CASE NO. _____

CAPITAL CASE

IN THE UNITED STATES SUPREME COURT

JAMES MAMMONE III,

Petitioner,

v.

CHARLOTTE JENKINS,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
VOLUME 1

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IN THE COURT OF COMMON PLEAS

STARK COUNTY, OHIO

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

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

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

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

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

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

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

Margaret Eakin:

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

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

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

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

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

Macy Mammone:

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

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

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

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

James Mammone, IV:

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

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

2) James Mammone, IV was under thirteen years of age at the time of his aggravated murder by the defendant and the defendant was the principal offender in the commission of the aggravated murder of James Mammone, IV.

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

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

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

MITIGATING FACTORS

1) The defendant's lack of a significant criminal record. The defendant was convicted of domestic violence, a misdemeanor of the fourth degree, but there was no other criminal conviction or juvenile adjudication. This mitigating factor was given substantial weight because it along with his adjustment to incarceration while at the Stark County Jail awaiting trial in this matter, were strong indicators that the defendant could adapt well to prison life.

2) The defendant expressed regrets regarding the aggravated murder of Margaret Eakin. This remorse was a mitigating factor and was given minimal weight by the Court as it related to the aggravated murder of Margaret Eakin.

3) The defendant was under extreme emotional distress and suffering from a severe mental disorder at the time of the aggravated murders of Margaret Eakin, Macy Mammone and James Mammone, IV. While the testimony of Jeffrey Smalldon is clear that any symptoms associated with the disorder were not so severe as to bring into question the 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 Schizotypl, Borderline and Narcissistic features. Dr. Smalldon also referenced passive-aggressive and obsessive-compulsive personality traits as well as alcohol abuse, episodic by history. All these conditions and traits were given substantial weight as mitigating factors.

4) The defendant's work history. The defendant started working at the age of 16 and worked continuously, except for a short period of time during 2007. His jobs included, Mary's Restaurant, insurance sales and real estate appraisals. The defendant even continued to work as a pizza deliverer while he was going back to college. The defendant worked hard and provided for his family. The defendant did well in college being placed on the "President's List" for academic achievement. These were mitigating factors and were given substantial weight by the Court.

5) The history, character and background of the defendant. Starting at about age five and continuing until about the age of ten when his father left their home, the defendant was subjected to physical and psychological abuse by his father and further witnessed his mother being subjected to physical and mental abuse by his father. The defendant was referred to as a "loser" and a "maggot". On the other hand, the defendant was loved by his mother and grandparents and had an especially close relationship with his grandfather Mammone. As a result of his parents being

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

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

MARGARET EAKIN

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

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

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

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

MACY MAMMONE

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

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

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

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

JAMES MAMMONE, IV

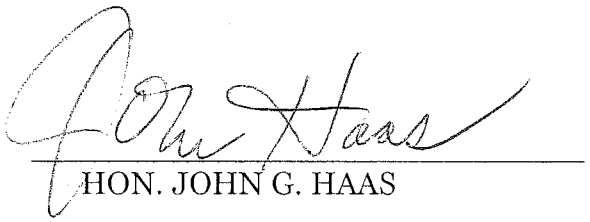
The Court weighed the specific aggravating circumstances related to the aggravated murder of James Mammone, IV against the mitigating factors set forth herein and found that the State of Ohio had proven beyond a reasonable doubt that the aggravated circumstances involving the aggravated murder of James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

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

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

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

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



HON. JOHN G. HAAS

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COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- JAMES MAMMONE, III Defendant-Appellant	:	JUDGES: Hon. Patricia A. Delaney, P. J. Hon. William B. Hoffman, J. Hon. Sheila G. Farmer, J. Case No. 2012CA00012 O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 2009CR0859

JUDGMENT: Affirmed

DATE OF JUDGMENT:

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Farmer, J.

{¶1} On June 17, 2009, the Stark County Grand Jury indicted appellant, James Mammone, III, on three counts of aggravated murder in violation of R.C. 2903.01 with death penalty specifications in violation of R.C. 2929.04(A)(5), (7), and (9). One of the aggravated murder counts carried a firearm specification in violation of R.C. 2941.145. Appellant was also indicted on two counts of aggravated burglary in violation of R.C. 2911.11, each with a firearm specification, violating a civil protection order in violation of R.C. 2919.27, and attempted arson in violation of R.C. 2923.02 and 2909.03. Said charges arose from the deaths of appellant's former mother-in-law, Margaret Eakin, and his two children, Macy, age five, and James, age three.

{¶2} A jury trial commenced on January 11, 2010. The jury found appellant guilty as charged. After the mitigation phase, the jury recommended the death penalty. By judgment entry filed January 22, 2010, the trial court sentenced appellant to three consecutive death sentences.

{¶3} Appellant filed an appeal with the Supreme Court of Ohio, Case No. 10-0576. The appeal remains pending.

{¶4} On May 27, 2011, appellant filed with the trial court a petition for postconviction relief. An amended petition was filed on September 2, 2011. By judgment entry filed December 14, 2011, the trial court denied appellant's petition, finding he did not present sufficient evidence to warrant a hearing.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE TRIAL COURT ERRED IN DISMISSING MAMMONE'S POST-CONVICTION PETITION WHEN HE PRESENTED SUFFICIENT OPERATIVE FACTS TO MERIT RELIEF OR, AT MINIMUM, AN EVIDENTIARY HEARING."

II

{¶7} "THE TRIAL COURT ERRED WHEN IT DENIED THE POST-CONVICTION PETITION WITHOUT FIRST ALLOWING MAMMONE TO CONDUCT DISCOVERY."

III

{¶8} "THE TRIAL COURT ERRED WHEN IT DENIED MAMMONE'S MOTION FOR FUNDS TO EMPLOY EXPERTS."

I

{¶9} Appellant claims the trial court erred in denying his petition for postconviction relief as he had raised violations of his constitutional rights and presented sufficient evidentiary items to warrant a hearing. We disagree.

{¶10} R.C. 2953.21 governs petition for postconviction relief. Subsection (C) states the following:

{¶11} "The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against

the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal."

{¶12} In his September 2, 2011 amended petition for postconviction relief at 9-30, appellant argued ten grounds for relief.[1]

{¶13} First, appellant argued his trial counsel was ineffective for failing to obtain all necessary experts specifically, a neuropsychologist to evaluate him, and failed to request neuroimaging. Appellant argues the trial court did not properly consider these claims.

{¶14} The record establishes on August 17, 2009, the trial court appointed the testifying forensic psychologist, Jeffrey Smalldon, Ph.D., as specifically requested by appellant on June 23, 2009.

{¶15} In his petition, appellant attached as Exhibit A the affidavit of a board certified forensic psychologist, Bob Stinson, Psy.D., J.D., ABPP, who opined at ¶17, "I strongly recommend that James Mammone be evaluated by specialists in the field of neurology, neurophysiology, and neuropsychology to determine the existence of brain dysfunction, neurological insults, and/or neuropsychological deficits." Dr. Stinson at ¶15 noted Dr. Smalldon was not a neuropsychologist. In fact, Dr. Smalldon is a forensic psychologist as is Dr. Stinson.

[1]As noted by the trial court in its December 14, 2011 judgment entry denying appellant's petition for postconviction relief at fn. 21, "[w]ith the exception of one paragraph that appears to be in error, Mammone's sixth and seventh grounds for relief are identical."

{¶16} Dr. Smalldon testified he has conducted neuropsychological assessments requested by neurologists, neurosurgeons, and other specialists to determine "whether some of their patients may have deficits that haven't maybe turned up on MRIs and cat scans, but that may show up in neuropsychological testing." Sentencing Phase Vol. II T. at 367-368.

{¶17} Dr. Smalldon testified he met with appellant seven times with twenty hours of face-to-face time. Id. at 376. His evaluation included numerous tests given to appellant as well as a "review of a very extensive collection of case relevant background records" and third-party interviews. Id. at 377, 400-401. Dr. Smalldon found no indication of any brain disorder, despite appellant's medical history of a bicycle accident wherein he may have lost consciousness. Id. at 401. He also opined appellant was not actively psychotic, but his profile did include characteristics of those who are psychotic. Id. at 405, 406. Dr. Smalldon found appellant to have a severe personality disorder not otherwise specified with schizotypl, borderline, and narcissistic features. Id. at 408, 416-419. Appellant also exhibited the "presence of both passive aggressive and obsessive compulsive personality traits" and "generalized anxiety disorder" by history. Id. at 408, 420-421. None of the testing indicated any brain damage. Id. at 426.

{¶18} In his affidavit, Dr. Stinson, who possesses the same credentials as Dr. Smalldon, advanced the opposite opinion. We fail to see that the presence of a contradicting opinion by one who never interviewed appellant would result in any affirmative help to appellant's case. The affidavit is only an offer of a contradicting opinion and not definitive evidence on the issue.

{¶19} We find the trial court did not err in rejecting Dr. Stinson's affidavit and denying appellant's first ground for relief.

{¶20} Secondly, appellant argued his trial counsel was ineffective for failing to properly question Juror No. 430 and failing to remove this juror from the panel. This issue is ripe for appellant's direct appeal and is therefore barred under *State v. Perry* (1967), 10 Ohio St.2d 175.

{¶21} We find the trial court did not err in denying appellant's second ground for relief.

{¶22} Appellant's third and fourth grounds for relief challenged activity that occurred during jury deliberations regarding Juror No. 438 and the fact that the jury prayed before beginning deliberations on the penalty phase. In support of his arguments, appellant submitted as Exhibit B the hearsay affidavit of a criminal investigator for the State Public Defender's Office, Felicia Crawford.

{¶23} Evid.R. 606 governs competency of juror as witness. Subsection (B) states the following:

{¶24} "**(B) 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. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after

some outside evidence of that act or event has been presented. However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court. A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying will not be received for these purposes."

{¶25} The affidavit of Ms. Crawford is a flagrant attempt to bypass the aliunde rule adopted by the Ohio legislature in Evid.R. 606(B). *State v. Jones* (December 29, 2000), Hamilton App. No. C-990813. The trial court was correct in disregarding the affidavit.

{¶26} We find the trial court did not err in denying appellant's third and fourth grounds for relief.

{¶27} Appellant's fifth and sixth grounds for relief argued his trial counsel was ineffective for failing to attack the Stark County Prosecutor's Office for its arbitrary, capricious, and discriminating practice in indicting the death penalty. Appellant argued this issue violates his rights to equal protection under the United States Constitution.

{¶28} Appellant argues he has supported this claim with items dehors the record and is entitled to a hearing. The submitted items dehors the record are Exhibits F, G, H, and I attached to appellant's petition. However, these exhibits are not of evidentiary quality. Also, having served ten years on the Common Pleas bench, this writer is aware that Exhibit F, titled "Stark County Death Penalty Indictments," is an incomplete list.

{¶29} The trial court found the arguments on this issue to be barred by the doctrine of res judicata, citing *Perry,* supra, and the Supreme Court of Ohio's decision in

State v. Jenkins (1984), 15 Ohio St.3d 164. The *Jenkins* court at paragraph one of the syllabus held, "Ohio's statutory framework for imposition of capital punishment, as adopted by the General Assembly effective October 19, 1981, and in the context of the arguments raised herein, does not violate the Eighth and Fourteenth Amendments to the United States Constitution or any provision of the Ohio Constitution." The *Jenkins* court at 169 specifically addressed the discretionary role of the state's elected prosecuting attorney, citing Justice Stewart's opinion in *Gregg v. Georgia* (1976), 428 U.S. 153, 199:

{¶30} " 'First, the petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would support a capital verdict. And finally, a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor of the State and the Georgia Board of Pardons and Paroles.

{¶31} " 'The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman* [*v. Georgia* (1972), 408 U.S. 238], in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted

of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. * * *' "

{¶32} We find the trial court did not err in denying appellant's fifth and sixth grounds for relief.

{¶33} As for the seventh ground for relief, see footnote 1.

{¶34} Appellant's eighth and ninth grounds for relief argued the state failed to disclose exculpatory evidence. Appellant submitted blood and urine samples. The preliminary notes of criminalist Jay Spencer in analyzing the samples indicated a positive result for Benzodiazepines. The confirming analysis was negative as was Mr. Spencer's opinion at trial. Vol. VI T. at 63-64. Because of the lack of disclosure of the preliminary findings, appellant argued he was denied an effective argument at the suppression hearing: the taking of Valium prior to his arrest thereby affecting his confession. Appellant further argued this evidence could have countered the state's implication during final argument that he was not truthful about taking drugs. Vol. VIII T. at 53-54. Appellant argued this non-disclosure is a violation of *Brady v. Maryland* (1963), 373 U.S. 83, wherein the United States Supreme Court held at 87, "[w]e now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

{¶35} The trial court concluded Mr. Spencer's testimony was not false because the confirmation test established the samples were negative for drugs. The trial court also concluded the presence or absence of drugs in appellant's system was not material to whether he committed the crimes, and the claimed ingestion of Valium was

thoroughly vetted during the suppression hearing. November 24, 2009 T. at 42-43, 45-46, 47-48, 59-60, 67.

{¶36} Although the trial court's conclusions are correct, even without the confession, we find the overwhelming evidence presented at trial persuades us that any failure to disclose the complained of evidence did not prejudice appellant in the guilty phase of the trial.

{¶37} Marcia Eakin testified during the trial. Ms. Eakin was appellant's ex-wife, and the mother of the children-victims, Macy and James, and the daughter of the adult-victim, Margaret Eakin. She testified throughout the evening preceding the deaths, appellant texted her and called her with veiled threats regarding the children's safety who were spending the evening with him. Vol. V T. at 56-63, 69-71; State's Exhibit 15. The children were with appellant all evening until they were found dead in the backseat of appellant's vehicle the next morning. Id. at 159. Appellant's vehicle was seen at the residence of Margaret Eakin at the time of her death by neighbors who ran outside after hearing gunshots. Id. at 125, 128-129.

{¶38} In the morning, appellant called Ms. Eakin and admitted to her that he had killed her mother and the children. Id. at 78-79. After his arrest, as the blood on appellant's hands was being swabbed for evidence, appellant gratuitously stated to Canton Police Crime Scene Officer Randy Weirich that he used his left hand in stabbing the children and beating his former mother-in-law. Id. at 220-221. Appellant left a voicemail for his friend, Richard Hull, and admitted his plan to kill the children and his former mother-in-law as vengeance for the divorce. State's Exhibit 64. The time of the

voicemail was prior to the time he claimed to have taken any pills. Vol. VII T. at 46; Sentencing Phase Vol. I T. at 285-286.

{¶39} A bloody knife was found in the backseat of appellant's vehicle where the children were found stabbed and dead in their car seats. Vol. V T. at 204; State's Exhibit 2K and 28. Many of the blood samples taken from the evidence contained a mixture of DNA profiles and shared genetic types. Vol. VI T. at 164, 170, 172-173. The blood on the knife belonged to James and possibly Macy. Id. at 164-165. Appellant's hands contained the blood of Margaret Eakin and possibly James and Macy. Id. at 170-172, 173-174; State's Exhibit 45. Appellant's blood was found on the firearm used to shoot Margaret Eakin. Id. at 184-185; State's Exhibit 23B. Appellant's fingernail clippings contained the blood of his son. Id. at 190-191; State's Exhibits 48A and B.

{¶40} Even without the confession that appellant now argues might be tainted because of drug consumption, the evidence is overwhelming and conclusive of appellant's guilt.

{¶41} Appellant further argued the prosecutor's remarks during closing argument implied that he had lied about taking drugs:

{¶42} "[MR. BARR:] The pills. Why did he take the pills? Let's talk about these alleged pills that don't show up in anybody's blood, although he took dozens. Again, reason and common sense, folks, just use it. He didn't take the pills to calm him down or to dull the pain. Listen to what he says in his statement.

{¶43} "Detective George said what kind of pills? Like Valium and some kind of pain killer. I don't even know. I took a pill last night. He took one pill at 9:00. That's the pill that he took in case he got shot when he finished his plan at 5:45, 5:50 the next

morning. The next dozen he took after the killings and he thought if it calms me down or helps me or helps me or just whatever. That's why he took the pills. Because maybe he was a little shook up after he'd just taken three lives. He took those pills to calm him down. Because he'd just finished his plan because remember, he didn't want to commit suicide. He didn't want to die. He wanted Macy and James and Margaret to die. But not James Mammone. He didn't want to die. He didn't want to walk up those steps in Marcia's house. He didn't want to make himself a sitting duck because he wanted to live. Because his goal was to inflict pain on Marcia." Vol. VIII T. at 53-54.

{¶44} We find the argument to fall short of any question about false testimony from Mr. Spencer. The statements were made during closing argument and the prosecutor invited the jury to judge appellant's claim vis-à-vis appellant's actual statement to the police. State's Exhibit 13.

{¶45} We find the trial court did not err in denying appellant's seventh and eighth grounds for relief.

{¶46} As for the ninth ground for relief, we find no cumulative error. With the record, transcript, and docket, the trial court could sufficiently address the errors claimed in appellant's petition for postconviction relief.

{¶47} Upon review, we find no error in not conducting an evidentiary hearing or in denying the petition.

{¶48} Assignment of Error I is denied.

II, III

{¶49} Appellant claims the trial court erred in not granting his request for discovery or expert witnesses. We disagree.

{¶50} A petition for post-conviction relief is a civil proceeding. *State v. Milanovich* (1975), 42 Ohio St.2d 46. As the Supreme Court of Ohio stated in *State ex rel. Love v. Cuyahoga County Prosecutor's Office,* 87 Ohio St.3d 158, 159, 1999-Ohio-314, "there is no requirement of civil discovery in postconviction proceedings." This court has issued numerous opinions consistent with this holding. *State v. Sherman* (October 30, 2000), Licking App. No. 00CA39; *State v. Elmore,* Licking App. No. 2005-CA-32, 2005-Ohio-5940; *State v. Muff,* Perry App. No. 06-CA-13, 2006-Ohio-6215; *State v. Lang,* Stark App. No. 2009 CA 00187, 2010-Ohio-3975 ("the procedure to be followed in ruling on such a petition is established by R.C. 2953.21, and the power to conduct and compel discovery under the Civil Rules is not included within the trial court's statutorily defined authority" and "R.C. 2953.21 itself does not specifically provide for a right to funding or the appointment of an expert witness in post-conviction petition proceedings").

{¶51} Given the ability of the trial court to address the issues via the use of the entire case file and docket, we find appellant was not entitled to the extraordinary relief requested.

{¶52} Assignments of Error II and III are denied.

{¶53} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, J.

Delaney, P.J. and

Hoffman, J. concur.

JUDGES

SGF/sg 0710

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- JAMES MAMMONE, III Defendant-Appellant	JUDGMENT ENTRY CASE NO. 2012CA00012

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed. Costs to appellant.

JUDGES

THE STATE OF OHIO, APPELLEE, *v.* MAMMONE, APPELLANT.

[Cite as *State v. Mammone,* 139 Ohio St.3d 467, 2014-Ohio-1942.]

Criminal law—Aggravated murder—Death penalty affirmed.

(No. 2010-0576—Submitted December 11, 2013—Decided May 14, 2014.)

APPEAL from the Court of Common Pleas of Stark County,

No. 2009-CR-0859.

LANZINGER, J.

{¶ 1} This is an appeal as of right by defendant-appellant, James Mammone III, who has been sentenced to death for the aggravated murders of his former mother-in-law, Margaret Eakin, his five-year-old daughter, Macy, and his three-year-old son, James. For the reasons explained below, we affirm Mammone's convictions and sentence.

I. CASE HISTORY

{¶ 2} On June 17, 2009, Mammone was indicted on three counts of aggravated murder (R.C. 2903.01), one with a firearm specification (R.C. 2941.145); two counts of aggravated burglary (R.C. 2911.11(A)), each with a firearm specification; violating a protection order (R.C. 2919.27(A)(1)); and attempted arson (R.C. 2923.02(A) and 2909.03(A)(1)).

{¶ 3} Each aggravated-murder count carried two death specifications. Count One, involving Margaret's murder, included a course-of-conduct specification (R.C. 2929.04(A)(5)) and a specification for committing her murder in the course of an aggravated burglary (R.C. 2929.04(A)(7)). Counts Three and Four charged Mammone with the aggravated murders of Macy and James, and each included a course-of-conduct specification and a child-murder specification (R.C. 2929.04(A)(9)). Mammone pled not guilty to all counts and specifications.

{¶ 4} Before trial, defense counsel filed, among other motions, a motion for a change of venue based on excessive pretrial publicity and a motion in limine to exclude all victim photographs at trial. After a hearing, the trial court denied Mammone's motion to change venue as premature but indicated that the motion could be renewed at a later date. The court held a separate hearing on the motion in limine and denied the motion as premature. The court at a later hearing preliminarily approved the photos that the state planned to introduce as evidence but invited further argument about specific photos at trial.

A. The State's Evidence

1. Testimony of Marcia Eakin and Other Witnesses

{¶ 5} Mammone's trial began on January 11, 2010. The state called Mammone's ex-wife, Marcia Eakin, to testify. Marcia testified about the breakdown of her relationship with Mammone and stated that she first told Mammone in August 2007 that she intended to leave him. On that day, Mammone stayed home from work and refused to let her or their two children, Macy and James IV, leave the family's Canton residence. Mammone broke Marcia's cell phone and took all the house phones. She did not leave him that day.

{¶ 6} Marcia and Mammone sought counseling, but she did not feel that the marital relationship improved. She testified that Mammone threatened her, warning that "if I tried to leave he would kill me and the children." Unbeknownst to Mammone, Marcia contacted a lawyer to initiate the process of filing for divorce.

{¶ 7} On June 13, 2008, Mammone learned that Marcia was seeking a divorce when he intercepted a call from Marcia's lawyer. According to Marcia, Mammone again threatened to kill her, declaring: "I told you if you tried to leave me I was going to kill you." He told Macy and James on that date that "it was time for mommy to go to her grave." Mammone did not let Marcia or the children out of his sight for the rest of the day.

{¶ 8} Marcia explained that she and the children managed to get away from Mammone, and she sought a civil protection order against him. On July 10, 2008, the Stark County Common Pleas Court issued a two-year protection order requiring Mammone to stay more than 500 feet away from Marcia. He was permitted only supervised contact with the children.

{¶ 9} Marcia testified that the Mammones' divorce was finalized in April 2009. Under the final divorce decree, Mammone was permitted overnight visitation with the children four times a month and evening visitation twice a week. Marcia explained that Mammone picked up and dropped off the children at the home of her parents, Margaret and Jim Eakin, so that Mammone would not have direct contact with Marcia or know where she lived. During visits, Mammone was permitted to text Marcia about matters pertaining to the children.

{¶ 10} Marcia testified that on Sunday, June 7, 2009, Mammone picked up five-year-old Macy and three-year-old James at the Eakins' home for a scheduled overnight visit. Mammone was driving his green BMW.

{¶ 11} Marcia met a friend, Ben Carter, to play tennis and have dinner. At 4:25 p.m., Mammone began to text Marcia. Although the two never spoke that night, they exchanged dozens of text messages over the next 15 hours, and records of these messages were introduced at trial.

{¶ 12} At first, Mammone sought advice about consoling Macy, who was upset. But he quickly shifted to blaming Marcia for the children's suffering, texting: "How long are we going to let these children that you * * * had to have suffer?" Throughout the evening Mammone repeatedly texted Marcia, accusing her of "ruin[ing] lives" by putting herself first. He admonished her to put her children first and demanded to know what was more important than the kids at that moment. Marcia replied by texting that Mammone should "stop tormenting" the children. No fewer than five times, she offered to have Mammone return the

children to her mother's house or asked if she could meet him to pick up the children.

{¶ 13} Mammone advised Marcia in a text that he was "at [the] point of no return" and that he "refuse[d] to let gov restrict my right as a man to fight for the family you promised me." At 9:11 p.m., he warned Marcia that "safe and good do not apply to this night my love." Marcia promptly responded, texting: "Do not hurt them." At 9:35 p.m., she asked him to "[k]eep them safe." Mammone texted:

> You got five minutes to call me back on the phone. I am not fucking around. I have stashed a bunch of pain killers for this nigh[t] * * * i hope u would never let happen. I have put on my wedding band, my fav shirt and I am ready to die for my love tonight. I am high as a kite * * * bring o[n] the hail of bullets if need be.

{¶ 14} At this point, Marcia called 9-1-1. The state played a recording of the call at trial. On the recording, Marcia advised the 9-1-1 operator that her children were in a car with her ex-husband, who had threatened to take "a bunch of painkillers" and had said that he was "ready to die tonight." While Marcia was on the line with the 9-1-1 operator, the operator attempted to call Mammone, but he would not answer his phone. After speaking to the 9-1-1 operator, Marcia texted Mammone that she would not call him (in accordance with the operator's advice), and again urged him to "keep the kids safe." At 10:18 p.m., Marcia in a text to Mammone asked him to meet her so that she could pick up the kids. Marcia's friend Carter confirmed that he and Marcia then drove around looking for Mammone.

{¶ 15} Marcia testified that she then contacted both Mammone's mother and the wife of Richard Hull, Mammone's friend and former employer. Phone

records indicate that Richard Hull began to text Mammone, advising him to calm down and keep the kids safe. Hull's texts suggested that Mammone should drop the kids off with Mammone's mother. Hull testified that he and his father also drove around for a time looking for Mammone but did not find him.

{¶ 16} At 2:00 a.m. on June 8, Mammone sent a text to Marcia, stating, "I am not one who accepts divorce. * * * I married you for love and for life * * *." At 2:36 a.m., he wrote, "I am so dead inside without u. The children r painful * * * [r]eminders of what I have lost of myself. This situation is beyond tolerable. So what happens next?" At 2:50 a.m., Mammone reiterated in a text to Marcia that the love of his children was "only a source of pain" without her love.

{¶ 17} Hull testified that around 3:00 a.m., he spoke to Marcia and decided not to go back out looking for Mammone because they were hopeful that everything would be fine. Marcia attempted to end her text conversation with Mammone, writing, "Please[] keep kids safe good night."

{¶ 18} At 5:34 a.m., Mammone texted Marcia: "Last chance. Here it goes."

{¶ 19} One of the Eakins' neighbors, Edward Roth, testified that around 5:30 a.m., he heard gunshots and screaming through his open bedroom window. Roth said that he saw a goldish-tan-colored car leaving the Eakin residence and several minutes later saw the same car returning to the street to sit in the middle of the intersection near the house. Roth called 9-1-1. A law-enforcement officer testified that he and another officer arrived to find Margaret Eakin lying severely injured on the floor of a second-floor bedroom. The officers observed two shell casings and a broken lamp.

{¶ 20} Marcia testified that she heard a car roar up her driveway around 5:40 a.m. From a second-floor bedroom window, she saw Mammone get out of the car and empty a red gasoline container onto Carter's truck, which was parked in the driveway. She called 9-1-1, and a recording of the call was introduced at

trial by the state. While Marcia was on the phone, she "heard the glass in my back door breaking in and he was inside my apartment." She did not hear Mammone speak, but she heard something that he had thrown hit the ceiling. He then went back outside and threw things at the windows. Mammone left before two deputy sheriffs arrived. According to the deputies, the back door had been forced open, the screen-door glass was broken, and pieces of the door frame were on the kitchen floor.

{¶ 21} The deputies quickly realized that the incident at Marcia's apartment was linked to the incident at the Eakins' residence, but law-enforcement officers had not yet located Mammone, and they did not know whether the children were safe.

{¶ 22} At 6:04 a.m., Mammone left a voice mail on Hull's phone, in which the jury heard Mammone confess to Hull, "I killed the kids." Mammone's voice mail continued:

> I said it when I got locked up fucking 358 days ago that she fucking has to die and unfortunately as fucking sick as it sounds I concluded after a while that she took my family from me and the fucking way to really get her is to take fucking her mom and her kids from her. I missed her dad by a couple minutes. I drove by the house, he was there, and I fucking circled the block and he must've just pulled out or I'd have fucking popped his fucking ass too.

2. Testimony of Officers

{¶ 23} Sergeant Eric Risner testified that he and other officers apprehended Mammone sometime after 7:30 a.m. on June 8, 2009, in the driveway of his residence. They found Macy and James dead in the back seat of Mammone's car,

still strapped into their car seats. The children had apparently been stabbed in the throat.

{¶ 24} Officer Randy Weirich testified that he removed two items from Mammone's car at the scene: a bloody knife from the back seat and a firearm from the front seat. The firearm had a live round in the chamber, its hammer was cocked, and the safety was off.

{¶ 25} After the vehicle was towed for processing, Officer Weirich cataloged the rest of the car's contents. The evidence log includes ammunition for a .32-caliber gun; a backpack containing knives, heavy-duty shears, and tongs; an axe handle with nails protruding from holes that had been drilled into it; a baseball bat; a military-style bayonet; Mammone's cell phone and a spare battery; a framed wedding photo of Marcia; and Marcia's dried wedding bouquet. Officer Weirich also removed from the car a switchblade and a pocket knife.

3. Mammone's Confession

{¶ 26} Mammone was arrested and transported to police headquarters. Once in custody, he signed a written waiver of his *Miranda* rights and gave a full confession. The state introduced an audio recording of the confession at trial.

{¶ 27} In his confession, Mammone explained that he had picked up Macy and James for visitation at about 4:00 p.m. on June 7. He then drove past Marcia's nearby apartment. (Mammone admitted that he was not supposed to know where Marcia lived, but he had learned her new address and occasionally stalked her.) He saw a truck parked in Marcia's driveway, and he recognized it because it had been parked there two weeks earlier. Macy told him that the truck belonged to a boy. Mammone explained that this news "didn't make me very happy obviously." He circled the block, and the truck was gone when he drove by again.

{¶ 28} Mammone stated that he suspected that Marcia was on a date, so he went "on the hunt" for her with the children in the back seat. He spent a few hours

driving around looking for Marcia, all the while "sending [her] agitating text messages trying to get her attention."

{¶ 29} Around 6:30 p.m., Mammone took the children to his place for dinner. As he continued to text Marcia, he was "getting to the point of no return." He figured that he had already violated the protection order, and he had "had enough." He said that he had long hoped that things would improve, but stated that "once I suspected that she might have a guy that she was interested in that was it for me, I can't deal with that. It's just not anything that I'm willing to accept."

{¶ 30} According to Mammone, after dinner he loaded the children into a gold 1992 Oldsmobile that he had recently purchased. He stated that he had a Beretta .32-caliber automatic handgun, a gasoline container (which he later stopped to refill), a Scripto lighter, a bag full of butcher-type knives, a bayonet, a baseball bat, and another bat-type weapon he had made by driving nails through a hickory shovel handle or axe handle. He also said that he had approximately a dozen painkillers. He took one pill around 9:00 p.m. to "deaden the pain" if he was shot by police officers later that night.

{¶ 31} Mammone stated that he parked at Westminster Church (his and Marcia's "family church") just before 5:45 a.m. He stabbed Macy and James with a butcher knife while they were still strapped in their car seats. Mammone related that he had to stab each child in the throat four or five times, which was more than he had expected would be necessary. When detectives asked why he had stabbed the children rather than shooting them, Mammone offered three reasons: (1) noise, (2) uncertainty about whether his gun was dependable, and (3) a desire to conserve rounds for what might lie ahead.

{¶ 32} Mammone said that after killing Macy and James, he drove to the Eakins' home at approximately 5:45 a.m. He left the children in the back seat of the car and "barged in" through the Eakins' unlocked door carrying his Beretta. Mammone found Margaret in a guest room and shot her in the chest. The gun

jammed before he could fire a second round, so he began to hit Margaret with the gun. He then beat her with a lamp until the lamp began to fall apart. Mammone managed to unjam the gun and shot Margaret in the face at close range. He told police officers that a third bullet may have fallen out of the gun when he was attempting to dislodge the slide.

{¶ 33} Mammone stated that he then drove to Marcia's nearby apartment. The truck that he had seen the previous evening was in the driveway. He poured gasoline on the truck and attempted to light it, but the lighter fell apart in his hands.

{¶ 34} Mammone related that after he was unable to light the fire, he retrieved four weapons from his car: (1) the handgun, which he had to unjam again to prepare to fire, (2) the bayonet, which he put in his front pocket, (3) the baseball bat, and (4) the "bat type of weapon" that he had made. He smashed Marcia's screen-door window and back door with the bat and then entered the apartment. Once inside, Mammone unsuccessfully looked for matches or a lighter. He did not go upstairs because he was concerned that Marcia or "the person that was there to protect her" might have a firearm, and he did not want to be a "sitting duck." Mammone left the apartment and began throwing the baseball bat at a second-floor window, but he became frustrated. He searched his car for another lighter and, unable to find it, drove away.

{¶ 35} After killing his mother-in-law and breaking into Marcia's apartment, Mammone drove around with the children's bodies for several hours. He had expected that he would want to die after committing these violent acts, but he was surprised to find that he "didn't really feel * * * like dying." He also "didn't feel like getting arrested," so he drove in areas where he did not expect to see police officers and drove the speed limit. He claimed that he then took approximately a dozen pills—which he identified as Valium or painkillers—but not enough to cause an overdose.

{¶ 36} Mammone said that he then drove to the Independence Police Station to turn himself in, but he fell asleep in the station parking lot. When he woke, he contacted a relative who arranged for Mammone to turn himself in at a Canton park. En route to the park, Mammone decided to go by his apartment to switch to his BMW, with the idea of leaving the children in the Oldsmobile so that they would not be part of any scene at the park. But an unmarked police car was waiting for him, and he was apprehended.

{¶ 37} Mammone told officers that he had contemplated "doing this" for 22 months, but that he had initially intended to kill Marcia, not Macy and James. He said that he killed his mother-in-law because it was "a major blow to [Marcia] to not have her mother." He indicated that hurting Marcia was one of the motives for killing Macy and James as well, but he also cited his objection to divorce as a reason for their murders. Mammone said that he did not intend to kill Marcia on June 8, but that he did plan to maim her. He had wanted to beat Marcia's uterus area with his homemade weapon (making her unable to conceive children), to break her ankles with the baseball bat (something she feared that she had seen done in a movie), and to cut out her tongue (as punishment for not speaking to him). Mammone also said that he would have killed the man at Marcia's apartment if he could have.

4. Forensic Evidence

{¶ 38} Dr. P.S. Murthy, the Stark County coroner, performed autopsies on Margaret, Macy, and James on June 9, 2009. He testified that he determined that the cause of death for all three victims was homicide.

{¶ 39} According to Dr. Murthy, Margaret had suffered two fatal gunshot wounds and more than 20 blunt-impact injuries and lacerations, consistent with being struck by the butt of a gun and by a household lamp. One bullet had been fired into Margaret's left upper lip from a distance of about six to eight inches and was recovered from the occipital lobe of her brain. Another bullet pierced

Margaret's right upper shoulder, perforated her right lung, and exited through her back.

{¶ 40} Dr. Murthy testified that both children died as a result of stab wounds with exsanguination (massive blood loss). Macy had multiple stab wounds to the neck, while James had a single stab wound that went through his neck. Both children's lungs were filled with aspirated blood. Macy's right hand and right leg bore multiple defensive wounds, and James had a defensive wound on his right hand.

{¶ 41} According to a laboratory analyst who testified, multiple bloodstains on Mammone's shirt at the time of his arrest had DNA profiles consistent with Margaret's DNA. In addition, a laboratory analyst identified Mammone's fingerprint on a lighter that officers retrieved from a flowerbed near Marcia's apartment.

{¶ 42} Law-enforcement officers took bodily fluid samples from Mammone on the day of his arrest. According to a laboratory analyst, tests did not reveal any trace of opiates or acetaminophen in Mammone's blood.

B. The Defense Case

{¶ 43} Mammone did not present a case in defense during the trial phase. Before the trial began, defense counsel advised the court during a bench conference that as a matter of strategy, Mammone had "elected to, in effect, concede the trial phase in this matter," and Mammone himself informed the judge that he instead preferred to focus on the second phase of trial. During a brief opening statement, defense counsel candidly explained to the jury that Mammone did not "contest[] much of the evidence and/or facts with respect to this matter." Mammone's counsel repeated that statement during trial-phase closing arguments, emphasized Mammone's honesty in responding to police officers' questioning, and urged the jury to decide the case based on the law rather than on emotion.

C. Verdict, Sentencing, and Appeal

{¶ 44} On January 14, 2010, the jury returned guilty verdicts on all counts. After a sentencing hearing, the jury unanimously recommended a sentence of death for each of the three aggravated murders. The trial court accepted the recommendation and imposed three death sentences in open court on January 22, 2010.

{¶ 45} The trial court then sentenced Mammone for his noncapital convictions. The court merged Mammone's convictions for two of the gun specifications and also merged his convictions for violating a civil protection order and aggravated burglary of the Eakins' home. Mammone was sentenced to a total of 27 years of consecutive imprisonment for his noncapital offenses. The trial court filed the R.C. 2929.03(F) sentencing opinion on January 26, 2010.

{¶ 46} Mammone appealed, raising nine propositions of law. We will consider Mammone's propositions as they arose chronologically rather than in the order he presents them.

II. ANALYSIS

A. Pretrial Issues

1. Venue and Pretrial Publicity

{¶ 47} In his first proposition of law, Mammone argues that the trial court's denial of his motion for a change of venue violated his rights to due process and to a fair trial by an impartial jury. *See* the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the U.S. Constitution; Ohio Constitution, Article I, Sections 5 and 16. According to Mammone, Stark County was so saturated with media coverage of his case that we should presume "prejudice from the weight of the adverse publicity" without the need for further inquiry. Alternatively, Mammone argues that we should conduct a review of the complete record and conclude that members of the jury were actually biased against Mammone due to their exposure to the extensive coverage.

a. Factual and procedural background

{¶ 48} Mammone filed a pretrial motion for a change of venue on October 1, 2009. As an appendix to the motion, Mammone attached copies of articles posted on the *Canton Repository*'s website, CantonRep.com, between June 9 and August 26, 2009, along with comments posted by online readers of the newspaper. He also attached copies of postings that appeared on other websites.

{¶ 49} The trial court held a venue hearing on November 12, 2009. During the hearing, Mammone submitted 11 exhibits, including coverage of his case from various radio, television, and print publications. The materials included a copy of a "confession letter" that had been published in the print version of the *Repository* on August 25, 2009, and posted on its website. The letter, written and sent by Mammone himself, began with the statement that it was mailed to the newspaper to "set the record straight regarding any questions and misconceptions" about the murders of Margaret, Macy, and James. Mammone argued at the hearing that in light of these materials, "an attempt to seat a jury would be likely futile," so that the court should presume prejudice and grant his change-of-venue motion.

{¶ 50} The state countered that it would be premature to change venue before conducting voir dire, and the trial court agreed. The court expressed concern about the *Repository*'s publication of Mammone's letter, but observed that "this case has not gotten nearly the type of publicity" that would require the court to grant the motion without even seeking "to review and do a voir dire of prospective jurors." Without a thorough voir dire, the court deemed it impossible to determine whether media exposure was "so pervasive that an impartial jury [would] be impossible to seat." As a result, the court denied Mammone's motion as premature but left the issue open for further consideration "during and after the Voir Dire."

{¶ 51} At the close of the venue hearing, the court advised Mammone, "I would expect you to refile at any time or reargue your motion for a change of venue." Mammone never did so.

{¶ 52} 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.

b. Right to a fair and impartial jury

{¶ 53} "[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). In a capital case, jurors must be impartial as to both culpability and punishment. *Morgan v. Illinois*, 504 U.S. 719, 726-728, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). "[W]hen it appears that a fair and impartial trial cannot be held in the court in which the action is pending," Crim.R. 18(B) gives a trial court authority—sua sponte or upon a party's motion—to transfer venue to another jurisdiction. *See* R.C. 2901.12(K); *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 33. One common argument for a venue change is that pretrial publicity has impaired a jury's ability to be fair and impartial.

{¶ 54} The trial court has a "duty to protect" criminal defendants from "inherently prejudicial publicity" that renders a jury's deliberations unfair. *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). However, "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 554, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

{¶ 55} This court has repeatedly stated that "the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality" is "a careful and searching voir dire." *State v. Bayless*, 48 Ohio St.2d

73, 98, 357 N.E.2d 1035 (1976); *see State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 49 (listing cases). As a general rule, a trial court should therefore make " 'a good faith effort * * * to impanel a jury before * * * grant[ing] a motion for change of venue.' " *State v. Warner*, 55 Ohio St.3d 31, 46, 564 N.E.2d 18 (1990), quoting *State v. Herring*, 21 Ohio App.3d 18, 486 N.E.2d 119 (9th Dist.1984), syllabus.

{¶ 56} That said, the United States Supreme Court has held that in certain rare cases, pretrial publicity is so damaging that prejudice must be conclusively presumed even without a showing of actual bias. *See, e.g., Sheppard*; *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); *Irvin*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751. To prevail on a claim of presumed prejudice, however, a defendant must make " 'a clear and manifest showing * * * that pretrial publicity was so pervasive and prejudicial that an attempt to seat a jury would be a vain act.' " *Warner* at 46, quoting *Herring* at syllabus; *see Herring* at 18 (citing judicial economy, convenience, and reducing taxpayer expense as reasons for a trial court to attempt to seat a jury prior to transferring venue to another location).

{¶ 57} We therefore must engage in a two-step analysis of venue in this case, determining first whether the jury was presumptively prejudiced against Mammone and, if not, whether Mammone has established actual juror prejudice. *See Skilling v. United States*, 561 U.S. 358, 381, 130 S.Ct. 2896, 2915, 177 L.Ed.2d 619 (2010); *Campbell v. Bradshaw*, 674 F.3d 578, 593-594 (6th Cir.2012).

c. Prejudice should not be presumed in this case

{¶ 58} "A presumption of prejudice" because of adverse press coverage "attends only the extreme case." *Skilling* at 381; *see also Campbell* at 593, quoting *Foley v. Parker*, 488 F.3d 377, 387 (6th Cir.2007) (prejudice from pretrial publicity " 'is rarely presumed' ").

{¶ 59} The doctrine of presumed prejudice "is the product of three Supreme Court decisions from the 1960's": *Rideau v. Louisiana*, *Estes v. Texas*, and *Sheppard v. Maxwell*. *Hayes v. Ayers*, 632 F.3d 500, 508 (9th Cir.2011). The United States Supreme Court most recently applied the doctrine in *Skilling v. United States*, in which the court analyzed four factors before rejecting a claim of presumed prejudice. Namely, the court considered (1) the size and characteristics of the community in which the crime occurred, (2) whether media coverage about the defendant contained "blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight," (3) whether the passage of time lessened media attention, and (4) whether the jury's conduct was inconsistent with a presumption of prejudice. *Id.* at 382-383; *see United States v. Warren*, 989 F.Supp.2d 494 (E.D.La.2013). However, *Skilling* did not hold that these four factors are dispositive in every case or indicate that these are the only relevant factors in a presumed-prejudice analysis.

{¶ 60} Here, we find that our analysis is best informed by comparing the facts of this case not to *Skilling*—in which prejudice was not presumed—but to the facts of the cases in which the United States Supreme Court *has* presumed prejudice. Two of these three cases, *Estes* and *Sheppard*, are not particularly instructive because they "involved media interference with courtroom proceedings *during* trial." (Emphasis sic.) *Skilling*, 561 U.S. at 382, 130 S.Ct. 2896, 177 L.Ed.2d 619, fn.14; *see also Hayes*, 632 F.3d at 508. In *Estes*, "extensive publicity before trial swelled into excessive exposure during preliminary court proceedings" as the media "overran the courtroom" and caused significant disruption. *Skilling* at 379-380. In *Sheppard*, "bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom." *Sheppard*, 384 U.S. at 355, 86 S.Ct. 1507, 16 L.Ed.2d 600. The United States Supreme Court in *Sheppard* "upset the [defendant's] murder conviction because a 'carnival atmosphere' [had]

pervaded the trial." *Skilling* at 380, quoting *Sheppard* at 358. There is no evidence of such interference here.

{¶ 61} The third case, *Rideau*, is most relevant to our analysis because in that case, the United States Supreme Court presumed prejudice based solely on pretrial publicity. In *Rideau*, the parish sheriff's office had filmed an interrogation of the defendant, during which he confessed to bank robbery, kidnapping, and murder. 373 U.S. at 724, 83 S.Ct. 1417, 10 L.Ed.2d 663. A 20-minute recording of the confession was broadcast three times on television within weeks of Rideau's trial. *Id.* Audiences ranging from 20,000 to 53,000 people viewed the broadcasts, in a total population of approximately 150,000 people. *Id.* Under the circumstances, the United States Supreme Court concluded that "to the tens of thousands of people who saw and heard" Rideau "personally confessing in detail to the crimes," the interrogation "in a very real sense *was* Rideau's trial—at which he pleaded guilty to murder." (Emphasis sic.) *Id.* at 726. As a result, the court concluded that the defendant's subsequent trial amounted to a "hollow formality," and it conclusively presumed prejudice. *Id.* at 726-727.

{¶ 62} As in *Rideau*, the instant case involves the widespread dissemination of a suspect's supposed confession to crimes. Like the trial court, we believe that "the publication of the [confession] letter on the front page" of the *Repository* "is the thing that's most troublesome" about the pretrial publicity in this case.[1] A "defendant's own confession [is] probably the most probative and damaging evidence that can be admitted against him." *Skilling* at 383, quoting *Parker v. Randolph*, 442 U.S. 62, 72, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979) (plurality opinion). That said, pretrial publicity about a confession—even one that

1. Mammone's generalized claims about other adverse pretrial publicity and social media are insufficient to trigger a presumption of prejudice. His assertions about extensive media coverage would apply to nearly every homicide case. And he points to no evidence that the social media comments cited "are representative of the hundreds of thousands of individuals who [were] eligible to serve as jurors" in his trial. *United States v. Warren*, 989 F.Supp.2d at 501.

is inadmissible at trial[2]—"is not in itself sufficient to require a venue transfer." *United States v. Warren*, 989 F.Supp.2d at 501.

{¶ 63} Several constitutionally significant factors distinguish the print publication of Mammone's confession from the repeated television broadcasts of Rideau's confession that aired in 1961. First, the manner of publication differed in a crucial way. As the United States Court of Appeals for the Sixth Circuit has explained, "[T]he controlling factor in the [*Rideau*] decision was the fact that the public *viewed* the confession in a televised format." (Emphasis sic.) *DeLisle v. Rivers*, 161 F.3d 370, 384 (6th Cir.1998) (en banc). "[A]ctually seeing and hearing the confession, as one would in a courtroom, would create a certainty of belief that would be difficult for the public to lay aside." *Id.* Here, the public did not *view* Mammone confessing.

{¶ 64} Second, the circumstances of publication diverge from *Rideau* in significant ways. In *Rideau*, the defendant's televised confession aired just weeks before the trial began, and roughly one-third of the entire local population viewed the broadcast. Here, Mammone's confession letter was published a single time more than four months before his trial began. And Mammone failed to establish a level of exposure in Stark County similar to the exposure in *Rideau*. The trial court concluded that it was not futile to attempt to seat a jury given "the figures submitted by the *Repository*" about readership, "the population of Stark County," and the considerations that the county has three newspapers and that many county residents subscribe to a fourth newspaper published outside the county. Mammone never supplemented the record or attempted to reargue this point.

{¶ 65} Third, unlike *Rideau*, in which the defendant played no role in the dissemination of his confession, here Mammone himself provided the confession

2. Mammone's confession letter published in the *Repository* was not admitted into evidence at trial. However, the jury during the trial phase did hear a recording of his confession made to police officers on the day of his arrest. The jury also heard a five-hour unsworn statement Mammone made during the mitigation phase of his trial, in which he confessed in great detail.

letter to the *Repository*. He therefore is responsible for instigating the single most significant incident of pretrial publicity in his case, which more than anything increased that publicity to a level that he claims should have required the trial court to grant his motion to change venue.

{¶ 66} Finally, although Mammone claims that "[t]he venires were replete with potential jurors who had been extensively prejudiced by media accounts and had formed such strong opinions as to not be able or willing to change their minds," the voir dire transcript reveals otherwise. Prejudice should not be presumed.

{¶ 67} The trial court was very conscious of pretrial publicity in Mammone's case. Each potential juror was asked to complete an extensive publicity questionnaire, and the court permitted thorough questioning about publicity issues during small-group voir dire. Dozens of potential jurors stated that they knew nothing about the case. The court instructed the potential jurors during voir dire to disregard all information from outside sources and sought assurances that every juror would set aside any preexisting opinions and be fair to both sides. The potential jurors were reminded that the media is not always accurate, and they were warned to avoid additional publicity. Most importantly, the trial court excused potential jurors who expressed an inability to set aside preexisting opinions.

{¶ 68} Under these circumstances, we cannot conclude that extensive pretrial publicity rendered Mammone's trial a "hollow formality." *Compare Rideau*, 373 U.S. at 726, 83 S.Ct. 1417, 10 L.Ed.2d 663. As a result, we hold that this is not one of the extraordinary cases in which prejudice should be presumed based solely on the amount and nature of the pretrial publicity alone.

d. Actual prejudice does not exist in this case

{¶ 69} Having concluded that prejudice should not be presumed here, we next analyze whether actual prejudice exists. Because Mammone did not raise this

objection in the trial court or seek a change of venue at any point after the pretrial venue hearing, we review this claim for plain error. *See State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 61 (reviewing change-of-venue claim for plain error when defendant had waived the argument). We take notice of plain error "with the utmost caution, under exceptional circumstances and only to prevent a miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. To prevail, Mammone must show that an error occurred, that the error was plain, and that but for the error, the outcome of the trial clearly would have been otherwise. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

{¶ 70} Mammone levies several charges of actual bias due to pretrial publicity among members of both the jury pool and the seated jury and argues that the trial court should have ordered a change of venue. For the reasons below, we find no error in this regard, let alone plain error.

{¶ 71} First, Mammone argues that he was denied a fair trial because almost every seated juror "had either read, heard, discussed or [seen] an account of the deaths of the Mammone children and their grandmother." But actual bias is not established simply by pointing out some degree of media exposure. *See, e.g., Trimble* at ¶ 63-64; *State v. Maurer*, 15 Ohio St.3d 239, 251, 473 N.E.2d 768 (1984). A juror will be considered unbiased "if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, 366 U.S. at 723, 81 S.Ct. 1639, 6 L.Ed.2d 751.

{¶ 72} Second, Mammone objects that four specific seated jurors—juror Nos. 372, 438, 448, and 461—were biased against him. But juror Nos. 438 and 448 testified that they had not formed *any* opinions about the case before trial. Juror Nos. 372 and 461 admitted that they had formed some preliminary opinions, but they assured the judge that they could set these opinions aside and be fair.

{¶ 73} The trial judge is "in the best position to judge each juror's demeanor and fairness" and thus to decide whether to credit a potential juror's assurance that he or she will set aside any prior knowledge and preconceived notions of guilt. *Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, at ¶ 64. One factor in determining whether a trial judge reasonably accepted such assurances is how many other potential jurors admitted a disqualifying prejudice:

> In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations [of impartiality] may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it.

Murphy v. Florida, 421 U.S. 794, 803, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). Here, there is no evidence of such unwitting influence. For example, in the first small-group voir dire session of 12 potential jurors, only two admitted to a disqualifying prejudice based on pretrial publicity and were excused. Upon careful examination of the record, we defer to the trial court's reasonable conclusion that the four jurors now challenged could be fair and impartial jurors.

{¶ 74} Finally, we are not persuaded by Mammone's vague claim that the entire jury was tainted because those jurors who had been exposed to extensive publicity shared "innumerable opinions about the case" with other jurors. As explained above, Mammone has not established that any of his jurors were actually biased by pretrial publicity. Moreover, he presents no evidence that any juror improperly influenced another juror by stating an inappropriate opinion. Under the circumstances, we reject Mammone's contention as meritless and unsupported by the record.

{¶ 75} For these reasons, we reject proposition of law I.

2. Juror Bias in Favor of the Death Penalty

{¶ 76} In his second proposition of law, Mammone argues that two of his trial jurors, juror Nos. 418 and 448, "were unfairly biased in favor of the death penalty" and made it apparent during their responses to questioning during voir dire that they "would automatically vote for the death penalty once they found Mammone guilty of the facts in this case." He asserts that this bias violated his constitutional rights to due process, to receive a fair and reliable sentence, and to be free from cruel and unusual punishment.[3] *See* the Eighth and Fourteenth Amendments to the U.S. Constitution; Ohio Constitution, Article I, Sections 9, 10, and 16.

{¶ 77} The United States Supreme Court and this court have long recognized that a defendant's right to a fair and impartial jury extends to capital sentencing. Accordingly, "[a] prospective juror in a capital case may be excused for cause if [the prospective juror's] views on capital punishment would ' "prevent or substantially impair the performance of [the prospective juror's] duties as a juror in accordance with [the prospective juror's] instructions and * * * oath." ' " *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 38, quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). If a juror would "automatically vote for the death penalty in every case," the juror cannot be fair and impartial because he or she "will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the

3. Mammone also argues, in a single sentence without citation, that "it was error for the trial court to deny defense counsel's motion for additional peremptory challenges." We summarily reject this argument based on our review of the record. *See State v. Stallings*, 89 Ohio St.3d 280, 288-289, 731 N.E.2d 159 (2000) (summarily rejecting argument that trial court erred by denying motion for 12 peremptory challenges); *State v. Greer*, 39 Ohio St.3d 236, 530 N.E.2d 382 (1988), paragraph two of the syllabus (numerical limit on peremptory challenges is reasonable regulation of right to challenge prospective jurors during voir dire).

instructions require [the juror] to do." *Morgan v. Illinois*, 504 U.S. at 729, 112 S.Ct. 2222, 119 L.Ed.2d 492. "If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." *Id.*

{¶ 78} When a defendant challenges a prospective juror for cause, the trial court's ruling "will not be disturbed on appeal unless it is manifestly arbitrary and unsupported by substantial testimony, so as to constitute an abuse of discretion." *State v. Williams*, 79 Ohio St.3d 1, 8, 679 N.E.2d 646 (1997). However, a defendant who does not present a challenge for cause "waive[s] any alleged error in regard to [that] prospective juror." *Jackson* at ¶ 39; *see State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 102. Under those circumstances, plain-error review applies. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 89-90.

a. Juror No. 418

{¶ 79} Mammone argues that juror No. 418 was "unfairly biased in favor of the death penalty" and "could not fairly consider all the possible sentencing options in this case." Mammone did not challenge juror No. 418 for cause, so we review this claim of bias for plain error. *See id*.

{¶ 80} Juror No. 418's views on the death penalty were explored in several ways during voir dire. On her written questionnaire inquiring into her views on capital punishment, juror No. 418 stated her belief "that the punishment should fit the crime" and stated that if a defendant "is found guilty without doubt of taking another person's life, he indeed is not entitled to live out his own life." She indicated that the death penalty is "[g]enerally the proper punishment" for aggravated murder, "with very few exceptions." However, she acknowledged that "there may be circumstances—such as, mental disability—" in which it is not appropriate. Ultimately, juror No. 418 expressed her belief "that the death penalty is appropriate in *some* capital murder cases." (Emphasis added.)

{¶ 81} During voir dire, defense counsel questioned juror No. 418 to determine whether she would automatically impose a death sentence if Mammone were convicted. The juror again explained that she generally thinks "punishment should fit the crime," but that she does not firmly believe that every murderer should receive the death penalty. She observed that "sometimes there are circumstances that you need to think about," such as "a mental issue" or "those types of things." In the absence of such circumstances, however, juror No. 418 stated that "it should be an eye for an eye definitely, and especially where there [are] small children involved where it sounds like there was [here]."

{¶ 82} Juror No. 418 never indicated that she would automatically impose the death penalty if Mammone were convicted. Her questionnaire and her verbal responses indicated a general preference for the death penalty for those who commit aggravated murder, but she consistently acknowledged exceptions—both before and after the trial court explained the two phases of a capital trial and the jury's duty to weigh aggravating circumstances and mitigating factors. *See State v. Stojetz*, 84 Ohio St.3d 452, 460, 705 N.E.2d 329 (1999) (rejecting argument that a juror was an "automatic death penalty juror" when the juror had "expressed a willingness to take into consideration other factors, such as defendant's background and the nature and circumstances of the crime, before deciding to render a death verdict").

{¶ 83} "[D]eference must be accorded to the trial judge who sees and hears the juror." *Id.* Here, neither the court nor the parties expressed any concern that juror No. 418 was an "automatic death" juror, even as they discussed concerns about other prospective jurors in the same small-group voir dire. Under these circumstances, we defer to the trial judge's decision to seat juror No. 418 and find no error with respect to her service.

b. Juror No. 448

{¶ 84} Mammone also argues that juror No. 448 was "unfairly biased in favor of the death penalty" and "could not fairly consider all the possible sentencing options in this case." As with juror No. 418, Mammone did not challenge juror No. 448 for cause, so plain-error review applies. *Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, at ¶ 89-90.

{¶ 85} During larger-group voir dire, the trial judge flagged juror No. 448 as a juror to discuss with counsel. Juror No. 448 had responded to a question from defense counsel by stating, "I think I would have some problem with" being fair given the circumstances of the case. Later, the court and counsel for both sides discussed whether to have this juror return for small-group voir dire. The prosecutor indicated that she "want[ed] the opportunity to explore why" juror No. 448 had "said I can't be fair." The court agreed that juror No. 448 should remain in the jury pool, and the defense made no effort to excuse the juror.

{¶ 86} Juror No. 448 first indicated his attitude toward the death penalty on his written questionnaire asking for his views on that subject. His responses revealed some tension in his thoughts about capital punishment. On the one hand, juror No. 448 wrote that he supported "the state law and right to enforce the death penalty"—which he characterized as a "God-ordained law of the land"—and he indicated agreement with the view that the death penalty is the "proper punishment in all cases where someone is convicted of aggravated murder." On the other hand, he also wrote, "I am not sure due to my religious views if I could give a death penalty verdict."

{¶ 87} During small-group voir dire, the judge and both parties explored this tension. Juror No. 448 assured the judge that even though he had "some religious problems with it," he recognized the state's authority to impose the death penalty and "would want to follow [the court's] orders." He later explained that

even though his church "in general leans toward being" pacifistic, he "believes that an eye for an eye is in the Bible."

{¶ 88} During prosecution questioning, juror No. 448 expressed a preference for the death penalty in all cases of aggravated murder. But he later clarified that he could not say for sure whether if there were a conviction he would sentence Mammone to death; he "would have to look at the evidence." The prosecutor explained that mitigating factors "are things that might cause [a juror] to consider a sentence less than death," and juror No. 448 responded that he would follow "the law of the land" and "would consider" such a sentence. The prosecutor again asked, "So you'll follow the Judge's instructions?" The juror said yes. But to defense counsel he again indicated in response to further questioning that if Mammone were convicted of aggravated murder, he "would tend or would vote for capital punishment."

{¶ 89} The judge and the parties did not later specifically analyze juror No. 448's attitudes about the death penalty because neither party challenged him for cause. However, the trial court did comment on juror No. 448's responses when analyzing a challenge to juror No. 412. The court observed that juror Nos. 412 and 448 had both "given answers which would indicate a natural inclination to lean towards the death penalty." But the court went on to explain that "[s]ometimes in a vacuum it's hard for jurors to articulate how they feel about [the death penalty], and so it comes down to the basics of whether or not they would follow the law fairly, and that's why I pushed them on fairly." The court then denied the challenge to juror No. 412, and there was no further discussion of juror No. 448.

{¶ 90} The trial judge's comments are consistent with this court's past observations regarding the difficulty of having prospective jurors articulate their views on capital punishment during voir dire. Many prospective jurors in a death-penalty case are being asked "to face their views about the death penalty" "for the first time" during voir dire. *Williams*, 79 Ohio St.3d at 6, 679 N.E.2d 646. "[I]t is

not uncommon for jurors to express themselves in contradictory and ambiguous ways" in this context, "both due to unfamiliarity with courtroom proceedings and cross-examination tactics and because the jury pool runs the spectrum in terms of education and experience." *White v. Mitchell*, 431 F.3d 517, 537 (6th Cir.2005), citing *Patton v. Yount*, 467 U.S. 1025, 1039, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). Moreover, even when a prospective juror does have "very strongly held views" about the death penalty, he or she likely has "never had to define them within the context of following the law." *Williams* at 6.

{¶ 91} During voir dire, both parties may be "attempting to push a prospective juror into a certain position in order to remove him or her from the jury." *Id.* at 7-8. Accordingly, "it is often necessary for the trial judge to step in and provide some neutral, nonleading instructions and questions in an attempt to determine whether the prospective juror can actually be fair and impartial." *Id*. at 8. It then falls naturally on the "trial judge to sort through [the] responses and determine whether the prospective jurors will be able to follow the law." *Id.* at 6.

{¶ 92} In this case, neither the judge nor the parties ultimately expressed reservations that juror No. 448 was biased in favor of the death penalty. When asked, the juror agreed that he could follow the trial judge's instructions on mitigating factors. The judge was able to "see[] and hear[]" juror No. 448, *Wainwright v. Witt*, 469 U.S. at 426, 105 S.Ct. 844, 83 L.Ed.2d 841, and therefore had "the benefit of observing [the juror's] demeanor and body language." *Williams*, 79 Ohio St.3d at 8, 679 N.E.2d 646. The judge was satisfied that juror No. 448 would follow instructions, and we defer to that judgment. *See Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, at ¶ 40 (no abuse of discretion in denying challenge for cause when "a juror, even one predisposed in favor of imposing death, states that he or she will follow the law and the court's instructions").

{¶ 93} For these reasons, we reject proposition II.

B. Trial-Phase and Mitigation-Phase Issues

1. Gruesome Photographs

{¶ 94} Mammone argues in his fifth proposition of law that the trial court violated his constitutional rights by admitting "shocking and gruesome photographs" that were "irrelevant, unnecessary, cumulative, [and] repetitive." Specifically, he challenges the admission of two categories of photos: (1) crime-scene photos of the dead children in their car seats and (2) autopsy photos of the children.[4] According to Mammone, we should order a new trial or vacate his death sentence because these photos deprived him of due process, a fair trial, and a reliable sentencing determination. *See* the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution; Ohio Constitution, Article I, Sections 2, 9, 10, and 16. We reject this contention.

{¶ 95} Under Evid.R. 403(A), a trial court *must* exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Under Evid.R. 403(B), a trial court *may* exclude evidence "if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence."

{¶ 96} In the context of capital trials, however, we have established "a stricter evidentiary standard" for admitting gruesome photographs and have "strongly caution[ed] judicious use." *State v. Morales*, 32 Ohio St.3d 252, 257-258, 259, 513 N.E.2d 267 (1987), citing *State v. Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768, at paragraph seven of the syllabus. A gruesome photograph is admissible only if its "probative value * * * outweigh[s] the danger of prejudice to the defendant." *Morales* at 258. Unlike Evid.R. 403, which turns on whether prejudice *substantially* outweighs probative value, this standard requires "a simple

4. Mammone does not challenge any photographs of Margaret Eakin. Even if he had, however, the admission of those photos was proper because their probative value outweighed the danger of unfair prejudice and the photos were not repetitive or cumulative. *See State v. Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768, at paragraph seven of the syllabus.

balancing of the relative values" of prejudice and probative value. *Id.* And even if a photo satisfies the balancing test, it can be "neither repetitive nor cumulative in nature." *Id*.; *see State v. Thompson*, 33 Ohio St.3d 1, 9, 514 N.E.2d 407 (1987). A trial court's decision that a photo satisfies this standard is reviewable only for abuse of discretion. *See State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶ 69; *Morales* at 257; *Maurer* at 264.

a. Photos of the crime scene

{¶ 97} First, Mammone challenges the introduction of two crime-scene photos, Exhibits 2H and 2I, showing Macy and James dead in their car seats. These photos depict the condition in which police officers found the child victims at the time of Mammone's arrest. Mammone unsuccessfully sought to exclude these photos before trial and again objected to them at trial.

{¶ 98} Exhibits 2H and 2I had significant probative value. Each photo "illustrated the testimony of the detectives who described the crime scene," and also was "probative of [the defendant's] intent and the manner and circumstances of the victims' deaths." *Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, at ¶ 134, 136; *see also State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶ 26; *Morales* at 258. Detectives Weirich and Risner testified that upon arriving at the scene, they found the children dead in the back seat of Mammone's car. Macy and James had been stabbed in the throat while strapped into their car seats, unable to move.

{¶ 99} Mammone nevertheless claims that these photos were "completely unnecessary" because he never denied murdering Macy and James and the state could have proven cause of death "in a less gruesome manner." But we have repeatedly rejected similar arguments in the past. *See Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, at ¶ 70; *Maurer*, 15 Ohio St.3d at 264-265, 473 N.E.2d 768. The state had the burden to prove that Mammone purposely killed the children, and these photos were probative of that issue. *See Maurer* at 265,

quoting *State v. Strodes*, 48 Ohio St.2d 113, 116, 357 N.E.2d 375 (1976), *vacated in part on other grounds*, 438 U.S. 911, 98 S.Ct. 3135, 57 L.Ed.2d 1154 (1978) (" '[t]he state must prove, and the jury must find, that the killing was purposely done' ").

{¶ 100} Under these circumstances, we conclude that the probative value of these two photos outweighed the danger of unfair prejudice to Mammone and that the photos "were neither repetitive nor cumulative in nature." *Morales*, 32 Ohio St.3d at 258, 513 N.E.2d 267. The prosecution selected, and the trial court admitted, a single photo of each child victim from 34 available crime-scene photos showing Mammone's car with the children inside. These two photos were published to the jury only once, although two witnesses authenticated them during their testimony. Accordingly, the trial court did not abuse its discretion by admitting Exhibits 2H and 2I.

b. Autopsy photos

{¶ 101} Mammone also challenges the admission of autopsy photos "of very young children." The trial court admitted six autopsy photos of James's injuries, Exhibits 5A-F, and seven of Macy's, Exhibits 6A-G. Defense counsel unsuccessfully sought to exclude these photos both before trial and during the coroner's testimony at trial. But notably, Mammone personally thanked the court during his allocution "for the discretion used in, ah, limiting the, ah, display of autopsy photos for the deceased in this matter."

{¶ 102} Exhibits 5A-F and 6A-G had significant probative value. As mentioned above, the state was required to prove that Mammone purposely killed Macy and James. *See Maurer*, 15 Ohio St.3d at 265, 473 N.E.2d 768. The number and location of the children's injuries and the resulting wounds were all probative evidence of a purpose to cause death. *Id*. In addition, each photo supported and illustrated the coroner's testimony about the wounds inflicted on Macy and James and the cause of their deaths. *Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911

N.E.2d 242, at ¶ 148; *Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, at ¶ 26; *Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, at ¶ 72.

{¶ 103} As with the crime-scene photos, Mammone contends that the prejudicial impact of showing the jury gruesome autopsy photos of young children outweighed this probative value. Mammone asserts that the photos were unnecessary because he did not dispute the cause of the children's deaths and because the state could have used testimony alone to prove the children's injuries. But, as explained above, the state bears the burden of proof and it has no obligation to meet that burden in the *least* gruesome way. Consistent with our previous holdings in cases involving children, we conclude that the prejudicial impact of these autopsy photos did not outweigh their probative value. *See*, *e.g.*, *Vrabel* at ¶ 69-72; *Trimble* at ¶ 142-145, 155.

{¶ 104} Further, these photos were neither repetitive nor cumulative. At trial, the state offered seven of the more than 100 photographs taken during Macy's autopsy. Each photo presents a different injury. Exhibit 6A depicts Macy as she arrived at the coroner's office, still strapped in her car seat. Exhibits 6B, 6D, and 6E show different knife wounds: (1) three wounds to Macy's left lower face and upper neck, severing her esophagus and trachea, (2) a cluster of three wounds on Macy's left neck, and (3) an exit wound. Exhibits 6C and 6F depict defensive wounds on Macy's right hand and right leg, respectively. Finally, Exhibit 6G shows finger-shaped bruises on Macy's left leg, consistent with someone having a firm grip on that spot.

{¶ 105} Likewise, each of the six autopsy photos of James depicts something different: (1) Exhibit 5B shows a defensive wound on James's right palm, (2) Exhibit 5E depicts a large stab wound on James's neck, transecting his esophagus and trachea and cutting through to his back, (3) Exhibit 5F depicts the exit wound on James's upper left back, (4) Exhibit 5A captures a close-up of James's hands, (5) Exhibit 5C shows a view of the stab wound on his neck from

the other side of his head, and (6) Exhibit 5D shows injuries on his right arm, including the defensive wound on his right hand. Like the autopsy photos of Macy, none of these photos is cumulative or repetitive.

{¶ 106} For these reasons, we find no abuse of discretion in the admission of these autopsy photos.[5] Mammone's fifth proposition of law fails.

2. Prosecutorial Misconduct

{¶ 107} In his fourth and sixth propositions of law, Mammone argues that his due-process rights were violated due to prosecutorial misconduct. *See* the Sixth, Eighth, Ninth, and Fourteenth Amendments to the U.S. Constitution; Ohio Constitution, Article I, Sections 1, 2, 9, 10, 16, and 20. According to Mammone, the prosecution "infest[ed]" the trial phase by introducing irrelevant and "disturbing physical evidence in such a manner that it inflame[d] the jury." And at the sentencing phase, he contends, the prosecutor committed misconduct by questioning a defense expert's failure to write a report and by arguing revenge as an aggravating circumstance.

{¶ 108} A prosecutor is "in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); *see State v. Lott*, 51 Ohio St.3d 160, 166, 555 N.E.2d 293 (1990) (*Berger* court's comments about prosecutors "apply with equal force to Ohio prosecuting attorneys"). Accordingly, even though a prosecutor "may prosecute with earnestness and vigor" and "may strike hard blows," a prosecutor "is not at liberty

5. Even if one or more of these photos had been introduced in error, any such error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Lundgren*, 73 Ohio St.3d 474, 486, 653 N.E.2d 304 (1995). The evidence that Mammone murdered Macy and James was overwhelming: Mammone confessed these crimes to law enforcement in detail, and the jury heard his recorded confession at trial. Further, there is no evidence that these photos improperly affected the jury during the penalty phase. *Compare Thompson*, 33 Ohio St.3d at 14-15, 514 N.E.2d 407 (admission of gruesome photos was harmless error at trial phase, but was not harmless when prosecutor committed misconduct during penalty phase by overzealously appealing to jurors' emotions in urging them to remember those photos when weighing appropriateness of death sentence).

to strike foul ones." *Berger* at 88. Prosecutors have a "duty to refrain from improper methods calculated to produce a wrongful conviction." *Id.*

{¶ 109} Because allegations of prosecutorial misconduct implicate due-process concerns, the touchstone of this analysis is the " 'fairness of the trial, not the culpability of the prosecutor.' " *State v. Newton*, 108 Ohio St.3d 13, 2006-Ohio-81, 840 N.E.2d 593, ¶ 92, quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). If any misconduct occurred, the court must consider the effect it had on the jury "in the context of the entire trial." *State v. Keenan*, 66 Ohio St.3d 402, 410, 613 N.E.2d 203 (1993).

{¶ 110} With regard to each allegation of misconduct, we must determine whether the conduct was "improper, and, if so, whether [it] prejudicially affected substantial rights of the defendant." *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). "[A] defendant's substantial rights cannot be prejudiced when the remaining evidence, standing alone, is so overwhelming that it constitutes defendant's guilt, and the outcome of the case would have been the same regardless of evidence admitted erroneously." *State v. Hicks*, 194 Ohio App.3d 743, 2011-Ohio-3578, 957 N.E.2d 866, ¶ 30 (8th Dist.2011), citing *State v. Williams*, 38 Ohio St.3d 346, 349-350, 528 N.E.2d 910 (1988).

{¶ 111} If a defendant failed to object to the alleged misconduct below, however, we review the claim for plain error. To prevail on plain-error review, Mammone must establish both that misconduct occurred and that but for the misconduct, the outcome of the trial clearly would have been otherwise. *State v. Barnes*, 94 Ohio St.3d at 27, 759 N.E.2d 1240; *see* Crim.R. 52(B).

a. Misconduct during the trial phase

{¶ 112} Mammone alleges that various incidents of misconduct occurred during the trial phase. First, he argues that the prosecution improperly used certain evidence and other courtroom techniques to pander to the emotions of the jurors. According to Mammone, his trial was already emotionally charged due to pretrial

publicity and the circumstances of the murders. Against that backdrop, he maintains that the prosecution took a "histrionic approach" using excessively emotional arguments, courtroom stunts, and irrelevant evidence. But Mammone does not specifically identify any examples of excessively emotional arguments or courtroom stunts. Instead, his brief argues that the prosecution introduced a variety of irrelevant (and repetitive) evidence in a "calculated" effort "to evoke an emotional response from the jury."

{¶ 113} Second, Mammone claims that prosecutorial misconduct occurred when the state offered several additional pieces of "inflammatory" evidence at trial. Mammone argues that this evidence served no legitimate purpose and "inflamed the jury and unnecessarily reminded the jury of the age and helplessness of the victims" at both stages of the proceedings.

{¶ 114} At bottom, these arguments are evidentiary claims. Accordingly, we must determine whether each piece of challenged evidence was properly admitted. Because "[a] trial court enjoys broad discretion in admitting evidence," "[t]his court will not reject an exercise of this discretion unless it clearly has been abused and the criminal defendant thereby has suffered material prejudice." *State v. Long*, 53 Ohio St.2d at 98, 372 N.E.2d 804.

{¶ 115} Evidence is relevant, and therefore generally admissible under Evid.R. 402, if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. A trial court may exclude relevant evidence if "its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence." Evid.R. 403(B). Further, a court *must* exclude evidence when its "probative value is substantially outweighed by the danger of unfair prejudice." Evid.R. 403(A). Contrary to Mammone's suggestions, neither the Rules of Evidence nor this court's precedents make "necessity" a prerequisite for admissibility.

{¶ 116} If the evidence was properly admitted, then the prosecutor's decision to offer it cannot form the basis of a misconduct claim.

1) Prosecutorial theatrics

{¶ 117} Mammone objects that the prosecution engaged in inappropriate theatrics by introducing specific evidence during the testimony of four witnesses. For the reasons explained below, this evidence was properly admitted.

{¶ 118} First, Mammone argues that the prosecution introduced a photo of Macy and James, dead in their car seats, during Detective Risner's testimony solely for "shock value." Risner testified regarding his arrest of Mammone on the morning of June 8. While handcuffing Mammone and removing him from his car, Risner looked through the windows and saw a pistol near Mammone's leg and two dead children strapped in car seats. During Risner's testimony, the state offered a single photograph depicting the back seat of the car at the time of Mammone's arrest. The trial court admitted the photo over a defense objection, explaining that it was "necessary as to what [Risner] observed and [was] not unduly prejudicial given the totality of the testimony."

{¶ 119} Risner's testimony and the photo were admissible because they were probative of Mammone's guilt for the charged offenses. Moreover, as discussed in the analysis of proposition V, the photo satisfies the standard for admitting gruesome photos in capital cases. Accordingly, the trial court did not abuse its discretion by permitting this evidence, and the prosecutor did not engage in misconduct by offering it.

{¶ 120} Second, Mammone argues that the prosecution engaged in "theatrics" by introducing during Detective Weirich's testimony physical evidence that had been in Mammone's car when he was arrested. Weirich collected evidence, took photographs, and processed the crime scenes. At trial, Weirich identified the photos and physical evidence, which was important to establish the chain of custody for several of the state's exhibits. The prosecution introduced

items Weirich found in Mammone's car, including weapons, a wedding photo of Marcia, Marcia's dried wedding bouquet, car seats, sippy cups, children's blankets, diapers, sleepers, children's clothing, and diaper/overnight bags. Mammone did not object to Weirich's testimony or these exhibits at trial, but he now claims that the physical evidence had no probative value. Mammone reasons that Risner had already described the scene and the jury had already seen the photo of the children dead in their car seats, so the additional evidence was not probative.

{¶ 121} The trial court did not err by admitting this evidence because it was relevant to proving the offenses charged. This physical evidence supported a finding that Mammone acted with purpose when he committed the three murders; he planned ahead for the evening, bringing a host of weapons and supplies for the children with him. In addition, the presence of the wedding bouquet and wedding photo confirms that he acted with Marcia in mind, consistent with his admission that he knew the murders would be a major blow to Marcia, in revenge for their destroyed marriage. Weirich's description of the scene and the photograph of the children could not simply replace this physical evidence; instead, they supplemented it.

{¶ 122} But even if any of this evidence had been admitted in error, Mammone cannot show that it was outcome-determinative. *See* Crim.R. 52(B). Mammone gave a full confession to the crimes and, for the most part, did not contest the facts of the murders. He cannot persuasively argue that the exclusion of any, or all, of this physical evidence would have led to a different outcome at his trial.

{¶ 123} Third, Mammone objects to the prosecution's introduction during Dr. Murthy's testimony of several autopsy photos of the children as well as the children's car seats, clothing, and other personal belongings found in Mammone's car. The trial court admitted the autopsy photos over defense objection, but

Mammone did not object to the physical evidence at trial. Mammone now argues that all this evidence was irrelevant and lacked probative value.

{¶ 124} This claim fails. The autopsy photos were properly admitted for the reasons explained in our analysis of proposition V. And the physical evidence collected from Mammone's car was admissible to illustrate the nature and circumstances of the crime. The car seats and children's clothing supported Dr. Murthy's testimony about the state of the children's bodies when he received them at the coroner's office. Moreover, even if any of this physical evidence had been improperly admitted, Mammone cannot establish that the error was outcome-determinative.

{¶ 125} Finally, Mammone argues that it was improper for Michael Short to testify about the children's bloody car seats. Mammone did not object to this testimony at trial, but he now claims that the testimony was improper for three reasons: (1) two witnesses had already discussed the car seats, (2) the jury did not need Short's testimony to point out the apparent blood on the car seats, and (3) Short was introduced as a firearms expert.

{¶ 126} Mammone's first two arguments fail for several reasons. First, no other witness testified about the car seats from the perspective of a forensic analyst. Instead, a police officer discussed the car seats when describing his activity at the crime scene, and the coroner discussed the car seats because the children arrived at his office in the seats. Second, the fact that a jury can draw its own conclusions by observing physical evidence does not preclude a witness—particularly a forensic expert—from testifying about his own conclusions drawn from the evidence.

{¶ 127} Mammone also contends that because the court recognized Short as an expert "qualified to render opinions in the area of firearms and fingerprints," Short could not opine about blood on car seats. Short testified that he is a criminalist with responsibility "for either assisting with forensic support or actually

going out and responding and processing the major crime scenes in Stark County." He explained that he had examined the car seats for defects such as those consistent with knife slashes and briefly described one of the car seats as "saturated with apparent blood." The trial court arguably defined Short's expertise too narrowly or erred by letting him offer expert testimony about the car seats. And if Mammone had objected during the trial, the court easily could have addressed these concerns. However, Mammone did not object, and he cannot now establish that but for Short's testimony about the car seats, the outcome of his trial would have differed.

{¶ 128} For these reasons, the evidence Mammone objected to at trial was properly admitted, and no plain error occurred with regard to evidence that Mammone did not object to at trial. As a result, Mammone's claim that the prosecutor engaged in improper "theatrics" by introducing this evidence likewise fails.

2) Evidence with no probative value

{¶ 129} Mammone next argues that misconduct occurred when the prosecutor introduced evidence that allegedly lacked any probative value.

{¶ 130} As an initial matter, Mammone urges us to adopt a higher standard for the admission of "highly inflammatory" evidence in capital cases than the Rules of Evidence demand. We have adopted a stricter standard for admitting gruesome photos in capital cases than in other cases, *see Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768, at paragraph seven of the syllabus, and Mammone argues that the same standard should also apply to other "highly inflammatory evidence" in capital cases. But we have never applied this heightened standard outside the context of gruesome images of victims, and we see no reason to do so here. *See State v. Benner*, 40 Ohio St.3d 301, 312, 533 N.E.2d 701 (1988) ("unlike gruesome photographs, testimony alleged to be gruesome should not be subjected to the *Maurer* standard").

{¶ 131} First, Mammone objects to "[a]utopsy photos of dead children" and "a photo of dead children in their car seats." These photos were relevant and admissible for the reasons explained in our analysis of proposition V.

{¶ 132} Second, Mammone objects to the admission of the children's bloodstained car seats and their belongings found in Mammone's car. This evidence was relevant and admissible because it was probative of Mammone's intent and of the manner and circumstances of the children's deaths. *See State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504, ¶ 65.

{¶ 133} Third, Mammone objects to the admission, during the testimony of Marcia and of Richard Hull, of text messages Mammone exchanged with Marcia and Hull on June 7 and 8, 2009. The messages were relevant and admissible because they were indicative of Mammone's intent and conduct throughout the events that occurred on those dates.

{¶ 134} Finally, Mammone challenges the admission of the audio recordings of Marcia's 9-1-1 calls. These recordings were relevant to establish the nature and circumstances of the crimes and to explain the actions of police officers as the events transpired.

{¶ 135} None of this evidence was more prejudicial than probative. Nor was it unduly cumulative or repetitive. Instead, this evidence illustrated the testimony of different state witnesses, each of whom contributed to the prosecution's case against Mammone. And because none of this evidence was erroneously admitted, the prosecution's decision to introduce it did not deprive Mammone of due process or a fair trial.

b. Misconduct during the mitigation phase

{¶ 136} Mammone argues in his sixth proposition of law that the prosecutor also committed two instances of misconduct during the mitigation phase, asserting that the prosecutor improperly commented on the fact that Mammone's expert failed to provide a written report and that the prosecutor

improperly argued that Mammone's desire for revenge against his ex-wife was an aggravating factor. As explained below, however, the prosecutor's conduct in both regards was well within acceptable bounds.

1) Dr. Smalldon's failure to write a written report

{¶ 137} Mammone objects that the prosecution "repeatedly commented upon Dr. Smalldon's failure to submit a written report" during cross-examination at the mitigation phase.

{¶ 138} Dr. Jeffrey Smalldon is a psychologist who testified as a defense expert during the mitigation phase. On cross-examination, the prosecution questioned Dr. Smalldon about his practices with regard to written reports. Through questioning, the state made clear that Dr. Smalldon usually prepares a written report when he is appointed by the court in child-custody and some other cases. By contrast, here Dr. Smalldon was retained by defense counsel and did not write a report. The prosecutor conveyed to the jury that because there was no written report, he had to contact Dr. Smalldon before trial to get some idea of Dr. Smalldon's likely testimony.

{¶ 139} Mammone argues that this line of questioning amounted to prosecutorial misconduct. In support, he cites *State v. Fears*, 86 Ohio St.3d 329, 715 N.E.2d 136 (1999). In *Fears*, Dr. Smalldon had interviewed the capital defendant in preparation for mitigation. Dr. Smalldon took notes during the interview, and the prosecution sought access to those notes. The trial court ruled that the state could not see the notes, but "[n]evertheless, the prosecutor made several comments about these notes in the presence of the jury." *Id.* at 334. Over objection, the prosecutor asked Dr. Smalldon whether he had provided his notes to the state and alluded to Dr. Smalldon's failure to write a report. During closing argument, the prosecutor argued that "Smalldon's bias was shown by his refusal to give information"—including his notes—"to the state." *Id.* The trial court "sustained several defense objections" during the prosecutor's cross-examination

of Dr. Smalldon as well as an objection to the prosecutor's comment about the notes during closing. *Id.* at 334-335. On review, this court concluded that because the trial court had initially overruled the state's request for the notes, the prosecutor "should not have made" the comments he did during closing. *Id.* at 335. However, even then, we did not find that the prosecutor's remarks denied Fears a fair trial. *Id.*

{¶ 140} Mammone maintains that as in *Fears*, the prosecutor here committed misconduct by "implying" that Dr. Smalldon's failure to submit a report "was improper." But unlike in *Fears*, here, the prosecutor's allegedly improper comments occurred during cross-examination, not during closing arguments *after* the trial court had already sustained numerous objections to improper cross-examination on the same issue. In addition, in *Fears* the prosecutor accused Dr. Smalldon of wrongdoing by highlighting his refusal to provide existing materials. By contrast, here the prosecutor simply pointed out Dr. Smalldon's practice of not generating written reports in cases like this one and did not imply that the practice was irregular or unjustifiable. The prosecutor was entitled to cross-examine Dr. Smalldon about all relevant matters affecting bias and credibility, Evid.R. 611(B), and he did not engage in misconduct by doing so.

{¶ 141} Further, even if the prosecutor's comments had been improper, Mammone cannot meet the high standard for plain error. The outcome of the trial would not have differed even if this exchange had not occurred.

2) Revenge as an aggravating circumstance

{¶ 142} Finally, Mammone contends that the prosecutor improperly argued that revenge was an aggravating circumstance during closing arguments at the mitigation phase. Mammone did not raise this objection at trial, so he has waived all but plain error. *See Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504, at ¶ 89.

{¶ 143} In Ohio, the second phase of a capital trial has a specific purpose: the jury must determine "whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors" beyond a reasonable doubt. R.C. 2929.03(D)(2). "[T]he 'aggravating circumstances' against which the mitigating evidence is to be weighed *are limited to* the specifications of aggravating circumstances set forth in R.C. 2929.04(A)(1) through (8) that have been alleged in the indictment and proved beyond a reasonable doubt." (Emphasis added.) *State v. Wogenstahl*, 75 Ohio St.3d 344, 662 N.E.2d 311 (1996), paragraph one of the syllabus. The jury shall consider any evidence relevant to those aggravating circumstances, including evidence about the nature and circumstances of those aggravators. *See* R.C. 2929.03(D)(1); *Wogenstahl* at 353.

{¶ 144} As we have long recognized, a prosecutor's argument during the mitigation phase is restricted to issues germane to the jury's weighing process. The prosecutor may comment on any "testimony or evidence relevant to the nature and circumstances of the aggravating circumstances specified in the indictment of which the defendant was found guilty." *State v. Gumm*, 73 Ohio St.3d 413, 653 N.E.2d 253 (1995), syllabus. However, because the jury is not at liberty to consider nonstatutory aggravating circumstances, the prosecutor cannot argue the existence of nonstatutory aggravating circumstances. *See Wogenstahl* at 355 ("in the penalty phase of a capital murder trial, any use of the term 'aggravating circumstances' must be confined to the statutory aggravating circumstances set forth in R.C. 2929.04(A)(1) through (8)").

{¶ 145} Mammone claims that the prosecutor argued a nonstatutory aggravating factor—revenge—in his mitigation-phase closing argument. During closing, the prosecutor discussed the mitigating factors, then asked the jury, "Now, what are the aggravating circumstances that you have to weigh against those mitigating factors?" The challenged portion of the prosecutor's argument stated:

On June 8, 2009, [Mammone] trespassed, by force in the Eakin family home with purpose—not out of anger, because you don't drive around the block to see who's there when you're angry, ladies and gentlemen. You go, you're mad, you're upset. You don't care who's there.

But he wanted Margaret alone and as he told police, because that would be a major [blow] to Marcia.

And in his letter to Marcia, My motivation was to hurt you—talking about killing Margaret. My motivation was to hurt you and bring forth the despair one feels when the whole family is taken from them.

The whole family. Goes back to his plan, to his course of conduct.

And his purpose when he went in there was to kill Margaret Eakin, that 57-year old former kindergarten teacher who made the holidays so special for James. And he committed that murder during an aggravated burglary.

And at the same time he committed another aggravating circumstance. Because Margaret was his third victim. She was the third person that this man purposely killed throughout a course of conduct, motivated by the same driving force, to hurt Marcia.

And prior to that he committed this first aggravating circumstance, when as he had planned, he killed his own daughter, Macy, five years old.

She'd only enjoyed five years on this earth and on that day he decided, James Mammone decided, not a jury, that Macy was to die. She was the first victim in his course of conduct that involved

> the purposeful killing of three people on the sacred ground that he chose.
>
> But he wasn't done yet. No. Because he had also decided that James must die.
>
> James, who would die at his own father's hands, because he thought it was necessary. James would become the second victim. Three-year old James, the second victim in this course of conduct, again, driven by that similar motivation, the desire to hurt Marcia.
>
> Those are the aggravating circumstances that you must now weigh against the mitigating factors.
>
> And I submit to you, ladies and gentlemen, that this course of conduct was not carried out because of deeply held religious beliefs. This course of conduct was carried out because of * * * [jealousy].

{¶ 146} Contrary to Mammone's claims, the prosecutor did not improperly refer to nonstatutory aggravating circumstances. The jury had convicted Mammone of a course-of-conduct specification, R.C. 2929.04(A)(5), for each of the three murders, meaning that the jury " 'discern[ed] some connection, common scheme, or some pattern or psychological thread' " that tied the offenses together. *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, 822 N.E.2d 1239, syllabus, quoting *State v. Cummings*, 332 N.C. 487, 510, 422 S.E.2d 692 (1992). In his closing argument at the mitigation phase, the prosecutor argued the nature and circumstances of Mammone's course-of-conduct specification. Namely, he argued that jealousy and Mammone's desire to hurt Marcia motivated all three murders. The prosecutor did not suggest that the jury could independently consider revenge as an aggravating circumstance.

{¶ 147} Even if any of the prosecutor's comments had been improper, Mammone cannot show prejudice because the trial court correctly instructed the jury on the aggravating circumstances and the proper standard to apply in the weighing process. *See Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504, at ¶ 90; *State v. Smith*, 87 Ohio St.3d 424, 444, 721 N.E.2d 93 (2000). It is presumed that the jury followed the court's instructions. *State v. Loza*, 71 Ohio St.3d 61, 79, 641 N.E.2d 1082 (1994). Accordingly, we find no plain error.

c. Cumulative effect of prosecutorial misconduct

{¶ 148} Finally, Mammone claims that the cumulative effect of "[t]he prosecutor's misconduct, taken together with the presence of jurors biased in favor of the death penalty, and the introduction of irrelevant and inflammatory evidence in the trial phase, so infected Mammone's trial as to result in a deprivation of his rights to due process." This argument lacks merit. *See Cunningham* at ¶ 91; *State v. Landrum*, 53 Ohio St.3d 107, 113, 559 N.E.2d 710 (1990); *Smith* at 444-445. And to the extent that Mammone more broadly invokes the doctrine of cumulative error, that doctrine does not apply because he cannot point to "multiple instances of harmless error." *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995).

{¶ 149} For all the above reasons, we reject propositions IV and VI.

3. Ineffective Assistance of Counsel

{¶ 150} In his third proposition of law, Mammone argues that counsel provided constitutionally ineffective assistance throughout the trial. *See* the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution; Ohio Constitution, Article I, Sections 2, 9, 10, and 16. He identifies three instances of allegedly deficient performance with regard to voir dire, presents a sweeping claim about counsel's failure to object to improper exhibits and instances of prosecutorial misconduct, asserts that counsel did not properly investigate and prepare for the mitigation phase, and criticizes counsel for allowing Mammone to make a five-hour unsworn statement in mitigation.

{¶ 151} To establish ineffective assistance of counsel, a defendant must both (1) show that counsel's performance "fell below an objective standard of reasonableness," as determined by "prevailing professional norms" and (2) demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). When performing a *Strickland* analysis, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

a. Voir dire

{¶ 152} Mammone contends that counsel rendered ineffective assistance at voir dire by failing to adequately question potential jurors about possible bias in favor of the death penalty, about exposure to pretrial publicity, and about their ability to understand and consider mitigating factors. He also alleges that counsel were ineffective for not challenging jurors for cause on these grounds.

{¶ 153} When evaluating claims of ineffective assistance at voir dire, this court has "consistently declined to 'second-guess trial strategy decisions' or impose 'hindsight views about how current counsel might have voir dired the jury differently.' " *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 63, quoting *State v. Mason*, 82 Ohio St.3d 144, 157, 694 N.E.2d 932 (1998). Decisions about voir dire are highly subjective and prone to individual attorney strategy because they are often based on intangible factors. *Mundt* at ¶ 64, citing *Miller v. Francis*, 269 F.3d 609, 620 (6th Cir.2001). Accordingly, "counsel is in the best position to determine whether any potential juror should be questioned and to what extent." *State v. Murphy*, 91 Ohio St.3d 516, 539, 747 N.E.2d 765 (2001).

{¶ 154} First, Mammone argues that counsel did not adequately question or challenge two jurors, juror Nos. 418 and 448, for cause. According to Mammone, these two jurors "clearly indicated during voir dire that they could not fairly

consider all the possible sentencing options in this case." But counsel did not provide deficient performance in this regard because, as explained in our analysis of proposition II, these jurors' views on the death penalty *were* extensively probed during voir dire. Neither party, nor the judge, expressed reservations that either juror No. 418 or No. 448 was biased in favor of the death penalty. And even now, Mammone does not identify any questions that counsel *should* have asked during voir dire. Under these circumstances, we find that counsel's decision not to inquire further was objectively reasonable. In fact, defense counsel could well have made a strategic decision not to challenge either juror for cause. *See State v. Cornwell*, 86 Ohio St.3d 560, 569, 715 N.E.2d 1144 (1999) ("we will not second-guess trial strategy decisions such as those made in voir dire").

{¶ 155} Second, Mammone argues that counsel failed to adequately voir dire and challenge jurors as to pretrial publicity. As discussed in the analysis of proposition I, every potential juror completed a publicity questionnaire and was questioned about exposure to publicity during voir dire. Thus, counsel's failure to ask additional questions was not objectively unreasonable. Moreover, the trial court, which was in the best "position to judge each juror's demeanor and fairness," concluded that every juror and alternate selected—including the four Mammone specifically expresses concern about—could be fair and impartial. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, at ¶ 64. Accordingly, counsel's performance was not deficient in this regard.

{¶ 156} Finally, Mammone argues that counsel's performance was deficient in failing "to voir dire jurors as to their ability to consider mitigating factors." The record indicates that the prosecutor thoroughly explained mitigation to the jurors and questioned them about whether they would be able to balance the aggravating circumstances against mitigating factors. Defense counsel then posed additional questions about possible mitigating factors, and the trial court itself inquired further when necessary. The fact that defense counsel did not decide to

ask additional questions or to press every single potential juror on this issue—or to inquire about specific mitigating factors—is reasonable as a matter of strategy. *See Murphy*, 91 Ohio St.3d at 539, 747 N.E.2d 765.

{¶ 157} Even if counsel's performance at voir dire had been deficient in one or more of these ways, Mammone cannot establish prejudice under *Strickland*. He has failed to establish a reasonable probability that but for counsel's allegedly deficient performance at voir dire, the result of the trial would have been different. *See, e.g., State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, at ¶ 67.

{¶ 158} For these reasons, we find that counsel did not render ineffective assistance during voir dire.

b. Failure to object

{¶ 159} In conjunction with propositions IV and VI, Mammone argues that counsel provided ineffective assistance by failing to object to allegedly improper exhibits and instances of prosecutorial misconduct. As explained above, we reject Mammone's evidentiary claims and allegations of prosecutorial misconduct. Accordingly, he cannot establish ineffective assistance in this regard.

c. Mitigation investigation and preparation

{¶ 160} Mammone contends that counsel also provided ineffective assistance during the second phase of his trial by failing to properly interview and prepare the defense's mitigation witnesses. Mammone asserts that information harmful to his mitigation defense emerged during the prosecutor's cross-examination of his mother, Gilise Mammone, and during the direct testimony of his father, James Mammone Jr.

{¶ 161} On direct examination, Gilise testified that Mammone regretted his actions and knew that what he did was wrong. But on cross-examination, she did not effectively dispute the prosecutor's allegation that Mammone continued to maintain that he had no regrets. She also did not dispute that Mammone had told

her that Marcia "got exactly what she was told she would get," and she conceded that "[f]rom what he tells me, he's warned her and warned her about it."

{¶ 162} Mammone argues that the jury would not have heard this harmful testimony if counsel had fully interviewed Gilise before the hearing and better prepared her to testify. But there is no evidence that counsel did not fully interview Gilise or adequately prepare her. To establish that "would require proof outside the record," and such a claim "is not appropriately considered on a direct appeal." *State v. Madrigal*, 87 Ohio St.3d 378, 391, 721 N.E.2d 52 (2000). Further, Mammone's counsel may have been aware of potential pitfalls in Gilise's testimony but nevertheless still made a reasonable strategic decision to put her on the stand. *See State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, at ¶ 115 (counsel's decision to call a witness "reflected reasonable trial strategy"). Gilise had valuable information to offer the jury about Mammone's childhood and history of abuse, and counsel may have decided that the information was more important than avoiding potentially unfavorable testimony on cross-examination. Therefore, Mammone cannot show that counsel were deficient in this regard.

{¶ 163} Further, Mammone cannot show a reasonable likelihood that but for counsel's alleged error, he would not have been sentenced to death. Mammone argues that Gilise conveyed two facts to the jury: (1) that Mammone felt that Marcia got what she deserved and did not regret the murders of the children and (2) that Mammone had repeatedly warned Marcia that there would be grave consequences for her actions. But Mammone's unsworn statement and Dr. Smalldon's testimony conveyed essentially the same information to the jury. Gilise's testimony in this regard was merely cumulative and does not provide a sufficient basis for establishing prejudice.

{¶ 164} Mammone similarly argues that counsel's mitigation investigation and preparation of his father, James Jr., was deficient because his father's

testimony directly contradicted the defense's narrative about Mammone's difficult childhood and relationship with his father. James Jr. testified that he had a good relationship with Mammone when he was a child and denied abusing him or calling him names (at least often). He also made what Mammone characterizes as "bizarre and unfocused comments," which Mammone argues detracted from his mitigation case.

{¶ 165} As with Gilise, Mammone cannot establish that counsel were deficient in preparing James Jr. to testify or that counsel were deficient in allowing him to testify at all. First, there is no evidence that counsel did not fully interview James Jr. or prepare him to testify. Second, counsel may have reasonably decided to put James Jr. on the stand in spite of some apparent contradictions between his testimony and the defense's mitigation theory. *See Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, at ¶ 115. James Jr. denied abusing Mammone, but he also candidly admitted that he drank frequently and that he recalled striking Gilise a few times. He also admitted that he regularly blacked out in those days, so that there was much he did not remember about this time period. In light of these statements, defense counsel could reasonably have decided that James Jr.'s testimony would do more good than harm.

{¶ 166} Even if counsel's preparation of James Jr. had been somehow deficient, however, Mammone cannot establish that but for this error, there is a reasonable likelihood that he would have received a life sentence. Much of James Jr.'s testimony was consistent with Mammone's mitigation theory and when it was inconsistent, Mammone had three witnesses to support his version of events—his mother, Dr. Smalldon, and himself.

{¶ 167} In sum, Mammone cannot establish that counsel provided ineffective assistance by failing to adequately interview his mitigation witnesses or prepare them for the mitigation hearing.

d. Mammone's unsworn statement

{¶ 168} Mammone argues that counsel provided ineffective assistance by failing to prepare him for mitigation, by allowing him to make a five-hour unsworn statement, and by failing to limit or guide his statement in any way.

{¶ 169} At his mitigation hearing, Mammone presented a lengthy unsworn statement—spanning more than 250 pages in the transcript—that described his upbringing, his relationships with Marcia and his children, the events leading up to June 7 and 8, 2009, and the murders themselves. He began by stating that his intent was to give the jury "a firsthand account of what I did and how I was feeling and thinking at the time." He concluded by saying that he is full of regrets and expressing hope that others will learn from this tragedy by renewing their commitments to God, their marriage, and their children. Ultimately, the court directed Mammone to "[w]rap it up," and he responded by stating, "I've said my piece, Judge."

{¶ 170} Mammone cannot establish that counsel were ineffective by allowing him to make this long unsworn statement. Mammone, "*not counsel*, had the choice whether to testify or give an unsworn statement." (Emphasis added.) *State v. Brooks*, 75 Ohio St.3d 148, 157, 661 N.E.2d 1030 (1996). And regardless, "the decision to give an unsworn statement is a tactical one, a call best made by those at the trial who can judge the tenor of the trial and the mood of the jury." *Id.*

{¶ 171} Mammone's statement was well spoken, coherent, and organized. For the most part, the statement amplified the confession Mammone had made to police officers the day he was arrested and gave the jury an opportunity to observe his personality and learn more about his background. Moreover, because the court permitted Dr. Smalldon to observe the statement, Dr. Smalldon was able to refer to it during his own testimony. Under the circumstances, to the extent that trial counsel may have influenced Mammone's decision to give an unsworn statement,

allowing the statement was objectively reasonable as a matter of strategy. *See State v. Jalowiec*, 91 Ohio St.3d 220, 237, 744 N.E.2d 163 (2001).

{¶ 172} Moreover, even if counsel had somehow performed deficiently with regard to Mammone's unsworn statement, this conduct was not prejudicial. Mammone speculates that the statement was harmful because it was long, cold, and detached and because the jury had no context for connecting it to Mammone's mental illness. But Mammone cannot establish a reasonable likelihood that he would have been sentenced to life imprisonment if not for this statement. For the most part, Mammone's statement amplified his confession statement to police officers, which was played for the jury at trial.

e. Cumulative errors

{¶ 173} Finally, Mammone argues that trial counsel's cumulative errors and omissions violated his constitutional rights. However, because none of Mammone's individual claims of ineffective assistance has merit, he cannot establish an entitlement to relief simply by joining those claims together.

{¶ 174} For all these reasons, we deny Mammone's ineffective-assistance claims and reject his third proposition of law.

C. Challenges to the Death Penalty

1. Cruel and Unusual Punishment

{¶ 175} In his eighth proposition of law, Mammone argues that his death sentence violates the Eighth and Fourteenth Amendments because he is "seriously mentally ill." We reject this claim because the Eighth Amendment does not bar the execution of the seriously mentally ill and, in any event, Mammone has not shown that he suffers from a "serious mental illness."

{¶ 176} As interpreted by the United States Supreme Court, the Eighth Amendment's prohibition on "cruel and unusual punishments" requires that the "punishment for crime * * * be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910). As

"the most severe punishment," the death penalty is "reserved for a narrow category of crimes and offenders." *Roper v. Simmons*, 543 U.S. 551, 568, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Accordingly, the United States Supreme Court has identified three categories of offenders who cannot be sentenced to death consistent with the Eighth Amendment: juveniles, the insane, and the mentally retarded. *Id.* at 578 (abrogating *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989)); *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986); *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (abrogating *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)).

{¶ 177} Mammone does not (and does not claim to) fit any of these categories. Instead, he urges this court to extend the Eighth Amendment's protections to a fourth category of offenders: defendants with severe mental illness. Mammone in effect argues that the Eighth Amendment protections can change over time because the amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (Warren, C.J., plurality opinion). In light of present "standards of decency," Mammone would have us hold that the Eighth Amendment bars capital punishment for offenders with serious mental problems.

{¶ 178} Mammone cites two concurring opinions in support of his argument. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 343-367 (Lundberg Stratton, J., concurring); *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 210-250 (Lundberg Stratton, J., concurring). But these opinions do not support Mammone's claim of an Eighth Amendment violation. Instead, they speak to policy matters. Justice Lundberg Stratton did not interpret the Eighth Amendment to bar the execution of the severely mentally ill. She noted that " 'mental illnesses vary widely in severity' " and that " '[t]he

General Assembly would be the proper body to * * * take public testimony, hear from experts in the field, and fashion criteria for the judicial system to apply.' " *Lang* at ¶ 365 (Lundberg Stratton, J., concurring), quoting *Ketterer* at ¶ 248 (Lundberg Stratton, J., concurring).

{¶ 179} Neither the United States Supreme Court nor any other court has ever recognized the seriously mentally ill as a category of offenders who cannot be constitutionally executed. *See State v. Dunlap*, 155 Idaho 345, 380, 313 P.3d 1 (2013) ("It appears that every court that has considered this issue [has] refused to extend *Atkins* and hold that the Eighth Amendment categorically prohibits execution of the mentally ill"). Likewise, we have repeatedly rejected claims that executing a severely mentally ill person constitutes cruel and unusual punishment. *See, e.g., Ketterer* at ¶ 176; *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 155 ("We have found no court that has held that it violates the Eighth Amendment to impose a death sentence on a defendant who was severely mentally ill at the time of the offense" [footnote omitted]).

{¶ 180} In addition, there is tremendous variation in the types and degrees of mental illness. *See Hancock* at ¶ 157 ("Mental illnesses come in many forms; different illnesses may affect a defendant's moral responsibility or deterrability in different ways and to different degrees"). It is therefore fitting that Ohio's sentencing statutes permit consideration of mental illness on a case-by-case basis. Evidence of mental illness is relevant during sentencing under R.C. 2929.04(B)(3) and (B)(7), thereby allowing for "the individualized balanc[ing] between aggravation and mitigation in a specific case." *Id.* at ¶ 158. Here, defense counsel presented evidence about Mammone's mental illness in mitigation, and the jury and trial court weighed that information when determining his sentence. We will again weigh that evidence during our independent sentence evaluation.

{¶ 181} Even if we had some inclination to interpret the Eighth Amendment more broadly, we are unconvinced that Mammone has a "serious

mental illness." Dr. Smalldon testified that Mammone has a personality disorder (not otherwise specified) with schizotypal, borderline, and narcissistic features. He further stated that Mammone also has passive-aggressive and compulsive personality traits, as well as some traits that are commonly associated with psychotics. Regardless of how "serious mental illness" is defined, Mammone's mental problems are less severe than those of defendants in other cases in which we have rejected Eighth Amendment challenges. *See, e.g.*, *Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, at ¶ 211 (Lundberg Stratton, J., concurring) (noting that the state did not contest the defendant's serious mental illness, including bipolar disorder, substance-abuse problems, and multiple past suicide attempts); *State v. Scott*, 92 Ohio St.3d 1, 2, 748 N.E.2d 11 (2001) (rejecting Eighth Amendment challenge to execution of "any person with a biologically based severe mental illness such as schizophrenia").

{¶ 182} For all these reasons, we reject proposition of law VIII.

2. Constitutional and International-Law Challenges

{¶ 183} In his ninth proposition of law, Mammone presents seven often raised—and always rejected—constitutional challenges to Ohio's capital-punishment scheme. He also argues that Ohio's death-penalty statutes violate international law and treaties and therefore offend the Supremacy Clause of the United States Constitution.

{¶ 184} The court has previously considered and rejected each of these claims:

- Ohio's death-penalty scheme is not imposed in an arbitrary and discriminatory manner. *State v. Ferguson*, 108 Ohio St.3d 451, 2006-Ohio-1502, 844 N.E.2d 806, ¶ 86 (rejecting claims of arbitrary and unequal punishment); *State v. Jenkins*, 15 Ohio St.3d 164, 169-170, 473 N.E.2d 264 (1984) (rejecting arguments

regarding prosecutorial discretion); *State v. Steffen*, 31 Ohio St.3d 111, 124-125, 509 N.E.2d 383 (1987) (rejecting assertions of racial discrimination).

- Ohio's statutory weighing scheme is neither unconstitutionally vague nor arbitrary and capricious. *Jenkins* at 171-173.

- Ohio does not unconstitutionally burden a capital defendant's right to trial by jury. *Ferguson* at ¶ 89; *State v. Buell*, 22 Ohio St.3d 124, 138, 489 N.E.2d 795 (1986).

- Ohio's requirement that a defendant must submit to the jury any presentence investigation report or mental evaluation he requests is constitutional. *Ferguson* at ¶ 90; *Buell* at 138.

- Ohio's felony-murder specification is constitutional when applied to aggravated murder under R.C. 2903.01(B). *Jenkins* at 177-178.

- R.C. 2929.03(D)(1) and 2929.04(B) are not unconstitutionally vague. *Ferguson* at ¶ 92; *State v. McNeill*, 83 Ohio St.3d 438, 453, 700 N.E.2d 596 (1998).

- Ohio's review of sentence proportionality and appropriateness is constitutional. *Steffen* at paragraph one of the syllabus; *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 207.

- Ohio's death-penalty scheme does not violate international law. *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 137-138; *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621, ¶ 127; *State v. Issa*, 93

Ohio St.3d 49, 69, 752 N.E.2d 904 (2001); *State v. Bey*, 85 Ohio St.3d 487, 502, 709 N.E.2d 484 (1999).

{¶ 185} In light of the above precedent, we reject Mammone's various claims. *See, e.g., State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶ 215-216; *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 381-383; *State v. Carter*, 89 Ohio St.3d 593, 607-608, 734 N.E.2d 345 (2000).

{¶ 186} As we have previously stated, "Ohio's statutory framework for imposition of capital punishment, as adopted by the General Assembly effective October 19, 1981, and in the context of the arguments raised herein, does not violate the Eighth and Fourteenth Amendments to the United States Constitution or any provision of the Ohio Constitution." *Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264, at paragraph one of the syllabus. In addition, we have "rejected the argument that Ohio's death penalty statutes are in violation of treaties to which the United States is a signatory" and thus have held that the statutes do not offend the Supremacy Clause of the United States Constitution. *Bey*, 85 Ohio St.3d at 502, 709 N.E.2d 484.

{¶ 187} Mammone's ninth proposition of law is not well taken.

III. INDEPENDENT SENTENCE EVALUATION

{¶ 188} Finally, Mammone argues in his seventh proposition of law that his death sentences were unreliable and inappropriate. This claim invokes R.C. 2929.05(A), which requires us to review Mammone's death sentences for appropriateness and proportionality. In conducting this review, we must determine whether the evidence supports the jury's finding of aggravating circumstances, whether the aggravating circumstances outweigh the mitigating factors, and whether Mammone's death sentence is proportionate to those affirmed in similar cases. *Id*.

A. Aggravating Circumstances

{¶ 189} Mammone was convicted of two death specifications for each count of aggravated murder. The jury found that Mammone killed all three victims as "part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender." R.C. 2929.04(A)(5). With respect to Macy and James, the jury also found a violation of R.C. 2929.04(A)(9), murdering a child under the age of 13. And with respect to Margaret, the jury found that the murder occurred during an aggravated burglary, in violation of R.C. 2929.04(A)(7). The evidence at trial supports the jury's finding of all these aggravating circumstances.

{¶ 190} First, the murders of Margaret, Macy, and James were purposeful and part of a single continuing course of conduct. The attacks were linked in time and motive. *See State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, 822 N.E.2d 1239, at syllabus and ¶ 52 (factors such as time, location, a common scheme, or a common psychological thread can establish the factual link necessary to prove a course of conduct). In addition, Mammone's conduct was purposeful. He contemplated violent revenge for months. On June 7, 2009, he packed a bag of weapons and loaded Macy and James into his car. After driving around for hours, Mammone parked and stabbed his children as they sat strapped in their car seats. He then drove to Margaret's house, where he beat her and fatally shot her twice. Hours later, Mammone confessed to all three murders and agreed that they were all motivated, at least in part, by his desire to hurt Marcia. This evidence supports Mammone's conviction under R.C. 2929.04(A)(5) with respect to each of the three counts of aggravated murder.

{¶ 191} Second, Mammone murdered children under the age of 13 when he killed Macy and James. Before trial, Mammone stipulated that his children were five and three years old at the time of their deaths. Accordingly, the evidence

supports Mammone's conviction under R.C. 2929.04(A)(9) for two of the three counts of aggravated murder.

{¶ 192} Finally, the evidence shows that Mammone murdered Margaret during an aggravated burglary. R.C. 2911.11(A) defines aggravated burglary as follows:

> (A) No person, by force, stealth, or deception, shall trespass in an occupied structure * * *, when another person other than an accomplice of the offender is present, with purpose to commit in the structure * * * any criminal offense, if any of the following apply:
>
> (1) The offender inflicts, or attempts or threatens to inflict physical harm on another;
>
> (2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

Mammone committed aggravated burglary when he entered the Eakins' occupied home, with the intent to harm Margaret, while carrying a deadly weapon. Mammone located Margaret, then shot and beat her, causing her death. There is no question that Mammone was the principal offender in this murder; nothing suggests that any other offender was involved. Accordingly, the evidence supports the jury's finding of felony murder. *See* R.C. 2929.04(A)(7).

B. Mitigating Factors

{¶ 193} For each murder count, we must weigh the applicable aggravating circumstances against any mitigating evidence about the "nature and circumstances of the offense" and Mammone's "history, character, and background." R.C. 2929.04(B). In addition, we consider the statutory mitigating factors set forth in

the subsections of R.C. 2929.04(B): (B)(1) (victim inducement), (B)(2) (duress, coercion, or strong provocation), (B)(3) (mental disease or defect), (B)(4) (youth of the offender), (B)(5) (lack of a significant criminal record), (B)(6) (accomplice rather than principal offender), and (B)(7) (any other relevant factors).

{¶ 194} At the mitigation hearing, the defense presented Mammone's unsworn statement, testimony from his parents, and testimony from defense expert psychologist Dr. Jeffrey Smalldon.

1. Mammone's Unsworn Statement

{¶ 195} In his unsworn statement, Mammone told the jury about his background, described the events leading up to June 7 and 8, 2009, and gave "a firsthand account" of what he did and how he was feeling and thinking at the time of the murders.

{¶ 196} Mammone was born in Canton in 1973 and lived in that area most of his life. When Mammone was a child, his father drank excessively and regularly beat his wife and son severely. By the time Mammone was five or six years old, he was "horrified to go home."

{¶ 197} Mammone's parents divorced when he was ten years old and his father, James Jr., moved back in with his own parents. Mammone's mother, Gilise, struggled financially and became depressed. Mammone, who had always been a strong student, lost interest in school and also became depressed. In 1986, Gilise began to date a neighbor, and she and her son eventually moved in with the neighbor. Mammone was extremely jealous and believed that his mother was being mentally controlled. He began to spend more time at his paternal grandparents' house. His relationship with his father improved, and he became very close to his grandfather, who had always treated Mammone like a son. One of Mammone's grandmothers took him to church with her and taught him strong values. Around this time, Mammone began to develop "a complex" about how his family wasn't the way that he "thought families should be." As a teenager,

Mammone had several close friends. He began working at age 16 and held a steady succession of jobs. At age 18, Mammone left home and lived with a friend for a short time before moving in with his paternal grandparents. He also met Richard Hull, and the two quickly became inseparable.

{¶ 198} Mammone and Marcia met while working at a restaurant, and they began dating in February 1996. They shared the same views about commitment and God. Mammone respected Marcia's family, and he began attending church with them. The couple married in December 1998. At some point, Marcia mentioned that she could imagine leaving Mammone if he were to make a certain kind of financial mistake with their money. This comment shocked Mammone, and he became insecure about the marriage. He questioned whether they should have children, because he believed that children should be raised only in a home with both parents present as husband and wife. Marcia assuaged Mammone's fears and reiterated her commitment to him.

{¶ 199} Macy was born on March 22, 2004, and James IV was born on May 5, 2006. Marcia was overwhelmed after Macy's birth and even more overwhelmed after James was born. She started seeing a psychologist, but Mammone rejected the idea of joint marriage counseling. Eventually he agreed to see a psychological counselor on his own, but his counseling was not helpful and his relationship with Marcia deteriorated.

{¶ 200} In spring 2007, Marcia got drunk at a party and informed her work colleagues that Mammone did not want Macy and James to be around them because many of them "had been divorced and had children who were being raised in broken homes." This statement was true: Mammone did not "want [his] children in that environment." However, he had great difficulty explaining his views to Marcia's coworkers, some of whom he regarded as friends. Marcia felt more and more isolated and believed that Mammone was too judgmental.

{¶ 201} On August 3, 2007, Marcia announced that she was leaving Mammone. Mammone reminded her that he would never let the children be raised in a home without both parents living together. Marcia told him that she already felt like a single mother and that she would rather just be one. Mammone refused to let Marcia leave the house. He blocked the door and crushed her phone. By the end of the day, Mammone agreed to enter marriage counseling, and the couple committed to making the marriage work.

{¶ 202} Mammone experienced a nervous breakdown. He quit his job and did not feel like leaving the house for several months.

{¶ 203} In December 2007, Mammone got drunk at a Cleveland Browns game. He became very upset with Marcia and warned her, "If you try to leave me, you know, I'll kill you and I'll kill the kids." He assured her that he would "send the children back to heaven to be with God" because, as he had previously told her, he "would absolutely see [them] dead before I would see them go through what I know to be the tragedies of a broken home." Unbeknownst to Mammone at the time, Marcia contacted a lawyer soon after the Browns game. She also secretly started setting money aside.

{¶ 204} One morning in summer 2008, Mammone saw Marcia decline a phone call. He took Marcia's phone, called the number on it, and was connected to a lawyer's office. Marcia then told Mammone that she was leaving him. Mammone threatened Marcia, but he did not really intend to hurt her. Later that day, Marcia was driving the family to the Eakins' house when they passed a police officer. Marcia yelled for help and Mammone was arrested. He was charged with verbal domestic violence and briefly jailed for threatening to kill Marcia. By the time Mammone was released, Marcia and the children had left on a trip to New York. Marcia later got a protection order and Mammone attended court-ordered domestic-violence therapy. After his arrest, Mammone experienced another nervous breakdown. He felt shocked, depressed, betrayed, and abandoned.

Mammone assembled a shrine to Marcia in the living room of the house that they had formerly shared, with items such as her wedding photo and bridal bouquet.

{¶ 205} Mammone "couldn't stop thinking about violent means" of revenge. He bought a pickax, a machete-like tool, and a shovel handle at a farming supply store. He then sat in front of his living room shrine and drove long nails through the shovel handle to create a weapon. Throughout the summer, Mammone spoke to various people—including Richard Hull, another friend, and his lawyer—about his desire to kill Marcia, but he did not mention anything about killing his children.

{¶ 206} Mammone tried to keep tabs on Marcia and the children throughout the summer. When he questioned Marcia about her social life, she told him to mind his own business. In response, Mammone once unsuccessfully tried to enter the Eakins' house with a baseball bat.

{¶ 207} Mammone eventually got supervised visitation with Macy and James and, later, overnight visitation. But Mammone only became more upset and frustrated about the situation, and his thoughts grew increasingly violent.

{¶ 208} On June 7, 2009, Mammone picked up Macy and James at the Eakins' house for an overnight visit. He and the children drove by Marcia's apartment and saw a truck in the driveway. When they drove by again, the truck was gone, so Mammone went looking for it.

{¶ 209} Mammone began to text Marcia and became increasingly angry with her responses. Back at his apartment, Mammone filled a blue bag with the contents of a kitchen drawer, including tongs and a meat shears. He eventually also collected two knives, a handgun, a large wedding photo of Marcia, and Marcia's wedding bouquet. Mammone took a valium and drank half a bottle of wine. According to Mammone, "[A]t this point in time I had concluded that * * * that night I was going to kill the children." He took all the supplies, loaded the children into his Oldsmobile, and began driving around.

{¶ 210} Mammone continued to text Marcia. Around 3:30 a.m. on June 8, he decided to burn the truck that was parked in Marcia's driveway and went to his apartment for additional supplies.

{¶ 211} Later, Mammone parked at the church. He pulled out a knife and plunged it into Macy's neck three or four times as she slept. He simultaneously severed Macy's jugular vein and brain stem because he wanted to kill her instantly. Mammone cut James at a different angle. Then he got back in the car, said a prayer, and started driving again.

{¶ 212} At a stop sign, Mammone looked back at his children and felt a surge of aggression that caused him to contemplate killing his wife's parents. He drove to the Eakins' house, grabbed the pistol, and cocked the hammer. Mammone ran upstairs and found Margaret lying on the bed in the guest bedroom. He shot her right shoulder. The gun jammed, so Mammone hit Margaret's face with the gun and a lamp. Mammone unjammed the gun and shot Margaret again, in the face.

{¶ 213} Next, Mammone drove to Marcia's apartment. He doused the truck that was parked there with gasoline, but his lighter fell apart. Mammone smashed in Marcia's back door and entered the apartment. Eventually, he left the apartment and threw a bat at Marcia's window before deciding to drive away.

{¶ 214} Mammone drove back to the church, where he called his mother and confessed that he had committed the three murders. He drove around for a time, took a dozen pills, and drank some wine. He left three voice mails for Hull. But—contrary to what Mammone said in one message to Hull—he had not actually decided a year earlier that what he had done would be the best way to get revenge on Marcia.

{¶ 215} Mammone knew the detectives who interviewed him after his arrest. He felt comfortable with them and wanted to talk about what had happened. According to Mammone, he has plenty of regrets now. But he hopes

that his children's deaths will encourage others to be fully committed to their marriages and their families.

2. Testimony of James Mammone Jr.

{¶ 216} Mammone's father, James Jr., testified that he married Gilise in 1973, three months before Mammone's birth. The couple divorced when Mammone was ten, and James Jr. moved back to his parents' house.

{¶ 217} James Jr. has been antisocial for about 15 years. He was unemployed at the time of the trial and prefers to be by himself. Although he lived only ten minutes away from Mammone for many years, they had not spoken since before Macy was born. Mammone stopped seeing James Jr. after James Jr. refused to come to the hospital when Macy was born.

{¶ 218} James Jr. believed that he had a close relationship with Mammone when he was a child. He admitted to calling his son a "maggot," but he does not recall using this nickname often or in a particularly derogatory way or calling Mammone stupid. James Jr. was sad to hear that Mammone and his mother thought he was abusive, though he did recall striking his wife at least once or twice while Mammone was present. He testified that there is a lot that he does not remember, however, because at that time of his life he drank five to nine beers most nights and regularly blacked out.

{¶ 219} James Jr. stated that when he was a child, his own father "was a major drunk" who regularly passed out at the steering wheel of his car. But James Jr. acknowledged that Mammone had a very good relationship with James Jr.'s father.

3. Testimony of Gilise Mammone

{¶ 220} Gilise and James Jr. married in 1973 and divorced in 1984, when Mammone was ten years old. Gilise entered another relationship about four years later and had been with the same man for 22 years by the time of Mammone's trial. Gilise testified that James Jr. was a "pretty bad drinker" who mentally and

physically abused her and Mammone. James Jr. called Gilise names and found it amusing to call Mammone a "maggot." He beat Gilise (sometimes making Mammone watch) and physically harmed Mammone.

{¶ 221} Although Mammone's relationship with his father was poor, he had a good relationship with his grandparents, especially his paternal grandfather and maternal grandmother. He was much closer to Gilise than to James Jr. As an only child, Mammone spent a lot of time alone in his room. But Gilise testified that he was a smart child who got along well with other children. He was always with friends and treated them like brothers.

{¶ 222} Gilise did not realize that Mammone and Marcia were having serious marital problems until Mammone was arrested for domestic violence. Marcia had complained that Mammone worked too much, but Gilise thought that her son had a wonderful relationship with Macy and James.

{¶ 223} Gilise stated her opinion that Mammone knew that he had done something wrong and regretted it, though he had not expressly told her so. On cross-examination, she explained that Mammone had called her from jail and gave her the impression that he had felt that murder was his only option. She recalls telling Mammone that Marcia had made a costly decision. But she was clear that she did not consider the murders to be Marcia's fault and stated that Mammone was "the only person at fault here."

4. Testimony of Dr. Smalldon

{¶ 224} Psychologist Jeffrey Smalldon testified about his extensive and wide-ranging psychological evaluation of Mammone. Dr. Smalldon never doubted Mammone's competence to stand trial. He testified that Mammone knew the difference between right and wrong when he committed the murders, but he opined that Mammone was experiencing extreme emotional distress and suffering from a severe mental disorder.

{¶ 225} As a child, Mammone was a bright but chronically underachieving student. Mammone and his mother both told Dr. Smalldon that he was abused by his father, but they also related that the abuse ended when the parents divorced when Mammone was age ten. On cross-examination, Dr. Smalldon admitted that he had no independent confirmation of abuse other than Mammone's and Gilise's allegations. Mammone has worked steadily since age 16 except for a few brief periods of time.

{¶ 226} Dr. Smalldon described an odd interview that he had conducted with Mammone's father, James Jr., for 40 minutes outside James Jr.'s home on a frigid day during the winter while James Jr. was wearing only shorts. James Jr. had explained that he does not like to be around people and that he rarely leaves the house. Because James Jr. would not come to the hospital to see Macy when she was born, Mammone had not spoken to him in about five years. James Jr. indicated that he did not "see what the big deal is about children." He denied abusing Mammone.

{¶ 227} Dr. Smalldon opined that Mammone was profoundly affected by his father frequently calling him names like "maggot" and "loser" as a child. Dr. Smalldon explained that certain developmental factors in Mammone's childhood likely played a role in shaping his personality. People interviewed by Dr. Smalldon described Mammone as inward, reclusive, and passive in his relationships with others. But according to Dr. Smalldon, Mammone experienced tremendous social turmoil during the two years preceding the murders.

{¶ 228} Marcia was Mammone's first serious girlfriend. They began dating when Mammone was age 23 and married when he was age 25. Mammone described Marcia in highly idealized terms, such as calling her a moral woman of God. He believed that they were soul mates and that God had blessed their union.

{¶ 229} A few years into the marriage, Marcia mentioned a scenario in which she could imagine leaving the marriage, and it hit Mammone hard. When

he later learned that Marcia wanted to see a marriage counselor, his insecurity came to the surface. Marcia tried to leave Mammone in August 2007, and from then on, Mammone was beside himself and his anxiety increased. He blew up at a Cleveland Browns game in late 2007 and continued to be in emotional tumult during 2008. Mammone was devastated when Marcia left him. He responded with panic.

{¶ 230} Mammone was always polite and respectful during meetings with Dr. Smalldon. He was "almost disarmingly casual and matter of fact," even when describing his crimes. In fact, Mammone was eager to discuss the circumstances of his crimes and arrest. He repeatedly expressed remorse about Margaret's death, but he never questioned his decision to take Macy's and James's lives. He justified killing the children by saying that he was acting as "an instrument of moral righteousness" and that "it was absolutely the correct thing to do to restore them to their purity." Mammone told Dr. Smalldon that it would have been unacceptable for them to be brought up in a broken home. According to Dr. Smalldon, Mammone still to this day considers himself to be a devoted father. Dr. Smalldon explained that when Mammone left the voice mail for his friend Richard Hull, he was speaking from the bottom, in a moment of anger and utter despair. Dr. Smalldon opined that he does not think that Mammone was literally stating his motivation for the murders in that voice mail.

{¶ 231} Dr. Smalldon performed cognitive and neuropsychological testing on Mammone. Mammone has a full-scale IQ of 117, indicating above-average intelligence. He always gave his best effort on tests and never tried to convince Dr. Smalldon that he was mentally ill. Dr. Smalldon found no evidence of physical brain impairment.

{¶ 232} Mammone's profile on the Minnesota Multiphasic Personality Inventory (commonly called the MMPI-2) indicated a number of characteristics that are rarely seen in people who are not psychotic. For example, Mammone's

thinking was confused and very disordered, he experienced profound personal alienation, he was preoccupied with odd or occult ideas, he spent a great deal of time engaged in fantasies, his thinking was rigid and unwavering, he was preoccupied with persecutory thoughts, and he viewed the world as highly threatening. Nevertheless, Dr. Smalldon stated that he does not believe that Mammone is psychotic.

{¶ 233} Dr. Smalldon diagnosed Mammone with an unspecified personality disorder, with schizotypal, borderline, and narcissistic features. He explained that this is a severe personality disorder. "Schizotypal" refers to an inner personality that is typically perceived by others as highly idiosyncratic and is often associated with deficits in empathy and with feelings of alienation. "Borderline" means that Mammone tends to see things in black-and-white terms and has an unstable sense of self. He is likely to be preoccupied with abandonment and prone to overreact emotionally. Finally, "narcissistic" means that Mammone acts with a high degree of self-absorption. Dr. Smalldon also identified passive-aggressive and obsessive-compulsive personality traits and concluded that Mammone suffers from generalized anxiety disorder. In addition, Mammone had engaged in episodic alcohol abuse in the past. Dr. Smalldon indicated that these diagnoses are consistent with diagnoses by prior treating mental-health professionals.

{¶ 234} On cross-examination, Dr. Smalldon conceded that Mammone does not have brain damage and that he is not insane, bipolar, delusional, schizophrenic, or an alcoholic. He then confirmed that Mammone had "thought about [murder] almost constantly for about a year," and he indicated that jealousy undoubtedly played a role in motivating Mammone to commit the killings.

C. Weighing of Aggravating Circumstances and Mitigating Factors

{¶ 235} This court is required to independently determine whether the aggravating circumstances the offender was found guilty of committing outweigh

the mitigating factors in the case. R.C. 2929.05(A). Mammone now urges us to assign weight to the following mitigating factors: (1) his mental state at the time of the murders (R.C. 2929.04(B)(3)), (2) his history and background, (3) his lack of significant criminal history (R.C. 2929.04(B)(5)), and (4) his cooperation with the police investigation and remorse for Margaret's murder (R.C. 2929.04(B)(7)).

{¶ 236} 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 to conform [his] conduct to the requirements of the 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 at the speed limit on infrequently patrolled roads—confirmed that he knew that his conduct was criminal. Mammone's mental problems therefore do not qualify as a mitigating factor under R.C. 2929.04(B)(3). All of this evidence is, however, relevant under R.C. 2929.04(B)(7). *See, e.g., State v. Treesh*, 90 Ohio St.3d 460, 492, 739 N.E.2d 749 (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 at 349, 715 N.E.2d 136.

{¶ 237} Mammone's history and background are entitled to some weight in mitigation. As explained above, Mammone as a child had a strained relationship with his father. There is evidence that James Jr. emotionally abused Mammone and physically abused Mammone and his mother. But Mammone also enjoyed the love and support of his mother and his grandparents (particularly his paternal grandfather) throughout his childhood. We therefore assign slight mitigating weight to the difficult circumstances of Mammone's childhood. *See, e.g., State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 244 (difficult

childhood as mitigating factor); *State v. Scott*, 101 Ohio St.3d 31, 2004-Ohio-10, 800 N.E.2d 1133, ¶ 103, 108 (same).

{¶ 238} Mammone's lack of a significant criminal record is entitled to minimal weight. Mammone has only one prior criminal conviction, for a fourth-degree misdemeanor. But that conviction was for domestic violence against Marcia, and given that revenge against her was a motivating factor in these purposeful killings, we assign little mitigating weight to Mammone's lack of criminal history. *See State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, at ¶ 207-208 (assigning little weight to criminal-history factor when defendant had a prior misdemeanor conviction for domestic violence against a member of his household).

{¶ 239} 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. *See State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 76, 118 (assigning moderate weight to defendant's personality disorders). Second, we give some weight to Mammone's strong work history and his success as a student. *See State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶ 281 (work history as mitigating factor). Finally, since committing these crimes, Mammone has expressed remorse for Margaret's murder (though not for the murders of Macy and James), cooperated with the police investigation, and adjusted well to incarceration. *See State v. Smith*, 80 Ohio St.3d 89, 121, 684 N.E.2d 668 (1997) (remorse, cooperation, and adjustment to incarceration afforded marginal weight). We assign modest weight to each of these factors.

{¶ 240} We conclude that the two aggravating circumstances for each of the three murder counts outweigh the mitigating factors. With respect to Margaret's murder, the course-of-conduct and felony-murder specifications strongly outweigh the mitigating factors. *See State v. Short*, 129 Ohio St.3d 360,

2011-Ohio-3641, 952 N.E.2d 1121, at ¶ 163 (rejecting defendant's argument that multiple-murder specification should be afforded "comparatively light weight" in case in which the state had proved two aggravating circumstances—course of conduct and felony murder predicated on aggravated burglary). The two specifications that apply to the murders of Macy and James—course of conduct and child murder—overwhelm the mitigating factors. "In particular, the R.C. 2929.04(A)(9) child-murder specification is entitled to great weight because it involved the murder of a young and vulnerable victim." *State v. Powell,* 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 282. As a result, we conclude that for each of the three murders, the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

D. Proportionality

{¶ 241} Finally, we conclude that the death penalty is appropriate and proportionate here when compared to death sentences approved in similar cases. We have previously upheld death sentences for a course of conduct under R.C. 2929.04(A)(5). *See, e.g., State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, at ¶ 329; *Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, at ¶ 284; *State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504, at ¶ 140. We have also upheld the death penalty for other child murders under R.C. 2929.04(A)(9). *See Powell* at ¶ 284; *State v. Hunter,* 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 206; *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 119. Finally, we have upheld the death penalty for aggravated murder during an aggravated burglary under R.C. 2929.04(A)(7). *See, e.g., State v. Goff*, 82 Ohio St.3d 123, 143-144, 694 N.E.2d 916 (1998); *State v. Bonnell*, 61 Ohio St.3d 179, 187, 573 N.E.2d 1082 (1991); *State v. Franklin*, 62 Ohio St.3d 118, 129-130, 580 N.E.2d 1 (1991).

IV. CONCLUSION

{¶ 242} We affirm all judgments of conviction and the sentences of death entered against James Mammone III.

Judgments affirmed.

O'CONNOR, C.J., and PFEIFER, O'DONNELL, KENNEDY, and FRENCH, JJ., concur.

O'NEILL, J., concurs in part and dissents in part.

O'NEILL, J., concurring in part and dissenting in part.

{¶ 243} Once again, a case has come before us that challenges my resolve to stay the course regarding the unconstitutionality of the death penalty in Ohio. It is incomprehensible how someone could murder his own children while they are helplessly strapped into their car seats. Five-year-old Macy and three-year-old James were stabbed in their throats by their father for absolutely no reason other than to make their mother suffer.

{¶ 244} This case comes on the heels of *State v. Kirkland*, ___ Ohio St.3d ___, 2014-Ohio-1966, ___ N.E.3d ___, and *State v. Wogenstahl*, 134 Ohio St.3d 1437, 2013-Ohio-164, 981 N.E.2d 900, two other capital cases involving atrocious monsters who took the lives of innocent children in gruesome acts of violence.

{¶ 245} There is no doubt that these three murderers should be dealt with in the strongest manner permitted under the Constitution. I agree with the majority in this case that Mammone's convictions must stand. The state proved its case, and it has demonstrated that he is guilty of multiple murders, beyond a reasonable doubt. However, as evil as Mammone is, I still must conclude that life in prison without the possibility of ever being released is the appropriate sentence, for the reasons I offered in my dissent in *Wogenstahl*. *See id*. at ¶ 1-9 (O'Neill, J., dissenting). The death penalty is both cruel and unusual and I refuse to ratify the taking of any human life in the name of retribution, deterrence, or punishment. We as a society

live by our Constitutions and by a moral code that clearly is not subscribed to by this defendant. On a moral level, I simply cannot countenance the concept of lowering 11 million Ohioans to Mr. Mammone's level of depravity.

{¶ 246} Accordingly, I concur in affirming the convictions and dissent on the imposition of the death penalty.

John D. Ferrero, Stark County Prosecuting Attorney, and Kathleen O. Tatarsky and Renee M. Watson, Assistant Prosecuting Attorneys, for appellee.

Timothy Young, Ohio Public Defender, and Robert K. Lowe and Shawn P. Welch, Assistant Public Defenders; and Angela Miller, for appellant.

The Supreme Court of Ohio

State of Ohio

v.

James Mammone, III

Case No. 2012-1598

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

It is further ordered that appellee's motion to strike memorandum in support of jurisdiction and dismiss notice of appeal is denied.

(Stark County Court of Appeals; No. 2012CA00012)

Maureen O'Connor
Chief Justice

The Official Case Announcement can be found at http://www.supremecourt.ohio.gov/ROD/docs/.

The Supreme Court of Ohio

State of Ohio

v.

James Mammone, III

Case No. 2010-0576

ENTRY

This cause came on for further consideration upon the filing of appellant's application for reopening under S.Ct.Prac.R. 11.06. It is ordered by the court that the application is denied.

(Stark County Court of Common Pleas; No. 2009CR0859)

Maureen O'Connor
Chief Justice

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 22a0216p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES MAMMONE,

Petitioner-Appellant,

v.

CHARLOTTE JENKINS, Warden,

Respondent-Appellee.

No. 20-3069

Appeal from the United States District Court for the Northern District of Ohio at Akron.
No. 5:16-cv-00900—James G. Carr, District Judge.

Argued: July 19, 2022

Decided and Filed: September 21, 2022

Before: GIBBONS, ROGERS, and READLER, Circuit Judges.

COUNSEL

ARGUED: Vicki Ruth Adams Werneke, Office of the Federal Public Defender, Cleveland, Ohio, for Appellant. Jerri L. Fosnaught, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON BRIEF:** Vicki Ruth Adams Werneke, Sharon A. Hicks, Office of the Federal Public Defender, Cleveland, Ohio, for Appellant. Charles L. Wille, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. James Mammone, a death-row prisoner in Ohio, appeals the denial of his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Mammone raises four issues on appeal: whether pretrial publicity was so prejudicial that

he did not receive a fair trial; whether the jurors unconstitutionally prayed before penalty-phase deliberations; whether trial counsel was ineffective; and whether appellate counsel was ineffective. For the reasons set forth below, we affirm the denial of habeas relief.

I. BACKGROUND

Because this case does not turn on factual disputes, we rely on the following account of the facts from the Ohio Supreme Court's decision:

A. The State's Evidence

1. Testimony of Marcia Eakin and Other Witnesses

> Mammone's trial began on January 11, 2010. The state called Mammone's ex-wife, Marcia Eakin, to testify. Marcia testified about the breakdown of her relationship with Mammone and stated that she first told Mammone in August 2007 that she intended to leave him. On that day, Mammone stayed home from work and refused to let her or their two children, Macy and James IV, leave the family's Canton residence. Mammone broke Marcia's cell phone and took all the house phones. She did not leave him that day.
>
> Marcia and Mammone sought counseling, but she did not feel that the marital relationship improved. She testified that Mammone threatened her, warning that "if I tried to leave he would kill me and the children." Unbeknownst to Mammone, Marcia contacted a lawyer to initiate the process of filing for divorce.
>
> On June 13, 2008, Mammone learned that Marcia was seeking a divorce when he intercepted a call from Marcia's lawyer. According to Marcia, Mammone again threatened to kill her, declaring: "I told you if you tried to leave me I was going to kill you." He told Macy and James on that date that "it was time for mommy to go to her grave." Mammone did not let Marcia or the children out of his sight for the rest of the day.
>
> Marcia explained that she and the children managed to get away from Mammone, and she sought a civil protection order against him. On July 10, 2008, the Stark County Common Pleas Court issued a two-year protection order requiring Mammone to stay more than 500 feet away from Marcia. He was permitted only supervised contact with the children.
>
> Marcia testified that the Mammones' divorce was finalized in April 2009. Under the final divorce decree, Mammone was permitted overnight visitation with the children four times a month and evening visitation twice a week. Marcia explained that Mammone picked up and dropped off the children at the home of

her parents, Margaret and Jim Eakin, so that Mammone would not have direct contact with Marcia or know where she lived. During visits, Mammone was permitted to text Marcia about matters pertaining to the children.

Marcia testified that on Sunday, June 7, 2009, Mammone picked up five-year-old Macy and three-year-old James at the Eakins' home for a scheduled overnight visit. Mammone was driving his green BMW.

Marcia met a friend, Ben Carter, to play tennis and have dinner. At 4:25 p.m., Mammone began to text Marcia. Although the two never spoke that night, they exchanged dozens of text messages over the next 15 hours, and records of these messages were introduced at trial.

At first, Mammone sought advice about consoling Macy, who was upset. But he quickly shifted to blaming Marcia for the children's suffering, texting: "How long are we going to let these children that you * * * had to have suffer?" Throughout the evening Mammone repeatedly texted Marcia, accusing her of "ruin[ing] lives" by putting herself first. He admonished her to put her children first and demanded to know what was more important than the kids at that moment. Marcia replied by texting that Mammone should "stop tormenting" the children. No fewer than five times, she offered to have Mammone return the children to her mother's house or asked if she could meet him to pick up the children.

Mammone advised Marcia in a text that he was "at [the] point of no return" and that he "refuse[d] to let gov restrict my right as a man to fight for the family you promised me." At 9:11 p.m., he warned Marcia that "safe and good do not apply to this night my love." Marcia promptly responded, texting: "Do not hurt them." At 9:35 p.m., she asked him to "[k]eep them safe." Mammone texted:

> You got five minutes to call me back on the phone. I am not fucking around. I have stashed a bunch of pain killers for this nigh[t] * * * i hope u would never let happen. I have put on my wedding band, my fav shirt and I am ready to die for my love tonight. I am high as a kite * * * bring o[n] the hail of bullets if need be.

At this point, Marcia called 9–1–1. The state played a recording of the call at trial. On the recording, Marcia advised the 9–1–1 operator that her children were in a car with her ex-husband, who had threatened to take "a bunch of painkillers" and had said that he was "ready to die tonight." While Marcia was on the line with the 9–1–1 operator, the operator attempted to call Mammone, but he would not answer his phone. After speaking to the 9–1–1 operator, Marcia texted Mammone that she would not call him (in accordance with the operator's advice), and again urged him to "keep the kids safe." At 10:18 p.m., Marcia in a text to Mammone asked him to meet her so that she could pick up the kids. Marcia's friend Carter confirmed that he and Marcia then drove around looking for Mammone.

Marcia testified that she then contacted both Mammone's mother and the wife of Richard Hull, Mammone's friend and former employer. Phone records indicate that Richard Hull began to text Mammone, advising him to calm down and keep the kids safe. Hull's texts suggested that Mammone should drop the kids off with Mammone's mother. Hull testified that he and his father also drove around for a time looking for Mammone but did not find him.

At 2:00 a.m. on June 8, Mammone sent a text to Marcia, stating, "I am not one who accepts divorce. * * * I married you for love and for life * * *." At 2:36 a.m., he wrote, "I am so dead inside without u. The children r painful * * * [r]eminders of what I have lost of myself. This situation is beyond tolerable. So what happens next?" At 2:50 a.m., Mammone reiterated in a text to Marcia that the love of his children was "only a source of pain" without her love.

Hull testified that around 3:00 a.m., he spoke to Marcia and decided not to go back out looking for Mammone because they were hopeful that everything would be fine. Marcia attempted to end her text conversation with Mammone, writing, "Please[ ] keep kids safe good night."

At 5:34 a.m., Mammone texted Marcia: "Last chance. Here it goes."

One of the Eakins' neighbors, Edward Roth, testified that around 5:30 a.m., he heard gunshots and screaming through his open bedroom window. Roth said that he saw a goldish-tan-colored car leaving the Eakin residence and several minutes later saw the same car returning to the street to sit in the middle of the intersection near the house. Roth called 9–1–1. A law-enforcement officer testified that he and another officer arrived to find Margaret Eakin lying severely injured on the floor of a second-floor bedroom. The officers observed two shell casings and a broken lamp.

Marcia testified that she heard a car roar up her driveway around 5:40 a.m. From a second-floor bedroom window, she saw Mammone get out of the car and empty a red gasoline container onto Carter's truck, which was parked in the driveway. She called 9–1–1, and a recording of the call was introduced at trial by the state. While Marcia was on the phone, she "heard the glass in my back door breaking in and he was inside my apartment." She did not hear Mammone speak, but she heard something that he had thrown hit the ceiling. He then went back outside and threw things at the windows. Mammone left before two deputy sheriffs arrived. According to the deputies, the back door had been forced open, the screen-door glass was broken, and pieces of the door frame were on the kitchen floor.

The deputies quickly realized that the incident at Marcia's apartment was linked to the incident at the Eakins' residence, but law-enforcement officers had not yet located Mammone, and they did not know whether the children were safe.

At 6:04 a.m., Mammone left a voice mail on Hull's phone, in which the jury heard Mammone confess to Hull, "I killed the kids." Mammone's voice mail continued:

> I said it when I got locked up fucking 358 days ago that she fucking has to die and unfortunately as fucking sick as it sounds I concluded after a while that she took my family from me and the fucking way to really get her is to take fucking her mom and her kids from her. I missed her dad by a couple minutes. I drove by the house, he was there, and I fucking circled the block and he must've just pulled out or I'd have fucking popped his fucking ass too.

2. Testimony of Officers

Sergeant Eric Risner testified that he and other officers apprehended Mammone sometime after 7:30 a.m. on June 8, 2009, in the driveway of his residence. They found Macy and James dead in the back seat of Mammone's car, still strapped into their car seats. The children had apparently been stabbed in the throat.

Officer Randy Weirich testified that he removed two items from Mammone's car at the scene: a bloody knife from the back seat and a firearm from the front seat. The firearm had a live round in the chamber, its hammer was cocked, and the safety was off.

After the vehicle was towed for processing, Officer Weirich cataloged the rest of the car's contents. The evidence log includes ammunition for a .32–caliber gun; a backpack containing knives, heavy-duty shears, and tongs; an axe handle with nails protruding from holes that had been drilled into it; a baseball bat; a military-style bayonet; Mammone's cell phone and a spare battery; a framed wedding photo of Marcia; and Marcia's dried wedding bouquet. Officer Weirich also removed from the car a switchblade and a pocket knife.

3. Mammone's Confession

Mammone was arrested and transported to police headquarters. Once in custody, he signed a written waiver of his *Miranda* rights and gave a full confession. The state introduced an audio recording of the confession at trial.

In his confession, Mammone explained that he had picked up Macy and James for visitation at about 4:00 p.m. on June 7. He then drove past Marcia's nearby apartment. (Mammone admitted that he was not supposed to know where Marcia lived, but he had learned her new address and occasionally stalked her.) He saw a truck parked in Marcia's driveway, and he recognized it because it had been parked there two weeks earlier. Macy told him that the truck belonged to a boy.

Mammone explained that this news "didn't make me very happy obviously." He circled the block, and the truck was gone when he drove by again.

Mammone stated that he suspected that Marcia was on a date, so he went "on the hunt" for her with the children in the back seat. He spent a few hours driving around looking for Marcia, all the while "sending [her] agitating text messages trying to get her attention."

Around 6:30 p.m., Mammone took the children to his place for dinner. As he continued to text Marcia, he was "getting to the point of no return." He figured that he had already violated the protection order, and he had "had enough." He said that he had long hoped that things would improve, but stated that "once I suspected that she might have a guy that she was interested in that was it for me, I can't deal with that. It's just not anything that I'm willing to accept."

According to Mammone, after dinner he loaded the children into a gold 1992 Oldsmobile that he had recently purchased. He stated that he had a Beretta .32–caliber automatic handgun, a gasoline container (which he later stopped to refill), a Scripto lighter, a bag full of butcher-type knives, a bayonet, a baseball bat, and another bat-type weapon he had made by driving nails through a hickory shovel handle or axe handle. He also said that he had approximately a dozen painkillers. He took one pill around 9:00 p.m. to "deaden the pain" if he was shot by police officers later that night.

Mammone stated that he parked at Westminster Church (his and Marcia's "family church") just before 5:45 a.m. He stabbed Macy and James with a butcher knife while they were still strapped in their car seats. Mammone related that he had to stab each child in the throat four or five times, which was more than he had expected would be necessary. When detectives asked why he had stabbed the children rather than shooting them, Mammone offered three reasons: (1) noise, (2) uncertainty about whether his gun was dependable, and (3) a desire to conserve rounds for what might lie ahead.

Mammone said that after killing Macy and James, he drove to the Eakins' home at approximately 5:45 a.m. He left the children in the back seat of the car and "barged in" through the Eakins' unlocked door carrying his Beretta. Mammone found Margaret in a guest room and shot her in the chest. The gun jammed before he could fire a second round, so he began to hit Margaret with the gun. He then beat her with a lamp until the lamp began to fall apart. Mammone managed to unjam the gun and shot Margaret in the face at close range. He told police officers that a third bullet may have fallen out of the gun when he was attempting to dislodge the slide.

Mammone stated that he then drove to Marcia's nearby apartment. The truck that he had seen the previous evening was in the driveway. He poured gasoline on the truck and attempted to light it, but the lighter fell apart in his hands.

Mammone related that after he was unable to light the fire, he retrieved four weapons from his car: (1) the handgun, which he had to unjam again to prepare to fire, (2) the bayonet, which he put in his front pocket, (3) the baseball bat, and (4) the "bat type of weapon" that he had made. He smashed Marcia's screen-door window and back door with the bat and then entered the apartment. Once inside, Mammone unsuccessfully looked for matches or a lighter. He did not go upstairs because he was concerned that Marcia or "the person that was there to protect her" might have a firearm, and he did not want to be a "sitting duck." Mammone left the apartment and began throwing the baseball bat at a second-floor window, but he became frustrated. He searched his car for another lighter and, unable to find it, drove away.

After killing his mother-in-law and breaking into Marcia's apartment, Mammone drove around with the children's bodies for several hours. He had expected that he would want to die after committing these violent acts, but he was surprised to find that he "didn't really feel * * * like dying." He also "didn't feel like getting arrested," so he drove in areas where he did not expect to see police officers and drove the speed limit. He claimed that he then took approximately a dozen pills—which he identified as Valium or painkillers—but not enough to cause an overdose.

Mammone said that he then drove to the Independence Police Station to turn himself in, but he fell asleep in the station parking lot. When he woke, he contacted a relative who arranged for Mammone to turn himself in at a Canton park. En route to the park, Mammone decided to go by his apartment to switch to his BMW, with the idea of leaving the children in the Oldsmobile so that they would not be part of any scene at the park. But an unmarked police car was waiting for him, and he was apprehended.

Mammone told officers that he had contemplated "doing this" for 22 months, but that he had initially intended to kill Marcia, not Macy and James. He said that he killed his mother-in-law because it was "a major blow to [Marcia] to not have her mother." He indicated that hurting Marcia was one of the motives for killing Macy and James as well, but he also cited his objection to divorce as a reason for their murders. Mammone said that he did not intend to kill Marcia on June 8, but that he did plan to maim her. He had wanted to beat Marcia's uterus area with his homemade weapon (making her unable to conceive children), to break her ankles with the baseball bat (something she feared that she had seen done in a movie), and to cut out her tongue (as punishment for not speaking to him). Mammone also said that he would have killed the man at Marcia's apartment if he could have.

4. Forensic Evidence

Dr. P.S. Murthy, the Stark County coroner, performed autopsies on Margaret, Macy, and James on June 9, 2009. He testified that he determined that the cause of death for all three victims was homicide.

According to Dr. Murthy, Margaret had suffered two fatal gunshot wounds and more than 20 blunt-impact injuries and lacerations, consistent with being struck by the butt of a gun and by a household lamp. One bullet had been fired into Margaret's left upper lip from a distance of about six to eight inches and was recovered from the occipital lobe of her brain. Another bullet pierced Margaret's right upper shoulder, perforated her right lung, and exited through her back.

Dr. Murthy testified that both children died as a result of stab wounds with exsanguination (massive blood loss). Macy had multiple stab wounds to the neck, while James had a single stab wound that went through his neck. Both children's lungs were filled with aspirated blood. Macy's right hand and right leg bore multiple defensive wounds, and James had a defensive wound on his right hand.

According to a laboratory analyst who testified, multiple bloodstains on Mammone's shirt at the time of his arrest had DNA profiles consistent with Margaret's DNA. In addition, a laboratory analyst identified Mammone's fingerprint on a lighter that officers retrieved from a flowerbed near Marcia's apartment.

Law-enforcement officers took bodily fluid samples from Mammone on the day of his arrest. According to a laboratory analyst, tests did not reveal any trace of opiates or acetaminophen in Mammone's blood.

B. The Defense Case

Mammone did not present a case in defense during the trial phase. Before the trial began, defense counsel advised the court during a bench conference that as a matter of strategy, Mammone had "elected to, in effect, concede the trial phase in this matter," and Mammone himself informed the judge that he instead preferred to focus on the second phase of trial. During a brief opening statement, defense counsel candidly explained to the jury that Mammone did not "contest[ ] much of the evidence and/or facts with respect to this matter." Mammone's counsel repeated that statement during trial-phase closing arguments, emphasized Mammone's honesty in responding to police officers' questioning, and urged the jury to decide the case based on the law rather than on emotion.

State v. Mammone, 13 N.E.3d 1051, 1060–65 (Ohio 2014) (paragraph numbers omitted).

On January 14, 2010, a jury convicted Mammone of the aggravated murder of his two children and his former mother-in-law, aggravated burglary, violation of a protective order, and attempted arson. Mammone's mother, his father, and a psychologist testified on his behalf at sentencing, and Mammone gave a five-hour unsworn statement. The jury recommended the death sentence for each aggravated murder. The trial court accepted the jury's recommendation, imposing three death sentences in open court on January 22, 2010. Additionally, the court sentenced Mammone to twenty-seven years of consecutive imprisonment for his noncapital offenses. The Ohio Supreme Court affirmed Mammone's convictions and sentences in 2014. *Mammone*, 13 N.E.3d at 1100. Mammone filed a post-conviction petition while his direct appeal was pending. The trial court denied the petition without an evidentiary hearing, and the Ohio Court of Appeals affirmed. *State v. Mammone*, No. 2012CA00012, 2012 WL 3200685 (Ohio Ct. App. 2012). Mammone moved to reopen his direct appeal in 2014 to raise claims of ineffective assistance of appellate counsel. The Ohio Supreme Court denied the motion in 2016.

Mammone filed a federal habeas petition in February 2017 and an amended petition in October 2017. The district court denied Mammone's petition in October 2019 and granted him a certificate of appealability ("COA") as to four claims and sub-claims. The district court subsequently amended the COA to clarify one of the claims. In February 2020, Mammone moved this court to stay the proceedings and hold his appeal in abeyance so he could litigate three claims in state court. We denied Mammone's motion in an order entered June 11, 2020, concluding he was not entitled to a stay and abeyance because his claims were exhausted and he had no remaining state court remedies. Mammone moved to expand the COA granted by the district court in July 2020, which we granted to include an additional subclaim.

II. STANDARD OF REVIEW

We review a district court's denial of a petition for a writ of habeas corpus de novo and its factual findings for clear error. *Scott v. Houk*, 760 F.3d 497, 503 (6th Cir. 2014). Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a federal court shall not grant habeas relief on any claim that was adjudicated on the merits in state court unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . was based on an

unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2).

Under § 2254(d)(1), the "contrary to" clause, "a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000). Under § 2254(d)(2), the "unreasonable application" clause, "a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the [petitioner's] case." *Id.* at 413; *see also Harrington v. Richter*, 562 U.S. 86, 100 (2011). Federal habeas relief is available only if the state court's decision was objectively unreasonable. *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004); *Joseph v. Coyle*, 469 F.3d 441, 468 (6th Cir. 2006). The petitioner must show that the state court's ruling was "so lacking in justification that there was an error . . . beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Section 2254(d) is a purposefully demanding standard, *Richter*, 562 U.S. at 102; *Montgomery v. Bobby*, 654 F.3d 668, 676 (6th Cir. 2011) (en banc), and it requires that state court determinations "be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)). The petitioner has the burden of rebutting, by clear and convincing evidence, the presumption that the state court's factual findings were correct. *See* 28 U.S.C. § 2254(e)(1).

III. DISCUSSION

There are four issues certified for appeal: (1) whether the state trial court should have presumed that the pretrial publicity about Mammone's case prejudiced his ability to receive a fair trial in Stark County; (2) whether the jurors violated Mammone's right to a fair trial by praying before their penalty-phase deliberations; (3) whether trial counsel were ineffective for: (a) failing to raise a defense of not guilty by reason of insanity, (b) failing to present evidence that Mammone has autism spectrum disorder, (c) failing to retain a neuropsychologist to evaluate Mammone, and (d) allowing Mammone to make an unsworn statement at the penalty phase or failing to prepare him to give a more effective statement; and (4) whether appellate counsel was

ineffective for not arguing that trial counsel were ineffective for urging the jury to consider Mammone's mental state as mitigation evidence under Ohio Rev. Code § 2929.04(B)(3) when the defense's own evidence foreclosed the jury's ability to do so. We discuss each issue in turn.

A. Whether the state trial court should have presumed pretrial publicity about Mammone's case prejudiced his ability to receive a fair trial in Stark County.

Mammone argues the trial court denied his right to due process and a fair trial by an impartial jury when it denied his motion for a change of venue due to pervasive and prejudicial pretrial publicity. He contends that the trial court should have presumed prejudice and that the state and district courts' analyses were contrary to and an unreasonable application of clearly established federal law. Mammone does not argue that any of the seated jurors were actually biased against him.

Before his trial began in state court, Mammone moved for a change of venue on the basis of pretrial publicity. *Mammone*, 13 N.E.3d at 1065–66. He pointed to articles from a local newspaper's website; comments posted by online readers; posts from other websites; and coverage by radio, television, and other publications. *Id.* Notably, Mammone himself sent a letter of confession to a local newspaper, which the newspaper published on the front page. Mammone's confession letter was published four months before the trial and was not admitted into evidence. *Id.* at 1069 & n.2. Mammone contended that trying to seat a jury in Stark County, Ohio, would be futile and asked the trial court to presume prejudice. The trial court found it would be premature to change venue before conducting voir dire and denied the motion, but it left the issue open for consideration during and after voir dire. *Id.* at 1066. The court asked each potential juror to complete an extensive publicity questionnaire and permitted thorough questioning about publicity during voir dire. *Id.* at 1069. Mammone did not renew his motion.

On direct appeal, the Ohio Supreme Court affirmed. The court held that pretrial publicity did not justify the presumption of prejudice, that plain error review applied to Mammone's assertion of actual bias because he did not argue actual bias in the trial court, and that the trial court did not plainly err. *Id.* at 1069–70. The court noted prejudice from pretrial publicity is presumed only in rare cases. *Id.* at 1067 (citing *Sheppard v. Maxwell*, 384 U.S. 333 (1966), *Estes v. Texas*, 381 U.S. 532 (1965), and *Rideau v. Louisiana*, 373 U.S. 723 (1963)). The Ohio

Supreme Court listed the four factors that the Supreme Court has identified as relevant to the presumption of prejudice:

> (1) the size and characteristics of the community in which the crime occurred, (2) whether media coverage about the defendant contained "blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight," (3) whether the passage of time lessened media attention, and (4) whether the jury's conduct was inconsistent with a presumption of prejudice.

Id. at 1067–68 (quoting *Skilling v. United States*, 561 U.S. 358, 382–83 (2010)). The court observed, "*Skilling* did not hold that these four factors are dispositive in every case or indicate that these are the only relevant factors in a presumed-prejudice analysis." *Id.*

After comparing the instant circumstances to cases in which prejudice was presumed, the Ohio Supreme Court held that several factors distinguished Mammone's case. *Id.* at 1068–70. First, Mammone's confession was printed, not televised, so the public did not view him confessing. *Id.* at 1069. Second, the confession in *Rideau* was broadcast just weeks before trial and roughly one-third of the local population saw it, whereas Mammone's confession was published only once, more than four months before trial, and Mammone did not show that the letter's exposure was similar to that in *Rideau*. *Id.* Third, Mammone himself sent his confession to the newspaper, while the defendant in *Rideau* played no role in disseminating his confession. *Id.* Finally, the voir dire transcript refuted Mammone's assertion that many of the potential jurors had been prejudiced by media accounts; rather, dozens of potential jurors said they knew nothing about the case, all potential jurors were instructed to disregard information from outside sources, and the trial court excused those who indicated they could not set aside their preexisting opinions. *Id.* at 1069–70. The Ohio Supreme Court held that it could not conclude that pretrial publicity rendered Mammone's trial a "hollow formality." *Id.* at 1070 (quoting *Rideau*, 373 U.S. at 726). The district court held that the Ohio Supreme Court's decision was neither contrary to clearly established Supreme Court precedent nor involved an unreasonable application thereof.

