

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

-vs-

JAMES MAMMONE, III,

Appellant.

:

: Case No. 10-0576

: Appeal taken from Stark County  
Court of Common Pleas

: Case No. 2009-CR-0859

: **This is a death penalty case**

**REPLY BRIEF OF APPELLANT JAMES MAMMONE, III**

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## **PREFACE**

Appellant James Mammone now replies to the State's brief. Any absence of a specific reply by Mammone is simply to avoid reargument of his merit brief. The absence of a reply to a particular argument raised by the State should not be construed as a concession by Mammone. Mammone stands on his merit brief when no specific reply is made.

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## PROPOSITION OF LAW NO. I

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

Every media outlet was saturated with details, interviews, and opinions about the Mammone case. Radio, television, websites, internet chat rooms, blogs, Twitter feeds, and newspapers provided "up-to-the-minute" coverage. On some Mammone online articles as many as 152 comments would be posted at a time with neighbors and people close to the victims' family posting additional details, opinions, and speculation as to what would or should happen to Mammone. Indeed, numerous readers wrote that given the nature and large number of comments posted it was hard to see how Mammone could get impartial jurors from the community. (Motion #47, Change of Venue, CantonRep.com attachments). Regardless, the state asserts that the media's coverage of Mammone's case is just "an inescapable result of modern technology and evolving methods of communication." (Appellee's Brief, p. 19). The state cites no case that holds that the advent of the internet and social media requires Mammone to forfeit his right to an impartial jury. Indeed, these new media developments require us as a society to employ more careful safeguards to protect this fundamental constitutional right. The following list (which is not exhaustive of the record before this Court) provides examples of the pretrial publicity, which the state wishes to downplay.

### Newspaper websites, online reader comment pages

(Motion #47, Change of Venue, attachments)

. **CantonRep.com:** 1) Shane Hoover, *Mammone Trial Jurors to be Asked about Views on Divorce, Child Custody*, CantonRep.com, Aug. 26, 2009. