he has been denied effective assistance because of his appellate counsel's failure to raise four issues in his direct appeal - two which rely on evidence outside the record and two that present no reasonable probability of success. In these proposed propositions of law, addressed below, Mammone fails to demonstrate that his counsel rendered anything less than objectively reasonable assistance or that there is a reasonable probability that, but for the alleged errors, the result of his direct appeal would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), at paragraphs two and three of the syllabus, *cert. denied*, 497 U.S. 1011 (1990).

## ARGUMENT

### 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.**

Under his first proposed proposition of law, Mammone contends his trial counsel argued the wrong legal standard to the jury during his mitigation case in regard to his mental health issues - R.C. 2929.04(B)(3), mental disease or defect, instead of R.C. 2929.04(B)(7), the “catch

all” provision - and his appellate counsel rendered ineffective assistance in failing to raise this claim.

This argument fails for two reasons. First, Mammone cannot demonstrate the outcome would have been different. Mammone’s mental disease and personality disorder were considered by the jury and the trial court. Second, this Court, in its independent weighing considered Mammone’s mental state and personality disorder under R.C. 2929.04(B)(7).

It is well settled that the decision as to what evidence to present in the penalty phase of a capital trial is a matter of trial strategy and that debatable strategy does not generally constitute ineffective assistance of counsel. *State v. Keith*, 79 Ohio St.3d 514, 530, 684 N.E.2d 47 (1997), *State v. Coulter*, 75 Ohio App.3d 219, 230, 598 N.E.2d 1324 (1992). Moreover, the existence of alternate or additional mitigation theories does not establish ineffective assistance. *State v. Combs*, 100 Ohio App.3d 90, 105, 652 N.E.2d 205 (1994).

Here, Mammone’s speculation that a different trial tactic could have improved the defense would not have demonstrated ineffective assistance of counsel had this issue been raised by his appellate counsel. *State v. Post*, 32 Ohio St.3d 380, 388, 513 N.E.2d 754, 762-763(1987). There is no requirement that counsel argue any one section of R.C. 2929.04(B) in mitigation and Mammone cites no authority to support his claim.

Additionally, both the trial court and this court gave weight to Mammone’s mental health issues under the “catch all” provision. First the trial court, in its sentencing opinion pursuant to R.C. 2929.03(F), noted:

...While the testimony of Jeffery Smalldon is clear that any symptoms associated with the disorder were not so severe as to bring into question the defendants sanity at the time of the offenses or his competency to stand trial, the disorder was a mitigating factor given substantial weight by the court. Dr. Smalldon’s primary diagnosis of the defendant was a personality disorder, not otherwise specified,

with Schizotypal, Borderline and Narcissistic features. Dr. Smalldon also referenced passive-aggressive and obsessive-compulsive personality traits as well as alcohol abuse, episodic by history. All these conditions and traits were given substantial weight as mitigating factors.

*State v. Mammone*, Stark County Court of Common Pleas No. 2009CR0859, Opinion of the Court filed January 26, 2010 at pages 5-6. Appendix A.

What is more, in its independent determination of whether the aggravating circumstances in this matter outweighed the mitigating factors, this Court specifically gave moderate weight to Mammone's mental state and personality disorder under R.C. 2929.04(B)(7) and upheld his sentence of death:

Finally, under the catchall mitigation provision, we assign weight to a variety of factors. First, we give moderate weight to Dr. Smalldon's extensive testimony about Mammone's severe personality disorder and his mental state...

*State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 239.

Therefore, even if counsel's choice could somehow be construed as ineffective, Mammone still could not demonstrate prejudice on appeal and his appellate counsel was thus not ineffective for failing to raise this issue. The first proposed proposition of law should therefore be rejected.

## **PROPOSITION OF LAW NO. II**

**A PROSECUTOR'S SUPPRESSION OF EXCULPATORY EVIDENCE CONSTITUTES MISCONDUCT AND DEPRIVES A CAPITAL DEFENDANT OF A FAIR TRIAL AND 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.**

Mammone's second and third propositions of law rely on evidence outside the record and

are therefore not properly raised in a direct appeal, but rather in a motion for post-conviction relief. Indeed, portions of both propositions of law are repeated verbatim from Mammone's post-conviction relief petition and appeal to this Court where the issues were properly raised.

***State v. Mammone, Case No. 2012-1598, Memorandum in Support of***

**Jurisdiction.** Mammone's appellate counsel can hardly be deemed ineffective for failing to raise issues barred in a direct appeal. His second and third proposed propositions of law are therefore without merit.

**Brady Issue**

Mammone first complains that his appellate counsel rendered ineffective assistance for failing to raise a *Brady* challenge in his direct appeal and a related prosecutorial misconduct challenge. Mammone asserts here, as he did in his motion for post-conviction relief, that he tested positive for benzodiazepines and the state failed to reveal this fact. First, Mammone did not test positive for benzodiazepines. Second, his challenges center on notes taken by the scientist who tested urine and blood samples taken from Mammone shortly after the murders. The notes were not part of the trial record and Mammone takes them out of context to fit his argument. Mammone's post-conviction relief counsel properly raised these issues in his motion for post-conviction relief. See *State v. Mammone*, Case No. 2012-1598, Memorandum in Support of Jurisdiction at 20-21, Appendix B.

**Juror 430**

Mammone next faults appellate counsel for failing to raise an ineffective assistance of counsel claim connected to trial counsel's allegedly deficient voir dire of juror 430.

Mammone raises the same challenge here as he did in his motion for post-conviction relief - that juror 430 was an "automatic death penalty juror" who allegedly failed to either

consider or weigh any mitigating evidence. Yet there is no indication on the record to support a conclusion that juror 430 would or did disregard mitigation evidence. During voir dire, juror 430 indicated his understanding of the state's burden for each phase of the trial. Then under questioning by Mammone's counsel, juror 430 indicated that he would first need to hear "what went down officially" in this matter before he could consider the death penalty. (VD (II) at 230-231, 257-258.)

The source of Mammone's allegations is an affidavit filed with his motion for post-conviction relief, and executed by an investigator with the State Public Defender's Office who allegedly interviewed juror 430 - not the trial record. See *State v. Mammone*, case No. 2012-1598, Memorandum in Support of Jurisdiction at 11-14, Appendix C. The information is therefore outside the record and not admissible in a direct appeal.

Mammone's counsel cannot be deemed ineffective for failing to brief issues in Mammone's direct appeal that required evidence outside the record. The second and third proposed assignments of error are thus groundless.

#### **PROPOSITION OF LAW NO. IV**

#### **FAILURE TO MAKE AND RENEW 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.**

Finally, Mammone complains his appellate counsel was ineffective for failing to raise an ineffective assistance of counsel claim for trial counsel's failure to renew the motion for a change of venue at the conclusion of voir dire and for failing to challenge two "automatic death penalty" jurors during voir dire.

First, this Court has repeatedly held that where voir dire regarding pretrial publicity is adequate, trial counsel's failure to renew a motion for a change of venue at the conclusion of voir dire does not equal ineffective assistance. See *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, at ¶ 49; *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 228-229; *State v. Thompson*, 2014--- N.E.3d ----, 2014 -Ohio- 4751, at ¶ 238-240.

Moreover, Mammone cannot demonstrate prejudice. In his direct appeal, Mammone's first proposition of law argued that the trial court's denial of his motion for a change of venue due to pre-trial publicity violated his rights to due process and a fair trial by an impartial jury. This Court conducted an exhaustive analysis and concluded that prejudice should not be presumed in Mammone's case and that actual prejudice did not exist. *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051 at ¶ 68, 74. What is more, Mammone himself created the biggest pre-trial publicity issue himself by mailing his confession to the Canton Repository, a letter the Repository published. This Court stated:

We decline to allow Mammone to benefit from the publicity he created by submitting his own confession to the *Repository*. We conclude that the trial court's denial of Mammone's motion for a change of venue did not violate his rights to due process and to a fair trial by an impartial jury.