The Constitution guarantees defendants the right to a fair trial by an impartial jury. *United States v. Tsarnaev*, 142 S. Ct. 1024, 1034 (2022); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). "Prejudice resulting from pretrial publicity can be presumptive or actual." *Foley v. Parker*, 488 F.3d 377, 387 (6th Cir. 2007). The Supreme Court has held presumed prejudice is

appropriate only in cases where press coverage "utterly corrupted" a trial's atmosphere. *See Murphy v. Florida*, 421 U.S. 794, 798 (1975) (citing *Irvin*, *Rideau*, *Estes*, and *Sheppard*). But such extreme cases are rare. *Skilling*, 561 U.S. at 381; *Foley*, 488 F.3d at 387. Extensive media coverage and knowledge within the community are insufficient to create a presumption of prejudice. *Dobbert v. Florida*, 432 U.S. 282, 303 (1977).

The Ohio Supreme Court's decision was a reasonable application of federal law. The state court correctly identified clearly established law on the presumption of prejudice. In *Skilling*, the Court called *Rideau* the "foundation precedent" on this issue and discussed *Estes* and *Sheppard*. 561 U.S. at 379–81. The circumstances in *Estes* and *Sheppard* are distinguishable because those cases, unlike this one, involved news media disrupting court proceedings. *See Estes*, 381 U.S. at 538 (in which pretrial publicity swelled to the point that reporters and television crews overran the courtroom and bombarded the community with coverage of pretrial hearings); *Sheppard*, 384 U.S. at 355 (in which "bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom").

In *Rideau*, local television stations broadcasted a filmed interrogation in which the defendant confessed without counsel. 373 U.S. at 724. It was shown on television three times with estimated audiences of 24,000, 53,000, and 20,000 in a community of approximately 150,000. *Id.* The trial occurred less than two months after the defendant's confession was televised. *Id.* at 729 (Clark, J., dissenting). The Supreme Court held that the trial court denied the defendant due process when it denied a change of venue. *Id.* at 727. "For anyone who has ever watched television the conclusion cannot be avoided that this . . . in a very real sense was Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." *Id.* at 726. Mammone's case involved substantially less publicity. The community was exposed to the written word, not a televised spectacle. Mammone's letter appeared in the newspaper more than four months before trial, while the video of Rideau's confession aired less than two months before trial. Even if Mammone's letter was available on the web up to the time of trial, it presumably had its greatest impact when first printed. Mammone did not establish how many people were exposed to publicity about his case, or even attempt to demonstrate how widely the

newspaper was distributed, while the record in *Rideau*, by contrast, indicated a substantial portion of the community viewed the defendant's confession. *Id.* at 724.

In addition, the Ohio Supreme Court found that the voir dire transcript refuted Mammone's assertion that many of the potential jurors had been prejudiced by media accounts and had such strong opinions that they could not or would not change their minds. *Mammone*, 13 N.E.3d at 1069. The trial court required each potential juror to complete an extensive publicity questionnaire, permitted thorough questioning about publicity issues, instructed potential jurors to disregard information from outside sources, sought assurances that jurors would set aside preexisting opinions and be impartial, warned jurors to avoid publicity of the trial, and excused potential jurors who seemed incapable of setting aside preexisting opinions. *Id.* at 1069–70.

We defer to the trial court's assessment of the jurors' impartiality and credibility. *See Skilling*, 561 U.S. at 386. When considering issues of pretrial publicity, "primary reliance on the judgment of the trial court makes [especially] good sense" because the judge sits in the community allegedly influenced by the publicity and "may base her evaluation on her 'own perception of the depth and extent of news stories that might influence a juror.'" *Id.* (quoting *Mu'Min v. Virginia*, 500 U.S. 415, 427 (1991)). Mammone did not rebut the state court's factual finding, so it is presumed to be correct. *See* § 2254(e)(1). Finally, nothing in *Rideau* precludes a court from considering the defendant's role in pretrial publicity. There, the Court noted it was not the defendant's idea to broadcast his confession but concluded that the source of the publicity was irrelevant. *Rideau*, 373 U.S. at 726. The Court has not addressed Mammone's situation, in which a defendant first caused and later protested pretrial publicity. The Ohio Supreme Court's denial of Mammone's claim was not an objectively unreasonable application of Supreme Court precedent. *See Yarborough*, 541 U.S. at 665.

B. Whether the jurors violated Mammone's right to a fair trial by praying before their penalty-phase deliberations.

Mammone argues that by praying, the jury abdicated its responsibility for sentencing by basing its determination on divine will rather than the weight of the aggravating and mitigating

factors. He alleges that the jury's actions deprived him of a fair trial and fair and reliable sentencing, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Mammone raised this claim in his post-conviction petition. In support, he submitted an affidavit from an Ohio Public Defender's Office investigator who interviewed five of the jurors. The investigator stated that before deliberations in the penalty phase, a juror asked if they could say a prayer and all of the jurors agreed to do so. Mammone argued that the introduction of religion amounts to extrajudicial evidence and that the jurors substituted divine authority for their own responsibility for imposing death. The trial court denied the claim. The Ohio Court of Appeals affirmed, refusing to consider the affidavit under Ohio Rule of Evidence 606(B). *Mammone*, 2012 WL 3200685, at *3. The district court held that the state court's denial of Mammone's claim was reasonable. The court concluded that § 2254 foreclosed relief, noting that there is no Supreme Court precedent forbidding jurors from praying or holding that prayer amounts to an extraneous influence.

The Ohio Court of Appeals decision was not contrary to or an unreasonable application of Supreme Court precedent. As an initial matter, Ohio Rule of Evidence 606(B) bars testimony from jurors about their deliberations or mental processes but permits admission of evidence that the jury was influenced by outside or extraneous information. *See Hoffner v. Bradshaw*, 622 F.3d 487, 501 (6th Cir. 2010). When cases "involve internal factors that affected the jury, rather than extraneous influences," *Nian v. Warden, N. Cent. Corr. Inst.*, 994 F.3d 746, 756 (6th Cir. 2021), there is no constitutional impediment to enforcing Rule 606(B), *Hoffner*, 622 F.3d at 501. *See also Brown v. Bradshaw*, 531 F.3d 433, 436, 438 (6th Cir. 2008) (holding a juror's affidavit that other jurors bullied her into changing her vote was inadmissible under Ohio law and that enforcing the rule was constitutional). We have distinguished cases involving the influence of extraneous information in which Rule 606(B) has been applied unconstitutionally. *See Nian*, 994 F.3d at 756 (holding that where a case came down to a credibility determination and a juror introduced extraneous information about the defendant's criminal record during deliberations, applying Rule 606(B) to exclude juror testimony was constitutional error); *Doan v. Brigano*, 237 F.3d 722, 732 (6th Cir. 2001) (holding the state court's application of Rule 606(B) to prevent inquiry into a juror's injection of extraneous evidence conflicted with Supreme Court

precedent recognizing a defendant's constitutional right to confront the witnesses and evidence against him), *overruled on other grounds by Wiggins v. Smith*, 539 U.S. 510 (2003).

A jury's verdict must be based on the evidence introduced at trial, not extraneous information. *Morgan v. Illinois*, 504 U.S. 719, 727 (1992); *Smith v. Phillips*, 455 U.S. 209, 217 (1982); *Thompson v. Parker*, 867 F.3d 641, 647 (6th Cir. 2017). But Mammone cites no Supreme Court precedent holding that prayer by jurors amounts to the influence of extraneous information. He cites *Caldwell v. Mississippi*, 472 U.S. 320, 328–29 (1985), for the proposition that the jury cannot be "led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere," and *Sandoval v. Calderon*, 241 F.3d 765, 777 (9th Cir. 2000), for the argument that relying on divine authority undercuts the jury's responsibility for imposing the death penalty. Both cases involve prosecutorial misconduct and do not address juror prayer. Neither *Caldwell* nor *Sandoval* is applicable, and *Sandoval* is not Supreme Court precedent. Mammone has not shown that the state court's reliance on Rule 606(B) was contrary to or an unreasonable application of Supreme Court precedent.

C. Whether trial counsel were ineffective.

The district court certified three claims of ineffective assistance of trial counsel: whether trial counsel were ineffective for failing to raise a defense of not guilty by reason of insanity ("NGRI"), for failing to retain a neuropsychologist to evaluate Mammone, and for allowing Mammone to make an unsworn statement at the penalty phase. We expanded the COA to include an additional claim: whether trial counsel were ineffective for failing to present evidence that Mammone has autism spectrum disorder. Mammone argues that trial counsel rendered ineffective assistance by failing to thoroughly investigate his mental-health issues and present a proper defense based on his mental health conditions. He also argues that the district court should have granted his request for discovery and an evidentiary hearing. We discuss each claim in turn, beginning with those that are procedurally defaulted.

1. Whether trial counsel were ineffective for failing to raise a defense of not guilty by reason of insanity.

The district court held Mammone procedurally defaulted his NGRI claim by failing to raise it in state court, noting that he had no remaining state-court remedies. The district court held that "allowing a petitioner periodically to discover (or rediscover) information about himself would frustrate [AEDPA's purpose of achieving finality], and could incentivize capital defendants to deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death." *Mammone v. Jenkins*, No. 5:16CV900, 2019 WL 5067866, at *34 (N.D. Ohio Oct. 9, 2019) (quoting *Carter v. Mitchell*, 829 F.3d 455, 467 (6th Cir. 2016) (cleaned up)). The court also held Mammone could not excuse his default under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). It concluded that Mammone had not shown ineffective assistance of postconviction counsel where his counsel failed to raise a claim lacking factual support.

Mammone procedurally defaulted his claim that counsel should have pursued the NGRI defense. Mammone did not raise this claim on direct appeal or in collateral proceedings. "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). When a petitioner has failed to present a claim to the state courts and no state remedy remains available, the claim is technically exhausted and procedurally defaulted. *See id.* at 848; *Coleman v. Thompson*, 501 U.S. 722, 732 (1991); *Pudelski v. Wilson*, 576 F.3d 595, 605 (6th Cir. 2009).

Here, Mammone cannot raise his NGRI claim in either a successive post-conviction petition under Ohio Revised Code § 2953.23 or a motion for a new trial under Ohio Rule of Criminal Procedure 33. Ohio law bars successive post-conviction relief petitions "unless the petitioner was unavoidably prevented from discovering the facts on which he later seeks to rely, or the United States Supreme Court has recognized a new right that applies retroactively to the petitioner." *Landrum v. Mitchell*, 625 F.3d 905, 919 (6th Cir. 2010) (citing Ohio Rev. Code § 2953.23(A)(1)(a)). The petitioner must also "show that, but for the error, no reasonable factfinder would have found the petitioner guilty, or, in a death penalty case, eligible for the

death sentence." *Id.* (citing § 2953.23(A)(1)(b)). A motion for a new trial based on newly discovered evidence must be filed within 120 days of the verdict unless the defendant was "unavoidably prevented from discovering the evidence" within that time period. Ohio R. Crim. P. 33(B).

Mammone was not unavoidably prevented from discovering the basis for his NGRI defense. The claim relies on his mental status at the times of his offenses and his trial, so he and his mental-health records are the relevant sources of information. Defense counsel's expert, forensic psychologist Jeffrey Smalldon, undertook a comprehensive review of Mammone's background and met with him for twenty hours over seven different occasions. As the district court noted, Dr. Smalldon was a qualified expert with extensive experience in death-penalty cases who ultimately opined that Mammone was not insane at the time of the crimes and did not qualify for the not guilty-by-reason-of-insanity defense.

Mammone points to a second opinion he obtained eight years after trial from Diane Mosnik, a clinical neuropsychologist and forensic psychologist, who took issue with some of Dr. Smalldon's diagnoses. Dr. Mosnik's 2017 opinion is new in the sense that it did not exist at the time of Mammone's trial, direct appeal, or post-conviction petition. However, aside from her in-person evaluation, Dr. Mosnik based her diagnoses on the records of Mammone's prior treatment. Dr. Smalldon met with Mammone in preparation for trial, reviewed his history, administered tests, diagnosed him, and testified that he was sane at time of his crimes. Forensic psychologist Dr. Robert Stinson evaluated Mammone for his post-conviction proceedings, found indications of neurological, neurophysiological, and/or neuropsychological deficits, and recommended that Mammone be evaluated by specialists in those fields. Because Drs. Smalldon and Stinson were able to assess Mammone in preparation for his state-court proceedings, the basis for his NGRI claim existed long before he raised it in his habeas petition. Finally, Mammone does not rely on a new constitutional right made retroactive to him. *See* § 2953.23(A)(1)(a); *Landrum*, 625 F.3d at 919. He cannot exhaust his claim through a second or successive post-conviction petition or a motion for a new trial and therefore has no remaining state-court remedies. *See* Ohio R. Crim. P. 33(B); Ohio Rev. Code § 2953.23(A)(1). Mammone's claim is procedurally defaulted.

Further, Mammone cannot excuse his procedural default through *Martinez* and *Trevino*. In *Martinez*, the Court held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. at 17. A substantial claim is one that has some merit. *Id.* at 14. The Court extended this rule to Texas in *Trevino*, holding that where a state's "procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal," procedural default is excused. 569 U.S. at 428–29.

We have not yet decided whether *Trevino* and *Martinez* apply to Ohio cases generally. *See Henness v. Bagley*, 766 F.3d 550, 557 (6th Cir. 2014). "[T]he application of *Trevino* to Ohio ineffective-assistance claims is neither obvious nor inevitable." *McGuire v. Warden*, 738 F.3d 741, 752 (6th Cir. 2013). This is because Ohio law provides for two kinds of ineffective-assistance-of-trial-counsel claims: ineffective-assistance-of-trial-counsel claims that do not depend on evidence outside the record must be brought on direct appeal, while claims that rely on evidence outside the record are raised in post-conviction petitions. *Id.* at 751–52. In *McGuire*, we found that the reasons for excusing default under *Trevino* applied weakly at best because the Ohio Supreme Court addressed the petitioner's claim of ineffective assistance of trial counsel when he alleged that counsel should have raised it on direct appeal. *See id.* at 752. We held that, even if *Trevino* applied, the petitioner's claim was not substantial. *Id.* In an earlier case, we held that *Martinez* could not excuse the petitioner's alleged default because he was permitted to, and did, raise his ineffective-assistance-of trial-counsel-claim on direct appeal. *Moore v. Mitchell*, 708 F.3d 760, 785 (6th Cir. 2013).

Mammone argues that we applied *Trevino* to an Ohio habeas case in *White v. Warden*, 940 F.3d 270 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 2826 (2020). In *White*, the petitioner raised a claim of ineffective assistance of trial counsel on direct appeal. 940 F.3d at 274. The Ohio Court of Appeals denied it because the trial court record lacked the facts necessary to fully consider it. *Id.* By the time the petitioner's direct appeal ended, it was too late for him to raise his claim in post-conviction proceedings. His pro se post-conviction petition was dismissed as

untimely. *Id.* This court held that *Martinez* and *Trevino* provided cause to excuse the petitioner's procedural default because he raised a substantial claim of ineffective assistance of trial counsel, he did not have counsel in post-conviction proceedings, those proceedings were his first opportunity for a merits review of his claim, and Ohio law made it unlikely that his claim could have been reviewed on direct appeal. *Id.* at 278. The court remanded the case to the district court for de novo review and the possibility of an evidentiary hearing. *Id.* (citing *Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) (en banc) for the proposition that a petitioner who demonstrated cause under *Martinez* was entitled to an evidentiary hearing notwithstanding § 2254(e)(2)). *White* illustrates that *Martinez* and *Trevino can* apply in an Ohio case, but it does not show that they apply to Ohio cases generally. *See Henness*, 766 F.3d at 557.

We need not resolve the issue conclusively because, even if *Martinez* and *Trevino* are relevant here, Mammone would still have to show that his post-conviction counsel were ineffective for failing to raise the NGRI claim and that the claim is substantial. *See Martinez*, 566 U.S. at 16. Mammone cannot excuse his default because the claim is not substantial. *See id.*

To prevail on a claim of ineffective assistance, a petitioner must show both that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009). "Even under de novo review, the standard for judging counsel's representation is a most deferential one." *Richter*, 562 U.S. at 105. The defendant must overcome the presumption that his counsel's actions were sound strategy. *Pinholster*, 563 U.S. at 189; *Strickland*, 466 U.S. at 689. Counsel's failure to explore an NGRI defense can amount to ineffective assistance. *See Lundgren v. Mitchell*, 440 F.3d 754, 771 (6th Cir. 2006). Counsel in a death-penalty case have a duty to reasonably investigate the defendant's background and present mitigating evidence to the jury. *Wiggins v. Smith*, 539 U.S. 510, 521–22 (2003); *Goodwin v. Johnson*, 632 F.3d 301, 318 (6th Cir. 2011). Counsel's performance prejudices a defendant in the guilt phase if "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Hinton v. Alabama*, 571 U.S. 263, 275 (2014) (per curiam) (quoting *Strickland*, 466 U.S. at 695). To assess potential prejudice at sentencing, we reweigh the

evidence in aggravation against the total available mitigating evidence to determine whether a reasonable probability exists that the defendant would have received a sentence less than death had counsel not erred. *Wiggins*, 539 U.S. at 534-6; *Strickland*, 466 U.S. at 695. The petitioner must present new evidence that differs both in strength and subject matter from the evidence presented at sentencing, not just cumulative mitigation evidence. *Jackson v. Bradshaw*, 681 F.3d 753, 770–71 (6th Cir. 2012); *Phillips v. Bradshaw*, 607 F.3d 199, 216 (6th Cir. 2010). We need not address both performance and prejudice if the defendant does not make a sufficient showing of one. *Strickland*, 466 U.S. at 697.

Mammone's underlying claim that trial counsel should have pursued a defense of NGRI is not substantial because he cannot overcome the presumption that his trial counsel's actions were strategic. *See Burt v. Titlow*, 571 U.S. 12, 23 (2013); *Strickland*, 466 U.S. at 689. Mammone's claim is based on Dr. Mosnik's opinion, in which she diagnosed him as having major depressive disorder with anxious distress, psychotic features, and autism spectrum disorder. She opined that Mammone did not know the wrongfulness of his acts as the result of serious mental disease. Dr. Mosnik criticized Dr. Smalldon's understanding of Ohio's insanity defense. According to Dr. Mosnik, Dr. Smalldon testified that Mammone knew the difference between right and wrong, but the proper question was whether he knew the wrongfulness of his acts.

Ohio's insanity defense requires the defendant to prove that at the time of the offense, he did not know, as a result of a severe mental disease or defect, the wrongfulness of his acts. Ohio Rev. Code § 2901.01(A)(14). NGRI is an affirmative defense that the defendant must prove by a preponderance of the evidence. *See* § 2901.05(A); *State v. Hancock*, 840 N.E.2d 1032, 1043 (Ohio 2006). The jury determines what weight to give the evidence, the credibility of the witnesses, and whether the defendant is insane. *State v. Thomas*, 434 N.E.2d 1356, 1357–58 (Ohio 1982). The term "wrongfulness" applies to legal, not moral, wrongs. "[A] defendant who knows his actions are against the law but acts under a command from God understands the 'wrongfulness' of his actions under [Ohio Revised Code §] 2901.01(A)(14)." *State v. Carreiro*, 988 N.E.2d 21, 27 (Ohio Ct. App. 2013). Ohio courts have described the test for insanity as whether the defendant knew right from wrong. *See id.* at 27 (holding the defendant was not

entitled to jury instructions on NGRI because "[i]nstead of acting pursuant to a command from God, [he] was able to appreciate the difference between right and wrong and simply chose to transgress these boundaries"); *State v. Taylor*, 781 N.E.2d 72, 86 (Ohio 2002) ("Appellant was not insane and understood right from wrong."); *State v. Reynolds*, 89 N.E.3d 235, 244 (Ohio Ct. App. 2017) ("Reynolds' 'goal oriented' behavior indicates that he appreciated right from wrong.")

Dr. Smalldon testified at sentencing that, at the time of the murders, Mammone was under extreme emotional distress and suffered from a severe mental disorder but knew the difference between right and wrong and knew his acts were illegal. Dr. Smalldon opined that Mammone "was able to know the difference between right and wrong at the time these offenses were committed." DE 11-6, Tr., Page ID 6047. Dr. Smalldon testified that Mammone knew his acts were "wrong in the eyes of the law" and that Mammone knew "his conduct on this night was criminal." *Id.* at 6047, 6068. Mammone justified killing his children by saying that it was the correct thing to do to restore them to their purity. However, his religious justification neither negates his knowledge that he broke the law nor means that he did not understand the wrongfulness of his actions. *See* § 2901.01(A)(14); *Carreiro*, 988 N.E.2d at 27.

Mammone has not shown that his trial counsel performed deficiently. Trial counsel had him examined by an experienced and well-qualified mental health expert who concluded Mammone knew that his acts were wrong and illegal. Dr. Smalldon's understanding of the insanity defense was consistent with Ohio law. *See Carreiro*, 988 N.E.2d at 27; *Taylor*, 781 N.E.2d at 86. Mammone has presented no evidence that Dr. Smalldon was incompetent or unqualified, so counsel reasonably relied on his opinion when they chose not to pursue the NGRI defense. *See Hinton*, 571 U.S. at 275; *McGuire*, 738 F.3d at 758; *Hodges v. Colson*, 727 F.3d 517, 545 (6th Cir. 2013). Even assuming we could consider her testimony, *but see Shinn v. Ramirez*, 142 S. Ct. 1718, 1734 (2022) ("[A] federal habeas court may not … consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel."); *see also Shoop v. Twyford*, 142 S. Ct. 2037, 2044 (2022) (discussing the "quite limited situations" in which a federal court can consider new evidence in a § 2254 proceeding), Dr. Mosnik's opinion does not show ineffectiveness of trial counsel. *See McGuire*, 738 F.3d at

758. In *Lundgren,* for example, the defendant stated he killed four members of his religious cult at God's command. 440 F.3d at 761. Defense counsel retained two mental health experts, who concluded that the defendant was not insane. *Id.* at 773. In post-conviction proceedings, a third expert[1] opined the defendant should have been seen as eligible for the NGRI defense. *Id.* at 772. This court held trial counsel reasonably investigated the defendant's mental state and their decision not to pursue an insanity defense was reasonable. *Id.* "The question before this Court . . . is not whether all mental health experts would agree on whether the defense was viable, but whether counsel's decision not to pursue the defense was a reasonable strategic choice." *Id.*; *see also Morris v. Carpenter*, 802 F.3d 825, 841 (6th Cir. 2015) (holding counsel reasonably relied on their experts when they chose not to pursue an insanity defense); *Wong v. Money*, 142 F.3d 313, 320 (6th Cir. 1998) (same). As in *Lundgren*, Mammone's counsel performed reasonably when they investigated his mental state, relied on their experts' opinions, and made the strategic choice not to pursue an NGRI defense.

In sum, Mammone's claim that counsel should have pursued the NGRI defense is procedurally defaulted. Even if applicable, *Martinez* and *Trevino* cannot excuse this procedural default of claims through ineffective assistance of post-conviction counsel because the underlying claims of ineffective assistance of trial counsel are not substantial.

2. Whether trial counsel were ineffective for failing to present evidence that Mammone has autism spectrum disorder.

Mammone did not present his autism spectrum disorder claim on direct appeal or in his post-conviction petition, raising it for the first time in his habeas petition. The district court held that Mammone procedurally defaulted this claim by failing to raise it in state court, that he had no remaining state court remedies, and that he could not excuse his default under *Martinez* and *Trevino*.

Mammone procedurally defaulted his claim that counsel should have presented evidence he suffers from autism spectrum disorder. Mammone did not raise this claim on direct appeal or

[1]This expert was Dr. Smalldon. *Lundgren*, 440 F.3d at 772 ("Petitioner submits an affidavit of Ph.D. psychologist Jeffrey Smalldon who opines that [he] 'should have been seen as eligible . . . for a defense of not guilty by reason of insanity.'").

in collateral proceedings. Mammone cannot raise his autism-spectrum-disorder claim in either a successive post-conviction petition under Ohio Revised Code § 2953.23 or a motion for a new trial under Ohio Rule of Criminal Procedure 33. He was not unavoidably prevented from discovering the basis for this claim, as it relies on his mental status at the times of his offenses and his trial. Dr. Mosnik's diagnoses are based on the records of Mammone's prior treatment, so the basis for his autism-spectrum-disorder claim existed before he raised it in his habeas petition. Mammone does not rely on a new constitutional right made retroactive to him. *See* § 2953.23(A)(1)(a); *Landrum*, 625 F.3d at 919. Mammone's claim is procedurally defaulted.

Even if *Martinez* and *Trevino* apply, Mammone cannot excuse his default because his claim that post-conviction counsel were ineffective for failing to raise the autism spectrum disorder claim is not substantial. *See Martinez*, 566 U.S. at 16. Mammone presented no evidence that his counsel erred by retaining Dr. Smalldon to evaluate him or by relying on Dr. Smalldon's opinion of Mammone's mental status. Mammone now relies on Dr. Mosnik's 2017 diagnosis that he has autism spectrum disorder. He argues that evidence of autism spectrum disorder would have given the jury context for his rigid demeanor during trial and his five-hour unsworn statement and would have provided mitigating evidence for the jury to consider. But selecting an expert is the classic example of a strategic choice made by counsel. *Hinton*, 571 U.S. at 275 (quoting *Strickland*, 466 U.S. at 690).

Attorneys are entitled to rely on the opinions and conclusions of a mental health expert unless they have good reason to believe the expert is incompetent or unqualified. *Morris*, 802 F.3d at 841; *McGuire*, 738 F.3d at 758; *Hodges v. Colson*, 727 F.3d 517, 545 (6th Cir. 2013). In *Morris*, defense counsel presented experts to testify about the effects of cocaine and alcohol to argue that the defendant lacked the requisite intent for first-degree murder. 802 F.3d at 841. They chose not to pursue an insanity defense because no expert found that the defendant was mentally ill. In post-conviction proceedings, however, the defendant's expert witnesses testified that the defendant was bipolar. We held that defense counsel reasonably relied on their expert witnesses' testimony. *Morris*, 802 F.3d at 841-42. "[S]imply introducing the contrary opinion of another mental health expert during habeas review is not sufficient to demonstrate the

ineffectiveness of trial counsel." *McGuire*, 738 F.3d at 758; *see also Pike v. Gross*, 936 F.3d 372, 381 (6th Cir. 2019); *Hill v. Mitchell*, 842 F.3d 910, 944 (6th Cir. 2016).

Mammone's trial counsel retained Dr. Smalldon to examine him and testify on his behalf. Dr. Smalldon diagnosed Mammone with a severe personality disorder, unspecified, with schizotypal, borderline, and narcissistic features. Dr. Stinson, who evaluated Mammone for post-conviction proceedings, agreed with Dr. Smalldon's diagnosis but opined that Mammone should have been tested for neurological, neurophysiological, and/or neuropsychological deficits. None of the mental health experts who treated or evaluated Mammone before 2017 suggested that he had autism spectrum disorder. Mammone does not suggest that Dr. Smalldon was incompetent or unqualified, so counsel reasonably relied on his opinions. *See Morris*, 802 F.3d at 841; *McGuire*, 738 F.3d at 758; *Hodges*, 727 F.3d at 545. Trial counsel's selection of Dr. Smalldon was a strategic choice and virtually unchallengeable. *See Hinton*, 571 U.S. at 275. Dr. Mosnik's different diagnosis does not show that trial counsel were ineffective. *See Pike*, 936 F.3d at 381; *Hill*, 842 F.3d at 944; *McGuire*, 738 F.3d at 758. Mammone cannot show that his counsel performed deficiently by relying on Dr. Smalldon and failing to discover evidence to support a diagnosis of autism spectrum disorder. Because Mammone cannot establish deficient performance, we need not consider prejudice. *See Strickland*, 466 U.S. at 697; *Hutton*, 839 F.3d at 501.

Mammone's claim that counsel should have presented evidence that he had autism spectrum disorder is procedurally defaulted. Even if applicable, *Martinez* and *Trevino* cannot excuse this procedural default because the underlying claim of ineffective assistance of trial counsel is not substantial.

3. Whether trial counsel were ineffective for failing to retain a neuropsychologist to evaluate Mammone.

In his state court post-conviction proceedings, Mammone alleged his trial counsel were ineffective for failing to retain a neuropsychologist and failing to request neuroimaging. In support, he submitted an affidavit by Dr. Stinson recommending that Mammone be evaluated by specialists in neurology, neurophysiology, and neuropsychology to look for brain dysfunction, neurological insults, and neuropsychological deficits. Mammone requested funding for such

testing. The trial court denied Mammone's request for funding and denied his petition, and the Ohio Court of Appeals affirmed. DE 10-22, J. Entry, Page ID 2419–20; *Mammone*, 2012 WL 3200685, at *2–3.

Before trial, the trial court appointed forensic psychologist Dr. Smalldon at Mammone's request. Dr. Smalldon testified he had done neuropsychological assessments for neurologists, neurosurgeons, and other specialists. He met with Mammone for approximately twenty hours, administered numerous tests, reviewed extensive records, and conducted third-party interviews. He diagnosed Mammone with a severe personality disorder, not otherwise specified, with schizotypal, borderline, and narcissistic features. Dr. Smalldon found that Mammone was not actively psychotic but had characteristics of people who were psychotic. He also noted that Mammone exhibited passive aggressive and obsessive compulsive personality traits and generalized anxiety disorder. Dr. Smalldon found no indication of a brain disorder or brain damage. The Ohio Court of Appeals held that the trial court did not err in rejecting Dr. Stinson's affidavit and denying Mammone's claim:

> In his affidavit, Dr. Stinson, who possesses the same credentials as Dr. Smalldon, advanced the opposite opinion. We fail to see that the presence of a contradicting opinion by one who never interviewed appellant would result in any affirmative help to appellant's case. The affidavit is only an offer of a contradicting opinion and not definitive evidence on the issue.

Mammone, 2012 WL 3200685, at *2–3. The district court agreed with the state court that Mammone's counsel performed reasonably when they relied on Dr. Smalldon's opinion that Mammone did not show signs of neurological damage.

On appeal, Mammone argues that trial counsel were ineffective for failing to have him examined by a neuropsychologist. He asserts that "trial counsel's failure to obtain a neuropsychologist to evaluate [him] and testify regarding his deficits deprived the jurors of significant mitigating evidence." CA6 R. 25, Appellant Br., at 11. This claim is subject to AEDPA review because the Ohio Court of Appeals denied it on the merits. *Mammone*, 2012 WL 3200685, at *2. When AEDPA review applies to a claim of ineffective assistance of counsel, our review of the state court decision is "doubly deferential" and gives both the state court and defense counsel the benefit of the doubt. *Titlow*, 571 U.S. at 15 (citation omitted);

Pinholster, 563 U.S. at 190. "A federal court may grant relief only if *every* 'fairminded jurist' would agree that *every* reasonable lawyer would have made a different decision." *Dunn v. Reeves*, 141 S. Ct. 2405, 2411 (2021) (per curiam) (cleaned up) (quoting *Richter*, 562 U.S. at 101). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105. Mammone must meet his burden on the record that was before the Ohio Supreme Court. *See Pinholster*, 563 U.S. at 181–82.

There is a reasonable argument that Mammone's counsel satisfied *Strickland*'s deferential standard. *See Richter*, 562 U.S. at 105. Counsel retained a psychologist, Dr. Smalldon, who performed neuropsychological screening tests on Mammone. Although Dr. Smalldon is a psychologist, not a neuropsychologist, he is highly experienced with capital cases and has performed "neuropsychological assessments" for neurologists, neurosurgeons, and other specialists. The trial court deemed him qualified as an expert in forensic psychology. Dr. Smalldon testified that because Mammone had sustained a head injury as a teenager, he screened Mammone for brain damage. He met with Mammone for approximately twenty hours, administered numerous tests, reviewed extensive records, and conducted third-party interviews. That Dr. Smalldon screened Mammone for brain damage indicates that the issue of potential neurological deficits was a focus of the defense. Mammone has not pointed to any evidence that Dr. Smalldon was incompetent or unqualified. It was not unreasonable for Mammone's counsel to rely on Dr. Smalldon's opinion that Mammone did not exhibit signs of neurological damage. That Dr. Stinson opined in an affidavit that Mammone *may* have had a brain impairment does not make counsel's performance deficient. The Ohio Court of Appeals reasonably concluded that Mammone suffered no prejudice.

4. Whether trial counsel were ineffective for allowing Mammone to make an unsworn statement at the penalty phase or failing to prepare him to give a more effective statement.

On direct appeal, Mammone argued his counsel failed to prepare him for the mitigation phase of trial and should not have allowed him to make a five-hour unsworn statement without guiding or limiting his presentation by asking questions.

The Ohio Supreme Court held Mammone could not show ineffective assistance of counsel because he, not his counsel, had the choice of testifying or giving a statement. *Mammone*, 13 N.E.3d at 1088. It also found the decision was a tactical one. *Id.* The court acknowledged that Mammone's statement was lengthy but described it in favorable terms:

> Mammone's statement was well spoken, coherent, and organized. For the most part, the statement amplified the confession Mammone had made to police officers the day he was arrested and gave the jury an opportunity to observe his personality and learn more about his background. Moreover, because the court permitted Dr. Smalldon to observe the statement, Dr. Smalldon was able to refer to it during his own testimony. Under the circumstances, to the extent that trial counsel may have influenced Mammone's decision to give an unsworn statement, allowing the statement was objectively reasonable as a matter of strategy.

Mammone, 13 N.E.3d at 1088 (citing *State v. Jalowiec*, 744 N.E.2d 163 (Ohio 2001)). The Ohio Supreme Court further held that even if trial counsel performed deficiently, Mammone was not prejudiced. *Id.* at 1088–89. Mammone argued his statement was harmful because it was long, cold, and detached, and because the jury had no context to connect it to his mental illness. *Id.* at 1089. The court found Mammone could not show a reasonable likelihood of a life sentence but for his unsworn statement because, for the most part, it amplified his confession to the police, which was played for the jury. *Id.* at 1088–89.

The district court found the Ohio Supreme Court's decision objectively reasonable. It noted the record was devoid of evidence that counsel failed to prepare Mammone and that "even if Mammone had given a more controlled statement (or none at all), there was simply no probability of the jury's recommending anything but a death sentence." *Mammone*, 2012 WL 5067866, at *53.

On appeal, Mammone argues that trial counsel were ineffective for "abandon[ing]" him when he made the five-hour unsworn statement. CA6 R. 25, Appellant Br., at 40–43. He asserts trial counsel did not guide or limit his statement and "failed to present to the jury a context within which to interpret the unsworn statement." *Id.* at 41. This claim is subject to AEDPA review because the Ohio Supreme Court denied it on the merits. *Mammone*, 13 N.E.3d at 1088–89. Therefore, our review gives both the state court and defense counsel the benefit of the doubt. *Pinholster*, 563 U.S. at 190.

Ohio law grants a capital defendant the right to make an unsworn statement at the penalty stage that is not subject to cross-examination. Ohio Rev. Code § 2929.03(D)(1). At the close of the prosecution's guilt-phase case, Mammone acknowledged on the record that his trial counsel had discussed the possibility of Mammone's giving an unsworn statement in the sentencing phase. The sentencing transcript refers to Mammone's decision to do so. Mammone did not present evidence from outside the trial court record because he raised this claim on direct appeal. *See McGuire*, 738 F.3d at 751–52. There is no indication in the record of what advice or preparation Mammone's counsel provided. When a petitioner does not present evidence in state court to support a claim of ineffective assistance, he has not rebutted the presumption that counsel had a reasonable strategy for the challenged decision. *Dunn*, 141 S. Ct. at 2412; *see also Titlow*, 571 U.S. at 23 ("[T]he absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" (citation omitted)); *Carter v. Mitchell*, 443 F.3d 517, 531 (6th Cir. 2006) (holding petitioner's failure to detail trial counsel's efforts to learn of his background provided no basis for finding counsel's investigation unreasonable). Regardless of whether the defendant has presented evidence of counsel's strategy, the court can consider possible reasons for counsel's decisions not expressed by counsel. *See Pinholster*, 563 U.S. at 196.

There is a reasonable argument that counsel's performance satisfied the doubly deferential standard of *Strickland* under AEDPA review. *See Richter*, 562 U.S. at 105. Mammone cannot point to any evidence that counsel failed to advise him of the possible risks of giving an unsworn statement or that they did not prepare him adequately. His counsel may have simply respected his statutory right to give an unsworn statement. Or they may have reasoned Mammone's unsworn statement would allow the jurors to hear about his background and beliefs directly from him and lead them to conclude that he was so disturbed that he should not be sentenced to death. In closing argument, Mammone's counsel reminded the jury that Mammone had told them about his bizarre set of rigid behavioral codes. She concluded by telling the jurors that sentencing was about the appropriate sentence for a person with "such a degree of . . . craziness." DE 11-6, Tr., Page ID 6158–59. Counsel may also have decided that Mammone's unsworn statement would give Dr. Smalldon the opportunity to comment on it, as he did. Dr. Smalldon testified that watching Mammone's unsworn statement did not change his diagnosis.

In the absence of evidence to the contrary, Mammone has not rebutted the presumption that counsel performed reasonably when they acceded to his decision to give his unsworn statement. *See Dunn*, 141 S. Ct. at 2412; *Titlow*, 571 U.S. at 23. The Ohio Supreme Court decided reasonably that Mammone did not show deficient performance.

Even if counsel for Mammone performed unreasonably, he cannot show prejudice. Mammone argued to the Ohio Supreme Court that his unsworn statement was long, cold, and detached, and the jury had no context to connect it to his mental illness. *Mammone*, 13 N.E.3d at 1089. The Ohio Supreme Court held Mammone could not show a reasonable likelihood of a life sentence but for his unsworn statement because, for the most part, it amplified his confession to the police. *Id.* at 1088–89. This, too, was a reasonable decision. Mammone's unsworn statement was similar to his confession introduced at trial, included mitigating evidence, and revealed the idiosyncratic nature of his beliefs. An examination of Mammone's confession and his unsworn statement confirms that Mammone was not prejudiced by his counsel's decision to let him give his unsworn statement.

Mammone's confession to the police began with the night before the murders. He described trying to find Marcia, texting her, and getting to the "point of no return" because he could not accept her being with another man. *Mammone*, 13 N.E.3d at 1063. He gave detailed descriptions of how he killed his children and his former mother-in-law. Mammone seemingly prepared for suicide by cop, but he also tried to avoid being injured or caught. When he broke into Marcia's house, he did not go upstairs because he thought Marcia or the man Mammone believed was with her might be armed. Mammone told the police he had thought about "doing this" for twenty-two months since Marcia first tried to leave him. *Id.* at 1064. He originally intended to kill Marcia, not the children, and said he killed Marcia's mother to punish Marcia. On the night of the killings, he had intended to maim Marcia, not kill her. He wanted to beat her with a weapon in such a way that she could not have any more children, break her ankles because he knew she feared that injury, and cut out her tongue because she would not talk to him.

Mammone's unsworn statement conveyed much of the same information as his confession, but also included mitigating facts and permitted Mammone to explain his family

background and his beliefs about marriage, children, and religion. *Mammone*, 13 N.E.3d at 1093–96; DE 11-6, Tr., Page ID 5725–5979. He detailed his father's alcoholism and physical abuse, his parents' divorce, and his mother's depression. Mammone thought his family was not the way families should be. Mammone described his relationship to Marcia, stating that when he met her, she shared his views about commitment and God and that he went to church with her and her family. Mammone's account of the collapse of his marriage and his reaction focused on the importance of family and religion. In at least two instances, Mammone threatened to kill Marcia and the children if she left him because he would rather they be dead with God than be raised in a broken home. Mammone's feelings about Marcia were conflicted, and his own thoughts disturbed him. He told the jury he believed that everything is the will of God, and that God did not permit him to hurt Marcia.

Next, Mammone described the events of June 7 and 8 from his perspective. The testimony was largely consistent with his confession, but Mammone described his motives differently. He emphasized his frustration with Marcia and her family's refusal to respond to his concerns about the children. Mammone recounted the manner in which he killed his children, stating he killed them in the parking lot of the church where they were baptized because he "was put there to send them back to be with God." DE 11-6, Tr., Page ID 5933. He said he was "completely stunned by the whole thing," prayed after killing them, and felt a surge of aggression when he saw his children deceased. *Id.* at 5937–38. He stated "what happened to the children was one thing that [he] felt was necessary to happen" but that the events that followed were "something completely different." *Id.* at 5938. After detailing how he killed his mother-in-law, Mammone said he felt for a couple of minutes that he had turned his back on his beliefs and what "was right and wrong with God." *Id.* at 5941–46. He was shocked that his children were in fact dead and that "this actually had happened." *Id.* at 5946.

When he broke into Marcia's apartment, his aggression was gone, and he felt "a combination of remorse and disbelief." *Id.* at 5948. He left a voicemail for Marcia after leaving her apartment informing her he had killed her mother and said he had been trying to get everyone's attention for months. Mammone felt God intervened and kept him from hurting Marcia, and he was grateful for that. He had "definitely intended" to harm Marcia in the ways he

later confessed to the police, but he told the jury he doubted he could have actually hurt her. *Id.* at 5957. Mammone hoped the jurors could wrap their heads around what happened and what he went through. He thought he was a "great guy" but ended up as a "raving lunatic" who killed people. *Id.* at 5965–66.

The final part of Mammone's unsworn statement to the jury had religious themes. He said he wanted to turn himself in with as much discretion as possible because he did not want anyone to see the children. He was not worried about the legal ramifications. Mammone told the jury he had planned on dying but felt responsible for handing the children over properly. He feels a spiritual connection with his children and his former mother-in-law. Mammone stated that he hoped that his children's lives were not in vain, and that people would be outraged by what happened because he did not want to see it happen to anyone else. He hoped people would commit themselves to God, take care of their children, and learn from this tragedy.

Mammone did not show a reasonable probability that the jury would have spared him the death penalty if counsel had not allowed him to give his unsworn statement, had better prepared him for it, or had limited its length. *See Wiggins*, 539 U.S. at 536–37; *Strickland*, 466 U.S. at 695. As the Ohio Supreme Court found, his statement mirrored his confession. Both described the murders in detail, and the transcripts do not suggest that Mammone showed emotion or regret in either one. In addition, Mammone's unsworn statement may have had some mitigating value. It placed his actions in the context of his childhood, his religious beliefs, and his views of marriage and family. The jury could have found his account of the abuse he suffered as a child and the effects of his parents' divorce to be mitigating. Mammone told the jury about the importance he placed on religion, marriage, and family and the torment he felt from the breakup with Marcia. Dr. Smalldon testified about Mammone's beliefs and psychological disorder, and trial counsel referred to his "craziness" in closing argument.

Mammone's unsworn statement downplayed the role of jealousy and revenge as motives, focusing instead on his religious views. In his confession, the suspicion that Marcia had a boyfriend appeared to have set him off and he told police he committed the murders to hurt her. *Mammone*, 13 N.E.3d at 1063–64. By contrast, in his unsworn statement, Mammone focused on his frustration with the break-up of his marriage and his belief that his children were better off

dead than growing up in a broken home. *Id.* at 1094. It is not obvious that Mammone's unsworn statement made him appear more culpable than his confession, and his statement may have been more consistent with trial counsel's argument that he was seriously mentally ill. As indicated above, the evidence in aggravation significantly outweighed the mitigating evidence. There is not a reasonable probability that his unsworn statement was so much more inflammatory than his confession that it swayed the jury to vote for the death penalty. The Ohio Supreme Court's conclusion on this issue was reasonable.

5. Whether the district court improperly denied Mammone's request for discovery and an evidentiary hearing.

Additionally, Mammone argues the district court abused its discretion when it denied him discovery and an evidentiary hearing on his claims of ineffective assistance of trial counsel. He contends the district court was required to grant his requests to depose trial counsel, post-conviction counsel, and Dr. Smalldon, and consider any new evidence from those depositions. The district court did not grant a COA on this issue, nor has Mammone requested one. Citing a single unpublished case, the respondent maintains that the lack of a COA deprives us of jurisdiction to consider the argument. CA6 R. 26, Appellee Br., at 42 (citing *Onunwor v. Moore*, 655 F. App'x 369, 375-76 (6th Cir. 2016)).

The petitioner need not obtain a separate COA to challenge discovery rulings that directly relate to an issue on which he did obtain permission to appeal. 28 U.S.C. § 2253(c)(2) requires COAs to issue upon a "substantial showing of the denial of a constitutional right." The COA must identify "which specific issue" satisfies the requirement imposed by § 2253(c)(2). *Id.* at § 2253(c)(3). Put another way, the only specificity requirement for COA concerns identifying which issues implicate a "denial of a constitutional right." Nothing in the statute suggests subsidiary questions—such as the right to obtain discovery to support a particular constitutional claim—need to be the subject of a separate certificate. *See Johnson v. Bauman*, 27 F.4th 384, 391 (6th Cir. 2022) (recognizing "[o]ur obligation to apply statutory text in accordance with its common meaning," particularly in the "federal habeas setting, where Congress has long had primary authority"). This view accords with our sister circuits. *See Buntion v. Lumpkin*, 982 F.3d 945, 952, n.† (5th Cir. 2020) (per curiam) ("'[A] request for an evidentiary hearing stands

or falls with the applicant's COA showing' on the constitutional merits") (citing *United States v. Davis*, 971 F.3d 524, 534 (5th Cir. 2020)); *Cunningham v. United States*, 378 F. App'x 955, 959 n.2 (11th Cir. 2010) (concluding that whether a petitioner is entitled to an evidentiary hearing is a "subsidiary question" of the one included in the COA) (citing *Gomez-Diaz v. United States*,433 F.3d 788, 790, 794 (11th Cir. 2005)); *Jones v. Smith*, 231 F.3d 1227, 1231 (9th Cir. 2000) ("[W]here a district court grants a COA with respect to the merits of a constitutional claim … we will assume that the COA also encompasses any procedural claims that must be addressed on appeal.").

While we possess jurisdiction over Mammone's requests for discovery and an evidentiary hearing, his requests are nonetheless meritless. As the Supreme Court recently recognized, AEDPA "restricts the ability of a federal habeas court to develop and consider new evidence." *Shoop*, 142 S. Ct. at 2043. Specifically, the statute allows the development of new evidence in "two quite limited situations": (1) when the claim relies on a "new" and "previously unavailable" "rule of constitutional law" made retroactive by the Supreme Court, or (2) when the claim relies on a "factual predicate that could not have been previously discovered through the exercise of due diligence." *Id.* at 2044 (quoting 28 U.S.C. § 2254(e)(2)). And even if a prisoner can satisfy either of those exceptions, to obtain an evidentiary hearing, he still must show by "clear and convincing evidence" that "no reasonable factfinder" would have convicted him of the crime charged. *Shinn*, 142 S. Ct. at 1734 (quoting 28 U.S.C. § 2245(e)(2)(A)(i), (ii)). Mammone does not purport to satisfy any of these stringent requirements for obtaining discovery or an evidentiary hearing: he does not rely on a new rule of constitutional law, he does not contend that the factual predicate for his constitutional claims could not have been previously discovered, and he points to no clear and convincing evidence that would cast doubt on the jury's verdict. The district court did not abuse its discretion in denying an evidentiary hearing as to Mammone's ineffective-assistance-of-counsel claims.

D. Whether appellate counsel was ineffective for not arguing that trial counsel were ineffective.

Mammone claims he was denied effective assistance of counsel when his appellate counsel failed to argue that his trial counsel were ineffective for arguing his mitigation case

under the wrong legal standard. During closing arguments, trial counsel asserted that Dr. Smalldon's testimony about Mammone's mental state constituted a statutory mitigating factor under Ohio Revised Code § 2929.04(B)(3). That provision, however, applies only when the defendant, at the time of committing the offense, lacks the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law because of a mental disease or defect. Ohio Rev. Code § 2929.04(B)(3). The prosecution pointed out that Dr. Smalldon's testimony did not support concluding that Mammone met the provisions of the statute. Mammone contends that by erroneously telling the jurors to consider Dr. Smalldon's testimony under § 2929.04(B)(3), counsel foreclosed the jurors from considering the testimony under § 2929.04(B)(7). Section 2929.04(B)(7) is a catch-all provision that requires the factfinder to consider "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death." Ohio Rev. Code § 2929.04(B)(7).

Mammone raised this claim in his motion to reopen his direct appeal. The Ohio Supreme Court denied it without opinion. The district court concluded Mammone's trial counsel erred by telling the jury to consider Mammone's mental state under § 2929.04(B)(3) but held that Mammone was not prejudiced. It found the aggravating circumstances of the murders and the course-of-conduct evidence was overwhelming, while Mammone's mitigating evidence was "hardly compelling." *Mammone*, 2019 WL 5067866, at *64. The district court noted that because the trial court instructed the jury about the catch-all provision, the jury could have given Mammone's mental state whatever weight it deemed appropriate. It concluded that the Ohio Supreme Court's decision was reasonable because there was not a reasonable probability that the result of Mammone's appeal would have been different if appellate counsel had raised the claim.

The district court properly denied Mammone's claim of ineffective assistance of appellate counsel. "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Richter*, 562 U.S. at 98–99. Mammone has not presented evidence to overcome this presumption, so AEDPA deference applies to this claim. To establish deficient performance of appellate counsel, Mammone must demonstrate that his appellate counsel's decision not to raise the claim was objectively unreasonable. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Smith v. Ohio Dep't of Rehab. & Corr.*, 463 F.3d 426, 433 (6th

Cir. 2006). To demonstrate prejudice, he must show that there was a reasonable probability that, but for his counsel's failure to raise the issue on appeal, he would have prevailed. *Robbins*, 528 U.S. at 285; *Strickland*, 466 U.S. at 694. A claim of ineffective assistance of appellate counsel has merit only to the extent that the underlying claim has merit. *See Davie v. Mitchell*, 547 F.3d 297, 312 (6th Cir. 2008).

Here, the Ohio Supreme Court's denial of Mammone's claim was not unreasonable. Mammone's trial counsel erred by referring to § 2929.04(B)(3), but Mammone cannot show prejudice. Dr. Smalldon testified that while Mammone acted under extreme emotional distress and had a severe mental disorder, he knew the difference between right and wrong at the time he committed the crimes. *Mammone*, 13 N.E.3d at 1097. Mammone's counsel argued to the jury that it could consider two specific mitigating factors: Mammone's lack of a criminal record, *see* § 2929.04(B)(5), and his mental disease or defect, *see* § 2929.04(B)(3). Counsel referred to Dr. Smalldon's testimony and the fact that Mammone talked calmly to the police after the murders and admitted what he had done. The prosecutor responded that there was no evidence, including from Dr. Smalldon, that Mammone lacked substantial capacity to appreciate the criminality of his conduct or to conform to the requirements of the law. The trial court instructed the jurors to consider Mammone's history, character, and background; whether he lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the law because of a mental defect or disease; his lack of a significant history of prior convictions and delinquency adjudications; and any other mitigating factors that weighed in favor of a sentence other than death. Dr. Smalldon's testimony did not support the § 2929.04(B)(3) mitigating factor, so Mammone's counsel erred in arguing that it did.

However, Mammone cannot show prejudice from trial counsel's error because the jury was free to consider Mammone's mental state under § 2929.04(B)(7), the catch-all provision. Jurors are presumed to follow the trial court's instructions. *See Richardson v. Marsh*, 481 U.S. 200, 208 (1987). Under the trial court's instructions, the jury presumably considered Dr. Smalldon's testimony and other evidence about Mammone's mental health under § 2929.04(B)(7) as relevant to whether Mammone should be sentenced to death. *See Hill v. Mitchell*, 400 F.3d 308, 325 (6th Cir. 2005) (holding counsel was not ineffective for failing to request an intoxication instruction because the trial court instructed the jury to consider "any other factors that are relevant to the issue of

whether the offender should be sentenced to death"). Mammone cannot show that his trial counsel's reference to language from § 2929.04(B)(3) prevented the jury from considering his mental state under § 2929.04(B)(7).

In addition, there is not a reasonable probability that, had trial counsel not referred to § 2929.04(B)(3), the jury would have sentenced Mammone to life. *See Wiggins*, 539 U.S. at 537; *Strickland*, 466 U.S. at 695. The jury heard about Mammone's difficult childhood, his religious beliefs, his reaction to the breakdown of his marriage, and Dr. Smalldon's diagnosis that he had a severe personality disorder. *Mammone*, 13 N.E.3d at 1093–98. Dr. Smalldon testified that Mammone expressed remorse for killing his former mother-in-law but maintained that killing his children was the right thing to do. *Id.* at 1097–98. As part of its mandatory review of Mammone's death sentence, the Ohio Supreme Court found that his mental state was not entitled to any weight under § 2929.04(B)(3) but gave "modest" weight to the evidence under § 2929.04(B)(7). *Id.* at 1098–1100. The court reasonably held that "the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt." *Id.* at 1100. Likewise, there is not a reasonable probability that, had counsel not invoked § 2929.04(B)(3), the jury would have given such weight to the evidence of Mammone's mental state under § 2929.04(B)(7) that it would have sentenced him to life. Because his underlying claim of ineffective assistance of trial counsel lacks merit, Mammone's claim of ineffective assistance of appellate counsel fails. *See Davie*, 547 F.3d at 312.

IV. CONCLUSION

For the reasons set forth above, we affirm the district court's denial of a writ of habeas corpus.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

James Mammone,

Petitioner

v.

Charlotte Jenkins, Warden,

Respondent

Case No. 5:16CV900

ORDER

This is a capital habeas case under 28 U.S.C. § 2254.

In 2010, a jury sitting in the Common Pleas Court of Stark County, Ohio convicted the petitioner, James Mammone, of murdering his two children and his former mother-in-law. The same jury recommended that Mammone be put to death, and the trial court imposed a death sentence. The Ohio Supreme Court affirmed the convictions and sentence on direct appeal, *State v. Mammone*, 139 Ohio St. 3d 467 (2014), and the Ohio courts rejected Mammone's collateral attack, *State v. Mammone*, 2012 WL 3200685 (Ohio App. 2012).

Pending is Mammone's amended petition for a writ of habeas corpus, which raises nineteen grounds for relief. (Doc. 23). For the following reasons, I deny the petition.

Background

In June, 2009, the Stark County grand jury indicted Mammone on three counts of aggravated murder, two counts of aggravated battery, and one count each of violating a protection order and attempted arson.

Each aggravated-murder charge carried two death-penalty specifications that, if proved, would make Mammone eligible for a death sentence.

Count one, which charged Mammone with killing his mother-in-law Margaret Eakin, carried a course-of-conduct specification and a specification that Mammone had killed Margaret in the course of an aggravated burglary. Counts three and four, which charged Mammone with killing his daughter Macy (age five) and son James IV (age three), contained course-of-conduct and child-murder specifications.

Mammone pleaded not guilty and went to trial in January, 2010.

A. Trial

According to the Ohio Supreme Court, whose factual determinations are presumptively correct on habeas review, *see* 28 U.S.C. § 2254(e)(1), the prosecution:

> called Mammone's ex-wife, Marcia Eakin, to testify. Marcia testified about the breakdown of her relationship with Mammone and stated that she first told Mammone in August 2007 that she intended to leave him. On that day, Mammone stayed home from work and refused to let her or their two children, Macy and James IV, leave the family's Canton residence. Mammone broke Marcia's cell phone and took all the house phones. She did not leave him that day.
>
> {¶ 6} Marcia and Mammone sought counseling, but she did not feel that the marital relationship improved. She testified that Mammone threatened her, warning that "if I tried to leave he would kill me and the children." Unbeknownst to Mammone, Marcia contacted a lawyer to initiate the process of filing for divorce.
>
> {¶ 7} On June 13, 2008, Mammone learned that Marcia was seeking a divorce when he intercepted a call from Marcia's lawyer. According to Marcia, Mammone again threatened to kill her, declaring: "I told you if you tried to leave me I was going to kill you." He told Macy and James on that date that "it was time for mommy to go to her grave." Mammone did not let Marcia or the children out of his sight for the rest of the day.
>
> {¶ 8} Marcia explained that she and the children managed to get away from Mammone, and she sought a civil protection order against him. On July 10, 2008, the Stark County Common Pleas Court issued a two-year protection order

requiring Mammone to stay more than 500 feet away from Marcia. He was permitted only supervised contact with the children.

{¶ 9} Marcia testified that the Mammones' divorce was finalized in April 2009. Under the final divorce decree, Mammone was permitted overnight visitation with the children four times a month and evening visitation twice a week. Marcia explained that Mammone picked up and dropped off the children at the home of her parents, Margaret and Jim Eakin, so that Mammone would not have direct contact with Marcia or know where she lived. During visits, Mammone was permitted to text Marcia about matters pertaining to the children.

{¶ 10} Marcia testified that on Sunday, June 7, 2009, Mammone picked up five-year-old Macy and three-year-old James at the Eakins' home for a scheduled overnight visit. Mammone was driving his green BMW.

{¶ 11} Marcia met a friend, Ben Carter, to play tennis and have dinner. At 4:25 p.m., Mammone began to text Marcia. Although the two never spoke that night, they exchanged dozens of text messages over the next 15 hours, and records of these messages were introduced at trial.

{¶ 12} At first, Mammone sought advice about consoling Macy, who was upset. But he quickly shifted to blaming Marcia for the children's suffering, texting: "How long are we going to let these children that you * * * had to have suffer?" Throughout the evening Mammone repeatedly texted Marcia, accusing her of "ruin[ing] lives" by putting herself first. He admonished her to put her children first and demanded to know what was more important than the kids at that moment. Marcia replied by texting that Mammone should "stop tormenting" the children. No fewer than five times, she offered to have Mammone return the children to her mother's house or asked if she could meet him to pick up the children.

{¶ 13} Mammone advised Marcia in a text that he was "at [the] point of no return" and that he "refuse[d] to let gov restrict my right as a man to fight for the family you promised me." At 9:11 p.m., he warned Marcia that "safe and good do not apply to this night my love." Marcia promptly responded, texting: "Do not hurt them." At 9:35 p.m., she asked him to "[k]eep them safe." Mammone texted:

> You got five minutes to call me back on the phone. I am not fucking around. I have stashed a bunch of pain killers for this nigh[t] * * * i hope u would never let happen. I have put on my wedding band, my fav shirt and I am ready to die for my love tonight. I am high as a kite * * * bring o[n] the hail of bullets if need be.

{¶ 14} At this point, Marcia called 9–1–1. The state played a recording of the call at trial. On the recording, Marcia advised the 9–1–1 operator that her children were in a car with her ex-husband, who had threatened to take "a bunch of

painkillers" and had said that he was "ready to die tonight." While Marcia was on the line with the 9–1–1 operator, the operator attempted to call Mammone, but he would not answer his phone. After speaking to the 9–1–1 operator, Marcia texted Mammone that she would not call him (in accordance with the operator's advice), and again urged him to "keep the kids safe." At 10:18 p.m., Marcia in a text to Mammone asked him to meet her so that she could pick up the kids. Marcia's friend Carter confirmed that he and Marcia then drove around looking for Mammone.

{¶ 15} Marcia testified that she then contacted both Mammone's mother and the wife of Richard Hull, Mammone's friend and former employer. Phone records indicate that Richard Hull began to text Mammone, advising him to calm down and keep the kids safe. Hull's texts suggested that Mammone should drop the kids off with Mammone's mother. Hull testified that he and his father also drove around for a time looking for Mammone but did not find him.

{¶ 16} At 2:00 a.m. on June 8, Mammone sent a text to Marcia, stating, "I am not one who accepts divorce. * * * I married you for love and for life * * *." At 2:36 a.m., he wrote, "I am so dead inside without u. The children r painful * * * [r]eminders of what I have lost of myself. This situation is beyond tolerable. So what happens next?" At 2:50 a.m., Mammone reiterated in a text to Marcia that the love of his children was "only a source of pain" without her love.

{¶ 17} Hull testified that around 3:00 a.m., he spoke to Marcia and decided not to go back out looking for Mammone because they were hopeful that everything would be fine. Marcia attempted to end her text conversation with Mammone, writing, "Please[ ] keep kids safe good night."

{¶ 18} At 5:34 a.m., Mammone texted Marcia: "Last chance. Here it goes."

{¶ 19} One of the Eakins' neighbors, Edward Roth, testified that around 5:30 a.m., he heard gunshots and screaming through his open bedroom window. Roth said that he saw a goldish-tan-colored car leaving the Eakin residence and several minutes later saw the same car returning to the street to sit in the middle of the intersection near the house. Roth called 9–1–1. A law-enforcement officer testified that he and another officer arrived to find Margaret Eakin lying severely injured on the floor of a second-floor bedroom. The officers observed two shell casings and a broken lamp.

{¶ 20} Marcia testified that she heard a car roar up her driveway around 5:40 a.m. From a second-floor bedroom window, she saw Mammone get out of the car and empty a red gasoline container onto Carter's truck, which was parked in the driveway. She called 9–1–1, and a recording of the call was introduced at trial by the state. While Marcia was on the phone, she "heard the glass in my back door breaking in and he was inside my apartment." She did not hear Mammone speak, but she heard something that he had thrown hit the ceiling. He then went back

outside and threw things at the windows. Mammone left before two deputy sheriffs arrived. According to the deputies, the back door had been forced open, the screen-door glass was broken, and pieces of the door frame were on the kitchen floor.

{¶ 21} The deputies quickly realized that the incident at Marcia's apartment was linked to the incident at the Eakins' residence, but law-enforcement officers had not yet located Mammone, and they did not know whether the children were safe.

{¶ 22} At 6:04 a.m., Mammone left a voice mail on Hull's phone, in which the jury heard Mammone confess to Hull, "I killed the kids." Mammone's voice mail continued:

> I said it when I got locked up fucking 358 days ago that she fucking has to die and unfortunately as fucking sick as it sounds I concluded after a while that she took my family from me and the fucking way to really get her is to take fucking her mom and her kids from her. I missed her dad by a couple minutes. I drove by the house, he was there, and I fucking circled the block and he must've just pulled out or I'd have fucking popped his fucking ass too.

{¶ 23} Sergeant Eric Risner testified that he and other officers apprehended Mammone sometime after 7:30 a.m. on June 8, 2009, in the driveway of his residence. They found Macy and James dead in the back seat of Mammone's car, still strapped into their car seats. The children had apparently been stabbed in the throat.

{¶ 24} Officer Randy Weirich testified that he removed two items from Mammone's car at the scene: a bloody knife from the back seat and a firearm from the front seat. The firearm had a live round in the chamber, its hammer was cocked, and the safety was off.

{¶ 25} After the vehicle was towed for processing, Officer Weirich cataloged the rest of the car's contents. The evidence log includes ammunition for a .32–caliber gun; a backpack containing knives, heavy-duty shears, and tongs; an axe handle with nails protruding from holes that had been drilled into it; a baseball bat; a military-style bayonet; Mammone's cell phone and a spare battery; a framed wedding photo of Marcia; and Marcia's dried wedding bouquet. Officer Weirich also removed from the car a switchblade and a pocket knife.

{¶ 26} Mammone was arrested and transported to police headquarters. Once in custody, he signed a written waiver of his *Miranda* rights and gave a full confession. The state introduced an audio recording of the confession at trial.

{¶ 27} In his confession, Mammone explained that he had picked up Macy and James for visitation at about 4:00 p.m. on June 7. He then drove past Marcia's

nearby apartment. (Mammone admitted that he was not supposed to know where Marcia lived, but he had learned her new address and occasionally stalked her.) He saw a truck parked in Marcia's driveway, and he recognized it because it had been parked there two weeks earlier. Macy told him that the truck belonged to a boy. Mammone explained that this news "didn't make me very happy obviously." He circled the block, and the truck was gone when he drove by again.

{¶ 28} Mammone stated that he suspected that Marcia was on a date, so he went "on the hunt" for her with the children in the back seat. He spent a few hours driving around looking for Marcia, all the while "sending [her] agitating text messages trying to get her attention."

{¶ 29} Around 6:30 p.m., Mammone took the children to his place for dinner. As he continued to text Marcia, he was "getting to the point of no return." He figured that he had already violated the protection order, and he had "had enough." He said that he had long hoped that things would improve, but stated that "once I suspected that she might have a guy that she was interested in that was it for me, I can't deal with that. It's just not anything that I'm willing to accept."

{¶ 30} According to Mammone, after dinner he loaded the children into a gold 1992 Oldsmobile that he had recently purchased. He stated that he had a Beretta .32–caliber automatic handgun, a gasoline container (which he later stopped to refill), a Scripto lighter, a bag full of butcher-type knives, a bayonet, a baseball bat, and another bat-type weapon he had made by driving nails through a hickory shovel handle or axe handle. He also said that he had approximately a dozen painkillers. He took one pill around 9:00 p.m. to "deaden the pain" if he was shot by police officers later that night.

{¶ 31} Mammone stated that he parked at Westminster Church (his and Marcia's "family church") just before 5:45 a.m. He stabbed Macy and James with a butcher knife while they were still strapped in their car seats. Mammone related that he had to stab each child in the throat four or five times, which was more than he had expected would be necessary. When detectives asked why he had stabbed the children rather than shooting them, Mammone offered three reasons: (1) noise, (2) uncertainty about whether his gun was dependable, and (3) a desire to conserve rounds for what might lie ahead.

{¶ 32} Mammone said that after killing Macy and James, he drove to the Eakins' home at approximately 5:45 a.m. He left the children in the back seat of the car and "barged in" through the Eakins' unlocked door carrying his Beretta. Mammone found Margaret in a guest room and shot her in the chest. The gun jammed before he could fire a second round, so he began to hit Margaret with the gun. He then beat her with a lamp until the lamp began to fall apart. Mammone managed to unjam the gun and shot Margaret in the face at close range. He told

police officers that a third bullet may have fallen out of the gun when he was attempting to dislodge the slide.
{¶ 33} Mammone stated that he then drove to Marcia's nearby apartment. The truck that he had seen the previous evening was in the driveway. He poured gasoline on the truck and attempted to light it, but the lighter fell apart in his hands.

{¶ 34} Mammone related that after he was unable to light the fire, he retrieved four weapons from his car: (1) the handgun, which he had to unjam again to prepare to fire, (2) the bayonet, which he put in his front pocket, (3) the baseball bat, and (4) the "bat type of weapon" that he had made. He smashed Marcia's screen-door window and back door with the bat and then entered the apartment. Once inside, Mammone unsuccessfully looked for matches or a lighter. He did not go upstairs because he was concerned that Marcia or "the person that was there to protect her" might have a firearm, and he did not want to be a "sitting duck." Mammone left the apartment and began throwing the baseball bat at a second-floor window, but he became frustrated. He searched his car for another lighter and, unable to find it, drove away.

{¶ 35} After killing his mother-in-law and breaking into Marcia's apartment, Mammone drove around with the children's bodies for several hours. He had expected that he would want to die after committing these violent acts, but he was surprised to find that he "didn't really feel * * * like dying." He also "didn't feel like getting arrested," so he drove in areas where he did not expect to see police officers and drove the speed limit. He claimed that he then took approximately a dozen pills—which he identified as Valium or painkillers—but not enough to cause an overdose.

{¶ 36} Mammone said that he then drove to the Independence Police Station to turn himself in, but he fell asleep in the station parking lot. When he woke, he contacted a relative who arranged for Mammone to turn himself in at a Canton park. En route to the park, Mammone decided to go by his apartment to switch to his BMW, with the idea of leaving the children in the Oldsmobile so that they would not be part of any scene at the park. But an unmarked police car was waiting for him, and he was apprehended.

{¶ 37} Mammone told officers that he had contemplated "doing this" for 22 months, but that he had initially intended to kill Marcia, not Macy and James. He said that he killed his mother-in-law because it was "a major blow to [Marcia] to not have her mother." He indicated that hurting Marcia was one of the motives for killing Macy and James as well, but he also cited his objection to divorce as a reason for their murders. Mammone said that he did not intend to kill Marcia on June 8, but that he did plan to maim her. He had wanted to beat Marcia's uterus area with his homemade weapon (making her unable to conceive children), to break her ankles with the baseball bat (something she feared that she had seen done in a movie), and to cut out her tongue (as punishment for not speaking to

him). Mammone also said that he would have killed the man at Marcia's apartment if he could have.

{¶ 38} Dr. P.S. Murthy, the Stark County coroner, performed autopsies on Margaret, Macy, and James on June 9, 2009. He testified that he determined that the cause of death for all three victims was homicide.

{¶ 39} According to Dr. Murthy, Margaret had suffered two fatal gunshot wounds and more than 20 blunt-impact injuries and lacerations, consistent with being struck by the butt of a gun and by a household lamp. One bullet had been fired into Margaret's left upper lip from a distance of about six to eight inches and was recovered from the occipital lobe of her brain. Another bullet pierced Margaret's right upper shoulder, perforated her right lung, and exited through her back.

{¶ 40} Dr. Murthy testified that both children died as a result of stab wounds with exsanguination (massive blood loss). Macy had multiple stab wounds to the neck, while James had a single stab wound that went through his neck. Both children's lungs were filled with aspirated blood. Macy's right hand and right leg bore multiple defensive wounds, and James had a defensive wound on his right hand.

{¶ 41} According to a laboratory analyst who testified, multiple bloodstains on Mammone's shirt at the time of his arrest had DNA profiles consistent with Margaret's DNA. In addition, a laboratory analyst identified Mammone's fingerprint on a lighter that officers retrieved from a flowerbed near Marcia's apartment.

{¶ 42} Law-enforcement officers took bodily fluid samples from Mammone on the day of his arrest. According to a laboratory analyst, tests did not reveal any trace of opiates or acetaminophen in Mammone's blood.

{¶ 43} Mammone did not present a case in defense during the trial phase. Before the trial began, defense counsel advised the court during a bench conference that as a matter of strategy, Mammone had "elected to, in effect, concede the trial phase in this matter," and Mammone himself informed the judge that he instead preferred to focus on the second phase of trial. During a brief opening statement, defense counsel candidly explained to the jury that Mammone did not "contest[ ] much of the evidence and/or facts with respect to this matter." Mammone's counsel repeated that statement during trial-phase closing arguments, emphasized Mammone's honesty in responding to police officers' questioning, and urged the jury to decide the case based on the law rather than on emotion.

On January 14, 2010, the jury returned guilty verdicts on all counts. After a sentencing hearing, the jury unanimously recommended a sentence of death for each of the three aggravated murders. The trial court accepted the

> recommendation and imposed three death sentences in open court on January 22, 2010.
>
> {¶ 45} The trial court then sentenced Mammone for his noncapital convictions. The court merged Mammone's convictions for two of the gun specifications and also merged his convictions for violating a civil protection order and aggravated burglary of the Eakins' home. Mammone was sentenced to a total of 27 years of consecutive imprisonment for his noncapital offenses.

Mammone, *supra*, 139 Ohio St. 3d at 468–75.

B. Direct Appeal

Mammone raised nine claims in his appeal to the Ohio Supreme Court:

1. The trial court's denial of his motion for a change of venue violated his right to a fair trial.

2. The trial court erred in refusing to dismiss two veniremembers who were biased in favor of the death penalty.

3. The trial court erred by admitting unduly prejudicial crime-scene and autopsy photographs.

4. Prosecutorial misconduct at the guilt and sentencing phases.

5. Trial counsel were ineffective at the guilt phase for not: A) conducting an adequate voir dire; B) objecting to the admission of the crime-scene and autopsy photographs; and C) objecting to the prosecutor's misconduct.

6. Trial counsel were ineffective at the penalty phase for: A) not properly interviewing the defense's mitigation witnesses and preparing them to testify; and B) allowing Mammone to make a five-hour, unsworn statement to the jury.

7. The death penalty constitutes cruel and unusual punishment.

8. The death penalty violates the U.S. Constitution and international law.

9. Mammone's death sentence was unreliable and inappropriate under O.R.C. § 2929.05(A).

The Ohio Supreme Court rejected these claims and affirmed Mammone's convictions and sentences. The United States Supreme Court denied Mammone's ensuing petition for a writ of certiorari. *Mammone v. Ohio*, 135 S. Ct. 959 (2015) (mem.).

C. Application to Reopen

In October, 2014, Mammone applied to reopen his direct appeal under Ohio S. Ct. Prac. R. 11.06. The application alleged that appellate counsel had been ineffective for not arguing that:

1. Trial counsel were ineffective for presenting Mammone's mitigation case under the wrong statutory mitigating factor.

2. The prosecution: A) withheld evidence that, shortly after his arrest, Mammone's blood and urine samples tested positive for benzodiazepines; and B) presented false testimony that Mammone's blood and urine tested negative for any drugs.

3. Trial counsel were ineffective for not conducting an adequate voir dire of Juror 430, an "automatic death penalty juror."

4. Trial counsel were ineffective for not making and/or renewing motions and objections to preserve Mammone's appellate rights.

(Doc. 10–21, PageID 1943–53).

The Ohio Supreme Court denied the application. (*Id.*, PageID 2036).

D. Postconviction Review

In May, 2011, while his direct appeal was pending, Mammone filed a petition for postconviction relief in the state trial court and a request for funds to obtain neuropsychological testing. (Doc. 10–22, PageID 2154, 2368). The petition raised ten grounds for relief:

1. Trial counsel were ineffective for not obtaining a neuropsychologist to evaluate Mammone.

2. Trial counsel were ineffective for not conducting an adequate voir dire to determine if the veniremembers were biased in favor of capital punishment.

3. Mammone did not receive a fair trial because one of the jurors refused to follow the trial court's instruction that he consider all mitigating factors presented by the defense.

4. Mammone did not receive a fair trial because the jurors prayed together before beginning their penalty-phase deliberations.

5. The imposition of the death penalty was arbitrary and capricious.

6. Trial counsel were ineffective for not arguing or presenting evidence that the death penalty is applied in arbitrary manner in Stark County, Ohio.

7. Trial counsel were ineffective for not using certain documents to cross-examine the state's toxicology expert, who testified that Mammone did not have drugs in his system after his arrest.

8. The prosecution suppressed favorable evidence showing that Mammone had benzodiazepines in his blood or urine.

9. The prosecution knowingly presented false testimony that Mammone did not have drugs in his system.

10. The cumulative effect of the errors alleged in the postconviction petition prejudiced Mammone's trial and sentencing hearing.

(*Id.*, PageID 2154–85).

The state trial court denied relief. (*Id.*, PageID 2419–39). It also denied the request to fund a neuropsychologist, explaining that Ohio law did not entitle Mammone to such funds and that Mammone's defense team had the assistance of a forensic psychologist at trial. (*Id.*, PageID 2419–20).

Mammone appealed, raising the same grounds for relief that he had raised in his postconviction petition. The Ohio Court of Appeals affirmed. *State v. Mammone*, 2012 WL 3200685 (Ohio App. 2012) (*Mammone II*). He then sought leave to raise those same claims in the Ohio Supreme Court, but the court declined to hear the case. *State v. Mammone*, 141 Ohio St. 3d 1454 (Ohio 2015).

E. Federal Habeas Petition

Mammone timely filed his § 2254 petition in this court in February, 2017, raising nineteen grounds for relief:

1. The trial court's denial of his motion for a change of venue violated his right to a fair trial.

2. The trial court erred by admitting unduly prejudicial photographs and physical evidence.

3. The admission of crime-scene and autopsy photographs of Mammone's children violated Mammone's right to a fair trial.

4. Two jurors were biased in favor of the death penalty.

5. Trial counsel were ineffective for not moving to exclude Juror 430 based on his bias in favor of the death penalty.

6. One of the jurors refused to follow the trial court's instruction that he consider all mitigating factors presented to the jury.

7. The jury violated Mammone's right to a fair trial by praying before its penalty-phase deliberations.

8. Executing Mammone, who has a severe mental illness, would be cruel and unusual punishment.

9. Trial counsel were ineffective for not obtaining a neuropsychologist to evaluate Mammone and conduct necessary testing.

10. The prosecution withheld favorable evidence showing that Mammone's blood and urine had tested positive for benzodiazepines.

11. The prosecution knowingly introduced false testimony regarding the alleged absence of drugs in Mammone's blood and urine.

12. The prosecution committed misconduct during the penalty phase by arguing non-statutory aggravating factors.

13. The Stark County prosecutor's uncontrolled discretion to seek the death penalty is unconstitutional.

14. Trial counsel were ineffective for:

    A. not introducing evidence that Mammone has Autism Spectrum Disorder;

    B. failing to conduct an adequate voir dire to ensure the jurors were not biased in favor of the death penalty;

    C. not properly preparing the defense's mitigation witnesses to testify;

    D. permitting Mammone to make a five-hour unsworn statement at the penalty phase; and

E. failing to object to all instances of prosecutorial misconduct.

15. Trial counsel were ineffective for not gathering and presenting statistical evidence showing that the Stark County prosecutor pursues capital sentences in an arbitrary and capricious way.

16. Appellate counsel was ineffective for not arguing that:

A. Trial counsel were ineffective for presenting Mammone's mitigation case under the wrong statutory mitigating factor.

B. The prosecution withheld evidence that Mammone's blood and urine samples tested positive for benzodiazepines and presented false testimony that Mammone's blood and urine tested negative for any drugs.

C. Trial counsel were ineffective for not conducting an adequate voir dire of Juror 430, who was an "automatic death penalty juror."

D. Trial counsel were ineffective for not making and/or renewing motions and objections to preserve Mammone's appellate rights.

17. Ohio's capital-sentencing regime is unconstitutional.

18. The cumulative effect of the foregoing errors prejudiced Mammone and violated his right to a fair trial.

19. Trial counsel were ineffective for not raising a defense of not guilty by reason of insanity.

(Doc. 23).

In December, 2017, Mammone moved for a stay so that he could return to the Ohio courts and litigate four claims that he described as "unexhausted." (Doc. 24). I denied the motion, concluding that the claims were procedurally defaulted, not unexhausted, because he "had the opportunity to develop them in state court, but did not[.]" *Mammone v. Jenkins*, 2018 WL 454432, *1 (N.D. Ohio 2018) (*Mammone III*) (internal quotation marks omitted).

Discussion

The habeas corpus statute "bars relitigation" of those claims a state court adjudicated on the merits, unless the "state court's decision was contrary to federal law then clearly established in the holdings of" the United States Supreme Court, "involved an unreasonable application of such law," or "was based on an unreasonable determination of the facts." *Harrington v. Richter*, 562 U.S. 86, 100 (2011); 28 U.S.C. § 2254(d).

A state court's decision is "contrary to" clearly established federal law only if the court "applies a rule that contradicts the governing law set forth in [Supreme] Court cases" or "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives" at a different result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

A state court's application of the governing legal rule is unreasonable only when the court "err[s] so transparently that no fairminded jurist could agree with the court's decision." *Bobby v. Dixon*, 565 U.S. 23, 24 (2011); *see also White v. Woodall*, 572 U.S. 415, 427 (2014) (habeas relief is available "if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no fairminded disagreement on the question") (internal quotations omitted).

Review under § 2254(d) is "limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

A. Pretrial Publicity

Mammone first claims that the "extensive pretrial publicity surrounding the deaths of his children and mother-in-law" denied him a fair trial. (Doc. 23, PageID 11178). He contends that, in light of the extensive and adverse nature of the publicity, the Ohio courts should have

presumed that he could not receive a fair trial in Stark County. Alternatively, he argues that the jurors were actually biased against him.

This claim revolves around the fact that the local newspaper, the *Canton Repository*, published a letter that Mammone wrote in jail and sent to the newspaper. According to Mammone, this letter "detail[ed] what happened in the case and why the murders were committed." (*Id.*, PageID 11179). The *Repository* published this letter, essentially Mammone's confession, on the front page of its August 25, 2009 print edition and on its website. (*Id.*).[1]

Mammone also maintains that "numerous blogs, television broadcasts, radio shows, online chat rooms, and newspaper articles" provided "extensive coverage" of the case." (*Id.*). He cites excerpts from the *Repository*'s online comments section, where various participants urged that "this man deserves no trial" and "execute, execute, execute." (*Id.*, PageID 11180).

Adding to the already prejudicial nature of the pretrial publicity, Mammone contends, was the "sensational" nature of the case – Mammone "stabbed" his children "when he had them for visitation" as part of "a bitter divorce[.]" (*Id.*, PageID 11178).

The Warden argues that this claim is procedurally defaulted in part and otherwise without merit. (Doc. 29, PageID 11383–89).

1. State Court's Decision

The Ohio Supreme Court rejected Mammone's claim on direct appeal.

It first held that Mammone's case was "not one of the extraordinary cases in which prejudice should be presumed based solely on the amount and nature of the pretrial publicity alone." *Mammone*, *supra*, 139 Ohio St. 3d at 480. The court then ruled that Mammone forfeited

[1] "Mammone's confession letter published in the *Repository* was not admitted into evidence at trial." *Mammone*, *supra*, 139 Ohio St. 3d at 479 n.1.

his claim that the pretrial publicity in fact biased the jurors, and that he had not shown plain error to excuse his forfeiture. *Id.* at 481–82.

As the state high court explained:

> {¶ 48} Mammone filed a pretrial motion for a change of venue on October 1, 2009. As an appendix to the motion, Mammone attached copies of articles posted on the *Canton Repository*'s website, CantonRep.com, between June 9 and August 26, 2009, along with comments posted by online readers of the newspaper. He also attached copies of postings that appeared on other websites.
>
> {¶ 49} The trial court held a venue hearing on November 12, 2009. During the hearing, Mammone submitted 11 exhibits, including coverage of his case from various radio, television, and print publications. The materials included a copy of a "confession letter" that had been published in the print version of the *Repository* on August 25, 2009, and posted on its website. The letter, written and sent by Mammone himself, began with the statement that it was mailed to the newspaper to "set the record straight regarding any questions and misconceptions" about the murders of Margaret, Macy, and James. Mammone argued at the hearing that in light of these materials, "an attempt to seat a jury would be likely futile," so that the court should presume prejudice and grant his change-of-venue motion.
>
> {¶ 50} The state countered that it would be premature to change venue before conducting voir dire, and the trial court agreed. The court expressed concern about the *Repository*'s publication of Mammone's letter, but observed that "this case has not gotten nearly the type of publicity" that would require the court to grant the motion without even seeking "to review and do a voir dire of prospective jurors." Without a thorough voir dire, the court deemed it impossible to determine whether media exposure was "so pervasive that an impartial jury [would] be impossible to seat." As a result, the court denied Mammone's motion as premature but left the issue open for further consideration "during and after the Voir Dire."
>
> {¶ 51} At the close of the venue hearing, the court advised Mammone, "I would expect you to refile at any time or reargue your motion for a change of venue." Mammone never did so.
>
> {¶ 52} 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.
>
> *b. Right to a fair and impartial jury*
> {¶ 53} "[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722

(1961). In a capital case, jurors must be impartial as to both culpability and punishment. *Morgan v. Illinois*, 504 U.S. 719, 726–728 (1992). "[W]hen it appears that a fair and impartial trial cannot be held in the court in which the action is pending," Crim.R. 18(B) gives a trial court authority—sua sponte or upon a party's motion—to transfer venue to another jurisdiction. *See* R.C. 2901.12(K); *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 33. One common argument for a venue change is that pretrial publicity has impaired a jury's ability to be fair and impartial.

{ ¶ 54} The trial court has a "duty to protect" criminal defendants from "inherently prejudicial publicity" that renders a jury's deliberations unfair. *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). However, "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 554, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

{ ¶ 55} This court has repeatedly stated that "the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality" is "a careful and searching voir dire." *State v. Bayless*, 48 Ohio St.2d 73, 98, 357 N.E.2d 1035 (1976); *see State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 49 (listing cases). As a general rule, a trial court should therefore make "'a good faith effort * * * to impanel a jury before * * * grant[ing] a motion for change of venue.'" *State v. Warner*, 55 Ohio St.3d 31, 46, 564 N.E.2d 18 (1990), quoting *State v. Herring*, 21 Ohio App.3d 18, 486 N.E.2d 119 (9th Dist.1984), syllabus.

{ ¶ 56} That said, the United States Supreme Court has held that in certain rare cases, pretrial publicity is so damaging that prejudice must be conclusively presumed even without a showing of actual bias. *See, e.g., Sheppard; Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); *Irvin*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751. To prevail on a claim of presumed prejudice, however, a defendant must make "'a clear and manifest showing * * * that pretrial publicity was so pervasive and prejudicial that an attempt to seat a jury would be a vain act.'" *Warner* at 46, 564 N.E.2d 18, quoting *Herring* at syllabus; *see Herring* at 18, 486 N.E.2d 119 (citing judicial economy, convenience, and reducing taxpayer expense as reasons for a trial court to attempt to seat a jury prior to transferring venue to another location).

{ ¶ 57} We therefore must engage in a two-step analysis of venue in this case, determining first whether the jury was presumptively prejudiced against Mammone and, if not, whether Mammone has established actual juror prejudice. *See Skilling v. United States*, 561 U.S. 358, 381, 130 S.Ct. 2896, 2915, 177 L.Ed.2d 619 (2010); *Campbell v. Bradshaw*, 674 F.3d 578, 593–594 (6th Cir.2012).

c. Prejudice should not be presumed in this case

{¶ 58} "A presumption of prejudice" because of adverse press coverage "attends only the extreme case." *Skilling* at 381, 130 S.Ct. at 2915; *see also Campbell* at 593, quoting *Foley v. Parker*, 488 F.3d 377, 387 (6th Cir.2007) (prejudice from pretrial publicity "'is rarely presumed'").

{¶ 59} The doctrine of presumed prejudice "is the product of three Supreme Court decisions from the 1960's": *Rideau v. Louisiana*, *Estes v. Texas*, and *Sheppard v. Maxwell*. *Hayes v. Ayers*, 632 F.3d 500, 508 (9th Cir.2011). The United States Supreme Court most recently applied the doctrine in *Skilling v. United States*, in which the court analyzed four factors before rejecting a claim of presumed prejudice. Namely, the court considered (1) the size and characteristics of the community in which the crime occurred, (2) whether media coverage about the defendant contained "blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight," (3) whether the passage of time lessened media attention, and (4) whether the jury's conduct was inconsistent with a presumption of prejudice. *Id.* at 382–383, 130 S.Ct. at 2915–2916; *see United States v. Warren*, 989 F.Supp.2d 494 (E.D.La.2013). However, *Skilling* did not hold that these four factors are dispositive in every case or indicate that these are the only relevant factors in a presumed-prejudice analysis.

{¶ 60} Here, we find that our analysis is best informed by comparing the facts of this case not to *Skilling*—in which prejudice was not presumed—but to the facts of the cases in which the United States Supreme Court has presumed prejudice. Two of these three cases, *Estes* and *Sheppard*, are not particularly instructive because they "involved media interference with courtroom proceedings *during* trial." (Emphasis sic.) *Skilling*, 561 U.S. at 382, 130 S.Ct. at 2915, 177 L.Ed.2d 619, fn. 14; see also *Hayes*, 632 F.3d at 508. In *Estes*, "extensive publicity before trial swelled into excessive exposure during preliminary court proceedings" as the media "overran the courtroom" and caused significant disruption. *Skilling* at 379–380, 130 S.Ct. at 2914. In *Sheppard*, "bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom." *Sheppard*, 384 U.S. at 355, 86 S.Ct. 1507, 16 L.Ed.2d 600. The United States Supreme Court in *Sheppard* "upset the [defendant's] murder conviction because a 'carnival atmosphere' [had] pervaded the trial." *Skilling* at 380, 130 S.Ct. at 2914, quoting *Sheppard* at 358, 86 S.Ct. 1507. There is no evidence of such interference here.

{¶ 61} The third case, *Rideau*, is most relevant to our analysis because in that case, the United States Supreme Court presumed prejudice based solely on pretrial publicity. In *Rideau*, the parish sheriff's office had filmed an interrogation of the defendant, during which he confessed to bank robbery, kidnapping, and murder. 373 U.S. at 724, 83 S.Ct. 1417, 10 L.Ed.2d 663. A 20–minute recording of the confession was broadcast three times on television within weeks of Rideau's trial. *Id.* Audiences ranging from 20,000 to 53,000 people viewed the broadcasts, in a total population of approximately 150,000 people. *Id.* Under the circumstances, the United States Supreme Court concluded that "to the tens of

thousands of people who saw and heard" Rideau "personally confessing in detail to the crimes," the interrogation "in a very real sense was Rideau's trial—at which he pleaded guilty to murder." (Emphasis sic.) *Id.* at 726, 83 S.Ct. 1417. As a result, the court concluded that the defendant's subsequent trial amounted to a "hollow formality," and it conclusively presumed prejudice. *Id.* at 726–727, 83 S.Ct. 1417.

{¶ 62} As in *Rideau*, the instant case involves the widespread dissemination of a suspect's supposed confession to crimes. Like the trial court, we believe that "the publication of the [confession] letter on the front page" of the *Repository* "is the thing that's most troublesome" about the pretrial publicity in this case. A "defendant's own confession [is] probably the most probative and damaging evidence that can be admitted against him." *Skilling* at 383, 130 S.Ct. at 2916, quoting *Parker v. Randolph*, 442 U.S. 62, 72, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979) (plurality opinion). That said, pretrial publicity about a confession—even one that is inadmissible at trial—"is not in itself sufficient to require a venue transfer." *United States v. Warren*, 989 F.Supp.2d at 501.

{¶ 63} Several constitutionally significant factors distinguish the print publication of Mammone's confession from the repeated television broadcasts of Rideau's confession that aired in 1961. First, the manner of publication differed in a crucial way. As the United States Court of Appeals for the Sixth Circuit has explained, "[T]he controlling factor in the [*Rideau*] decision was the fact that the public *viewed* the confession in a televised format." (Emphasis sic.) *DeLisle v. Rivers*, 161 F.3d 370, 384 (6th Cir.1998) (en banc). "[A]ctually seeing and hearing the confession, as one would in a courtroom, would create a certainty of belief that would be difficult for the public to lay aside." *Id.* Here, the public did not view Mammone confessing.

{¶ 64} Second, the circumstances of publication diverge from *Rideau* in significant ways. In *Rideau*, the defendant's televised confession aired just weeks before the trial began, and roughly one-third of the entire local population viewed the broadcast. Here, Mammone's confession letter was published a single time more than four months before his trial began. And Mammone failed to establish a level of exposure in Stark County similar to the exposure in Rideau. The trial court concluded that it was not futile to attempt to seat a jury given "the figures submitted by the *Repository*" about readership, "the population of Stark County," and the considerations that the county has three newspapers and that many county residents subscribe to a fourth newspaper published outside the county. Mammone never supplemented the record or attempted to reargue this point.

{¶ 65} Third, unlike *Rideau*, in which the defendant played no role in the dissemination of his confession, here Mammone himself provided the confession letter to the *Repository*. He therefore is responsible for instigating the single most significant incident of pretrial publicity in his case, which more than anything

increased that publicity to a level that he claims should have required the trial court to grant his motion to change venue.

{¶ 66} Finally, although Mammone claims that "[t]he venires were replete with potential jurors who had been extensively prejudiced by media accounts and had formed such strong opinions as to not be able or willing to change their minds," the voir dire transcript reveals otherwise. Prejudice should not be presumed.

{¶ 67} The trial court was very conscious of pretrial publicity in Mammone's case. Each potential juror was asked to complete an extensive publicity questionnaire, and the court permitted thorough questioning about publicity issues during small-group voir dire. Dozens of potential jurors stated that they knew nothing about the case. The court instructed the potential jurors during voir dire to disregard all information from outside sources and sought assurances that every juror would set aside any preexisting opinions and be fair to both sides. The potential jurors were reminded that the media is not always accurate, and they were warned to avoid additional publicity. Most importantly, the trial court excused potential jurors who expressed an inability to set aside preexisting opinions.

{¶ 68} Under these circumstances, we cannot conclude that extensive pretrial publicity rendered Mammone's trial a "hollow formality." *Compare Rideau*, 373 U.S. at 726, 83 S.Ct. 1417, 10 L.Ed.2d 663. As a result, we hold that this is not one of the extraordinary cases in which prejudice should be presumed based solely on the amount and nature of the pretrial publicity alone.

d. Actual prejudice does not exist in this case

{¶ 69} Having concluded that prejudice should not be presumed here, we next analyze whether actual prejudice exists. Because Mammone did not raise this objection in the trial court or seek a change of venue at any point after the pretrial venue hearing, we review this claim for plain error. *See State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 61 (reviewing change-of-venue claim for plain error when defendant had waived the argument). We take notice of plain error "with the utmost caution, under exceptional circumstances and only to prevent a miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. To prevail, Mammone must show that an error occurred, that the error was plain, and that but for the error, the outcome of the trial clearly would have been otherwise. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

{¶ 70} Mammone levies several charges of actual bias due to pretrial publicity among members of both the jury pool and the seated jury and argues that the trial court should have ordered a change of venue. For the reasons below, we find no error in this regard, let alone plain error.

{¶ 71} First, Mammone argues that he was denied a fair trial because almost every seated juror "had either read, heard, discussed or [seen] an account of the deaths of the Mammone children and their grandmother." But actual bias is not established simply by pointing out some degree of media exposure. *See, e.g., Trimble* at ¶ 63–64; *State v. Maurer*, 15 Ohio St.3d 239, 251, 473 N.E.2d 768 (1984). A juror will be considered unbiased "if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, 366 U.S. at 723, 81 S.Ct. 1639, 6 L.Ed.2d 751.

{¶ 72} Second, Mammone objects that four specific seated jurors—juror Nos. 372, 438, 448, and 461—were biased against him. But juror Nos. 438 and 448 testified that they had not formed any opinions about the case before trial. Juror Nos. 372 and 461 admitted that they had formed some preliminary opinions, but they assured the judge that they could set these opinions aside and be fair.

{¶ 73} The trial judge is "in the best position to judge each juror's demeanor and fairness" and thus to decide whether to credit a potential juror's assurance that he or she will set aside any prior knowledge and preconceived notions of guilt. *Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, at ¶ 64. One factor in determining whether a trial judge reasonably accepted such assurances is how many other potential jurors admitted a disqualifying prejudice:

> In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations [of impartiality] may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it.

Murphy v. Florida, 421 U.S. 794, 803, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). Here, there is no evidence of such unwitting influence. For example, in the first small-group voir dire session of 12 potential jurors, only two admitted to a disqualifying prejudice based on pretrial publicity and were excused. Upon careful examination of the record, we defer to the trial court's reasonable conclusion that the four jurors now challenged could be fair and impartial jurors.

{¶ 74} Finally, we are not persuaded by Mammone's vague claim that the entire jury was tainted because those jurors who had been exposed to extensive publicity shared "innumerable opinions about the case" with other jurors. As explained above, Mammone has not established that any of his jurors were actually biased by pretrial publicity. Moreover, he presents no evidence that any juror improperly influenced another juror by stating an inappropriate opinion. Under the circumstances, we reject Mammone's contention as meritless and unsupported by the record.

Mammone, *supra*, 139 Ohio St. 3d at 475–82.

2. Discussion

"Criminal defendants tried in state court have a Fourteenth Amendment right to a fair trial by a panel of impartial, unbiased jurors." *Lang v. Grundy*, 399 F. App'x 969, 972 (6th Cir. 2012). "A jury is presumed impartial, and the burden rests with the challenger to show otherwise." *Id.*

"It is well established," however, "that if prejudicial pretrial publicity jeopardizes a defendant's right to a fair trial by an impartial jury, the court should grant the defendant a change in venue." *Campbell v. Bradshaw*, 674 F.3d 578, 593 (6th Cir. 2012).

"Presumptive prejudice from pretrial publicity occurs where an inflammatory, circus-like atmosphere pervades both the courthouse and the surrounding community and is rarely presumed." *Id.* "To demonstrate actual prejudice, the publicity and the voir dire testimony must show that a fair trial was impossible." *Hand v. Houk*, 871 F.3d 390, 410 (6th Cir. 2017)

The Supreme Court has emphasized that its cases "cannot be made to stand for the proposition that juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process." *Skilling v. U.S.*, 561 U.S. 358, 380 (2010). Thus "pretrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976).

The Ohio Supreme Court's decision in this case was not contrary to, nor did it involve an unreasonable application of, this clearly established Supreme Court precedent.

a. Presumed Prejudice

i. The "Contrary to" Prong

The state court recognized that "'[a] presumption of prejudice' because of adverse press coverage 'attends only the extreme case.'" *Mammone*, *supra*, 139 Ohio St. 3d at 477 (quoting

Skilling, *supra*, 561 U.S. at 381). But the court concluded that, for several reasons, the pretrial publicity in Mammone's case did not trigger that presumption.

Mammone contends that one of the state court's rationales – its refusal to "allow Mammone to benefit from the publicity he created by submitting his own confession to the *Repository*," *Mammone*, *supra*, 139 Ohio St. 3d at 476 – "contravenes" the Supreme Court's decision in *Rideau v. Louisiana*, 373 U.S. 723 (1963). (Doc. 34, PageID 11459).

The Court held in *Rideau*, *supra*, 373 U.S. at 725–26, that the repeated publication of a film in which the defendant confessed to murder created a presumption that the defendant could not receive a fair trial absent a change of venue. In so holding, the Court noted some uncertainty in the record as to "who originally initiated the idea of the televised interview" but concluded that this was an "irrelevant detail":

> The record fails to show whose idea it was to make the sound film, and broadcast it over the local television station, but we know from the conceded circumstances that the plan was carried out with the active cooperation of the local law enforcement officers. And certainly no one has suggested that it was Rideau's idea, or even that he was aware of what was going on when the sound film was being made.
>
> In the view we take of this case, the question of who originally initiated the idea of the televised interview is, in any event, a basically irrelevant detail. For we hold that it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged.

Id.

Contrary to Mammone's claim, nothing in this passage from *Rideau* clearly forbids a state court adjudicating a presumed-prejudice claim to give some weight to the fact that it was the defendant, rather than the authorities, who initiated the chain of events that allegedly warrant a presumption of prejudice. Indeed, the Court in *Rideau* emphasized that, unlike what happened

in Mammone's case, "no one has suggested that it was Rideau's idea, or even that he was aware of what was going on when the sound film was being made." *Id.* at 725. Here, of course, it was Mammone's idea to write a confession and send it to the local newspaper.

Because the Ohio Supreme Court was not dealing with "a set of facts that are materially indistinguishable from" *Rideau*, its decision was not contrary to that case or any other Supreme Court precedent. *Williams*, *supra*, 529 U.S. at 405.

ii. The "Unreasonable Application" Prong

Nor did the Ohio Supreme Court unreasonably apply clearly established Supreme Court precedent in rejecting Mammone's presumed-prejudice claim.

The court began by comparing Mammone's case to two cases where the Supreme Court held that extensive pretrial publicity triggered a presumption of prejudice: *Estes v. Texas*, 381 U.S. 532 (1965), and *Sheppard v. Maxwell*, 384 U.S. 333 (1966). But those cases were "not particularly persuasive," the court found, because "they involved media interference with courtroom proceedings *during* trial," which was not an issue in Mammone's case. *Mammone*, *supra*, 139 Ohio St. 3d at 478 (emphasis in original).

Rather, the state court found that *Rideau*, *supra*, was the "most relevant" to its analysis because there the Supreme Court "presumed prejudice based solely on pretrial publicity." *Mammone*, *supra*, 139 Ohio St. 3d at 479.

Then, employing a totality-of-the-circumstances test that it derived from *Skilling*, *supra*, the Ohio Supreme Court identified "[s]everal constitutionally significant factors" that "distinguish[ed] the print publication of Mammone's confession from the repeated television broadcasts of Rideau's confession[.]" *Id.* These distinctions were: 1) the fact that Mammone's confession appeared once in print, whereas the confession in *Rideau* appeared on television three

times; 2) the *Repository* published Mammone's confession about four months before trial, whereas the confession in *Rideau* appeared "just weeks" before trial; 3) Mammone's "fail[ure] to establish a level of exposure in Stark County similar to the exposure in *Rideau*"; 4) Mammone was "responsible for instigating the single most significant incident of pretrial publicity"; and 5) the transcript of voir dire refuted Mammone's claim that "the venires were replete with potential jurors who had been extensively prejudiced by media accounts and had formed such strong opinions as to not be able or willing to change their minds." *Mammone*, *supra*, 139 Ohio St. 3d at 479–80.

Mammone responds that the state court's decision was unreasonable, first, because roughly fifty-six percent of the venire acknowledged that "they were exposed to media coverage of [his] alleged crimes." (Doc. 34, PageID 22457). In addition, eighty-one of those veniremembers "admitted to believing Mr. Mammone guilty based on media accounts." (*Id.*).

This contention lacks merit, given the Supreme Court's insistence that "[p]rominence does not necessarily produce prejudice, and juror *impartiality* . . . does not require *ignorance*." *Skilling*, *supra*, 561 U.S. at 381 (emphasis in original).

Furthermore, the Ohio Supreme Court found as a factual matter that: 1) the trial judge permitted an extensive voir dire on the issue of pretrial publicity; 2) "[d]ozens of potential jurors stated that they knew nothing about the case"; and 3) "the trial court excused potential jurors who expressed an inability to set aside preexisting opinions." *Mammone*, *supra*, 139 Ohio St. 3d at 479–80. These presumptively correct factual determinations, which Mammone has not tried to rebut at all – let alone with clear and convincing evidence, *see* 28 U.S.C. § 2254(e)(1) – support the Ohio Supreme Court's reasonable decision that the pretrial publicity, though widespread and

focusing on Mammone's confession, was not so extraordinary as to warrant a presumption of prejudice.

Mammone next faults the Ohio Supreme Court for "entirely discount[ing] the impact of publication of [his] confession letter online where many people could access it continually prior to and during trial." (Doc. 34, PageID 11461).

But the state court did not just write off the impact of social media and the statement's availability online, as Mammone claims. Instead, the Ohio Supreme Court reasoned that "Mammone's generalized claims about . . . social media are insufficient to trigger a presumption of prejudice." *Mammone*, *supra*, 139 Ohio St. 3d at 479. More to the point, the state court explained that there was "no evidence" suggesting that "the social media comments cited 'are representative of the hundreds of thousands of individuals who were eligible to serve as jurors' in his trial." *Id.* at 479 n.1 (quoting *U.S. v. Warren*, 989 F. Supp. 2d 494, 501 (E.D. La. 2013)).

Finally, Mammone suggests that the Ohio Supreme Court was wrong to draw a distinction between the televised confession in *Rideau* and the written confession here, calling this a "distinction without a difference." (Doc. 34, PageID 11461). But this argument is impossible to square with *Rideau*, which emphasized that it was the televised "spectacle" of Rideau's confession, made in jail and in the presence of the authorities, that would have cemented in the community's mind the idea of Rideau's guilt:

> For we hold that it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth to the *spectacle of Rideau personally confessing* to the crimes with which he was later to be charged. *For anyone who has ever watched television* the conclusion cannot be avoided that *this spectacle*, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial – at which he pleaded guilty to murder. Any subsequent court proceedings in a

> community so pervasively exposed to such a spectacle could be but a hollow formality.

373 U.S. at 726 (emphasis supplied).

Try as Mammone might, it is not possible to separate the televised publication of Rideau's confession from the Court's holding that a presumption of prejudice was warranted in that case.[2] In these circumstances, it was not unreasonable for the Ohio Supreme Court to conclude that the fact that Mammone's confession was written rather than televised, among the other reasons the court gave, distinguished his case in a meaningful way from *Rideau*.

Mammone is not entitled to habeas relief on his presumed-prejudice claim.

b. Actual Prejudice

The Ohio Supreme Court held that Mammone forfeited his claim of actual prejudice by not "rais[ing] this issue in the trial court or seek[ing] . . . a change of venue hearing after the pretrial venue hearing." *Mammone*, *supra*, 139 Ohio St. 3d at 480. It then held that Mammone could not show plain error because there was "no error" at all. *Id.* at 481.

Rather than address the Warden's procedural-default defense and the attendant questions of cause and prejudice, I will simply address this claim on the merits. In doing so, I follow the Sixth Circuit's decisions in *Stewart v. Trierweiler*, 867 F.3d 633 (6th Cir. 2017), and *Fleming v. Metrish*, 556 F.3d 520 (6th Cir. 2009), which hold that § 2254(d) applies to a state court's plain-error analysis.

Under that standard, Mammone's claim has no merit.

Although Mammone emphasized that "almost every seated juror had either read, heard, discussed or seen an account of the deaths of the Mammone children and their grandmother,"

[2] Of course, that does not mean – and the Ohio Supreme Court did not suggest – that the publication of a written confession could never trigger a similar presumption.

Mammone, *supra*, 139 Ohio St. 3d at 481, the Ohio Supreme Court reasonably – and correctly – responded that "actual bias is not established simply by pointing out some degree of media exposure." *Id.*

Moreover, of the four seated jurors whom Mammone singled out as biased – Jurors 372, 438, 448, and 461 – two testified that "they had not formed *any* opinions about the case before trial." *Id.* (emphasis in original). Two others "admitted that they had formed some preliminary opinions, but they assured the judge that they could set these opinions aside and be fair." *Id.* As the Ohio Supreme Court explained, the trial judge was "in the best position to judge each juror's demeanor and fairness" and he accepted those answers (without a contemporaneous objection by Mammone). *Id.*

On habeas review, I have "no license to redetermine [the] credibility of witnesses whose demeanor has been observed by the state trial court, but not by" me. *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983). This is especially so, given Mammone's failure to come forward with clear and convincing evidence that the jurors actually were biased.

For these reasons, I conclude that the Ohio Supreme Court's holding that Mammone "has not established that any of his jurors were actually biased" was reasonable. *Id.* at 482. Habeas relief is therefore unavailable.

B. Evidentiary Errors

In his second ground for relief, Mammone alleges that the prosecution improperly displayed three kinds of evidence during the testimony of four prosecution witnesses: 1) crime scene photographs, including pictures of Mammone's murdered children still strapped in their car seats; 2) autopsy photographs of Macy and James; and 3) physical evidence recovered at the

crime scene, including, *inter alia*, the children's car seats and sippy cups, weapons, and items from Mammone's wedding. (Doc. 23, PageID 11183–86).