*Id.* at ¶ 52.

Because Mammone could not demonstrate prejudice in his original complaint, to frame the same complaint as an ineffective assistance of trial counsel complaint would have fared no better. He therefore fails to demonstrate ineffective assistance of appellate counsel.

Similarly, Mammone complains that trial counsel rendered ineffective assistance when they failed to challenge two "automatic death penalty" jurors - Jurors 418 and 448 - and appellate counsel should have raised this issue as well. Yet this court thoroughly examined the issue in Mammone's second proposition of law and found no error in either juror's service. *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051 at ¶83 and 92. To frame the

issue another way would have had no greater possibility of success.

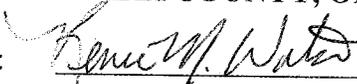
Mammone's final proposed proposition of law is without merit.

**CONCLUSION**

Mammone has failed to demonstrate a genuine issue as to whether he was deprived of the effective assistance of counsel on appeal. His motion for reopening should therefore be denied.

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By:

  
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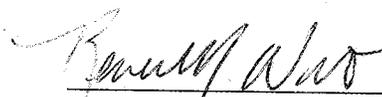
  
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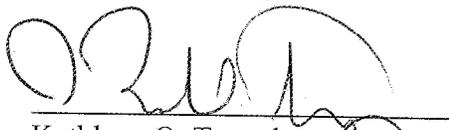
**PROOF OF SERVICE**

A copy of the foregoing MEMORANDUM IN RESPONSE was sent by ordinary U.S. mail this 14th day of November, 2014, to William S. Lazarow, counsel for defendant-appellant, at 400 South Fifth Street, Suite 301, Columbus, Ohio 43215.



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

#### MITIGATING FACTORS

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

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

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

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

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

**MARGARET EAKIN**

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

ineffective assistance of counsel is sufficient, if not to mandate a hearing, at least to avoid dismissal on the basis of res judicata.” State v. Cole, 2 Ohio St. 3d 112, 114, 443 N.E.2d 169, 171 (1982). The State of Ohio acknowledges that this evidence was available to trial counsel who did not investigate it. (Response/Motion to Dismiss, p. 29). This claim is not barred by res judicata and should not have been subject to summary judgment.

**E. The suppression of evidence material either to guilt or to punishment is a due process violation. (Eighth and Ninth Grounds for Relief).**

These Grounds involve the withholding of positive drug screening evidence that violated Mammone’s constitutional right to due process because the evidence was “material either to guilt or to punishment.” See Brady v. Maryland, 373 U.S. 83 (1963) (emphasis added). The trial court erred in granting summary judgment on these claims when the State provided no evidence that they correctly followed their drug testing procedure or that their procedure actually applies. The appellate court erred by relying on the “overwhelming and conclusive evidence of appellant’s guilt” and failing to consider that the withheld drug tests were material to Mammone’s *punishment*, in contradiction to Brady. State v. Mammone, Case No. 2012CA00012 at 11; 2012 Ohio 3546; 2012 Ohio App. LEXIS 3142 (Stark Ct. App. August 6, 2012).

In the Judgment Entry denying post-conviction relief and granting the State’s motion for summary judgment, the trial court said the impact Valium would have on Mammone’s statement was, “explored and rejected”. (Dec. 14, 2011, Judgment Entry, p. 15). But in considering the suppression motion, the court was misled by the State to believe that all drug tests were negative. (Nov. 24, 2009 Suppression Hearing, p. 69). Thus a positive drug test was never explored, and therefore could not have been rejected.

Evidence of positive drug tests would have changed the tenor of the suppression hearing, especially in light of the timing of the taped statement. Mammone gave the statement around 8 or

9 a.m. on the morning of June 8, 2009. (*Id.*, p. 34). Mammone's blood sample was not taken until much later, approximately 5:30 p.m. that evening. (Vol. 6 p. 55, 64). That Mammone still tested positive for drugs that much later reflects the great effect the "dozen pills" in his system would have made on the voluntariness of his statements early that morning. (PP. Vol. 1, p. 285).