Mammone contends that the display of this evidence was improper because "the jurors knew that trial counsel was not disputing the manner in which the victims were killed[.]" (*Id.*, PageID 11184). Because "the jurors knew [he] admitted to the murders," Mammone claims there was no reason to display this evidence other than to inflame the jurors' passions. (*Id.*).

In his third ground for relief, Mammone challenges the admission into evidence of the crime-scene photographs of the children in their car seats and their autopsy photos. (*Id.*, PageID 11187–88). He contends that admitting the photographs was "completely unnecessary" because "the details of what transpired that evening were repeatedly and clearly testified to by different witnesses." (*Id.*, PageID 11188). Mammone argues that "[w]hatever marginal utility these photographs may arguably have had was offset by the prejudicial impact they undoubtedly had on the jurors and [his] right to a fair trial." (*Id.*).

The Warden argues that the second claim is meritless and that the third claim is defaulted in part and otherwise meritless. (Doc. 29, PageID 11391–92).

1. State Court's Decision

On direct appeal, the Ohio Supreme Court held that Mammone was not entitled to relief on either of these claims.

Regarding the admission of the crime-scene and autopsy photos of Macy and James, the state court held that: 1) the significant probative value of the photos "outweighed the danger of unfair prejudice to Mammone"; and 2) the photos were "neither repetitive nor cumulative":

> {¶ 96} In the context of capital trials, however, we have established "a stricter evidentiary standard" for admitting gruesome photographs and have "strongly caution[ed] judicious use." *State v. Morales*, 32 Ohio St.3d 252, 257–258, 259, 513 N.E.2d 267 (1987), citing *State v. Maurer*, 15 Ohio St.3d 239, 473 N.E.2d

768, at paragraph seven of the syllabus. A gruesome photograph is admissible only if its "probative value * * * outweigh[s] the danger of prejudice to the defendant." *Morales* at 258, 513 N.E.2d 267. Unlike Evid.R. 403, which turns on whether prejudice substantially outweighs probative value, this standard requires "a simple balancing of the relative values" of prejudice and probative value. *Id.* And even if a photo satisfies the balancing test, it can be "neither repetitive nor cumulative in nature." *Id.*; *see State v. Thompson*, 33 Ohio St.3d 1, 9, 514 N.E.2d 407 (1987). A trial court's decision that a photo satisfies this standard is reviewable only for abuse of discretion. *See State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶ 69; *Morales* at 257, 513 N.E.2d 267; *Maurer* at 264, 473 N.E.2d 768.

a. Photos of the crime scene

{¶ 97} First, Mammone challenges the introduction of two crime-scene photos, Exhibits 2H and 2I, showing Macy and James dead in their car seats. These photos depict the condition in which police officers found the child victims at the time of Mammone's arrest. Mammone unsuccessfully sought to exclude these photos before trial and again objected to them at trial.

{¶ 98} Exhibits 2H and 2I had significant probative value. Each photo "illustrated the testimony of the detectives who described the crime scene," and also was "probative of [the defendant's] intent and the manner and circumstances of the victims' deaths." *Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, at ¶ 134, 136; *see also State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶ 26; *Morales* at 258, 513 N.E.2d 267. Detectives Weirich and Risner testified that upon arriving at the scene, they found the children dead in the back seat of Mammone's car. Macy and James had been stabbed in the throat while strapped into their car seats, unable to move.

{¶ 99} Mammone nevertheless claims that these photos were "completely unnecessary" because he never denied murdering Macy and James and the state could have proven cause of death "in a less gruesome manner." But we have repeatedly rejected similar arguments in the past. *See Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, at ¶ 70; *Maurer*, 15 Ohio St.3d at 264–265, 473 N.E.2d 768. The state had the burden to prove that Mammone purposely killed the children, and these photos were probative of that issue. *See Maurer* at 265, 473 N.E.2d 768, quoting *State v. Strodes*, 48 Ohio St.2d 113, 116, 357 N.E.2d 375 (1976), vacated in part on other grounds, 438 U.S. 911, 98 S.Ct. 3135, 57 L.Ed.2d 1154 (1978) ("'[t]he state must prove, and the jury must find, that the killing was purposely done' ").

{¶ 100} Under these circumstances, we conclude that the probative value of these two photos outweighed the danger of unfair prejudice to Mammone and that the photos "were neither repetitive nor cumulative in nature." *Morales*, 32 Ohio St.3d at 258, 513 N.E.2d 267. The prosecution selected, and the trial court admitted, a single photo of each child victim from 34 available crime-scene

photos showing Mammone's car with the children inside. These two photos were published to the jury only once, although two witnesses authenticated them during their testimony. Accordingly, the trial court did not abuse its discretion by admitting Exhibits 2H and 2I.

b. Autopsy photos

{¶ 101} Mammone also challenges the admission of autopsy photos "of very young children." The trial court admitted six autopsy photos of James's injuries, Exhibits 5A–F, and seven of Macy's, Exhibits 6A–G. Defense counsel unsuccessfully sought to exclude these photos both before trial and during the coroner's testimony at trial. But notably, Mammone personally thanked the court during his allocution "for the discretion used in, ah, limiting the, ah, display of autopsy photos for the deceased in this matter."

{¶ 102} Exhibits 5A–F and 6A–G had significant probative value. As mentioned above, the state was required to prove that Mammone purposely killed Macy and James. See *Maurer*, 15 Ohio St.3d at 265, 473 N.E.2d 768. The number and location of the children's injuries and the resulting wounds were all probative evidence of a purpose to cause death. *Id*. In addition, each photo supported and illustrated the coroner's testimony about the wounds inflicted on Macy and James and the cause of their deaths. *Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, at ¶ 148; *Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, at ¶ 26; *Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, at ¶ 72.

{¶ 103} As with the crime-scene photos, Mammone contends that the prejudicial impact of showing the jury gruesome autopsy photos of young children outweighed this probative value. Mammone asserts that the photos were unnecessary because he did not dispute the cause of the children's deaths and because the state could have used testimony alone to prove the children's injuries. But, as explained above, the state bears the burden of proof and it has no obligation to meet that burden in the least gruesome way. Consistent with our previous holdings in cases involving children, we conclude that the prejudicial impact of these autopsy photos did not outweigh their probative value. *See, e.g., Vrabel* at ¶ 69–72; *Trimble* at ¶ 142–145, 155.

{¶ 104} Further, these photos were neither repetitive nor cumulative. At trial, the state offered seven of the more than 100 photographs taken during Macy's autopsy. Each photo presents a different injury. Exhibit 6A depicts Macy as she arrived at the coroner's office, still strapped in her car seat. Exhibits 6B, 6D, and 6E show different knife wounds: (1) three wounds to Macy's left lower face and upper neck, severing her esophagus and trachea, (2) a cluster of three wounds on Macy's left neck, and (3) an exit wound. Exhibits 6C and 6F depict defensive wounds on Macy's right hand and right leg, respectively. Finally, Exhibit 6G shows finger-shaped bruises on Macy's left leg, consistent with someone having a firm grip on that spot.

> {¶ 105} Likewise, each of the six autopsy photos of James depicts something different: (1) Exhibit 5B shows a defensive wound on James's right palm, (2) Exhibit 5E depicts a large stab wound on James's neck, transecting his esophagus and trachea and cutting through to his back, (3) Exhibit 5F depicts the exit wound on James's upper left back, (4) Exhibit 5A captures a close-up of James's hands, (5) Exhibit 5C shows a view of the stab wound on his neck from the other side of his head, and (6) Exhibit 5D shows injuries on his right arm, including the defensive wound on his right hand. Like the autopsy photos of Macy, none of these photos is cumulative or repetitive.
>
> {¶ 106} For these reasons, we find no abuse of discretion in the admission of these autopsy photos.

Mammone, *supra*, 139 Ohio St. 3d at 486–89.

In a footnote, the Ohio Supreme Court added that any error in admitting this evidence was "harmless beyond a reasonable doubt." *Id.* at 489 n.5. This was so, the court explained, because "[t]he evidence that Mammone murdered Macy and James was overwhelming: Mammone confessed these crimes to law enforcement in detail, and the jury heard his recorded confession at trial." *Id.*

As for the admission of the physical evidence collected at the crime scene, and the display of that evidence and the autopsy and crime-scene photos during the testimony of prosecution witnesses, the Ohio Supreme Court held that the trial court committed no error.[3] According to the state high court:

> {¶ 117} Mammone objects that the prosecution engaged in inappropriate theatrics by introducing specific evidence during the testimony of four witnesses. For the reasons explained below, this evidence was properly admitted.
>
> {¶ 118} First, Mammone argues that the prosecution introduced a photo of Macy and James, dead in their car seats, during Detective Risner's testimony solely for "shock value." Risner testified regarding his arrest of Mammone on the morning

[3] Mammone raised these issues in state court as part of a claim that the prosecution engaged in "inappropriate theatrics" by seeking to admit and display this evidence to the jury. The Ohio Supreme Court concluded that the claims were, "[a]t bottom . . . evidentiary claims," and analyzed them on that basis. *Mammone*, *supra*, 139 Ohio St. 3d at 491.

of June 8. While handcuffing Mammone and removing him from his car, Risner looked through the windows and saw a pistol near Mammone's leg and two dead children strapped in car seats. During Risner's testimony, the state offered a single photograph depicting the back seat of the car at the time of Mammone's arrest. The trial court admitted the photo over a defense objection, explaining that it was "necessary as to what [Risner] observed and [was] not unduly prejudicial given the totality of the testimony."

{¶ 119} Risner's testimony and the photo were admissible because they were probative of Mammone's guilt for the charged offenses. Moreover, as discussed in the analysis of proposition V, the photo satisfies the standard for admitting gruesome photos in capital cases. Accordingly, the trial court did not abuse its discretion by permitting this evidence, and the prosecutor did not engage in misconduct by offering it.

{¶ 120} Second, Mammone argues that the prosecution engaged in "theatrics" by introducing during Detective Weirich's testimony physical evidence that had been in Mammone's car when he was arrested. Weirich collected evidence, took photographs, and processed the crime scenes. At trial, Weirich identified the photos and physical evidence, which was important to establish the chain of custody for several of the state's exhibits. The prosecution introduced items Weirich found in Mammone's car, including weapons, a wedding photo of Marcia, Marcia's dried wedding bouquet, car seats, sippy cups, children's blankets, diapers, sleepers, children's clothing, and diaper/overnight bags. Mammone did not object to Weirich's testimony or these exhibits at trial, but he now claims that the physical evidence had no probative value. Mammone reasons that Risner had already described the scene and the jury had already seen the photo of the children dead in their car seats, so the additional evidence was not probative.

{¶ 121} The trial court did not err by admitting this evidence because it was relevant to proving the offenses charged. This physical evidence supported a finding that Mammone acted with purpose when he committed the three murders; he planned ahead for the evening, bringing a host of weapons and supplies for the children with him. In addition, the presence of the wedding bouquet and wedding photo confirms that he acted with Marcia in mind, consistent with his admission that he knew the murders would be a major blow to Marcia, in revenge for their destroyed marriage. Weirich's description of the scene and the photograph of the children could not simply replace this physical evidence; instead, they supplemented it.

{¶ 122} But even if any of this evidence had been admitted in error, Mammone cannot show that it was outcome-determinative. See Crim.R. 52(B). Mammone gave a full confession to the crimes and, for the most part, did not contest the facts of the murders. He cannot persuasively argue that the exclusion of any, or all, of this physical evidence would have led to a different outcome at his trial.

{¶ 123} Third, Mammone objects to the prosecution's introduction during Dr. Murthy's testimony of several autopsy photos of the children as well as the children's car seats, clothing, and other personal belongings found in Mammone's car. The trial court admitted the autopsy photos over defense objection, but Mammone did not object to the physical evidence at trial. Mammone now argues that all this evidence was irrelevant and lacked probative value.

{¶ 124} This claim fails. The autopsy photos were properly admitted for the reasons explained in our analysis of proposition V. And the physical evidence collected from Mammone's car was admissible to illustrate the nature and circumstances of the crime. The car seats and children's clothing supported Dr. Murthy's testimony about the state of the children's bodies when he received them at the coroner's office. Moreover, even if any of this physical evidence had been improperly admitted, Mammone cannot establish that the error was outcome-determinative.

{¶ 125} Finally, Mammone argues that it was improper for Michael Short to testify about the children's bloody car seats. Mammone did not object to this testimony at trial, but he now claims that the testimony was improper for three reasons: (1) two witnesses had already discussed the car seats, (2) the jury did not need Short's testimony to point out the apparent blood on the car seats, and (3) Short was introduced as a firearms expert.

{¶ 126} Mammone's first two arguments fail for several reasons. First, no other witness testified about the car seats from the perspective of a forensic analyst. Instead, a police officer discussed the car seats when describing his activity at the crime scene, and the coroner discussed the car seats because the children arrived at his office in the seats. Second, the fact that a jury can draw its own conclusions by observing physical evidence does not preclude a witness—particularly a forensic expert—from testifying about his own conclusions drawn from the evidence.

{¶ 127} Mammone also contends that because the court recognized Short as an expert "qualified to render opinions in the area of firearms and fingerprints," Short could not opine about blood on car seats. Short testified that he is a criminalist with responsibility "for either assisting with forensic support or actually going out and responding and processing the major crime scenes in Stark County." He explained that he had examined the car seats for defects such as those consistent with knife slashes and briefly described one of the car seats as "saturated with apparent blood." The trial court arguably defined Short's expertise too narrowly or erred by letting him offer expert testimony about the car seats. And if Mammone had objected during the trial, the court easily could have addressed these concerns. However, Mammone did not object, and he cannot now establish that but for Short's testimony about the car seats, the outcome of his trial would have differed.

{¶ 128} For these reasons, the evidence Mammone objected to at trial was properly admitted, and no plain error occurred with regard to evidence that Mammone did not object to at trial. As a result, Mammone's claim that the prosecutor engaged in improper "theatrics" by introducing this evidence likewise fails.

2) Evidence with no probative value
{¶ 129} Mammone next argues that misconduct occurred when the prosecutor introduced evidence that allegedly lacked any probative value.

* * *

{¶ 131} First, Mammone objects to "[a]utopsy photos of dead children" and "a photo of dead children in their car seats." These photos were relevant and admissible for the reasons explained in our analysis of proposition V.

{¶ 132} Second, Mammone objects to the admission of the children's bloodstained car seats and their belongings found in Mammone's car. This evidence was relevant and admissible because it was probative of Mammone's intent and of the manner and circumstances of the children's deaths. *See State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504, ¶ 65.

* * *

{¶ 135} None of this evidence was more prejudicial than probative. Nor was it unduly cumulative or repetitive. Instead, this evidence illustrated the testimony of different state witnesses, each of whom contributed to the prosecution's case against Mammone. And because none of this evidence was erroneously admitted, the prosecution's decision to introduce it did not deprive Mammone of due process or a fair trial.

Mammone, *supra*, 139 Ohio St. 3d at 491–95.

2. Analysis

Habeas relief is not available for a state court's evidentiary ruling unless the ruling was "so egregious that it resulted in a denial of fundamental fairness." *Giles v. Schotten*, 449 F.3d 698, 704 (6th Cir. 2004); *see also Estelle v. McGuire*, 502 U.S. 62, 68 (1991). Mammone has not established that any of the state trial court's rulings was that egregious (or even, quite candidly,

incorrect) – let alone that the Ohio Supreme Court's decision rejecting his claims was contrary to, or involved an unreasonable application, of Supreme Court precedent.

As the state court explained, the crime-scene photos depicting Mammone's murdered children had "significant probative value." *Mammone*, 139 Ohio St. 3d at 487. They were highly probative of Mammone's intent and therefore relevant on the issue whether he intentionally and purposefully killed his children. The same is true of the autopsy photos, which showed the nature of the fatal wounds as well as a number of apparent defensive wounds on the children's hands and arms. *Id.* at 488.

It is no answer for Mammone to emphasize that the defense did not dispute the manner of the children's' deaths. (Doc. 23, PageID 11184). Because Mammone entered a not-guilty plea, the prosecution had to prove its case at the guilt phase beyond a reasonable doubt. "[N]othing in the Due Process Clause of the Fourteenth Amendment requires the State to refrain from introducing relevant evidence simply because the defense chooses not to contest the point." *Estelle*, *supra*, 502 U.S. at 70.

Nor is there merit in Mammone's claim that the trial court erred in admitting physical evidence from the crime scene. As the Ohio Supreme Court reasonably concluded, this evidence "supported a finding that Mammone acted with purpose" and that "he planned ahead for the evening, bringing a host of weapons and supplies for the children with him." *Mammone*, *supra*, 139 Ohio St. 3d at 492.

Finally, it was not unreasonable for the Ohio Supreme Court to hold that the testimony of a coroner, Dr. Murthy, and a criminalist, Michael Short, was relevant, probative, and not unduly

prejudicial. *Id.* at 492–93.[4] As the state court explained, both witnesses brought unique, non-cumulative perspectives to bear on the evidence at the crime scene.

For these reasons, Mammone is not entitled to relief on his second and third claims.

C. Juror Bias in Favor of Capital Punishment

In his fourth ground for relief, Mammone alleges that two jurors were biased in favor of the death penalty. (Doc. 23, PageID 11189–92).

He contends that Juror 418 stated during voir dire that "part of her belief system was 'an eye for an eye.'" (*Id.*, PageID 11190). Mammone also notes that this juror believed that if a defendant were of "sound mind and went out and did this thing anyhow, then yes, I think that it should be an eye for an eye definitely," "especially" if there were "small children involved." (*Id.*).

Mammone argues that Juror 448 testified during voir dire that he believed that "an eye for an eye" came from the Bible, and that the death penalty is the proper punishment for all cases of aggravated murder. (*Id.*, PageID 11191). Mammone notes that Juror 448 spoke unfavorably about incarceration as a form of punishment, which he believed "does virtually no good." (*Id.*).

The Warden argues that Mammone defaulted the claim, and that the claim is meritless in any event. (Doc. 29, PageID 11393–94).

1. State Court's Decision

On direct appeal, the Ohio Supreme Court held that Mammone forfeited this claim by failing to object to either juror during voir dire. *Mammone*, *supra*, 139 Ohio St. 3d at 483, 484. It then determined that neither juror was biased in favor of capital punishment:

[4] The Ohio Supreme Court held that Mammone forfeited some components of these claims, but ruled that there was no plain error. Accordingly, I have bypassed the Warden's default arguments and considered the claims under § 2254(d). *Stewart*, *supra*, 867 F.3d at 638.

a. Juror No. 418

{¶ 79} Mammone argues that juror No. 418 was "unfairly biased in favor of the death penalty" and "could not fairly consider all the possible sentencing options in this case." Mammone did not challenge juror No. 418 for cause, so we review this claim of bias for plain error. *See id.*

{¶ 80} Juror No. 418's views on the death penalty were explored in several ways during voir dire. On her written questionnaire inquiring into her views on capital punishment, juror No. 418 stated her belief "that the punishment should fit the crime" and stated that if a defendant "is found guilty without doubt of taking another person's life, he indeed is not entitled to live out his own life." She indicated that the death penalty is "[g]enerally the proper punishment" for aggravated murder, "with very few exceptions." However, she acknowledged that "there may be circumstances—such as, mental disability—" in which it is not appropriate. Ultimately, juror No. 418 expressed her belief "that the death penalty is appropriate in *some* capital murder cases." (Emphasis added.)

{¶ 81} During voir dire, defense counsel questioned juror No. 418 to determine whether she would automatically impose a death sentence if Mammone were convicted. The juror again explained that she generally thinks "punishment should fit the crime," but that she does not firmly believe that every murderer should receive the death penalty. She observed that "sometimes there are circumstances that you need to think about," such as "a mental issue" or "those types of things." In the absence of such circumstances, however, juror No. 418 stated that "it should be an eye for an eye definitely, and especially where there [are] small children involved where it sounds like there was [here]."

{¶ 82} Juror No. 418 never indicated that she would automatically impose the death penalty if Mammone were convicted. Her questionnaire and her verbal responses indicated a general preference for the death penalty for those who commit aggravated murder, but she consistently acknowledged exceptions—both before and after the trial court explained the two phases of a capital trial and the jury's duty to weigh aggravating circumstances and mitigating factors. *See State v. Stojetz*, 84 Ohio St.3d 452, 460, 705 N.E.2d 329 (1999) (rejecting argument that a juror was an "automatic death penalty juror" when the juror had "expressed a willingness to take into consideration other factors, such as defendant's background and the nature and circumstances of the crime, before deciding to render a death verdict").

{¶ 83} "[D]eference must be accorded to the trial judge who sees and hears the juror." *Id*. Here, neither the court nor the parties expressed any concern that juror No. 418 was an "automatic death" juror, even as they discussed concerns about other prospective jurors in the same small-group voir dire. Under these circumstances, we defer to the trial judge's decision to seat juror No. 418 and find no error with respect to her service.

b. Juror No. 448

{¶ 84} Mammone also argues that juror No. 448 was "unfairly biased in favor of the death penalty" and "could not fairly consider all the possible sentencing options in this case." As with juror No. 418, Mammone did not challenge juror No. 448 for cause, so plain-error review applies. *Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, at ¶ 89–90.

{¶ 85} During larger-group voir dire, the trial judge flagged juror No. 448 as a juror to discuss with counsel. Juror No. 448 had responded to a question from defense counsel by stating, "I think I would have some problem with" being fair given the circumstances of the case. Later, the court and counsel for both sides discussed whether to have this juror return for small-group voir dire. The prosecutor indicated that she "want[ed] the opportunity to explore why" juror No. 448 had "said I can't be fair." The court agreed that juror No. 448 should remain in the jury pool, and the defense made no effort to excuse the juror.

{¶ 86} Juror No. 448 first indicated his attitude toward the death penalty on his written questionnaire asking for his views on that subject. His responses revealed some tension in his thoughts about capital punishment. On the one hand, juror No. 448 wrote that he supported "the state law and right to enforce the death penalty"—which he characterized as a "God-ordained law of the land"—and he indicated agreement with the view that the death penalty is the "proper punishment in all cases where someone is convicted of aggravated murder." On the other hand, he also wrote, "I am not sure due to my religious views if I could give a death penalty verdict."

{¶ 87} During small-group voir dire, the judge and both parties explored this tension. Juror No. 448 assured the judge that even though he had "some religious problems with it," he recognized the state's authority to impose the death penalty and "would want to follow [the court's] orders." He later explained that even though his church "in general leans toward being" pacifistic, he "believes that an eye for an eye is in the Bible."

{¶ 88} During prosecution questioning, juror No. 448 expressed a preference for the death penalty in all cases of aggravated murder. But he later clarified that he could not say for sure whether if there were a conviction he would sentence Mammone to death; he "would have to look at the evidence." The prosecutor explained that mitigating factors "are things that might cause [a juror] to consider a sentence less than death," and juror No. 448 responded that he would follow "the law of the land" and "would consider" such a sentence. The prosecutor again asked, "So you'll follow the Judge's instructions?" The juror said yes. But to defense counsel he again indicated in response to further questioning that if Mammone were convicted of aggravated murder, he "would tend or would vote for capital punishment."

{¶ 89} The judge and the parties did not later specifically analyze juror No. 448's attitudes about the death penalty because neither party challenged him for cause. However, the trial court did comment on juror No. 448's responses when analyzing a challenge to juror No. 412. The court observed that juror Nos. 412 and 448 had both "given answers which would indicate a natural inclination to lean towards the death penalty." But the court went on to explain that "[s]ometimes in a vacuum it's hard for jurors to articulate how they feel about [the death penalty], and so it comes down to the basics of whether or not they would follow the law fairly, and that's why I pushed them on fairly." The court then denied the challenge to juror No. 412, and there was no further discussion of juror No. 448.

{¶ 90} The trial judge's comments are consistent with this court's past observations regarding the difficulty of having prospective jurors articulate their views on capital punishment during voir dire. Many prospective jurors in a death-penalty case are being asked "to face their views about the death penalty" "for the first time" during voir dire. *Williams*, 79 Ohio St.3d at 6, 679 N.E.2d 646. "[I]t is not uncommon for jurors to express themselves in contradictory and ambiguous ways" in this context, "both due to unfamiliarity with courtroom proceedings and cross-examination tactics and because the jury pool runs the spectrum in terms of education and experience." *White v. Mitchell*, 431 F.3d 517, 537 (6th Cir.2005), citing *Patton v. Yount*, 467 U.S. 1025, 1039, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). Moreover, even when a prospective juror does have "very strongly held views" about the death penalty, he or she likely has "never had to define them within the context of following the law." *Williams* at 6, 679 N.E.2d 646.

{¶ 91} During voir dire, both parties may be "attempting to push a prospective juror into a certain position in order to remove him or her from the jury." *Id*. at 7–8, 679 N.E.2d 646. Accordingly, "it is often necessary for the trial judge to step in and provide some neutral, nonleading instructions and questions in an attempt to determine whether the prospective juror can actually be fair and impartial." *Id*. at 8, 679 N.E.2d 646. It then falls naturally on the "trial judge to sort through [the] responses and determine whether the prospective jurors will be able to follow the law." *Id*. at 6, 679 N.E.2d 646.

{¶ 92} In this case, neither the judge nor the parties ultimately expressed reservations that juror No. 448 was biased in favor of the death penalty. When asked, the juror agreed that he could follow the trial judge's instructions on mitigating factors. The judge was able to "see[ ] and hear[ ]" juror No. 448, *Wainwright v. Witt*, 469 U.S. at 426, 105 S.Ct. 844, 83 L.Ed.2d 841, and therefore had "the benefit of observing [the juror's] demeanor and body language." *Williams*, 79 Ohio St.3d at 8, 679 N.E.2d 646. The judge was satisfied that juror No. 448 would follow instructions, and we defer to that judgment. *See Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, at ¶ 40 (no abuse of discretion in denying challenge for cause when "a juror, even one predisposed in

> favor of imposing death, states that he or she will follow the law and the court's instructions").

Mammone, *supra*, 139 Ohio St. 3d at 483–86.

2. Analysis

"In a death penalty case, a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." *Trimble v. Bobby*, 804 F.3d 767, 777–78 (6th Cir. 2015).

"A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). "If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." *Id.*

In reviewing this claim, I bear in mind that "it is not uncommon for jurors to express themselves in contradictory and ambiguous ways, both due to unfamiliarity with courtroom proceedings and cross-examination and because the jury pool runs the spectrum in terms of education and experience." *White v. Mitchell*, 431 F.3d 517, 537 (6th Cir. 2005). "As a result, the trial court's determination on a given juror's credibility is entitled to 'special deference.'" *Id.* (quoting *Patton v. Yount*, 467 U.S. 1025, 1038 (1984)).

The Ohio Supreme Court did not unreasonably apply Supreme Court precedent or unreasonably determine the facts when it rejected Mammone's claim.

a. Juror 418

First, the record supplies little basis to exclude Juror 418 on the ground that she was incapable of considering a sentence other than death.

Juror 418 acknowledged her belief that the "punishment should fit the crime," a belief that was, in her words, "basically the same thing" as "an eye for an eye." (Doc. 11–2, PageID 4539). She then testified that "there could possibly be circumstances" – such as mental illness, for example – that "should come into consideration" when deciding if someone convicted of aggravated murder should receive a death sentence. (*Id.*, PageID 4540). Juror 418 then reiterated her view that, "if they are of sound mind and went out and did this thing anyhow, then yes, I think that it should be an eye for an eye definitely, and especially where there is [*sic*] small children involved[.]" (*Id.*).

She concluded this portion of her voir dire by telling defense counsel that "this person that's in the courtroom as far as I'm concerned, he's innocent right now." (*Id.*, PageID 4540–41).

Nowhere did Juror 418 testify that she was incapable of considering a sentence other than death or that she would not or could not consider the mitigating factors. Indeed, her voir dire established that she was willing to consider the mitigating circumstances and that she would follow the law and the trial court's instructions. (*Id.*, PageID 4540).

In the end, Juror 418 expressed a preference – perhaps a very strong preference – for sentencing a convicted murderer to death. But Juror 418 also told the trial court that she could and would set aside that preference and follow the law. There was nothing unreasonable in the Ohio Supreme Court's judgment affirming the trial court's decision to allow Juror 418 to serve.

b. Juror 448

Likewise, Juror 448 insisted that he could and would follow the law, notwithstanding his belief in "an eye for an eye" and a statement on his juror questionnaire that the death penalty was "proper in all cases where a person is convicted of aggravated murder." (Doc. 11–2, PageID

4526–27). Indeed, he testified that he would consider the mitigating factors because it was "[t]he rule of the law of the land." (*Id.*, PageID 4528–29).

"The judge and the parties did not later specifically analyze juror No. 448's attitudes about the death penalty because neither party challenged him for cause." *Mammone*, *supra*, 139 Ohio St. 3d at 485. But the trial court "was satisfied that juror No. 448 would follow instructions," and the Ohio Supreme Court "defer[red]" – permissibly and reasonably – "to that judgment." *Id.* The trial court was in the best position to determine whether Juror 448 was sincere in his statements that he could follow the law, *see Wainwright v. Witt*, 469 U.S. 412, 430 (1985), and there is ample evidence in the transcript of voir dire to support the trial court's judgment.

Habeas relief is therefore unavailable.

D. Ineffective Assistance of Trial Counsel – Guilt Phase

In his fifth, fourteenth, and nineteenth grounds for relief, Mammone alleges that trial counsel were ineffective during the guilt phase.

According to Mammone, counsel were ineffective for not: 1) conducting an adequate voir dire of Juror 430, an alleged "automatic death penalty" juror, and objecting to him serving on the jury (Doc. 23, PageID 11192–94); 2) moving to excuse Jurors 418 and 448 for cause; (*id.*, PageID 11232–33); 3) objecting to the admission of the crime-scene photos, evidence recovered at the crime scene, text-message exchanges between Mammone and his wife, and the various 911 calls introduced at trial (*id.*, PageID 11243); and 4) raising a not-guilty-by-reason-of-insanity defense (*id.*, Page ID 11272–76).

1. The *Strickland* Standard

To prevail on his ineffective-assistance claim, Mammone must "show both that his counsel provided deficient assistance and that there was prejudice as a result." *Harrington*, *supra*, 562 U.S. at 104.

The performance prong calls for "an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Id.* at 110. My review of counsel's performance is highly deferential, and I am "required not simply to give [counsel] the benefit of the doubt, but to affirmatively entertain the range of possible reasons counsel may have had for proceeding as [they] did." *Pinholster*, *supra*, 563 U.S. at 196.

"With respect to prejudice, a challenger must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Harrington*, *supra*, 562 U.S. at 104. "This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case." *Id.* at 112.

"Surmounting *Strickland*'s bar is never an easy task," but "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Id.* at 105.

2. Juror 430: The "Automatic Death Penalty" Juror

Mammone contends that Juror 430 was an "automatic death penalty" juror who could not consider a sentence other than death. The Warden argues that this claim is procedurally defaulted and without merit. (Doc. 29, 11400–01).

a. Background

During voir dire, Juror 430 stated that, "in my personal opinion of the death penalty, you know, Manson murders, something like that, you know, I know that there is [*sic*] different murders, and not all murders require the death penalty but certain ones do. And if it is proven to be that, then I believe that it needs to be that." (Doc. 11–2, PageID 4522–23).

Under questioning by defense counsel, Juror 430 elaborated on his beliefs:

> Juror 430: Like I told the other attorney, you know, there are circumstances that do require the death penalty, and there are circumstances that don't, and I don't know what the circumstance is right now.
>
> Mr. Lowry: Can you describe for me what circumstances in your mind would result in, should result in the death penalty?
>
> Juror 430: Like the guy down, I think it was in Texas maybe, that killed all of those people down in Texas.
>
> Mr. Lowry: You're talking about Fort Hood?
>
> Juror 430: Fort Hood.
>
> Mr. Lowry: The military base.
>
> Juror 430: From what I've seen in the paper about that; yes, I think he deserved the death penalty, but I can't say that I'm going to impose that on him because I'm not there. I don't know what went down officially, but if somebody just snaps and kills people, do they deserve the death penalty? No, I don't agree with that.

(*Id.*, PageID 4549–50).

Juror 430 had also indicated on his juror questionnaire that "in my eyes cold blood murder is capital punishment."

After the trial ended, Mammone contends, Juror 430 told an investigator working for the public defender's office that "there was nothing that the defense attorneys could have done during the mitigation phase of Mr. Mammone's trial that would have changed his decision

regarding the death penalty." (Doc. 23, PageID 11194). As it turns out, Juror 430 said no such thing: the quoted passage represents Mammone's habeas counsel's rather optimistic gloss on Juror 430's statement to the investigator that "anyone who commits a premeditated murder should receive the death penalty." (Doc. 10–22, PageID 2109).

Mammone argued in his postconviction petition that trial counsel were ineffective for not exposing Juror 430 as an "automatic death penalty" juror and removing him from the venire. The state trial court held that this claim was "res judicata and barred from consideration in this proceeding" (*id.*, PageID 2433–34), and the Ohio Court of Appeals affirmed:

> Secondly, appellant argued his trial counsel was ineffective for failing to properly question Juror No. 430 and failing to remove this juror from the panel. This issue is ripe for appellant's direct appeal and is therefore barred under *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E. 104.

Mammone II, *supra*, 2012 WL 3200685 at *3.

b. Procedural Default

Mammone is not entitled to relief on this ineffectiveness claim because it is procedurally defaulted, and there are no grounds to excuse the default.

First, Ohio's res-judicata rule is an independent and adequate ground of decision that, if invoked by the Ohio courts – as it was here – precludes federal habeas review. *Lundgren v. Mitchell*, 440 F.3d 754, 765 (6th Cir. 2006).

Second, Mammone's claim that appellate counsel was ineffective for not raising this trial-counsel claim (Doc. 23, PageID 11192–93) lacks merit and thus cannot excuse Mammone's default. *See Edwards v. Carpenter*, 529 U.S. 446, 451 (2000).

It is "a bedrock principle of appellate practice in Ohio . . . that an appeals court is limited to the record of the proceedings at trial[.]" *McGuire*, *supra*, 738 F.3d at 751 (internal quotation marks omitted). This trial-counsel claim, however, depends on evidence that was not part of the

direct-appeal record: namely, Juror 430's statement to the public defender's investigator. "That being so, appellate counsel cannot be said to have been ineffective for failing to raise on direct appeal . . . a claim that relied on evidence outside the trial record." *Cowans v. Bagley*, 624 F. Supp. 2d 709, 783 (S.D. Ohio 2008).

Controlling principles of appellate practice aside, the record does not establish that Juror 430 was an "automatic death penalty" juror.

To be sure, Juror 430, like many veniremembers, had a strong belief that, at least in the abstract, those convicted of aggravated murder should receive a death sentence. Critically, though, Juror 430 agreed that he could not decide whether a death sentence was warranted in a given case without hearing the evidence and the trial court's instructions on the law. (Doc. 11–2, PageID 4549–50). Nowhere did Juror 430 testify, as Mammone has misleadingly claimed, that he would disregard or otherwise refuse to consider the defense's mitigation evidence.

For these two independent reasons, there was no probability appellate counsel could have prevailed on a claim that trial counsel were ineffective for not challenging Juror 430 for cause. *Kelly v. Lazaroff*, 846 F.3d 819, 831 (6th Cir. 2017) ("appellate counsel cannot be considered ineffective for failing to raise a meritless claim"). Habeas relief is therefore unavailable.

3. Inadequate Voir Dire

Mammone next claims that trial counsel were ineffective for not moving to exclude Jurors 418 and 448 on the ground that they were biased in favor of the death penalty, questioning the veniremembers in greater detail about the publicity surrounding Mammone's case, and examining in more depth their ability and willingness to consider the defense's mitigating evidence.

The Ohio Supreme Court rejected these contentions on direct appeal, holding that counsel's handling of voir dire was reasonable and that Mammone could not show prejudice:

> *a. Voir dire*
> {¶ 152} Mammone contends that counsel rendered ineffective assistance at voir dire by failing to adequately question potential jurors about possible bias in favor of the death penalty, about exposure to pretrial publicity, and about their ability to understand and consider mitigating factors. He also alleges that counsel were ineffective for not challenging jurors for cause on these grounds.
>
> {¶ 153} When evaluating claims of ineffective assistance at voir dire, this court has "consistently declined to 'second-guess trial strategy decisions' or impose 'hindsight views about how current counsel might have voir dired the jury differently.'" *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 63, quoting *State v. Mason*, 82 Ohio St.3d 144, 157, 694 N.E.2d 932 (1998). Decisions about voir dire are highly subjective and prone to individual attorney strategy because they are often based on intangible factors. *Mundt* at ¶ 64, citing *Miller v. Francis*, 269 F.3d 609, 620 (6th Cir.2001). Accordingly, "counsel is in the best position to determine whether any potential juror should be questioned and to what extent." *State v. Murphy*, 91 Ohio St.3d 516, 539, 747 N.E.2d 765 (2001).
>
> {¶ 154} First, Mammone argues that counsel did not adequately question or challenge two jurors, juror Nos. 418 and 448, for cause. According to Mammone, these two jurors "clearly indicated during voir dire that they could not fairly consider all the possible sentencing options in this case." But counsel did not provide deficient performance in this regard because, as explained in our analysis of proposition II, these jurors' views on the death penalty were extensively probed during voir dire. Neither party, nor the judge, expressed reservations that either juror No. 418 or No. 448 was biased in favor of the death penalty. And even now, Mammone does not identify any questions that counsel should have asked during voir dire. Under these circumstances, we find that counsel's decision not to inquire further was objectively reasonable. In fact, defense counsel could well have made a strategic decision not to challenge either juror for cause. *See State v. Cornwell*, 86 Ohio St.3d 560, 569, 715 N.E.2d 1144 (1999) ("we will not second-guess trial strategy decisions such as those made in voir dire").
>
> {¶ 155} Second, Mammone argues that counsel failed to adequately voir dire and challenge jurors as to pretrial publicity. As discussed in the analysis of proposition I, every potential juror completed a publicity questionnaire and was questioned about exposure to publicity during voir dire. Thus, counsel's failure to ask additional questions was not objectively unreasonable. Moreover, the trial court, which was in the best "position to judge each juror's demeanor and fairness," concluded that every juror and alternate selected—including the four Mammone specifically expresses concern about—could be fair and impartial.

> *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, at ¶ 64. Accordingly, counsel's performance was not deficient in this regard.
>
> {¶ 156} Finally, Mammone argues that counsel's performance was deficient in failing "to voir dire jurors as to their ability to consider mitigating factors." The record indicates that the prosecutor thoroughly explained mitigation to the jurors and questioned them about whether they would be able to balance the aggravating circumstances against mitigating factors. Defense counsel then posed additional questions about possible mitigating factors, and the trial court itself inquired further when necessary. The fact that defense counsel did not decide to ask additional questions or to press every single potential juror on this issue—or to inquire about specific mitigating factors—is reasonable as a matter of strategy. *See Murphy*, 91 Ohio St.3d at 539, 747 N.E.2d 765.
>
> {¶ 157} Even if counsel's performance at voir dire had been deficient in one or more of these ways, Mammone cannot establish prejudice under *Strickland*. He has failed to establish a reasonable probability that but for counsel's allegedly deficient performance at voir dire, the result of the trial would have been different. *See, e.g., State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, at ¶ 67.
>
> {¶ 158} For these reasons, we find that counsel did not render ineffective assistance during voir dire.

Mammone, *supra*, 139 Ohio St. 3d at 499–501.

The state high court's reasonable application of *Strickland* bars relitigation of these ineffective-assistance claims here.

As the Ohio Supreme Court found, and as the record establishes, Juror 418's and Juror 448's "views on the death penalty *were* extensively probed during voir dire," and neither the parties nor the trial judge "expressed reservations that either juror No. 418 or No. 448 was biased in favor of the death penalty." *Mammone*, *supra*, 139 Ohio St. 3d at 500 (emphasis in original). Seeming to underscore these points, on direct appeal Mammone was unable to "identify any questions that counsel *should* have asked during voir dire" to better probe or establish their supposed bias. *Id.* (emphasis in original).

Likewise, the Ohio Supreme Court reasonably rejected the claim based on counsel's alleged failure to voir dire the veniremembers more extensively about pretrial publicity.

"[E]very potential juror completed a publicity questionnaire and was questioned about exposure to publicity during voir dire." *Mammone*, *supra*, 139 Ohio St. 3d at 500. Furthermore, the trial judge questioned all seated jurors and "concluded that every juror and alternate selected – including the four Mammone specifically expresses concern about – could be fair and impartial." *Id.*

For these reasons, it was permissible for the state court to hold that "counsel's failure to ask additional questions was not objectively unreasonable." *Id.*

Finally, the record provides ample support for the state court's decision that trial counsel reasonably examined veniremembers about their ability to consider the mitigating factors.

The prosecutor, defense counsel, and the trial court all questioned the jurors about the concept of mitigation evidence and the jurors' willingness to consider those factors and weigh them against any aggravating factors that the prosecution proved. "The fact that defense counsel did not decide to ask additional questions or to press every single potential juror on this issue – or to inquire about specific mitigating factors – is reasonable[.]" *Id.*

Because Mammone has not shown that the Ohio Supreme Court unreasonably decided the performance prong of his *Strickland* claim, habeas relief is unavailable.

4. Objections to Alleged Prosecutorial Misconduct

Mammone alleges that trial counsel were ineffective for not objecting to the prosecution's alleged misconduct in seeking to admit and display crime-scene and autopsy photographs of Mammone's children and evidence from the crime scene. The Ohio Supreme Court, having previously ruled that this evidence was relevant, probative, and admissible,

rejected Mammone's claim that trial counsel was ineffective for not objecting to the admission of this evidence. *Mammone*, *supra*, 139 Ohio St. 3d at 501.

That decision was neither contrary to, nor an unreasonable application of, *Strickland*.

"[A]n ineffective assistance claim based on trial counsel's failure to object to prosecutorial misconduct hinges on whether the prosecutor's misconduct was plain enough for a minimally competent counsel to have objected." *Stojetz v. Ishee*, 892 F.3d 175, 203 (6th Cir. 2018). For the reasons given above, the evidence at issue was probative, not unfairly prejudicial, and properly admitted. Trial counsel's "failure" to seek its exclusion was not deficient, and, even had an objection been successfully made, there was no probability of a different result: the evidence of Mammone's guilt was beyond any possible doubt.

Mammone also claims that trial counsel should have objected to the admission of his text-message exchanges with his ex-wife immediately before the murders, and to the admission of his ex-wife's calls to 911.

On direct appeal, Mammone argued that this evidence was inadmissible. The Ohio Supreme Court disagreed:

> {¶ 133} Third, Mammone objects to the admission, during the testimony of Marcia and of Richard Hull, of text messages Mammone exchanged with Marcia and Hull on June 7 and 8, 2009. The messages were relevant and admissible because they were indicative of Mammone's intent and conduct throughout the events that occurred on those dates.
>
> {¶ 134} Finally, Mammone challenges the admission of the audio recordings of Marcia's 9–1–1 calls. These recordings were relevant to establish the nature and circumstances of the crimes and to explain the actions of police officers as the events transpired.
>
> {¶ 135} None of this evidence was more prejudicial than probative. Nor was it unduly cumulative or repetitive. Instead, this evidence illustrated the testimony of different state witnesses, each of whom contributed to the prosecution's case against Mammone. And because none of this evidence was erroneously admitted,

> the prosecution's decision to introduce it did not deprive Mammone of due process or a fair trial.

Mammone, *supra*, 139 Ohio St. 3d at 494–95.

The court then rejected Mammone's related ineffective-assistance claim. "As we explained above, we reject Mammone's evidentiary claims and allegations of prosecutorial misconduct. Accordingly, he cannot establish ineffective assistance in this regard." *Id.* at 501.

I agree with the reasons given by the Ohio Supreme Court: the text-message exchanges and 911 calls were extremely probative of Mammone's intent, and there was no plausible basis for excluding them. It was therefore reasonable for the Ohio Supreme Court to hold that trial counsel were not ineffective for failing to exclude this evidence from trial.

5. Insanity Defense

Finally, Mammone alleges that trial counsel were ineffective for failing to pursue a defense of not guilty by reason of insanity (NGRI). (Doc. 23, PageID 11272–76).

He claims that trial counsel "should have been aware of [his] prior medical diagnoses" that "supported" an NGRI defense." (*Id.*, PageID 11273). Mammone also contends that counsel "should have been aware that the assessment and ultimate testimony of their chosen expert," forensic psychologist Jeffrey Smalldon, "conflicted with [his] medical records and prior diagnoses." (*Id.*). Accordingly, had counsel pursued this "viable" NGRI defense, Mammone contends that there was a reasonable probability that he would have avoided an aggravated-murder conviction and a death sentence.

a. Background

Under Ohio law, a defendant is not guilty by reason of insanity if, "at the time of the commission of the offense, [he] did not know, as a result of a severe mental disease or defect, the wrongfulness of [his] acts." O.R.C. § 2901.01(14). An NGRI defense is an affirmative defense,

and the defendant has the burden to prove the defense by a preponderance of the evidence. O.R.C. § 2901.05(A).

At trial, Dr. Smalldon testified that Mammone was not insane at the time of the murders and therefore did not qualify for an NGRI defense:

Q: And part of your consultation was also to determine whether there were any issues to be explored regarding his mental status at the time of the offense, correct?

A: Correct.

Q: And you did –

A: Yes.

Q: -- consider that?

What did you conclude?

A: Ah, I concluded that at the time these offenses occurred, Mr. Mammone was experiencing, ah, extreme, ah, emotional distress. Ah, I concluded that at the time of these offenses, ah, he was suffering from a severe mental disorder, that the symptoms associated with that disorder were not so severe that they prevented him from knowing the difference between right and wrong. I believe that he was able to know the difference between right and wrong at the time these offenses were committed.

Q: So in other words, you found that he was not insane at the time?

A: Yeah, I didn't think that he would qualify for a defense of not guilty by reason of insanity. That's correct.

Q: And you have found that in other cases, correct? That, those to be issues?

A: I have. Not many, but I have.

Q: Okay.

On, on the ones where you did not find that, does that mean that the person was not suffering from a serious mental disorder?

A: No.

Q: So it's possible for someone to have a serious mental disorder and still be considered sane, correct?

A: Definitely. Yes.

(*Id.*, PageID 6046–48).

Nearly eight years after trial, Mammone obtained a second opinion from Dr. Diane Mosnik, a clinical neuropsychologist and forensic psychologist. (Doc. 23–1). Based on her evaluation of Mammone in 2017, Dr. Mosnik opined to a reasonable degree of medical and psychological certainty that, "at the time of the commission of the offenses, as a direct result of his serious mental disease . . . Mr. Mammone III did not know the wrongfulness of his acts." (*Id.*, PageID 11298).

Mosnik's opinion had three key components.

First, she diagnosed Mammone as suffering from "Major Depressive Disorder, recurrent, moderate to severe in severity, with anxious distress and psychotic features" at the time of the murders. (*Id.*). This diagnosis contrasted with that of Dr. Smalldon, who had diagnosed Mammone only with a severe personality disorder (albeit with "a number of characteristics that are very infrequently seen in individuals who are not psychotics" (Doc. 11–6, PageID 6078)) and general anxiety.

Dr. Mosnik took issue with Smalldon's diagnosis, opining that he "neglected to appreciate important information" in Mammone's "history and presentation" that should have clued him into a different diagnosis. (Doc. 23–1, PageID 11298).[5] Mosnik also observed that Smalldon's opinion was inconsistent "with prior clinical diagnoses" that Mammone had a "major mood disorder," not a personality disorder. (*Id.*).

[5] Mosnik's report is silent, however, as to what exactly it was in Mammone's history that Smalldon "neglected to appreciate." (Doc. 23–1, PageID 11298). So are Mammone's briefs. (Doc. 23, PageID 11272–75; Doc. 34, PageID 11548–51).

Second, Dr. Mosnik opined that Mammone did not "know the wrongfulness" of his acts "at the time of the crime." (*Id.*). To the contrary, Mosnik explained, the record showed that Mammone "saw no other option for himself other than the one he chose, which he believed to be right and just in his eyes and the eyes of God, which was a direct result of the distortion of his beliefs because of his serious mental disease." (*Id.*, PageID 11298–99).

Third, Dr. Mosnik criticized as non-responsive Smalldon's testimony regarding the NGRI defense. (*Id.*, PageID 11298). Whereas Ohio law asks whether the defendant knows the wrongfulness of his conduct, Mosnik observed that Smalldon had testified only that Mammone knew the difference between right and wrong. (*Id.*).

b. Procedural Default

"Claims that could have been, but were not, presented to the state courts and that are now barred by state procedural rule are deemed procedurally defaulted." *Franklin v. Bradshaw*, 695 F.3d 439, 449 (6th Cir. 2012). "Default is excused if the petitioner demonstrates: (1) cause for the default and prejudice flowing therefrom; or (2) that failure to consider the claim will result in a fundamental miscarriage of justice." *Id.*

Because Mammone never raised this trial-counsel claim in state court, and because it is now too late to do so, the claim is procedurally defaulted. As I explained in *Mammone III*, *supra*, 2018 WL 454432 at *3, where I denied Mammone's motion for a stay:

> Finally, in claim nineteen, petitioner alleges that trial counsel was ineffective for failing to present a defense that he was not guilty by reason of insanity. According to petitioner, counsel "should have been aware of Mr. Mammone's prior medical diagnoses" supporting that defense.
>
> This claim, like the others at issue, depends on evidence that was available to the defense at trial. For example, petitioner argues that the defense expert, Dr. Smalldon, "neglected to appreciate *important information in Mr. Mammone's history and presentation*, resulting in an inaccurate diagnosis of his condition."

> Likewise, petitioner maintains that Smalldon's testimony was generally inconsistent with "*prior clinical diagnoses* given to Mr. Mammone."
>
> Nevertheless, petitioner never raised this claim in state court, and it is too late to do so now. *Spivey*, *supra*, 2017 WL 1113339 at *9–10.
>
> That petitioner has obtained "new" evidence to support this claim – Dr. Mosnik's evaluation, which relies almost entirely on the same evidence available to the defense at trial – does not mean his claim is unexhausted. As the Circuit explained in *Carter v. Mitchell*, 829 F.3d 455, 469 (6th Cir. 2016), "[a]llowing a petitioner periodically to discover (or rediscover) information about himself would frustrate [AEDPA's purpose of achieving finality], and could incentivize capital defendants to deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death."

Relying on *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), Mammone argues that I can excuse his default. Mammone contends that "[t]he systemic failure of the state court process prevented post conviction counsel from litigating [his] case effectively." (Doc. 34, PageID 11548). He also maintains that the state trial court's "refusal to provide funds for a neurologist" meant that postconviction counsel "had no factual basis" to argue that trial counsel were ineffective for not raising the NGRI defense. (*Id.*).

i. *Martinez* and *Trevino*

In *Martinez*, *supra*, 566 U.S. at 17, the Court held that, where state law "requires" a criminal defendant to raise his ineffective-assistance-of-trial-counsel claim during an initial-review collateral proceeding, a procedural default of the trial-counsel claim during that proceeding will not preclude a federal habeas court from hearing the claim if "there was no counsel or counsel in that proceeding was ineffective." To excuse a default under *Martinez*, the petitioner must also show that the underlying ineffective-assistance claim is "substantial" and that postconviction counsel's failure to raise it was itself ineffective under the *Strickland* framework.

The Court extended the *Martinez* rule in *Trevino*, *supra*, 569 U.S. at 429, holding that it also applies in "situations where state law makes it highly unlikely that a defendant will have a meaningful opportunity to raise ineffective-assistance claims on direct appeal."

"*Martinez* currently applies only to States that deliberately choose to channel claims of ineffective assistance of trial counsel into collateral proceedings," *Davila v. Davis*, --- U.S. ---, 137 S. Ct. 2058, 2068 (2017), and the Sixth Circuit "has concluded that *Martinez* does not apply in Ohio because Ohio permits ineffective-assistance-of-counsel claims on direct appeal." *Henness v. Bagley*, 766 F.3d 550, 557 (6th Cir. 2014). The Sixth Circuit has not decided, however, whether *Trevino* applies to Ohio cases. *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 750–52 (6th Cir. 2013); *see also id.* at 582 (suggesting that *Trevino*'s application to Ohio cases "is neither obvious nor inevitable").

ii. The Default Is Not Excusable

Given the lack of guidance from the Sixth Circuit and the difficulty of the question, I will simply assume, *arguendo*, that *Trevino* applies here. The assumption does Mammone no good, however, because he has not shown that postconviction counsel was ineffective for failing to argue that trial counsel should have pursued the NGRI defense.

First, Mammone takes the position that postconviction counsel "could not raise this specific issue as they had no factual basis for it." (Doc. 34, PageID 11548). This was the case, according to Mammone, because the state trial court "refused to provide funds for a neurologist," thus depriving postconviction counsel "of the necessary tools" to litigate this claim. (*Id.*). But if there were no factual basis for the claim, postconviction counsel could not have been ineffective for failing to raise it.