The State presented no evidence that the Department of Health Administrative Code procedure applies or is followed by the Canton-Stark County Laboratory. Also, the blood serum tested by Jay Spencer specifically indicates that the GC/MS confirmation was not conducted. (PC Ex. J). Hence, there is no evidence that a secondary test on the blood serum was conducted to determine whether there was a false positive. Thus, there is a factual dispute in need of an evidentiary hearing, at minimum.

Additionally, the withholding of the positive test results was a Brady violation because it denied trial counsel the opportunity to seek expert opinion as to whether there was an influence or effect on Mammone's confession. (PC Exs. M, N). The State was also able to use this withheld evidence to undermine Mammone's credibility at the penalty phase by implying that he lied about taking drugs. (PP. Vol. 2, p. 472). Also, Dr. Smalldon was denied the benefit of this evidence in consideration for mitigation purposes. Since Brady violations concern evidence that was material as to guilt *or* punishment, Mammone's constitutional rights were violated by the withholding of the positive drug test results.

**F. Cumulative Error. (Tenth Ground for Relief).**

In this claim for relief, Mammone asserted that, assuming *arguendo* none of the grounds for relief in his post-conviction petition individually warrant relief, the cumulative effects of the errors and omissions as presented in the petition prejudged Mammone and violated his constitutional rights. U.S. Const. amends. IV, V, VI, VIII, IX and XIV; Ohio Const. art. I, §§ 1,

Performance of defense counsel is judged with an objective standard of reasonableness. Strickland, 466 U.S. at 688. Considering an objective standard of reasonableness, counsel's performance was deficient. Counsel must conduct a thorough investigation into their client's background. Williams v. Taylor, 529 U.S. 362, 397 (2000) (internal citation omitted); Austin v. Bell, 126 F.3d 843, 848 (6th Cir. 1997). See also ABA Guidelines, Comment 10.7.

As evidenced by Dr. Stinson's affidavit and specifically outlined in Mammone's post-conviction petition, Mammone possess numerous brain deficit indicators of which counsel should have been aware. (PC Ex. A, pp. 5-9). Trial counsel were deficient for failing to follow-up on these indicators to Mammone's prejudice because the jury was precluded from hearing valuable mitigating evidence.

Trial counsel were ineffective for failing to obtain all necessary experts as to this crucial mitigating evidence. This was crucial because Juror 438 did not consider Dr. Smalldon's testimony because he stated that Mammone was not crazy. (PC Ex. B). Had this juror and the other jurors been confronted with the neuropsychological evidence (and actually followed the court's instructions, as discussed below) a reasonable probability exists that the jury would have returned a different sentence.

**B. Defense counsel failed to fully voir dire an automatic death juror. (Second Ground for Relief).**

Mammone's trial counsel were also ineffective for failing to voir dire Juror 430, an "automatic death penalty juror," and allowing him to remain on the jury. The lower courts erred by dismissing this claim and not considering Mammone's submitted affidavit.

Defense counsel failed to reasonably question jurors before the start of the trial phase of Mammone's capital trial. Counsel's deficient performance allowed a juror to sit on Mammone's jury who would not consider mitigating evidence. This significantly prejudiced Mammone.

To support this ground for relief, Mammone cited the affidavit of Criminal Investigator Felicia Crawford. (PC Ex. B). Ms. Crawford was present for an interview with Juror 430. Juror 430 stated that there was nothing that the defense attorneys could have done during the mitigation phase of Mammone's trial that would have changed his decision regarding the death penalty. (*Id.*) As Juror 430 indicated, all premeditated murders should receive the death penalty. (*Id.*) On his questionnaire, Juror 430 wrote that "in my eyes cold blood murder is capital punishment." (PC Ex. C, Juror No. 430, p. 2). During voir dire, Juror 430 indicated that certain "murders require the death penalty." (Vol. 2, p. 231, 257). Juror 430 is commonly known as an "automatic death penalty" juror. Once he found Mammone 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. O.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 were 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 Mammone'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. 567-71). Counsel's errors rendered Mammone's trial fundamentally unfair and denied Mammone his constitutional rights under both the United States and Ohio Constitutions.

In granting summary judgment on this claim, the trial court stated that Investigator Crawford's affidavit was "inadmissible hearsay" under Evid. R. 606(B). (Dec. 14, 2011 Judgment Entry, p. 12). Evid. R. 606(B) provides in part:

Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, *a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations* or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith....(emphasis added).

However, Juror 430 brought his "automatic death juror" attitude into trial, as reflected in his juror questionnaire, meaning it preceded the deliberations, and therefore, the affidavit falls outside of Evid. R. 606(B) and should have been considered by the trial court. In his questionnaire, Juror 430 wrote that "in my eyes cold blood murder is capital punishment." (Ex. C, Juror No. 430, p. 2). The affidavit merely illustrates the responses trial counsel would have obtained from Juror 430 if they had properly questioned him during voir dire. Trial counsel failed to do this, even though they had ample notice that Juror 430 would automatically vote for the death penalty based on his questionnaire.

Despite jury instructions, Juror 430 refused to follow Ohio law. Therefore, his statements to Investigator Crawford fall outside of Evid. R. 606(B) because he was dishonest about considering mitigating evidence. "Some courts have held that testimony regarding a juror's failure to answer questions honestly during voir dire is not prohibited by Evid. R. 606(B)." See Grundy v. Dhillon, 120 Ohio St. 3d 415, 427, 900 N.E.2d 153, 163 (2008).

In granting summary judgment, the trial court quotes Juror 430 as stating he would first need to hear "what went down officially" before considering the death penalty. (Dec. 14, 2011 Judgment Entry, p. 11). This ambiguous statement meant, at best, that Juror 430 would need to hear evidence of guilt before automatically applying the death penalty, regardless of mitigation.

If anything, that statement reaffirms that Juror 430 had an automatic death attitude and should have been further questioned by counsel who knew this was a mitigation case.

By allowing an automatic death juror on a jury in a death penalty case, counsel's performance fell below an objective standard of reasonable representation and Mammone was prejudiced by having a juror who would not even listen to mitigation evidence, contrary to Ohio law. See Strickland v. Washington, 466 U.S. 668 (1984); O.R.C. § 2929.04(B). Also, Mammone had the right to a fair and impartial jury in the penalty phase of his trial. See Morgan v. Illinois, 504 U.S. 719, 726-27 (1992); White v. Mitchell, 431 F.3d 517, 537 (6th Cir. 2005).

**C. Appellant was prejudiced by juror misconduct. (Third and Fourth Grounds for Relief).**

These juror misconduct claims should not have been dismissed by the lower courts because they were based on evidence dehors the record. To support these grounds for relief, Mammone cited the affidavit of Criminal Investigator Felicia Crawford. (PC Ex. B). Ms. Crawford was present for an interview with Juror 438. Juror 438 said that once Dr. Jeffrey Smalldon testified that Mammone was not crazy he did not consider anything Dr. Smalldon testified to in support of mitigation. Therefore, Juror 438 did not consider Mammone's extreme emotional distress and the fact he was suffering from a severe mental disorder at the time of the crime. (See PP Vol. 2, pp. 407-422; PP Vol. 3, p. 568). As with Juror 430 (discussed above), Juror 438 did not follow Ohio law and failed to consider mitigation evidence *before* deliberations even began, which would make Juror 438's statements fall outside of Evid. R. 606(B). See Grundy v. Dhillon, 120 Ohio St. 3d 415, 427, 900 N.E.2d 153, 163 (2008). Thus, the lower courts erred in failing to consider Ms. Crawford's affidavit.

The trial court also erroneously relied on Juror 438's statements at trial. During voir dire, Juror 438 did not indicate that he would not follow the law. (Vol. 1, pp. 29-254; Vol. 2, pp. 188-