Second, Mammone's emphasis on the state trial court's denial of funds to retain a neuropsychologist suggests that he is not making a true *Martinez*/*Trevino* argument. Rather, the argument sounds in the more conventional basis for excusing a procedural default where "some objective factor external to the defense" – here, the denial of needed funds to retain an expert and develop the claim – "impeded counsel's efforts" to raise the claim. *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

Such an argument would lack merit, however, given that the basis of the claim was trial counsel's alleged failure to appreciate: 1) the alleged discrepancy between Dr. Smalldon's diagnosis and Mammone's earlier diagnoses that allegedly supported an NGRI defense; and 2) Smalldon's alleged misunderstanding of the criteria for an NGRI defense. These discrepancies were apparent from the face of the trial record, such that postconviction counsel was in a position to marshal them into a claim of ineffective assistance for not pursuing the NGRI defense.

Furthermore, while postconviction counsel lacked the assistance of a neuropsychologist, counsel did have the assistance of a second forensic psychologist, Dr. Bob Stinson, in preparing Mammone's postconviction petition. (Doc. 10–22, PageID 2186–94). With such expert assistance at the ready, the trial court's denial of funds for a neuropsychologist did not prevent postconviction counsel from raising the claim.

Third, as I explain below, the claim that trial counsel were ineffective for failing to raise an NGRI defense has no merit. Postconviction counsel's failure to raise this claim was not deficient, nor was there a reasonable probability of a different outcome to Mammone's collateral attack if counsel had raised the claim.

For these reasons, I cannot excuse Mammone's procedural default.

c. Merits

Even assuming that I could excuse Mammone's default, habeas relief is unavailable because Mammone has not shown that trial counsel's failure to raise an NGRI defense was deficient under a de novo standard of review.

i. Trial Counsel Considered the NGRI Defense

First, there is no evidence in the record tending to show that trial counsel failed to consider, overlooked, or simply ignored the possibility of an NGRI defense. Indeed, the record establishes just the opposite.

Trial counsel retained an expert – Dr. Smalldon – who explored that very issue (and many others) but concluded that Mammone did not "qualify for a defense of not guilty by reason of insanity." (Doc. 11–6, PageID 6047). Smalldon based this opinion on his comprehensive review of Mammone's background and twenty hours of meeting with Mammone over seven different occasions. (*Id.*, PageID 6049). There is no question, moreover, that Smalldon was qualified for his task, having worked on "about 250" capital cases during his twenty-year career. (*Id.*, PageID 6061).

Mammone's counsel, who are entitled to a "strong presumption of competence," *Pinholster*, *supra*, 563 U.S. at 196, were presumably familiar with the NGRI defense, and they would have certainly consulted with Dr. Smalldon about his conclusions before putting him on the stand. (Doc. 11–6, PageID 6044–45) (Smalldon testifying that he met with defense counsel before trial). Had counsel learned from Smalldon that there was a valid and viable basis for pursuing an NGRI defense, they presumably would have followed that path and raised the issue at trial. *Pinholster*, *supra*, 563 U.S. at 196 (courts applying *Strickland*'s performance prong must "affirmatively entertain the range of possible reasons [the petitioner's] counsel may have had for

proceeding as they did"). Yet they proceeded apace with Dr. Smalldon, who testified repeatedly that his evaluation foreclosed an insanity plea. (*Id.*, PageID 6046–48, 6068, 6104).

The record therefore excludes the possibility that counsel did not consider or investigate an NGRI defense.

ii. Counsel Reasonably Decided to Forgo the NGRI Defense

As just seen, trial counsel conducted a reasonable investigation into the possibility of an NGRI defense, but Dr. Smalldon's opinion that Mammone was not insane precluded the defense from raising that issue. (Doc. 11–6, PageID 6068 (Smalldon testifying that Mammone "know[s] that those acts [*i.e.*, the murders] were wrong in the eyes of the law"); (*id.*, PageID 6104) (Smalldon testifying that Mammone knew his "conduct on this night [*i.e.*, the night of the murders] was criminal")).

"Counsel's decision not to pursue an insanity defense must be understood as a strategic one, absent any compelling evidence to the contrary." *Lundgren*, *supra*, 440 F.3d at 772.

Mammone contends that such "compelling evidence" exists in the form of Dr. Smalldon's alleged shortcomings in performing his evaluation – specifically, his alleged misdiagnosis of a personality disorder (rather than major depressive disorder) and failure to appreciate "important information" in Mammone's "history and presentation." (Doc. 23–1, PageID 11298).

Mammone's argument – and Dr. Mosnik's critique of Smalldon's opinion as to the viability of the NGRI defense – also depend on Smalldon's testimony that Mammone was not insane because "he was able to know the difference between right and wrong at the time these offenses were committed." (Doc. 11–6, PageID 6047). The unstated premise of their position seems to be that Dr. Smalldon must have ruled out this defense, at least in part, because he

mistakenly believed that Mammone could not be legally insane if he knew the difference between right and wrong.

These contentions lack merit and are insufficient to overcome the "strong presumption" that counsel performed reasonably by relying on Dr. Smalldon and forgoing an NGRI defense. *Pinholster*, *supra*, 563 U.S. at 196.

(a). Consistency of Diagnoses

According to Dr. Mosnik's evaluation of Mammone:

1. Mammone participated in outpatient psychotherapy from April 2, 2007 through December 17, 2007. His care provider diagnosed him with Generalized Anxiety Disorder (Doc. 23–1, PageID 11286), which Smalldon also diagnosed. (Doc. 11–6, PageID 6100).
2. Mammone participated in psychotherapy with Dennis Ward and Cynthia Rudick from April, 2007 to April, 2008. (Doc. 23–1, PageID 11286).
3. Mammone's primary care doctor diagnosed him in September, 2007 with depression. (*Id.*).
4. Mammone received psychotherapeutic treatment from Carolyn Buck, a licensed professional clinical counselor, from July, 2008 through January, 2009. She diagnosed him with "Major Depression. (*Id.*).

Dr. Smalldon testified that he reviewed Mammone's medical records and interviewed Dr. Ward and Ms. Buck. (Doc. 11–6, PageID 6050–51, 6081–82). Asked by defense counsel whether his diagnosis of Mammone – a severe personality disorder with schizotypal, borderline, and narcissistic features, with passive-aggressive and obsessive-compulsive traits, and

generalized anxiety disorder – was consistent with "what you've learned from his prior treaters," Dr. Smalldon said that it was:

> A: Yes. In fact, the generalized anxiety disorder which I said was by history, ah, that was the diagnosis that was, ah, given, to Mr. Mammone by Dr. Dennis Ward, ah, who saw him towards the end of 2007.
>
> * * *
>
> Q: Okay. Your diagnosis was consistent, however, correct?
>
> A: Yes.

(Doc. 11–6, PageID 6081–82).

Dr. Smalldon elaborated on this point during cross-examination, when the prosecutor asked whether Smalldon was the only treatment provider to diagnose personality disorder. Smalldon acknowledged that he was the only such provider, but he explained that short-term care providers ordinarily do not make personality-disorder diagnoses:

> Q: And none of those other folks diagnosed him with the, with the personality disorder not otherwise specified, correct?
>
> A: No.
>
> Q: Okay. So you're the only one that made that diagnosis?
>
> A: Ah, a qualified, yes. I mean, ah, that, wasn't, ah, their – typically short term therapists wouldn't make a personality disorder diagnosis like that. But, no, to the best of my knowledge. Though they certainly described characteristics of him that were consistent with that diagnosis.

(*Id.*, PageID 6100).

This exchange, as well as Dr. Smalldon's testimony as a whole, established that the doctor had an explanation for why his diagnosis differed from that of Mammone's earlier treatment providers. While acknowledging the difference, moreover, Smalldon emphasized that the prior treatment providers "described characteristics" of Mammone's personality that were

consistent with his own diagnosis. (*Id.*). Nothing in Mosnik's report or Mammone's briefs calls that explanation into question, just as nothing there suggests that trial counsel should have recognized that Smalldon's explanation was problematic.

With no evidence "to support the conclusion that [Mammone's] trial counsel *should have been aware at the time of [his] trial* (including the penalty phase) that any further investigation into" his prior diagnoses "would have produced more evidence" to support an NGRI defense beyond that already" found lacking by Dr. Smalldon, Mammone's claim fails. *Black v. Bell*, 664 F.3d 81, 105 (6th Cir. 2011) (emphasis in original). Mammone's "trial-level counsel [were] entitled to rely on the conclusions arrived at by" Dr. Smalldon "after [his] examination of [Mammone]. Dr. [Smalldon] appears to have conducted himself in a professional and efficient manner, and [Mammone] makes no persuasive argument to the contrary." *McGuire*, *supra*, 738 F.3d at 758.

One final point is worth making.

Although Dr. Mosnik criticizes Smalldon for not diagnosing major depressive disorder, she ignores the fact that a second expert – Bob Stinson, a forensic psychologist who prepared a report in support of Mammone's postconviction petition – likewise diagnosed Mammone with a severe personality disorder. (Doc. 10–22, PageID 2186, 2192).

The defense retained Dr. Stinson to opine whether "there were mitigating factors that were not offered at trial . . . that would have been relevant, important, and helpful to the jury for mitigation purposes." (*Id.*, PageID 2188). After reviewing all of Mammone's medical records and interviewing Mammone in person, Stinson "agree[d] with" Smalldon's findings that Mammone suffered from "Personality Disorder Not Otherwise Specified with Schizotypal,

Borderline, and Narcissistic Features," and that this disorder "was a severe one." (*Id.*, PageID 2192).

All this tends to show that, even if counsel had a basis to question the validity of Dr. Smalldon's diagnosis (and Mammone has not established that they did), there was no guarantee that another mental-health expert would have diagnosed Mammone with major depressive disorder and excluded a personality-disorder diagnosis. Nor were counsel sure to get an explanation of how the alleged depressive disorder supported an NGRI defense.

"Absent a showing that trial counsel reasonably believed that Dr. [Smalldon] was somehow incompetent or that additional testing should have occurred" – a showing, I reiterate, that Mammone has not come close to making – "simply introducing the contrary opinion of another mental health expert" like Dr. Mosnik "during habeas review is not sufficient to demonstrate the ineffectiveness of trial counsel." *McGuire*, *supra*, 738 F.3d at 758.

(b). Dr. Smalldon's Understanding of an NGRI Defense

Dr. Mosnik opined that Mammone was insane at the time of the crimes because, "as a direct result of his serious mental disease," he "did not know the wrongfulness of his acts." (Doc. 23–1, PageID 11298). She took issue with Dr. Smalldon's opinion that an NGRI plea was not viable because Smalldon, in her view, failed to address that question. (*Id.*). Rather, Dr. Smalldon testified that Mammone was not insane because he "knew the difference between right and wrong," not that he knew the wrongfulness of his acts. (*Id.*).

Ohio case law confirms that Dr. Smalldon correctly understood the criteria for an NGRI defense.

As the Ohio courts have explained, "[t]he test of legal sanity is whether the defendant is able to recognize the difference between right and wrong in respect to a crime of which he was

charged and is able to choose right and abjure wrong." *State v. Bailey*, 2010-Ohio-6155, ¶40 (Ohio App. 2010). The critical question is whether the defendant knows that his actions are "against the law." *State v. Carreiro*, 988 N.E.2d 21, 27 (Ohio App. 2013) ("a defendant who knows his actions are against the law . . . understands the 'wrongfulness' of his actions under R.C. 2901.01(A)(14)).

It is therefore common to find Ohio cases that discuss the defendant's ability (just as Dr. Smalldon commented on Mammone's ability) to "appreciate the difference between right and wrong" as one basis for rejecting an NGRI defense. *E.g.*, *State v. Davenport*, 2018-Ohio-2933, ¶30 (Ohio App. 2018) (evidence that defendant "suffered mental health problems" did "not show that [he] was unable to understand the difference between right and wrong"); *State v. Muhammed*, 2008-Ohio-2839, ¶22 (Ohio App. 2008) ("At no time in his testimony did [the defendant] claim that he was so mentally ill that he did not know the difference between right and wrong[.]"); *see also Bobby v. Bies*, 556 U.S. 825, 829–30 (2009) (recounting evidence that defendant in Ohio capital-murder case "did not qualify for a plea of not guilty by reason of insanity . . . because he knew the difference between right and wrong at the time of the offense").

For all these reasons, trial counsel performed reasonably by forgoing an NGRI defense. Because Mammone cannot satisfy the performance prong, I need not consider the subject of prejudice.

E. Juror Misconduct During Penalty-Phase Deliberations

In his sixth ground for relief, Mammone alleges that one of the jurors violated the trial court's instructions by refusing to consider the defense's mitigation evidence and discussing the case with a family member. (Doc. 23, PageID 11195–97).

To support this claim, Mammone relies on the affidavit, discussed above, that the public defender's investigator prepared in May, 2011. According to the affidavit, Juror 438 told the investigator that he "did not consider Dr. Jeffrey Smalldon's testimony because James Mammone, III was not crazy." (Doc. 10–22, PageID 2211).

Mammone also argues that Juror 438 "may have violated the trial court's instructions by discussing the case with a family member." (Doc. 23, PageID 11197). Here Mammone relies on several comments that an anonymous poster made in the comments section of the *Canton Repository*'s website. The gist of the posts was that the commenter had "a close family member on the jury," and that the juror's service "is tearing him up." (*Id.*, PageID 11197–98). Mammone contends that the anonymous poster, who identified herself only as a secretary working in the legal field, was Juror 438's daughter. (*Id.*).

1. State Courts' Decisions

Mammone raised this claim in his postconviction petition, and the trial court rejected the claim for three reasons. (Doc. 22, PageID 2434).

First, the court held that "neither the evidence dehors the record nor the record itself supports Mammone's contention that juror 438 failed to consider aggravating and mitigating circumstances or that juror 438's decision was tainted by outside influence." (*Id.*). Second, the court ruled that the investigator's affidavit was "inadmissible hearsay" under Ohio Evid. R. 606(b). (*Id.*). Third, the court found that Mammone offered nothing but "pure speculation" to support his claim that Juror 438 had improper out-of-court communications. (*Id.*).

On postconviction appeal, the Ohio Court of Appeals affirmed the lower court's finding that the affidavit was not admissible to impeach the jury's verdict:

> {¶ 22} Appellant's third * * * ground[ ] for relief challenged activity that occurred during jury deliberations regarding Juror No. 438 * * *. In support of his

> arguments, appellant submitted as Exhibit B the hearsay affidavit of a criminal investigator for the State Public Defender's Office, Felicia Crawford.
>
> {¶ 23} Evid.R. 606 governs competency of juror as witness. Subsection (B) states the following:
>
> {¶ 24} "(B) 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. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented. However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court. A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying will not be received for these purposes."
>
> {¶ 25} The affidavit of Ms. Crawford is a flagrant attempt to bypass the aliunde rule adopted by the Ohio legislature in Evid.R. 606(B). *State v. Jones* (December 29, 2000), Hamilton App. No. C–990813. The trial court was correct in disregarding the affidavit.
>
> {¶ 26} We find the trial court did not err in denying appellant's third * * * ground[ ] for relief.

Mammone, *supra*, 2012 WL 3200685 at *3 (internal ellipses and brackets supplied).

2. Analysis

"There is nothing in clearly established Supreme Court law requiring states to take cognizance of evidence excludable under such common evidentiary rules" like Ohio's Evidence Rule 606(b). *Matthews v. Workman*, 577 F.3d 1175, 1182 (10th Cir. 2009) (Gorsuch, J.).

On the contrary, the "firmly-established common law rule in the United States flatly prohibit[s] the admission of juror testimony to impeach a jury verdict." *Tanner v. v. U.S.*, 483 U.S. 107, 116 (1987). Courts do not "call[ ] . . . verdict[s] into question by reviewing the private,

internal deliberations of the jury." *Doan v. Brigano*, 237 F.3d 722, 733 (6th Cir. 2001), *overruled on other grounds by Wiggins v. Smith*, 539 U.S. 510 (2003).

"Exceptions to the common-law rule [are] recognized only in situations in which an 'extraneous influence' [is] alleged to have affected the jury." *Tanner*, *supra*, 483 U.S. at 116 (quoting *Mattox v. U.S.*, 146 U.S. 140, 149 (1892)).

"Whether the jury understood the evidence presented at trial or the trial judge's instructions following the presentation of evidence, whether a juror was pressured into arriving at a particular conclusion, and even whether jurors were intoxicated during deliberations, are all internal matters for which juror testimony may not be used to challenge a final verdict." *Doan*, *supra*, 237 F.3d at 733 (citing *Tanner*, *supra*, 483 U.S. at 117–22).

Because Juror 438's statement to the investigator – that he did not consider Dr. Smalldon's testimony – concerned "an internal influence on the jury's verdict," Mammone may not use the affidavit to impeach the jury's verdict. *Djoumessi v. Wolfenbarger*, 2007 WL 2021837, *5 (E.D. Mich. 2007); *accord Hoffner v. Bradshaw*, 622 F.3d 487, 501 (6th Cir. 2010) (Ohio court properly excluded juror's affidavit stating that petitioner's lack of emotion was a factor in sentencing petitioner to death because the affidavit did "not allege that the jury was influenced by any 'extraneous' information").

Furthermore, there was no evidence before the Ohio courts – just as there is none before me – showing or even suggesting that Juror 438 discussed the case with a family member. Given the entirely speculative nature of Mammone's "evidence" on this score, the state courts acted reasonably in rejecting this component of the claim.

F. Juror Prayer Before Penalty-Phase Deliberations

Mammone's seventh ground for relief alleges that the jurors' decision to pray before beginning their penalty-phase deliberations violated his right to a fair trial. (Doc. 23, PageID 11200–02).

According to the affidavit of the public defender's investigator, four jurors acknowledged that "the jurors said a prayer prior to starting deliberations at the penalty phase. One juror asked if a prayer could be said and all jurors agreed to saying a prayer." (Doc. 10–22, PageID 2212). Relying on this evidence, Mammone argues that "the jury failed to consider the factors that [they] were specifically directed to consider" by the trial court and instead "attempt[ed] to apply God's perceived will" to the facts of the case. (Doc. 34, PageID 11492).

Mammone raised this claim during state collateral review, but the Ohio Court of Appeals rejected it. The court refused to consider the affidavit under Ohio Evid. R. 606(B) and concluded that Mammone was improperly attempting to impeach the jury's verdict. *Mammone II*, *supra*, 2012 WL 3200685 at *4.

The state court's decision was reasonable.

Due process requires that a criminal defendant be tried by a "jury capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). A juror's consideration of extraneous evidence violates the defendant's right to a jury trial. *Turner v. Louisiana*, 379 U.S. 466, 471–73 (1965)

While these rules are clearly established, no Supreme Court law forbids jurors to pray during deliberations or holds that such a prayer amounts to an improper "extraneous influence" on those deliberations.

Furthermore, the parties have not cited any relevant cases on this issue, but the decisions that I reviewed all rejected claims that juror prayers during deliberations are external influences or violate a defendant's jury-trial right. *E.g.*, *State v. DeMille*, 756 P.2d 81, 84 (Utah 1988) ("prayer and supposed responses to prayer are not included within the meaning of the words 'outside influence'"); *State v. Setzer*, 36 P.3d 477, 480 (Idaho 2001) (rejecting defendant's claim that "the prayer with which the jury began its deliberations" was an "outside religious influence"); *State v. Renner*, 1994 WL 501778, *8–9 (Tenn. App. 1994) (affidavits describing jurors praying during deliberations were inadmissible because "they demonstrate part of the internal, mental processes used by the jury in reaching its verdict"); *Lewis v. Davis*, 2018 WL 4024811, *23 (E.D. Cal. 2018) (statements by foreperson who began deliberations with a prayer "reasonably could be seen to reflect his personal religious and deliberative process rather than extrinsic information forbidden to jurors"); *Alkebulanyahh v. Byars*, 2015 WL 2381353, *27 (D.S.C. 2015) ("prayers offered by jurors with no external involvement would seem – perhaps even more so than the Bible – to invite inner examination of oneself").

In the absence of controlling Supreme Court authority, and given the view of state and federal courts that prayer does not amount to an extraneous influence, section 2254(d) forecloses habeas relief.

G. Execution of the "Severely Mentally Ill"

In his eighth ground for relief, Mammone argues that executing him would amount to cruel and unusual punishment because he has "a serious severe mental illness." (Doc. 23, PageID 11203). Because this illness "renders him no more culpable for his crime that a juvenile or an intellectually disabled person" – and because the Eighth Amendment forbids the executions of such persons – Mammone argues that his death sentence is invalid. (*Id.*).

Mammone raised this claim on direct appeal, but the Ohio Supreme Court rejected it on two grounds. After first holding that the Eighth Amendment does not categorically exempt the "seriously mental ill" from execution, the court held that Mammone did not suffer from a "serious mental illness":

> {¶ 175} In his eighth proposition of law, Mammone argues that his death sentence violates the Eighth and Fourteenth Amendments because he is "seriously mentally ill." We reject this claim because the Eighth Amendment does not bar the execution of the seriously mentally ill and, in any event, Mammone has not shown that he suffers from a "serious mental illness."
>
> {¶ 176} As interpreted by the United States Supreme Court, the Eighth Amendment's prohibition on "cruel and unusual punishments" requires that the "punishment for crime * * * be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910). As "the most severe punishment," the death penalty is "reserved for a narrow category of crimes and offenders." *Roper v. Simmons*, 543 U.S. 551, 568, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Accordingly, the United States Supreme Court has identified three categories of offenders who cannot be sentenced to death consistent with the Eighth Amendment: juveniles, the insane, and the mentally retarded. *Id.* at 578, 125 S.Ct. 1183, (abrogating *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989)); *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986); *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (abrogating *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)).
>
> {¶ 177} Mammone does not (and does not claim to) fit any of these categories. Instead, he urges this court to extend the Eighth Amendment's protections to a fourth category of offenders: defendants with severe mental illness. Mammone in effect argues that the Eighth Amendment protections can change over time because the amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (Warren, C.J., plurality opinion). In light of present "standards of decency," Mammone would have us hold that the Eighth Amendment bars capital punishment for offenders with serious mental problems.
>
> {¶ 178} Mammone cites two concurring opinions in support of his argument. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 343–367 (Lundberg Stratton, J., concurring); *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 210–250 (Lundberg Stratton, J., concurring). But these opinions do not support Mammone's claim of an Eighth Amendment violation. Instead, they speak to policy matters. Justice Lundberg Stratton did not

interpret the Eighth Amendment to bar the execution of the severely mentally ill. She noted that "'mental illnesses vary widely in severity'" and that "'[t]he General Assembly would be the proper body to * * * take public testimony, hear from experts in the field, and fashion criteria for the judicial system to apply.'" *Lang* at ¶ 365 (Lundberg Stratton, J., concurring), quoting *Ketterer* at ¶ 248 (Lundberg Stratton, J., concurring).

{¶ 179} Neither the United States Supreme Court nor any other court has ever recognized the seriously mentally ill as a category of offenders who cannot be constitutionally executed. See *State v. Dunlap*, 155 Idaho 345, 380, 313 P.3d 1 (2013) ("It appears that every court that has considered this issue [has] refused to extend Atkins and hold that the Eighth Amendment categorically prohibits execution of the mentally ill"). Likewise, we have repeatedly rejected claims that executing a severely mentally ill person constitutes cruel and unusual punishment. See, e.g., *Ketterer* at ¶ 176; *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 155 ("We have found no court that has held that it violates the Eighth Amendment to impose a death sentence on a defendant who was severely mentally ill at the time of the offense" [footnote omitted]).

{¶ 180} In addition, there is tremendous variation in the types and degrees of mental illness. *See Hancock* at ¶ 157 ("Mental illnesses come in many forms; different illnesses may affect a defendant's moral responsibility or deterrability in different ways and to different degrees"). It is therefore fitting that Ohio's sentencing statutes permit consideration of mental illness on a case-by-case basis. Evidence of mental illness is relevant during sentencing under R.C. 2929.04(B)(3) and (B)(7), thereby allowing for "the individualized balanc[ing] between aggravation and mitigation in a specific case." *Id.* at ¶ 158. Here, defense counsel presented evidence about Mammone's mental illness in mitigation, and the jury and trial court weighed that information when determining his sentence. We will again weigh that evidence during our independent sentence evaluation.

{¶ 181} Even if we had some inclination to interpret the Eighth Amendment more broadly, we are unconvinced that Mammone has a "serious mental illness." Dr. Smalldon testified that Mammone has a personality disorder (not otherwise specified) with schizotypal, borderline, and narcissistic features. He further stated that Mammone also has passive-aggressive and compulsive personality traits, as well as some traits that are commonly associated with psychotics. Regardless of how "serious mental illness" is defined, Mammone's mental problems are less severe than those of defendants in other cases in which we have rejected Eighth Amendment challenges. *See, e.g., Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, at ¶ 211 (Lundberg Stratton, J., concurring) (noting that the state did not contest the defendant's serious mental illness, including bipolar disorder, substance-abuse problems, and multiple past suicide attempts); *State v. Scott*, 92 Ohio St.3d 1, 2, 748 N.E.2d 11 (2001) (rejecting Eighth Amendment challenge to execution of "any person with a biologically based severe mental illness such as schizophrenia").

{¶ 182} For all these reasons, we reject proposition of law VIII.

Mammone, *supra*, 139 Ohio St. 3d at 504–06.

This decision was neither contrary to, nor an unreasonable application of, Supreme Court precedent.

The Supreme Court has never held that the Eighth Amendment forbids the execution of the "seriously mentally ill," and "[i]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by" the Supreme Court." *Harrington*, *supra*, 562 U.S. at 101; *see also Carey v. Musladin*, 549 U.S. 70, 77 (2006).

For these reasons, "extending the holding of *Atkins* to exempt the mentally ill, or even just the seriously mentally ill, from executions exceeds the limited elasticity of the AEDPA and the Court's relevant holdings." *Franklin v. Bradshaw*, 2009 WL 649581, *74 (S.D. Ohio 2009), *aff'd on other grounds by Franklin v. Bradshaw*, 695 F.3d 439 (6th Cir. 2012). Habeas relief is thus unavailable.

H. Ineffective Assistance of Trial Counsel – Penalty Phase

In his ninth, fourteenth, and fifteenth grounds for relief, Mammone argues that trial counsel were ineffective at the penalty phase.

1. Failure to Retain a Neuropsychologist

a. Background

According to Mammone, counsel were ineffective for not obtaining a neuropsychologist to evaluate him. (Doc. 23, PageID 11209–16).

While recognizing that counsel had the assistance of Dr. Smalldon, Mammone contends that Smalldon failed to "uncover any information pointing to the presence of a brain disorder"

despite "numerous indicators of brain deficits in [Mammone's] history and prior evaluations[.]" (*Id.*, PageID 11210).

During state postconviction review, Mammone emphasizes, forensic psychologist Bob Stinson evaluated Mammone and opined, contrary to Dr. Smalldon, that "there are indications of neurological, neurophysiological, and/or neuropsychological deficits in James Mammone." (*Id.*, PageID 11211). This signaled a need for further neuropsychological testing, Stinson believed, which could have led to the discovery of mitigating evidence. (*Id.*, PageID 11211–12).

To illustrate the kind of evidence such testing could have produced, Mammone relies on the "[r]esults of neuropsychological testing recently conducted" by Dr. Mosnik in 2017. (*Id.*, PageID 11212). According to her report, Mammone: 1) cannot "accurately discriminate people's emotions" or "make inferences and interpret perspectives about behavior in social situations"; 2) consistently had "episodes of major depression and anxiety" and "delusional" thoughts; 3) meets "the criteria for a clinical diagnosis of Major Depressive Disorder, recurrent, moderate to severe in severity over time, with anxious distress and psychotic features"; and 4) "exhibits certain characteristics that would be consistent with a diagnosis of Bipolar disorder (*id.*, PageID 11212–13).

Had the jury heard this evidence, Mammone concludes, there was a reasonable probability that they would have spared his life.

b. State Courts' Decisions

The Ohio Court of Appeals rejected this claim on postconviction appeal:

> {¶ 13} First, appellant argued his trial counsel was ineffective for failing to obtain all necessary experts specifically, a neuropsychologist to evaluate him, and failed to request neuroimaging. Appellant argues the trial court did not properly consider these claims.

{¶ 14} The record establishes on August 17, 2009, the trial court appointed the testifying forensic psychologist, Jeffrey Smalldon, Ph.D., as specifically requested by appellant on June 23, 2009.

{¶ 15} In his petition, appellant attached as Exhibit A the affidavit of a board certified forensic psychologist, Bob Stinson, Psy.D., J.D., ABPP, who opined at ¶ 17, "I strongly recommend that James Mammone be evaluated by specialists in the field of neurology, neurophysiology, and neuropsychology to determine the existence of brain dysfunction, neurological insults, and/or neuropsychological deficits." Dr. Stinson at ¶ 15 noted Dr. Smalldon was not a neuropsychologist. In fact, Dr. Smalldon is a forensic psychologist as is Dr. Stinson.

{¶ 16} Dr. Smalldon testified he has conducted neuropsychological assessments requested by neurologists, neurosurgeons, and other specialists to determine "whether some of their patients may have deficits that haven't maybe turned up on MRIs and cat scans, but that may show up in neuropsychological testing." Sentencing Phase Vol. II T. at 367–368.

{¶ 17} Dr. Smalldon testified he met with appellant seven times with twenty hours of face-to-face time. *Id*. at 376. His evaluation included numerous tests given to appellant as well as a "review of a very extensive collection of case relevant background records" and third-party interviews. *Id*. at 377, 400–401. Dr. Smalldon found no indication of any brain disorder, despite appellant's medical history of a bicycle accident wherein he may have lost consciousness. *Id*. at 401. He also opined appellant was not actively psychotic, but his profile did include characteristics of those who are psychotic. *Id*. at 405, 406. Dr. Smalldon found appellant to have a severe personality disorder not otherwise specified with schizotypl [*sic*], borderline, and narcissistic features. *Id*. at 408, 416–419. Appellant also exhibited the "presence of both passive aggressive and obsessive compulsive personality traits" and "generalized anxiety disorder" by history. *Id*. at 408, 420–421. None of the testing indicated any brain damage. *Id*. at 426.

{¶ 18} In his affidavit, Dr. Stinson, who possesses the same credentials as Dr. Smalldon, advanced the opposite opinion. We fail to see that the presence of a contradicting opinion by one who never interviewed appellant would result in any affirmative help to appellant's case. The affidavit is only an offer of a contradicting opinion and not definitive evidence on the issue.

{¶ 19} We find the trial court did not err in rejecting Dr. Stinson's affidavit and denying appellant's first ground for relief.

Mammone II, *supra*, 2012 WL 3200685 at *2–3.[6]

[6] Contrary to the state appellate court's decision, Dr. Stinson did interview Mammone in person before preparing his opinion. (Doc. 10–22, PageID 2189).

c. Analysis

"In assessing whether a defendant's counsel was ineffective at the mitigation hearing for failing to introduce evidence, the focus must be on whether the investigation supporting counsel's decision not to introduce mitigating evidence of the defendant's background was itself reasonable." *Clark v. Mitchell*, 425 F.3d 270, 284 (6th Cir. 2005).

Here the record establishes that trial counsel investigated and presented mitigating evidence relating primarily to Mammone's mental health and abusive family background. To aid these efforts, counsel retained a psychologist who, though not himself a neuropsychologist, performed neuropsychological screening tests on Mammone and concluded that there was no evidence that Mammone had a brain impairment. (Doc. 11–6, Page ID, 6070–74). Smalldon testified, moreover, that the accounts of Mammone sustaining a head injury as a teenager (either from falling off a bicycle or as a result of being hit by a car while riding his bike) had prompted him to screen for brain damage. (*Id.*, PageID 6074).

Dr. Smalldon examined Mammone at great length, meeting with him seven times for a total of twenty hours. (*Id.*, PageID 6049). As discussed above, Smalldon was experienced with capital cases, having worked on "about 250" of them. (*Id.*, PageID 6061). He had even performed "neuropsychological assessments" at the request of "neurologists, neurosurgeons, [and] other specialists" in cases where "there are questions about whether some of their patients may have deficits that haven't maybe turned up on MRIs and cat scans[.]" (*Id.*, PageID 6040–41).

What's more, there is no evidence in the record – nor even any allegations – that trial counsel simply ignored the issue.

To the contrary, that Smalldon screened Mammone for brain damage suggests that the issue of possible neurological deficits was something that the defense focused on. Smalldon was, moreover, competent for this task, having handled neurological consults before. And with Mammone having failed to identify any basis in the record for doubting Smalldon's competence, I must presume that it was reasonable for trial counsel to rely on his expertise. *Lundgren*, *supra*, 440 F.3d at 772 ("A licensed practitioner is generally held to be competent, unless counsel has good reason to believe to the contrary.").

As in *Clark*, *supra*, 425 F.3d at 285, here it was "not unreasonable for [Mammone's] counsel, untrained in the field of mental health, to rely on" Dr. Smalldon's opinion that Mammone showed no signs of neurological damage. *Accord Campbell v. Coyle*, 260 F.3d 531, 555–56 (6th Cir. 2001) (rejecting claim that trial counsel was ineffective for not retaining expert in post-traumatic stress disorder where defense psychologist who examined petitioner detected no evidence that petitioner suffered from PTSD); *Sneed v. Johnson*, 2007 WL 709778, *62 (N.D. Ohio 2007) (Gaughan, J.) ("the Sixth Circuit has held that counsel cannot be ineffective for failing to procure a neuropsychologist when a retained psychologist failed to find a mental ailment").

Furthermore, the state appellate court could have reasonably concluded that Mammone suffered no prejudice.

Dr. Stinson's affidavit did not opine that Mammone in fact had a brain impairment. (Doc. 10–22, PageID 2186–94). He concluded only that there were indications that "Mammone may suffer from neurological, neurophysiological, and/or neuropsychological deficits." (Doc. 10–22, PageID 2194). That does not suffice to clear *Strickland*'s – and § 2254(d)'s – high bars. *Carter*, *supra*, 443 F.3d at 529 (petitioner "wholly failed to show any error relating to trial

counsel's decision not to hire a neuropsychologist" where a neuropsychologist retained during state postconviction review "stated only that there is a 'likelihood' that [petitioner] has 'some kind of brain related difficulty'"); *accord McGuire*, *supra*, 738 F.3d at 758 (rejecting similar claim where new expert's report "suggest[ed] only the possibility of organic brain tissue damage without corroboration").

Finally, I have not considered – indeed, cannot consider – Dr. Mosnik's evaluation of Mammone because that evidence was not before the state court that adjudicated this *Strickland* claim. *Pinholster*, *supra*, 563 U.S. at 181.

For these reasons, habeas relief is unavailable on Mammone's ninth ground.

2. Autism Spectrum Disorder

Mammone next alleges that trial counsel were ineffective for not presenting evidence that he suffers from Autism-Spectrum Disorder. (Doc. 23, PageID 11231–32).

According to Mammone, such evidence "would have provided the jury with context for Mr. Mammone's rigid demeanor throughout trial" and especially his "5-hour unsworn statement during which he repeatedly showed little emotion." (*Id.*). Because trial counsel failed to present such evidence, Mammone argues that the jury had no "context within which to interpret Mr. Mammone's unsworn statement," such that his "detailed, cold and detached narrative was therefore likely disturbing to jurors." (*Id.*).

a. Procedural Default

Mammone is not entitled to habeas relief on this claim because it is procedurally defaulted. As I held in a prior order:

> Although petitioner did not raise this claim either on direct appeal, *State v. Mammone*, 139 Ohio St. 3d 467 (2014), or during postconviction review, *State v. Mammone*, 2012-Ohio-3546 (Ohio App.), that does not necessarily mean the

claim is unexhausted. Rather, the claim would be unexhausted only if there were some state-court process by which the petitioner could litigate this claim now.

But no such process exists because the evidence on which the claim rests is not "new."

The two state-court processes theoretically open to petitioner are a successive postconviction petition and a delayed motion for a new trial. (Doc. 27 at 3) (petitioner arguing that he could litigate his "new" ineffective-assistance claims in either proceeding).

To file a successive postconviction petition, petitioner would have to show, *inter alia*, that he was "unavoidably prevented from discovery of the facts upon which [he] must rely to present the claim for relief." O.R.C. § 2953.23(A)(1)(a). Similarly, to file a delayed motion for a new trial, petitioner would need to show "by clear and convincing evidence that [he] was unavoidably prevented from the discovery of the evidence upon which" his motion rests. Ohio Crim. R. 33(B).

Here, however, the factual predicate of this *Strickland* claim—the existence of petitioner's alleged Autism Spectrum Disorder—was available, and likely already in the hands of the defense, at trial: as petitioner explains, the source of this claim is petitioner's "history" and "records." (Doc. 23 at 66, ¶ 162).

To be sure, Dr. Mosnik's 2017 forensic evaluation making the diagnosis is "new" in the sense that, having been prepared only last year, it did not exist at the time of the 2010 trial.

Nevertheless, all of the materials on which Mosnik based her opinion—with the exception of her interview and testing of petitioner in 2017—were available to the defense at trial (and during postconviction proceedings). (Doc. 23–1 at 2–3) (list of 22 items Mosnik reviewed, none of which is dated after the conclusion of postconviction proceedings).

At trial, moreover, the defense engaged Dr. Jeffrey Smalldon, "a psychologist who testified as a defense expert during the mitigation phase." *Mammone*, *supra*, 139 Ohio St. 3d at 495. Dr. Smalldon conducted an "extensive and wide-ranging psychological evaluation of Mammone" before trial that included "cognitive and neuropsychological testing." *Id.* at 514, 515. To the extent that petitioner's medical records might have supported a finding of Autism Spectrum Disorder, that evidence was there for the taking.

In sum, petitioner failed to present this ineffective-assistance claim to the Ohio courts, and the Ohio courts would not permit him to litigate that claim now. Accordingly, the claim is procedurally defaulted, not unexhausted, and it provides no basis for a stay under *Rhines*.

Mammone III, *supra*, 2018 WL 454432 at *2.

In his traverse, Mammone again argues that "[t]he systemic failure of the state court process prevented post conviction counsel from litigating Mammone's case effectively." (Doc. 34, PageID 11522). He contends that his procedural default can therefore be excused under *Martinez* and *Trevino*.

Assuming, as I did previously, that these cases apply here, I cannot excuse the default for two reasons.

First, the factual basis of the claim was apparent from the record, and Mammone's postconviction counsel worked with a forensic psychologist (Dr. Stinson) in preparing the petition. Accordingly, the state trial court's denial of funds to retain a neuropsychologist did not actually prevent Mammone from raising this claim in his collateral attack.

Second, this ineffective-assistance claim is not substantial.

Mammone's claim relies on Dr. Mosnik's opinion in 2017 that "a diagnosis of an Autism Spectrum Disorder . . . should be raised" for Mammone, "given [his] reported history of persistent deficits in social communication and social interaction and his apparent restricted range of interests and involvement in activities." (Doc. 23–1, PageID 11297). As further support for her diagnosis, Mosnik cited "a lack of meaningful friendships and romantic involvement over [Mammone's] lifetime, a pattern of rigid perfectionistic thinking, obsessive compulsive behaviors [and] a history . . . of underachievement and lack of direction despite [Mammone] often being told that he was highly intelligent." (*Id.*).

In contrast, Dr. Smalldon, who reviewed the same records as Dr. Mosnik, did not render a diagnosis of Autism Spectrum Disorder. Nor did Dr. Stinson, the forensic psychologist whom

Mammone retained in connection with his postconviction petition. (Doc. 10 –22, PageID 2186–94).

Nowhere in Mosnik's report, moreover, does she fault Smalldon for failing to diagnose Mammone with Autism Spectrum Diagnosis. (Doc. 23–1). That omission contrasts notably with Dr. Mosnik's criticism of Smalldon for "neglect[ing] to appreciate important information in [Mammone's] history" and incorrectly diagnosing him with "a personality disorder" instead of "the clinical diagnosis of a major mood disorder. (*Id.*, PageID 11298). In this respect, Mosnik's report does not yield an inference that trial counsel should have recognized that Smalldon obviously erred in failing to diagnose Mammone with Autism Spectrum Disorder.

"Absent a showing that trial counsel reasonably believed that Dr. [Smalldon] was somehow incompetent or that additional testing should have occurred" – a showing that Mammone has not made – "simply introducing the contrary opinion of another mental health expert during habeas review is not sufficient to demonstrate the ineffectiveness of trial counsel." *McGuire*, *supra*, 738 F.3d at 758.

For these reasons, Mammone does not have a substantial claim under *Strickland*'s performance prong. His default is therefore not excusable under *Martinez* and *Trevino*.

Nor has Mammone made a substantial showing that, but for counsel's failure to introduce evidence that he suffered from Autism Spectrum Disorder, there was a reasonable probability of a different result at the penalty phase. To show prejudice, Mammone must "point to evidence that differ[s] in a substantial way – in strength and subject matter – from the evidence actually presented at sentencing." *Caudill v. Conover*, 881 F.3d 454, 464 (6th Cir. 2018).

Mammone cannot make such a showing, however, because Dr. Smalldon's testimony covered essentially the same ground as Dr. Mosnik's Autism Spectrum Diagnosis. (Doc. 11–6, PageID 6029–126).

Smalldon's goal, he explained to the jurors, was to "make it possible to see some of [Mammone's] actions in light of his psychological makeup." (*Id.*, PageID 6048). Like Dr. Mosnik, Dr. Smalldon opined that, while Mammone was "viewed as very bright," he was also a "very uneven student" and a chronic underachiever. (*Id.*, PageID 6059–60). Where Dr. Mosnik emphasized Mammone's lack of meaningful friendships and romantic relationships, Smalldon testified that Marcia Eakin, his (former) wife of ten years whom he met when he was twenty-three, was Mammone's "first serious girl friend[.]" (*Id.*, PageID 6063).

Just as Dr. Mosnik opined that Mammone displayed "rigid perfectionistic thinking and obsessive compulsive behaviors," Dr. Smalldon found, for example, that Mammone described his wife "in highly idealized terms, in a way that [Smalldon] later came to realize is sort of typical of his way of thinking about relationships and about things in general." (*Id.*, PageID 6063–64). Likewise, Mammone's personality was marked by a preoccupation with "very abstract or odd" and "rigid" and "unwavering . . . thinking patterns[.]" (*Id.*, PageID 6078–79).

Further, "[i]n considering the potential prejudice of omitting this additional testimony, it's important to keep in mind the State's evidence on the other side of the scale." *Caudill*, *supra*, 881 F.3d at 464.

That evidence conclusively proved that Mammone stabbed his two children – at the time of the killings helplessly strapped into their car seats – to death before searching out his mother-in-law, shooting her in the chest and face at point-blank range, and bludgeoning her with a gun and a lamp. Mammone meticulously planned and carefully prepared for this episode, the details

of which he confessed to police and reiterated to the jury during his lengthy unsworn statement at the penalty phase.

Perhaps making the case for death even stronger, Mammone was insistent – adamant, even – that he had done the "right thing" by killing his children, to "spare" them from living in a world where their mother had divorced him. *Mammone*, *supra*, 139 Ohio St. 3d at 473. Not once, Dr. Smalldon testified, did Mammone question "the rightness" of having murdered his children or express regret for having done so, and he even professed himself a devoted father after the killings. (Doc. 11–6, PageID 6062).

Mammone takes the position that these statements only prove that he acted because of his mental illness and/or Autism-Spectrum Disorder, but the jury could plausibly have rejected that view and considered them compelling evidence of Mammone's callousness and lack of remorse.

In the end, Dr. Smalldon's testimony provided a framework that the jurors could have used to reach some understanding of, to find some mitigating circumstances in, Mammone's commission of a heinous triple murder. Dr. Mosnik's diagnosis of Autism Spectrum Disorder, resting as it does on many of the same themes that Dr. Smalldon conveyed to the jury, does not significantly add to or expand upon that framework, nor, quite candidly, make it any more compelling when weighed against the overwhelming evidence in aggravation.

I therefore conclude that "[t]he jury did not sentence [Mammone] to die because [his] lawyers were ineffective" in not presenting this diagnosis. *Caudill*, *supra*, 881 F.3d at 465. "They did so because of [his actions]." *Id.*

Because Mammone's ineffective-assistance claim relating to the Autism Spectrum Disorder is defaulted, and no grounds exist to excuse that default, habeas relief is unavailable.

3. Mitigation Witnesses

Mammone next claims that trial counsel failed to "properly investigate and prepare mitigation witnesses." (Doc. 23, PageID 11233).

Trial counsel called Mammone's mother Gilise to testify at the penalty phase. Mammone contends that counsel should have questioned her about her own traumatic upbringing (including a history of sexual abuse by her alcoholic father), her history of mental illness, and the abuse that Mammone's father subjected him to. (*Id.*, PageID 11235–36). Mammone then claims that counsel failed to prepare Gilise to give effective mitigation testimony, and that this failure caused her to give testimony that hurt the mitigation case. (*Id.*, PageID 11237–38).

Mammone also alleges that trial counsel failed to prepare Mammone's father James Jr. to testify effectively. (*Id.*, PageID 11238). He observes that when "James Jr. took the stand, he denied the very information that counsel was presenting in mitigation": their abusive father-and-son relationship. (*Id.*).

Finally, Mammone claims that counsel failed to "investigate or interview" Mammone's uncle and Gilise's brother Stephen DeOrio. (*Id.*, PageID 11239–40). DeOrio would have testified that "he was shocked" when he heard that Mammone had killed his children and mother-in-law, that his and Gilise's father was an abusive alcoholic, and that he knew that his father had sexually abused Gilise. (*Id.*).

a. Preparation of Gilise and James Jr.

The Ohio Supreme Court held on direct appeal that counsel were not deficient in their preparation of Mammone's parents, and that Mammone had not shown prejudice:

> {¶ 160} Mammone contends that counsel also provided ineffective assistance during the second phase of his trial by failing to properly interview and prepare the defense's mitigation witnesses. Mammone asserts that information harmful to his mitigation defense emerged during the prosecutor's cross-examination of his

mother, Gilise Mammone, and during the direct testimony of his father, James Mammone Jr.

{¶ 161} On direct examination, Gilise testified that Mammone regretted his actions and knew that what he did was wrong. But on cross-examination, she did not effectively dispute the prosecutor's allegation that Mammone continued to maintain that he had no regrets. She also did not dispute that Mammone had told her that Marcia "got exactly what she was told she would get," and she conceded that "[f]rom what he tells me, he's warned her and warned her about it."

{¶ 162} Mammone argues that the jury would not have heard this harmful testimony if counsel had fully interviewed Gilise before the hearing and better prepared her to testify. But there is no evidence that counsel did not fully interview Gilise or adequately prepare her. To establish that "would require proof outside the record," and such a claim "is not appropriately considered on a direct appeal." *State v. Madrigal*, 87 Ohio St.3d 378, 391, 721 N.E.2d 52 (2000). Further, Mammone's counsel may have been aware of potential pitfalls in Gilise's testimony but nevertheless still made a reasonable strategic decision to put her on the stand. *See State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, at ¶ 115 (counsel's decision to call a witness "reflected reasonable trial strategy"). Gilise had valuable information to offer the jury about Mammone's childhood and history of abuse, and counsel may have decided that the information was more important than avoiding potentially unfavorable testimony on cross-examination. Therefore, Mammone cannot show that counsel were deficient in this regard.

{¶ 163} Further, Mammone cannot show a reasonable likelihood that but for counsel's alleged error, he would not have been sentenced to death. Mammone argues that Gilise conveyed two facts to the jury: (1) that Mammone felt that Marcia got what she deserved and did not regret the murders of the children and (2) that Mammone had repeatedly warned Marcia that there would be grave consequences for her actions. But Mammone's unsworn statement and Dr. Smalldon's testimony conveyed essentially the same information to the jury. Gilise's testimony in this regard was merely cumulative and does not provide a sufficient basis for establishing prejudice.

{¶ 164} Mammone similarly argues that counsel's mitigation investigation and preparation of his father, James Jr., was deficient because his father's testimony directly contradicted the defense's narrative about Mammone's difficult childhood and relationship with his father. James Jr. testified that he had a good relationship with Mammone when he was a child and denied abusing him or calling him names (at least often). He also made what Mammone characterizes as "bizarre and unfocused comments," which Mammone argues detracted from his mitigation case.

> {¶ 165} As with Gilise, Mammone cannot establish that counsel were deficient in preparing James Jr. to testify or that counsel were deficient in allowing him to testify at all. First, there is no evidence that counsel did not fully interview James Jr. or prepare him to testify. Second, counsel may have reasonably decided to put James Jr. on the stand in spite of some apparent contradictions between his testimony and the defense's mitigation theory. *See Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, at ¶ 115. James Jr. denied abusing Mammone, but he also candidly admitted that he drank frequently and that he recalled striking Gilise a few times. He also admitted that he regularly blacked out in those days, so that there was much he did not remember about this time period. In light of these statements, defense counsel could reasonably have decided that James Jr.'s testimony would do more good than harm.
>
> {¶ 166} Even if counsel's preparation of James Jr. had been somehow deficient, however, Mammone cannot establish that but for this error, there is a reasonable likelihood that he would have received a life sentence. Much of James Jr.'s testimony was consistent with Mammone's mitigation theory and when it was inconsistent, Mammone had three witnesses to support his version of events—his mother, Dr. Smalldon, and himself.
>
> {¶ 167} In sum, Mammone cannot establish that counsel provided ineffective assistance by failing to adequately interview his mitigation witnesses or prepare them for the mitigation hearing.

Mammone, *supra*, 139 Ohio St. 3d at 501–03.

The Ohio Supreme Court's decision was a reasonable application of *Strickland*.

As the court pointed out, there was no evidence in the record on appeal – just as there is no evidence in the habeas record – that counsel inadequately prepared Gilise and James Jr. to testify. With no factual support for this *Strickland* claim, the state court could reasonably find that Mammone failed to show that counsel performed deficiently.

As for prejudice, the Ohio Supreme Court reasonably found that Gilise's "harmful" testimony was cumulative to evidence that Mammone himself supplied. The bulk of James Jr.'s testimony was, the court permissibly concluded, consistent with Mammone's mitigation theory: that his father was a drinker and verbally and physically abusive. There was simply no

reasonable probability that, but for James Jr.'s testimony that he and Mammone supposedly had a good relationship, Mammone would have received a sentence other than death.

b. Gilise's Upbringing and DeOrio's Testimony

As I explained in *Mammone III*, *supra*, 2018 WL 454432 at *2–3, Mammone never argued in state court that counsel were ineffective for failing to: 1) elicit testimony from Gilise about her own traumatic upbringing; or 2) investigate or interview Stephen DeOrio. The claim is therefore procedurally defaulted. Furthermore, I cannot excuse the default under *Martinez* and *Trevino* because the underlying *Strickland* claim is insubstantial.

First, regarding Gilise's proposed testimony, nothing in her 2017 affidavit establishes that trial counsel were unaware of her traumatic upbringing or failed to consider eliciting such testimony from her. (Doc. 23–3).

That evidence, moreover, had only a tenuous connection to Mammone himself. While Mammone claims that counsel's blunder denied the jury knowledge of "the severe multi-generational mental illness, physical and sexual abuse that plagued his extended family" (Doc. 23, PageID 11237), Mammone himself was not a victim of sexual abuse, he did not have a mental breakdown that required him to be institutionalized, and the jury in any event heard evidence not only that he had a severe mental disorder but also that his father had abused him.

In these circumstances, counsel could reasonably decide not to elicit evidence from Gilise about her own difficult life.

Nor is there a substantial basis to conclude that the failure to elicit this testimony was prejudicial: that Mammone's mother was a victim of sexual abuse and had mental-health problems was not reasonably likely to change the balance of aggravating and mitigating evidence before the jury.

Second, DeOrio's affidavit established that one of Mammone's lawyers spoke to him by telephone before the trial began, though the conversation "only lasted a few minutes" and did not cover "the family history." (Doc. 23–4, PageID 11313).

Furthermore, it is undisputed – though ignored by Mammone – that Dr. Smalldon interviewed DeOrio as part of his "wide-ranging psychological investigation" into Mammone's background. (Doc. 11–6, PageID 6050). While the record does not establish what the two talked about, Dr. Smalldon explained that he had interviewed Mammone's family members to "shed light on aspects of the individual's functioning at different stages of his . . . life." (*Id.*).

This evidence establishes that trial counsel were familiar with DeOrio and in a position to make a reasonable decision whether to call him as a mitigation witness. Mammone has not made a substantial showing that it was unreasonable for counsel not to call DeOrio. In accordance with *Strickland*, I presume that they made a reasonable decision not to have him testify.

For these reasons, habeas relief is unavailable.

4. Mammone's Unsworn Statement

Mammone next faults trial counsel for "allow[ing]" him to make a five-hour unsworn statement at the penalty phase. (Doc. 23, PageID 11241–42). He claims that counsel failed to "guide or limit the presentation by asking questions although counsel could have sought to do so." (*Id.* at 11241). Because counsel failed "to present a context within which to interpret the unsworn statement," Mammone argues that his "detailed, cold and detached narrative was likely disturbing to jurors." (*Id.*).

On direct appeal, the Ohio Supreme Court held that this claim was meritless:

> {¶ 168} Mammone argues that counsel provided ineffective assistance by failing to prepare him for mitigation, by allowing him to make a five-hour unsworn statement, and by failing to limit or guide his statement in any way.

> {¶ 169} At his mitigation hearing, Mammone presented a lengthy unsworn statement—spanning more than 250 pages in the transcript—that described his upbringing, his relationships with Marcia and his children, the events leading up to June 7 and 8, 2009, and the murders themselves. He began by stating that his intent was to give the jury "a firsthand account of what I did and how I was feeling and thinking at the time." He concluded by saying that he is full of regrets and expressing hope that others will learn from this tragedy by renewing their commitments to God, their marriage, and their children. Ultimately, the court directed Mammone to "[w]rap it up," and he responded by stating, "I've said my piece, Judge."
>
> {¶ 170} Mammone cannot establish that counsel were ineffective by allowing him to make this long unsworn statement. Mammone, "not counsel, had the choice whether to testify or give an unsworn statement." (Emphasis added.) *State v. Brooks*, 75 Ohio St.3d 148, 157, 661 N.E.2d 1030 (1996). And regardless, "the decision to give an unsworn statement is a tactical one, a call best made by those at the trial who can judge the tenor of the trial and the mood of the jury." *Id*.
>
> {¶ 171} Mammone's statement was well spoken, coherent, and organized. For the most part, the statement amplified the confession Mammone had made to police officers the day he was arrested and gave the jury an opportunity to observe his personality and learn more about his background. Moreover, because the court permitted Dr. Smalldon to observe the statement, Dr. Smalldon was able to refer to it during his own testimony. Under the circumstances, to the extent that trial counsel may have influenced Mammone's decision to give an unsworn statement, allowing the statement was objectively reasonable as a matter of strategy. *See State v. Jalowiec*, 91 Ohio St.3d 220, 237, 744 N.E.2d 163 (2001).
>
> {¶ 172} Moreover, even if counsel had somehow performed deficiently with regard to Mammone's unsworn statement, this conduct was not prejudicial. Mammone speculates that the statement was harmful because it was long, cold, and detached and because the jury had no context for connecting it to Mammone's mental illness. But Mammone cannot establish a reasonable likelihood that he would have been sentenced to life imprisonment if not for this statement. For the most part, Mammone's statement amplified his confession statement to police officers, which was played for the jury at trial.

Mammone, *supra*, 139 Ohio St. 3d at 503–04.

The Ohio Supreme Court's decision was objectively reasonable.

First, it was Mammone's decision – not counsel's – whether to make an unsworn statement. *See* O.R.C. § 2929.03(D)(1). There is no evidence in the record, moreover, to prove that counsel did not help prepare Mammone to give the statement. For all that the (essentially

empty) record discloses, counsel may have tried hard to dissuade Mammone from making the statement, or counsel may have advised Mammone on how to limit the damage – only to have Mammone simply ignore the advice.

In these circumstances, it was reasonable for the Ohio Supreme Court to hold that counsel's performance was not deficient.

Second, there was no probability – let alone a reasonable one – of a different result had counsel more effectively "guided" Mammone's statement or persuaded him not to give one. While it seems to me that the Ohio Supreme Court underestimated, perhaps considerably, the prejudicial impact of Mammone's extremely disturbing remarks, it cannot be gainsaid that the prosecution's case in aggravation was beyond overwhelming. Without dwelling on the details, this was a heinous triple-murder case where Mammone murdered his own children and mother-in-law to punish his ex-wife for divorcing him.

Underscoring how a reasonable judge might reject this *Strickland* claim on prejudice grounds is a passage from Justice O'Neill's opinion concurring in part and dissenting in part from the Ohio Supreme Court's judgment on direct appeal. Justice O'Neill dissented only on the ground that, in his view, capital punishment is unconstitutional. Yet even Justice O'Neill acknowledged that Mammone's case was so disturbing that it "challenges my resolve to stay the course regarding the unconstitutionality of the death penalty in Ohio." *Id.* at 519 (O'Neill, J., concurring in part and dissenting in part). He continued:

> It is incomprehensible how someone could murder his own children while they are helplessly strapped into their car seats. Five-year-old Macy and three-year-old James were stabbed in their throats by their father for absolutely no reason other than to make their mother suffer.

Id.; *see also id.* (describing Mammone as an "atrocious monster[ ]," "evil," and "deprav[ed]").

Fairminded judges could accordingly have rejected Mammone's claim on the ground that, even if Mammone had given a more controlled statement (or none at all), there was simply no probability of the jury's recommending anything but a death sentence.

5. Prosecutorial Misconduct

Mammone argues that trial counsel were ineffective for not objecting to "all instances of prosecutorial misconduct" at the penalty phase. (Doc. 23, PageID 11243). The sole instance of alleged misconduct during the penalty phase was Mammone's claim that the prosecutor improperly urged the jury to impose the death penalty because of a non-statutory aggravating factor: revenge. (*Id.*, PageID 11224–26).

As I explain in more detail below, the Ohio Supreme Court found (reasonably and correctly) that this argument was proper: because each aggravated-murder charge included a "course of conduct" specification, and because the jury found Mammone guilty of those charges, the prosecutor was free to argue that Mammone's admitted desire to hurt his ex-wife was part of that course of conduct and thus an aggravating factor warranting a death sentence. *Mammone*, *supra*, 139 Ohio St. 3d at 498.

The Ohio Supreme Court's summary disposition of this claim on direct appeal was reasonable. (Doc. 10–20, PageID 1546–47) (Mammone's direct-appeal brief); *Mammone*, *supra*, 139 Ohio St. 3d at 503–04. Because the prosecutor's argument was proper, trial counsel had no basis to object, and there was no probability either of the trial court sustaining the objection or a different outcome at the penalty phase.

6. Arbitrariness of the Death Penalty in Stark County

Finally, Mammone argues that trial counsel were ineffective for not presenting evidence "establishing the arbitrariness of the death penalty's application in Stark County." (Doc. 23, PageID 11244–46).

In support, Mammone notes that the Stark County prosecutor "capitally indicted 53 people" between 1982 and 2010. (*Id.*, PageID 11245). But only six of those defendants received a death sentence. (*Id.*). In addition, the prosecutor "authorized a plea or other deal in 26 (or 49) percent of the 53 cases resulting in something other than a death sentence." (*Id.*).

Mammone concludes that, "[w]hether the prosecutor uses death penalty indictment as a bargaining chips, a scare tactic, or for some other impermissible purpose, there is an arbitrary practice in Stark County to use death indictments to achieve other goals." (*Id.*). Had trial counsel presented this information to the trial court, Mammone argues, the court would have concluded that the Eighth Amendment prohibited a death sentence.

The Ohio Court of Appeals rejected this claim on postconviction appeal:

> {¶ 27} Appellant's fifth and sixth grounds for relief argued his trial counsel was ineffective for failing to attack the Stark County Prosecutor's Office for its arbitrary, capricious, and discriminating practice in indicting the death penalty. Appellant argued this issue violates his rights to equal protection under the United States Constitution.
>
> {¶ 28} Appellant argues he has supported this claim with items dehors the record and is entitled to a hearing. The submitted items dehors the record are Exhibits F, G, H, and I attached to appellant's petition. However, these exhibits are not of evidentiary quality. Also, having served ten years on the Common Pleas bench, this writer is aware that Exhibit F, titled "Stark County Death Penalty Indictments," is an incomplete list.
>
> {¶ 29} The trial court found the arguments on this issue to be barred by the doctrine of res judicata, citing *Perry*, *supra*, and the Supreme Court of Ohio's decision in *State v. Jenkins* (1984), 15 Ohio St.3d 164, 473 N.E.2d 264. The *Jenkins* court at paragraph one of the syllabus held, "Ohio's statutory framework for imposition of capital punishment, as adopted by the General Assembly

effective October 19, 1981, and in the context of the arguments raised herein, does not violate the Eighth and Fourteenth Amendments to the United States Constitution or any provision of the Ohio Constitution." The *Jenkins* court at 169 specifically addressed the discretionary role of the state's elected prosecuting attorney, citing Justice Stewart's opinion in *Gregg v. Georgia* (1976), 428 U.S. 153, 199, 96 S.Ct. 2909, 49 L.Ed.2d 859:

> {¶ 30} "'First, the petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would support a capital verdict. And finally, a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor of the State and the Georgia Board of Pardons and Paroles.
>
> {¶ 31} "'The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman* [*v. Georgia* (1972), 408 U.S. 238], in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. * * *'"

{¶ 32} We find the trial court did not err in denying appellant's fifth and sixth grounds for relief.

Mammone II, *supra*, 2018 WL 3200685 at *3–4.

The state court's disposition of this ineffective-assistance claim was not unreasonable.

The Sixth Circuit and district courts within the Circuit have uniformly rejected claims that Ohio's death-penalty regime is unconstitutional because it is impermissibly arbitrary and gives prosecutors too much discretion. *E.g.*, *Williams v. Bagley*, 380 F.3d 932, 963 (6th Cir. 2004); *Coleman v. Mitchell*, 268 F.3d 417, 441 (6th Cir. 2001); *Benge v. Johnson*, 312 F. Supp. 2d 978, 1031 (S.D. Ohio 2004); *Jamison v. Collins*, 100 F. Supp. 2d 647, 762 (S.D. Ohio 2002);

Jackson v. Houk, 2008 WL 1946790, *71 (N.D. Ohio 2008) (Nugent, J.) (rejecting challenge to prosecutor's discretion during the indictment phase).

The Ohio courts have also rejected these claims. *State v. Jenkins*, 15 Ohio St. 3d 164 (1984); *accord State v. Mink*, 101 Ohio St. 3d 350, 365 (2004); *State v. Hale*, 2016-Ohio-5837, ¶46 (Ohio App. 2016); *State v. Skatzes*, 2003-Ohio-516, ¶¶393–94 (Ohio App. 2003).

And "it is settled that capital punishment is constitutional." *Glossip v. Gross*, --- U.S. ---, 135 S. Ct. 2726, 2732 (2015).

In light of these authorities, and the Ohio Supreme Court's own ruling in *State v. Jenkins*, 15 Ohio St. 3d 164 (1984), there was no possible merit in the argument that Mammone faults counsel for not making. The state court's decision rejecting this *Strickland* claim was not unreasonable.

I. *Brady* and *Napue* Claims

In his tenth ground for relief, Mammone alleges that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose evidence that his blood and urine samples tested positive for benzodiazepines. (Doc. 23, PageID 11216–19). In his eleventh ground for relief, Mammone alleges that the prosecution violated *Napue v. Illinois*, 360 U.S. 264 (1959), by knowingly introducing false testimony from Jay Spencer, an analyst at the Canton-Stark County Crime Laboratory, that there were no benzodiazepines in his blood or urine. (*Id.*, PageID 11220–24).

1. Background

Spencer testified that he tested samples of Mammone's blood and urine (which authorities obtained shortly after arresting Mammone) for the presence of "any type of drug residue evidence, any kind of drugs or drug metabolites[.]" (Doc. 11–4, PageID 5211).

The analysis proceeded in two steps. First, Spencer performed an immunoassay, which is a screening test that can identify "classes of drugs and direct [his] examination otherwise." (*Id.*). He then used a gas chromatography mass spectrometer (GCMS) "to identify any kind of and confirm any kind of drugs that might be in that sample." (*Id.*, PageID 5212). Based on this testing, Spencer opined that Mammone's blood was "negative for any drugs that I was testing for." (*Id.*, PageID 5213).

During postconviction review, Mammone's attorneys obtained Spencer's lab worksheets and notes, which, it is undisputed, the prosecution did not disclose before trial. (Doc. 10–22, PageID 2437). These documents show that, when Spencer performed the immunoassay (also called an ELIZA) on the blood and urine samples, he obtained a "positive result for benzodiazepines[.]" (*Id.*, PageID 2243–46). Spencer's notes also establish that, after testing the samples via the GCMS, Mammone's blood and urine were negative for benzodiazepines. (*Id.*, PageID 2244, 2246).

2. State Courts' Decisions

Relying on Spencer's worksheets and notes, Mammone raised *Brady* and *Napue* claims in his postconviction petition. The state trial court rejected the claims, and the state appellate court affirmed:

> {¶ 34} Appellant's eighth and ninth grounds for relief argued the state failed to disclose exculpatory evidence. Appellant submitted blood and urine samples. The preliminary notes of criminalist Jay Spencer in analyzing the samples indicated a positive result for Benzodiazepines. The confirming analysis was negative as was Mr. Spencer's opinion at trial. Vol. VI T. at 63–64. Because of the lack of disclosure of the preliminary findings, appellant argued he was denied an effective argument at the suppression hearing [on the motion to suppress his confession]: the taking of Valium prior to his arrest thereby affecting his confession. Appellant further argued this evidence could have countered the state's implication during final argument that he was not truthful about taking drugs. Vol. VIII T. at 53–54. Appellant argued this non-disclosure is a violation of *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215,

wherein the United States Supreme Court held at 87, "[w]e now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

{¶ 35} The trial court concluded Mr. Spencer's testimony was not false because the confirmation test established the samples were negative for drugs. The trial court also concluded the presence or absence of drugs in appellant's system was not material to whether he committed the crimes, and the claimed ingestion of Valium was thoroughly vetted during the suppression hearing. November 24, 2009 T. at 42–43, 45–46, 47–48, 59–60, 67.

{¶ 36} Although the trial court's conclusions are correct, even without the confession, we find the overwhelming evidence presented at trial persuades us that any failure to disclose the complained of evidence did not prejudice appellant in the guilty phase of the trial.

{¶ 37} Marcia Eakin testified during the trial. Ms. Eakin was appellant's ex-wife, and the mother of the children-victims, Macy and James, and the daughter of the adult-victim, Margaret Eakin. She testified throughout the evening preceding the deaths, appellant texted her and called her with veiled threats regarding the children's safety who were spending the evening with him. Vol. V T. at 56–63, 69–71; State's Exhibit 15. The children were with appellant all evening until they were found dead in the backseat of appellant's vehicle the next morning. *Id*. at 159. Appellant's vehicle was seen at the residence of Margaret Eakin at the time of her death by neighbors who ran outside after hearing gunshots. *Id*. at 125, 128–129.

{¶ 38} In the morning, appellant called Ms. Eakin and admitted to her that he had killed her mother and the children. *Id*. at 78–79. After his arrest, as the blood on appellant's hands was being swabbed for evidence, appellant gratuitously stated to Canton Police Crime Scene Officer Randy Weirich that he used his left hand in stabbing the children and beating his former mother-in-law. *Id*. at 220–221. Appellant left a voicemail for his friend, Richard Hull, and admitted his plan to kill the children and his former mother-in-law as vengeance for the divorce. State's Exhibit 64. The time of the voicemail was prior to the time he claimed to have taken any pills. Vol. VII T. at 46; Sentencing Phase Vol. I T. at 285–286.

{¶ 39} A bloody knife was found in the backseat of appellant's vehicle where the children were found stabbed and dead in their car seats. Vol. V T. at 204; State's Exhibit 2K and 28. Many of the blood samples taken from the evidence contained a mixture of DNA profiles and shared genetic types. Vol. VI T. at 164, 170, 172–173. The blood on the knife belonged to James and possibly Macy. *Id*. at 164–165. Appellant's hands contained the blood of Margaret Eakin and possibly James and Macy. *Id*. at 170–172, 173–174; State's Exhibit 45. Appellant's blood was found on the firearm used to shoot Margaret Eakin. *Id*. at

184–185; State's Exhibit 23B. Appellant's fingernail clippings contained the blood of his son. *Id*. at 190–191; State's Exhibits 48A and B.

{¶ 40} Even without the confession that appellant now argues might be tainted because of drug consumption, the evidence is overwhelming and conclusive of appellant's guilt.

{¶ 41} Appellant further argued the prosecutor's remarks during closing argument implied that he had lied about taking drugs:

{¶ 42} "[MR. BARR:] The pills. Why did he take the pills? Let's talk about these alleged pills that don't show up in anybody's blood, although he took dozens. Again, reason and common sense, folks, just use it. He didn't take the pills to calm him down or to dull the pain. Listen to what he says in his statement.

{¶ 43} "Detective George said what kind of pills? Like Valium and some kind of pain killer. I don't even know. I took a pill last night. He took one pill at 9:00. That's the pill that he took in case he got shot when he finished his plan at 5:45, 5:50 the next morning. The next dozen he took after the killings and he thought if it calms me down or helps me or helps me or just whatever. That's why he took the pills. Because maybe he was a little shook up after he'd just taken three lives. He took those pills to calm him down. Because he'd just finished his plan because remember, he didn't want to commit suicide. He didn't want to die. He wanted Macy and James and Margaret to die. But not James Mammone. He didn't want to die. He didn't want to walk up those steps in Marcia's house. He didn't want to make himself a sitting duck because he wanted to live. Because his goal was to inflict pain on Marcia." Vol. VIII T. at 53–54.

{¶ 44} We find the argument to fall short of any question about false testimony from Mr. Spencer. The statements were made during closing argument and the prosecutor invited the jury to judge appellant's claim vis-à-vis appellant's actual statement to the police. State's Exhibit 13.

{¶ 45} We find the trial court did not err in denying appellant's seventh and eighth grounds for relief.

Mammone II, *supra*, 2012 WL 3200685 at *4–6.

3. Analysis

a. *Brady*

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, *supra*, 373 U.S. at 87.

"Evidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury." *Wearry v. Cain*, --- U.S. ---, 136 S. Ct. 1002, 1006 (2016). To prevail, a defendant "need not show that he more likely than not would have been acquitted had the new evidence been admitted." *Id.* "He must show only that the new evidence is sufficient to undermine confidence in the outcome." *Id.*

The Ohio Court of Appeals's decision was not an unreasonable application of *Brady*'s materiality prong. Whether Mammone had taken Valium on the night of the murders, and whether there were any benzodiazepines in his system, were only tangential issues at trial.

For one thing, the trial court and the parties explored that issue in depth during a pretrial hearing on the defense motion to suppress Mammone's confession. There the trial court heard evidence that, despite Mammone's claim to have taken a Valium and drank wine, police observed no signs that Mammone may have been intoxicated while giving his confession. Indeed, when the trial court denied that motion, it expressly found "no evidence that [Mammone] was under the influence." (Doc. 11–1, PageID 3856). Thus, Spencer's notes were not material to the admissibility of Mammone's confession.

For another, it was reasonable for the state court to find that the evidence was not material to Mammone's guilt. As the court of appeals held, the evidence against him was overwhelming. Mammone made repeated threats to harm his children while texting his ex-wife

shortly before the murders. It was undisputed that he had custody of his children on the night of the killings, and that police found the children's bodies strapped into their car seats in Mammone's car. He left a voicemail (at a time before he claimed to have taken pills) for a friend admitting that he planned to kill James and Macy to punish his ex-wife. Mammone admitted to a police officer that he used his left hand to stab the kids and beat his former mother-in-law. Forensic testing established that his children's blood was literally on his hands.

Finally, Mammone claims that the failure to disclose Spencer's notes prejudiced him because "this evidence could have been given to [Dr. Smalldon] . . . who was prevented from considering this information during his mitigation evaluation." (Doc. 23, PageID 11218).

This argument fails because Mammone has not made a plausible showing that this information had any mitigating force. After all, Dr. Smalldon – who was indisputably aware of Mammone's claim to have taken "pills" and wine – testified that Mammone never "tried to convince me that . . . these offenses occurred" because "he was out of his mind on drugs or wine or anything . . . when these happened." (Doc. 11–6, PageID 6070–71).

Because the state court reasonably found that Spencer's notes were not material, habeas relief is unavailable.

b. *Napue*

"[A] conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue*, *supra*, 360 U.S. at 269. "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.*

To prevail on a *Napue* claim, the defendant must show "(1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false." *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir. 1998).

Here the state appellate court affirmed the trial court's finding that "Mr. Spencer's testimony was not false because the confirmation tests established the samples were negative for blood." *Mammone II*, *supra*, 2012 WL 3200685 at *5.

This was a reasonable determination of the facts. As the trial court found, Spencer's testing protocol provided that, if the initial immunoassay/ELIZA reported the presence of a drug, but the GCMS did not confirm the presence of a drug, Spencer was to deem the test result "negative." (Doc. 10–22, PageID 2437 (citing Ohio Admin. Code § 3701-53-03(B)). Mammone does not cite any evidence or authority to support his contention that Spencer should have interpreted the test as "positive" for benzodiazepines.

For this reason, it was permissible for the state court to find that Spencer's testimony was not "actually false."

J. Prosecutorial Misconduct – Penalty Phase Closing Argument

In his twelfth ground for relief, Mammone alleges that the prosecutor improperly urged the jury that "revenge against Marcia Eakin [Mammone's ex-wife] was an aggravating circumstance[.]" (Doc. 23, PageID 11225). Because such comments allegedly touched on "non-statutory aggravating circumstances," Mammone contends that the prosecutor "improperly tipped the scales in favor of death." (*Id.*, PageID 11226).

1. State Court's Decision

The Ohio Supreme Court rejected this claim on direct appeal, holding that Mammone failed to show that the comments – to which he did not object – amounted to error, let alone plain error:

> {¶ 142} Finally, Mammone contends that the prosecutor improperly argued that revenge was an aggravating circumstance during closing arguments at the mitigation phase. Mammone did not raise this objection at trial, so he has waived all but plain error. *See Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504, at ¶ 89.
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> {¶ 143} In Ohio, the second phase of a capital trial has a specific purpose: the jury must determine "whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors" beyond a reasonable doubt. R.C. 2929.03(D)(2). "[T]he 'aggravating circumstances' against which the mitigating evidence is to be weighed *are limited to* the specifications of aggravating circumstances set forth in R.C. 2929.04(A)(1) through (8) that have been alleged in the indictment and proved beyond a reasonable doubt." (Emphasis added.) *State v. Wogenstahl*, 75 Ohio St.3d 344, 662 N.E.2d 311 (1996), paragraph one of the syllabus. The jury shall consider any evidence relevant to those aggravating circumstances, including evidence about the nature and circumstances of those aggravators. *See* R.C. 2929.03(D)(1); *Wogenstahl* at 353, 662 N.E.2d 311.
>
> {¶ 144} As we have long recognized, a prosecutor's argument during the mitigation phase is restricted to issues germane to the jury's weighing process. The prosecutor may comment on any "testimony or evidence relevant to the nature and circumstances of the aggravating circumstances specified in the indictment of which the defendant was found guilty." *State v. Gumm*, 73 Ohio St.3d 413, 653 N.E.2d 253 (1995), syllabus. However, because the jury is not at liberty to consider nonstatutory aggravating circumstances, the prosecutor cannot argue the existence of nonstatutory aggravating circumstances. *See Wogenstahl* at 355, 662 N.E.2d 311 ("in the penalty phase of a capital murder trial, any use of the term 'aggravating circumstances' must be confined to the statutory aggravating circumstances set forth in R.C. 2929.04(A)(1) through (8)").
>
> {¶ 145} Mammone claims that the prosecutor argued a nonstatutory aggravating factor—revenge—in his mitigation-phase closing argument. During closing, the prosecutor discussed the mitigating factors, then asked the jury, "Now, what are the aggravating circumstances that you have to weigh against those mitigating factors?" The challenged portion of the prosecutor's argument stated:

On June 8, 2009, [Mammone] trespassed, by force in the Eakin family home with purpose—not out of anger, because you don't drive around the block to see who's there when you're angry, ladies and gentlemen. You go, you're mad, you're upset. You don't care who's there.

But he wanted Margaret alone and as he told police, because that would be a major [blow] to Marcia.

And in his letter to Marcia, My motivation was to hurt you—talking about killing Margaret. My motivation was to hurt you and bring forth the despair one feels when the whole family is taken from them.

The whole family. Goes back to his plan, to his course of conduct.

And his purpose when he went in there was to kill Margaret Eakin, that 57–year old former kindergarten teacher who made the holidays so special for James. And he committed that murder during an aggravated burglary.

And at the same time he committed another aggravating circumstance. Because Margaret was his third victim. She was the third person that this man purposely killed throughout a course of conduct, motivated by the same driving force, to hurt Marcia.

And prior to that he committed this first aggravating circumstance, when as he had planned, he killed his own daughter, Macy, five years old.

She'd only enjoyed five years on this earth and on that day he decided, James Mammone decided, not a jury, that Macy was to die. She was the first victim in his course of conduct that involved the purposeful killing of three people on the sacred ground that he chose.

But he wasn't done yet. No. Because he had also decided that James must die.

James, who would die at his own father's hands, because he thought it was necessary. James would become the second victim. Three-year old James, the second victim in this course of conduct, again, driven by that similar motivation, the desire to hurt Marcia.

Those are the aggravating circumstances that you must now weigh against the mitigating factors.

And I submit to you, ladies and gentlemen, that this course of conduct was not carried out because of deeply held religious beliefs. This course of conduct was carried out because of * * * [jealousy].

> {¶ 146} Contrary to Mammone's claims, the prosecutor did not improperly refer to nonstatutory aggravating circumstances. The jury had convicted Mammone of a course-of-conduct specification, R.C. 2929.04(A)(5), for each of the three murders, meaning that the jury "'discern[ed] some connection, common scheme, or some pattern or psychological thread'" that tied the offenses together. *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, 822 N.E.2d 1239, syllabus, quoting *State v. Cummings*, 332 N.C. 487, 510, 422 S.E.2d 692 (1992). In his closing argument at the mitigation phase, the prosecutor argued the nature and circumstances of Mammone's course-of-conduct specification. Namely, he argued that jealousy and Mammone's desire to hurt Marcia motivated all three murders. The prosecutor did not suggest that the jury could independently consider revenge as an aggravating circumstance.
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> {¶ 147} Even if any of the prosecutor's comments had been improper, Mammone cannot show prejudice because the trial court correctly instructed the jury on the aggravating circumstances and the proper standard to apply in the weighing process. *See Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504, at ¶ 90; *State v. Smith*, 87 Ohio St.3d 424, 444, 721 N.E.2d 93 (2000). It is presumed that the jury followed the court's instructions. *State v. Loza*, 71 Ohio St.3d 61, 79, 641 N.E.2d 1082 (1994). Accordingly, we find no plain error.

Mammone, *supra*, 139 Ohio St. 3d 496–98.

2. Analysis

"On habeas review of alleged prosecutorial misconduct, [courts] must evaluate the totality of the circumstances surrounding each trial to determine if the challenged conduct rendered the trial fundamentally unfair." *Majid v. Noble*, 751 F. App'x 735, 743 (6th Cir. 2018).

"Due process is the touchstone here: "[I]t is not enough that the prosecutors' remarks were undesirable or even universally condemned.'" *Id.* (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). "Instead, the relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

Setting aside whether there are grounds to excuse Mammone's procedural default of this claim, Mammone has not shown that the Ohio Supreme Court's decision finding no plain error was objectively unreasonable. *Stewart*, *supra*, 867 F.3d at 638. To the contrary, it was correct.

The jury's finding that Mammone killed his children and mother-in-law during a "course of conduct," O.R.C. § 2929.04(A)(5), meant that the jury had found "some connection, common scheme, or some pattern or psychological thread" that tied the crimes together. *Mammone*, *supra*, 139 Ohio St. 3d at 498. As the prosecutor argued, and as the evidence – including Mammone's own statements – showed beyond any possible doubt, the thread was Mammone's jealousy and desire to punish his ex-wife for divorcing him.

The prosecutor's argument was proper, and it was not an unreasonable application of Supreme Court precedent for the Ohio Supreme Court to so conclude. Habeas relief is therefore unavailable on Mammone's twelfth ground for relief.

K. Constitutionality of the Death Penalty

Mammone next brings two constitutional challenges to Ohio's death penalty regime.

In his thirteenth ground for relief, Mammone argues that Ohio law "permits the imposition of capital punishment in an arbitrary, capricious and discriminatory manner due to the uncontrolled discretion afforded the elected Stark County Prosecutor in determining when to seek the death penalty." (Doc. 23, PageID 11227).

In his seventeenth ground for relief, Mammone alleges that: 1) Ohio's death-penalty law allows for arbitrary and unequal punishment and involves unreliable sentencing procedures; 2) the felony-murder aggravating factor, O.R.C. § 2929.04(A)(7) is unconstitutional because it does not narrow the class of death-eligible murders; 3) the statutory weighing scheme is

unconstitutionally vague; and 4) the death penalty regime is unconstitutional because it does not contain a mercy option. (*Id.*, PageID 11250–69).

1. State Courts' Decisions

The Ohio Court of Appeals rejected Mammone's discretion-based challenge to the death penalty during postconviction review. As discussed above with respect to Mammone's claim that trial counsel were ineffective for not challenging the death penalty on this basis, the court of appeals held that "'[t]he existence of . . . discretionary stages'" throughout Ohio's capital punishment system did not violate the Constitution. *Mammone II*, *supra*, 2012 WL 3200685 at *4 (quoting *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (Stewart, J.)).

For its part, the Ohio Supreme Court rejected Mammone's other challenges to the death penalty:

> {¶ 183} In his ninth proposition of law, Mammone presents seven often raised—and always rejected—constitutional challenges to Ohio's capital-punishment scheme. He also argues that Ohio's death-penalty statutes violate international law and treaties and therefore offend the Supremacy Clause of the United States Constitution.
>
> {¶ 184} The court has previously considered and rejected each of these claims:
>
> • Ohio's death-penalty scheme is not imposed in an arbitrary and discriminatory manner. *State v. Ferguson*, 108 Ohio St.3d 451, 2006-Ohio-1502, 844 N.E.2d 806, ¶ 86 (rejecting claims of arbitrary and unequal punishment); *State v. Jenkins*, 15 Ohio St.3d 164, 169–170, 473 N.E.2d 264 (1984) (rejecting arguments regarding prosecutorial discretion); *State v. Steffen*, 31 Ohio St.3d 111, 124–125, 509 N.E.2d 383 (1987) (rejecting assertions of racial discrimination).
>
> • Ohio's statutory weighing scheme is neither unconstitutionally vague nor arbitrary and capricious. *Jenkins* at 171–173 [473 N.E.2d 264].
>
> • Ohio does not unconstitutionally burden a capital defendant's right to trial by jury. *Ferguson* at ¶ 89; *State v. Buell*, 22 Ohio St.3d 124, 138, 489 N.E.2d 795 (1986).

> • Ohio's requirement that a defendant must submit to the jury any presentence investigation report or mental evaluation he requests is constitutional. *Ferguson* at ¶ 90; *Buell* at 138 [489 N.E.2d 795].
>
> • Ohio's felony-murder specification is constitutional when applied to aggravated murder under R.C. 2903.01(B). *Jenkins* at 177–178 [473 N.E.2d 264].
>
> • R.C. 2929.03(D)(1) and 2929.04(B) are not unconstitutionally vague. *Ferguson* at ¶ 92; *State v. McNeill*, 83 Ohio St.3d 438, 453, 700 N.E.2d 596 (1998).
>
> • Ohio's review of sentence proportionality and appropriateness is constitutional. *Steffen* at paragraph one of the syllabus; *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 207.
>
> • Ohio's death-penalty scheme does not violate international law. *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 137–138; *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621, ¶ 127; *State v. Issa*, 93 Ohio St.3d 49, 69, 752 N.E.2d 904 (2001); *State v. Bey*, 85 Ohio St.3d 487, 502, 709 N.E.2d 484 (1999).

{ ¶ 185} In light of the above precedent, we reject Mammone's various claims. *See, e.g., State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶ 215–216; *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 381–383; *State v. Carter*, 89 Ohio St.3d 593, 607–608, 734 N.E.2d 345 (2000).

{ ¶ 186} As we have previously stated, "Ohio's statutory framework for imposition of capital punishment, as adopted by the General Assembly effective October 19, 1981, and in the context of the arguments raised herein, does not violate the Eighth and Fourteenth Amendments to the United States Constitution or any provision of the Ohio Constitution." *Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264, at paragraph one of the syllabus. In addition, we have "rejected the argument that Ohio's death penalty statutes are in violation of treaties to which the United States is a signatory" and thus have held that the statutes do not offend the Supremacy Clause of the United States Constitution. *Bey*, 85 Ohio St.3d at 502, 709 N.E.2d 484.

{ ¶ 187} Mammone's ninth proposition of law is not well-taken.

Mammone, *supra*, 139 Ohio St. 3d at 506–07.

2. Analysis

In the absence of any Supreme Court precedent holding that capital punishment is unconstitutional, Mammone is not entitled to habeas relief on these claims.

"[I]t is settled that capital punishment is constitutional," *Glossip*, *supra*, --- U.S. at ---, 135 S. Ct. at 2732, and the Sixth Circuit has repeatedly upheld Ohio's death penalty regime against constitutional challenges, including those that Mammone makes here. *Buell v. Mitchell*, 274 F.3d 337, 367–68 (6th Cir. 2001) (rejecting claims of arbitrary and unequal punishment and unreliable sentencing procedures); *Beuke v. Houk*, 537 F.3d 618, 652–53 (6th Cir. 2008) (rejecting claim that O.R.C. § 2929.04(A) does not narrow class of death-eligible offenders); *Cooey v. Coyle*, 289 F.3d 882, 927–28 (6th Cir. 2002) (rejecting vagueness challenge to statute's weighing process).

The Supreme Court itself, moreover, has rejected Mammone's argument that the jury must have the option to decline to impose a death sentence, even if it finds that the aggravating factors outweigh the mitigating factors. *Boyde v. California*, 494 U.S. 370, 377 (1990).

For these reasons, habeas relief is not available for Mammone's thirteenth and seventeenth claims.

L. Ineffective Assistance of Appellate Counsel

In his sixteenth ground for relief, Mammone claims that direct-appeal counsel was ineffective for not arguing that: 1) trial counsel were ineffective for (a) presenting Mammone's mitigation case under the wrong statutory mitigating factor; (b) not making and/or renewing motions and objections to preserve Mammone's appellate rights; and (c) not conducting an adequate voir dire of Juror 430; and 2) the prosecution (a) withheld evidence that Mammone's blood and urine samples tested positive for benzodiazepines and (b) presented false testimony at

the pretrial suppression hearing that Mammone's blood and urine tested negative for drugs. (Doc. 23, PageID 11246–50).

Mammone presented these claims in his motion to reopen his direct appeal, but the Ohio Supreme Court denied them without a reasoned opinion. (Doc. 10–21, PageID 2036).

"When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington*, *supra*, 562 U.S. at 99. "The presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Id.* at 99–100.

Because Mammone has not argued that the presumption is inapplicable here, I presume that the Ohio Supreme Court's unexplained order was an adjudication on the merits. *Accord Wells v. Potter*, 2018 WL 1614273, *2 (6th Cir. 2018); *Leonard v. Warden, Ohio State Penitentiary*, 2013 WL 831727, *42 (S.D. Ohio 2013).

1. Trial Counsel's Handling of the Mental-State Evidence

Dr. Smalldon testified that Mammone was under "extreme emotional distress" and suffering from "a severe mental disorder" at the time of the murders. But he also testified in no uncertain terms that Mammone was not insane and that he had the capacity to conform his conduct to the requirements of the law.

Despite this latter opinion, trial counsel urged the jury to consider Mammone's mental-health evidence as a mitigating factor under O.R.C. § 2929.04(B)(3). That provision directs the jury to consider as mitigating evidence whether the defendant, "because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of [his] conduct or to conform [his] conduct to the requirements of the law[.]"

Citing Dr. Smalldon's testimony the Ohio Supreme Court – which independently reweighed the aggravating and mitigating factors and found that the death sentence could stand – gave Mammone's mental state no weight under § 2929.04(B)(3). *Mammone*, *supra*, 139 Ohio St. 3d at 516. But the court nevertheless gave "moderate weight" to Smalldon's "extensive testimony about Mammone's severe personality and his mental state" under § 2929.04(B)(7), the so-called "catchall mitigation provision." *Id.* at 517.

The state supreme court's decision shows that counsel erred in arguing that the jury should consider Mammone's mental state under § 2929.04(B)(3): Dr. Smalldon's testimony denied the jury a factual basis for doing so. But was the error "sufficiently egregious" that counsel's overall representation of Mammone fell below an objective standard of reasonableness, such that this issue was likely to prevail on direct appeal? *Murray v. Carrier*, 477 U.S. 478, 496 (1986). I doubt it, given the sturdy work that counsel put into defending a case that was, essentially, unwinnable.

But I need not definitively resolve that issue because appellate counsel's failure to raise the claim was not prejudicial, and the Ohio Supreme Court was not unreasonable in so concluding.

The aggravating circumstances, involving the murder of two small children and the course-of-conduct evidence discussed above, were overwhelming. Mammone's mitigation evidence, by contrast, was hardly compelling. Furthermore, the trial court instructed the jury about the catchall aggravator, and thus, trial counsel's error notwithstanding, the jury could give whatever weight to Mammone's mental state it deemed appropriate. (Doc. 11–6, PageID 6172 – 73).

There was thus no reasonable probability that, had appellate counsel raised this claim on direct appeal, the result of the direct appeal would have been different. The Ohio Supreme Court's decision so holding was reasonable, thereby foreclosing habeas relief under § 2254(d).

2. Voir Dire of Juror 430 and Prosecutorial Misconduct

It is "a bedrock principle of appellate practice in Ohio . . . that an appeals court is limited to the record of the proceedings at trial[.]" *McGuire*, *supra*, 738 F.3d at 751 (internal quotation marks omitted).

Mammone's claims of ineffective assistance based on counsel's voir dire of Juror 430 and prosecutorial misconduct, in contrast, depend on evidence that was not part of the direct-appeal record: Juror 430's statements to the public defender's investigator and Spencer's undisclosed lab notes. "That being so, appellate counsel cannot be said to have been ineffective for failing to raise on direct appeal . . . a claim that relied on evidence outside the trial record." *Cowans v. Bagley*, 624 F. Supp. 2d 709, 783 (S.D. Ohio 2008).[7]

"Appellate counsel could not have brought th[ese] claim[s] on direct appeal and did not perform deficiently by complying with Ohio law." *Hill v. Mitchell*, 842 F.3d 910, 946–47 (6th Cir. 2016). The Ohio Supreme Court's decision to that effect was not unreasonable.

3. Failure to Renew Objections

This appellate-counsel claim fails because the objections that trial counsel failed to renew – the motion for a change of venue at the close of voir dire and to remove jurors 418 and 448 from the venire – were themselves meritless. It was not objectively unreasonable for the Ohio Supreme Court to reject this claim.

[7] To the extent that the claim depends on Juror 430's testimony during voir dire, the claim still fails because the record does not establish that Juror 430 was biased in favor of capital punishment.

M. Cumulative Error

Finally, in his eighteenth ground for relief, Mammone alleges that the cumulative effect of the errors that occurred at trial and sentencing entitle him to a new trial. (Doc. 23, PageID 11269–72). Mammone raised this claim on postconviction review, and the Ohio Court of Appeals rejected it, "find[ing] no cumulative error." *Mammone II*, *supra*, 2012 WL 3200685 at *6.

Because "[t]he Supreme Court has not held that constitutional claims that would not individually support habeas relief may be cumulatived in order to support relief," *Scott v. Elo*, 302 F.3d 598, 607 (6th Cir. 2002), habeas relief is unavailable under § 2254(d). *Harrington*, *supra*, 562 U.S. at 101; *Musladin*, *supra*, 549 U.S. at 77.

N. Motion for Discovery

I previously denied Mammone's first motion for discovery (Doc. 35) without prejudice to my reviewing the motion after deciding whether the state courts had adjudicated the claims on the merits and whether any claims were procedurally barred. (Doc. 40). By this order I have rejected all of Mammone's claims, some in light of § 2254(d), others because of procedural default, and still others under de novo review. There is, accordingly, no basis for discovery. I will therefore convert my prior order into a denial of the discovery motion with prejudice.

O. Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts provides that a court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."

A certificate may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

If the district court "has rejected the constitutional claims on the merits . . . [t]he petitioner must show that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). If the court denies the claim in whole or in part on procedural grounds, the certificate should issue only if "jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id.*

Having reviewed Mammone's claims at length, I conclude that a certificate of appealability should issue as to four claims:

1. Whether the state trial court should have presumed that the pretrial publicity about Mammone's case prejudiced his ability to receive a fair trial in Stark County.
2. Whether the jurors violated Mammone's right to a fair trial by praying before their penalty-phase deliberations.
3. Whether trial counsel were ineffective for: (a) failing to raise a defense of not guilty by reason of insanity; (b) failing to retain a neuropsychologist to evaluate Mammone; and (c) allowing Mammone to make an unsworn statement at the penalty phase or failing to prepare him to give a more effective statement. Because the first and second of these claims are procedurally defaulted, the certificate will also encompass the debatable question whether the defaults can or should be excused under *Trevino v. Thaler*, 569 U.S. 413 (2013), or some other basis.
4. Whether appellate counsel was ineffective for not arguing that trial counsel were ineffective for urging the jury to consider Mammone's mental state as mitigation

evidence under O.R.C. § 2929.04(B)(3) where the defense's own evidence foreclosed the jury's ability to do so.

If Mammone wishes to expand the certificate of appealability, he should so move in the Court of Appeals.

Conclusion

It is, therefore,

ORDERED THAT:

1. The amended petition for a writ of habeas corpus (Doc. 23) be, and the same hereby is, denied.
2. The motion for discovery (Doc. 35) be, and the same hereby is, denied with prejudice.
3. A certificate of appealability be, and the same hereby is, issued on the following claims:
   - A. Whether the state trial court should have presumed that the pretrial publicity about Mammone's case prejudiced his ability to receive a fair trial in Stark County.
   - B. Whether the jurors violated Mammone's right to a fair trial by praying before their penalty-phase deliberations.
   - C. Whether trial counsel were ineffective for: (a) failing to raise a defense of not guilty by reason of insanity; (b) failing to retain a neuropsychologist to evaluate Mammone; and (c) allowing Mammone to make an unsworn statement at the penalty phase or failing to prepare him to give a more effective statement. Because the first and second of these claims are

procedurally defaulted, the certificate will also encompass the debatable question whether the defaults can or should be excused under *Trevino v. Thaler*, 569 U.S. 413 (2013), or some other basis.

D. Whether appellate counsel was ineffective for not arguing that trial counsel were ineffective for urging the jury to consider Mammone's mental state as mitigation evidence under O.R.C. § 2929.04(B)(3) where the defense's own evidence foreclosed the jury's ability to do so.

So ordered.

/s/ James G. Carr
Sr. U.S. District Judge

CASE NO.: 2009CR0859 (DIRECT) (CMC)
CNH/ss

INDICTMENT FOR: AGGRAVATED MURDER, 1 CT.
[R.C. 2903.01(A) and/or (B)] (DEATH)
(With Two Death Specifications)
(With Firearm Specification)
AGGRAVATED BURGLARY, 1 CT.
[R.C. 2911.11(A)(1) and/or (A)(2)] (F1)
(With Firearm Specification)
AGGRAVATED MURDER, 2 CTS.
[R.C. 2903.01(A) and/or (C)] (DEATH)
(With Two Death Specifications)
AGGRAVATED BURGLARY, 1 CT.
[R.C. 2911.11(A)(2)] (F1)
(With Firearm Specification)
VIOLATING A PROTECTION ORDER, 1 CT.
[R.C. 2919.27(A)(1)] (F3)
ATTEMPT TO COMMIT AN OFFENSE (ARSON), 1 CT.
[R.C. 2923.02(A)] [2909.03(A)(1)] (F5)

THE STATE OF OHIO, STARK COUNTY, ss.

(FELONY)

In the Court of Common Pleas, Stark County, Ohio, of the Term of May in the year of our Lord two thousand and nine.

The Jurors of the Grand Jury of the County of Stark and State of Ohio, then and there duly impaneled, sworn and charged to inquire of and present all offenses whatever committed within the limits of said County, on their said oaths, in the name and by the authority of the State of Ohio, do find and present:

That **JAMES MAMMONE, III,** late of said County on or about the 8th day of June in the year of our Lord two thousand and nine, at the County of Stark, aforesaid, did purposely, and with prior calculation and design, cause the death of Margaret Eakin, and/or did purposely cause the death of Margaret Eakin, while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit Aggravated Burglary, as charged in Count Two of this Indictment, in violation of Section 2903.01(A) and/or (B) of the Ohio Revised Code, contrary to the statute in such cause made and provided, and against the peace and dignity of the State of Ohio.

Specification One to Count One [R.C. 2929.04(A)(5)]

The Grand Jury further finds and specifies that defendant, **JAMES MAMMONE, III**, did commit the offense of Aggravated Murder [R.C. 2903.01(A) and/or (B)], and prior to the offense at bar, the said JAMES MAMMONE, III, was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill Margaret Eakin, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the said JAMES MAMMONE, III.

Specification Two to Count One [R.C. 2929.04(A)(7)]

The Grand Jury further finds and specifies that defendant, **JAMES MAMMONE, III**, did commit the offense of Aggravated Murder [R.C. 2903.01(A) and/or (B)], while the said JAMES MAMMONE, III, was committing, attempting to commit, or fleeing immediately after committing or attempting to commit Aggravated Burglary [R.C. 2911.11(A)(1) and/or (A)(2)], as charged in Count Two of this Indictment, and the said JAMES MAMMONE, III, was the principal offender in the commission of the Aggravated Murder or, if not the principal offender, committed the Aggravated Murder with prior calculation and design.

Specification Three to Count One [R.C. 2941.145]

The Grand Jury further finds that defendant, **JAMES MAMMONE, III**, did have a firearm on or about his person or under his control while committing the offense of Aggravated Murder [R.C. 2903.01(A) and/or (B)] and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense of Murder [R.C. 2903.01(A) and/or (B)].

COUNT TWO

And the jurors aforesaid, by their oaths aforesaid, and by virtue of the authority aforesaid, do further find and present that **JAMES MAMMONE, III,** late of said County on or about the 8th day of June in the year of our Lord two thousand and nine, at the County of Stark, aforesaid, did, knowingly, by force, stealth, or deception, trespass in 315 Poplar Avenue N.W., Canton, Ohio, an occupied structure, or a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender was present, with purpose to commit therein any criminal offense, and the said JAMES MAMMONE, III, recklessly inflicted, or attempted or threatened to inflict physical harm on Margaret Eakin, and/or the said JAMES MAMMONE, III, had a deadly weapon or dangerous ordnance on or about his person or under his control, in violation of Section 2911.11(A)(1) and/or (A)(2) of the Ohio Revised Code, contrary to the statute in such cause made and provided, and against the peace and dignity of the State of Ohio.

Specification to Count Two [R.C. 2941.145]

The Grand Jury further finds that defendant, **JAMES MAMMONE, III,** did have a firearm on or about his person or under his control while committing the offense of Aggravated Burglary [R.C. 2911.11(A)(1) and/or (A)(2)] and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense of Aggravated Burglary [R.C. 2911.11(A)(1) and/or (A)(2)].

COUNT THREE

And the jurors aforesaid, by their oaths aforesaid, and by virtue of the authority aforesaid, do further find and present that **JAMES MAMMONE, III,** late of said County on or about the 8th day of June in the year of our Lord two thousand and nine, at the County of Stark, aforesaid, did purposely, and with prior calculation and design, cause the death of Macy Mammone, and/or did purposely cause the death of Macy Mammone, who was under thirteen years of age at the time of the commission of the offense, in violation of Section 2903.01(A) and/or (C) of the Ohio Revised Code, contrary to the statute in such cause made and provided, and against the peace and dignity of the State of Ohio.

Specification One to Count Three [R.C. 2929.04(A)(5)]

The Grand Jury further finds and specifies that defendant, **JAMES MAMMONE, III**, did commit the offense of Aggravated Murder [R.C. 2903.01(A) and/or (C)], and prior to the offense at bar, the said JAMES MAMMONE, III, was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill Macy Mammone, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the said JAMES MAMMONE, III.

Specification Two to Count Three [R.C. 2929.04(A)(9)]

The Grand Jury further finds and specifies that defendant, **JAMES MAMMONE, III**, did commit the offense of Aggravated Murder [R.C. 2903.01(A) and/or (C)], and the said JAMES MAMMONE, III, in the commission of the offense of Aggravated Murder purposefully caused the death of Macy Mammone, who was under thirteen years of age at the time of the commission of the offense, and either the said JAMES MAMMONE, III, was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.

COUNT FOUR

And the jurors aforesaid, by their oaths aforesaid, and by virtue of the authority aforesaid, do further find and present that **JAMES MAMMONE, III,** late of said County on or about the 8th day of June in the year of our Lord two thousand and nine, at the County of Stark, aforesaid, did purposely, and with prior calculation and design, cause the death of James Mammone, IV, and/or did purposely cause the death of James Mammone, IV, who was under thirteen years of age at the time of the commission of the offense, in violation of Section 2903.01(A) and/or (C) of the Ohio Revised Code, contrary to the statute in such cause made and provided, and against the peace and dignity of the State of Ohio.

Specification One to Count Four [R.C. 2929.04(A)(5)]

The Grand Jury further finds and specifies that defendant, **JAMES MAMMONE, III**, did commit the offense of Aggravated Murder [R.C. 2903.01(A) and/or (C)], and prior to the offense at bar, the said JAMES MAMMONE, III, was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill James Mammone, IV, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the said JAMES MAMMONE, III.

Specification Two to Count Four [R.C. 2929.04(A)(9)]

The Grand Jury further finds and specifies that defendant, **JAMES MAMMONE, III**, did commit the offense of Aggravated Murder [R.C. 2903.01(A) and/or (C)], and the said JAMES MAMMONE, III, in the commission of the offense of Aggravated Murder purposefully caused the death of James Mammone, IV, who was under thirteen years of age at the time of the commission of the offense, and either the said JAMES MAMMONE, III, was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.

COUNT FIVE

And the jurors aforesaid, by their oaths aforesaid, and by virtue of the authority aforesaid, do further find and present that **JAMES MAMMONE, III,** late of said County on or about the 8th day of June in the year of our Lord two thousand and nine, at the County of Stark, aforesaid, did, knowingly, by force, stealth, or deception, trespass in 414 Aultman Avenue N.W., Canton, Ohio, an occupied structure, or a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender was present, with purpose to commit therein any criminal offense, and the said JAMES MAMMONE, III, had a deadly weapon or dangerous ordnance on or about his person or under his control, in violation of Section 2911.11(A)(2) of the Ohio Revised Code, contrary to the statute in such cause made and provided, and against the peace and dignity of the State of Ohio.

Specification to Count Five [R.C. 2941.145]

The Grand Jury further finds that defendant, **JAMES MAMMONE, III,** did have a firearm on or about his person or under his control while committing the offense of Aggravated Burglary [R.C. 2911.11(A)(2)] and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense of Aggravated Burglary [R.C. 2911.11(A)(2)].

COUNT SIX

And the jurors aforesaid, by their oaths aforesaid, and by virtue of the authority aforesaid, do further find and present that **JAMES MAMMONE, III,** late of said County on or about the 8th day of June in the year of our Lord two thousand and nine, at the County of Stark, aforesaid, did recklessly violate the terms of a protection order issued or consent agreement approved pursuant to section 2919.26 or 3113.31 of the Revised Code, and being a felony of the third degree, the said JAMES MAMMONE, III, violated a protection order or consent agreement while committing a felony offense, to-wit: Aggravated Burglary [R.C. 2911.11(A)(2)], as charged in Count Five in this Indictment, in violation of Section 2919.27(A)(1) of the Ohio Revised Code, contrary to the statute in such cause made and provided, and against the peace and dignity of the State of Ohio.

COUNT SEVEN

And the jurors aforesaid, by their oaths aforesaid, and by virtue of the authority aforesaid, do further find and present that **JAMES MAMMONE, III,** late of said County on or about the 8th day of June in the year of our Lord two thousand and nine, at the County of Stark, aforesaid, did, knowingly, with sufficient culpability for commission of a violation of Section 2909.03(A)(1) of the Revised Code (Arson), engage in conduct which, if successful, would constitute or result in a violation of Section 2909.03(A)(1) of the Revised Code, to-wit: Did, by means of fire or explosion, knowingly attempt to cause, or create a substantial risk of physical harm to the property of Harold B. Carter without his consent, and being a felony of the fifth degree, the value of the property or the amount of physical harm involved was $500 or more, in violation of Section 2923.02(A) [Section 2909.03(A)(1)] of the Ohio Revised Code, contrary to the statute in such cause made and provided, and against the peace and dignity of the State of Ohio.

John D. Ferrero, #0018590
Prosecuting Attorney
Stark County

A True Bill:

Donald G. Beaver, Jr., Foreperson, Grand Jury

Request for Warrant

THE STATE OF OHIO, STARK COUNTY, ss.

I, Nancy S. Reinbold, Clerk of the Court of Common Pleas, in and for said County, do hereby certify that the within and foregoing is a full, true and correct copy of the original indictment, together with the endorsements thereon, now on file in my office.

WITNESS my hand and the seal of said Court at Canton, Ohio, this _____ day of _____, 2009.

_____, Clerk

By _____, Deputy

Sheriff's Return:

On _____, 2009, I delivered personally to the within named _____ a true and certified copy of this indictment, with all endorsements thereon.

_____, Sheriff

(CMC: 2009CRA02696; 2009CRA02705; 2009CRB02706)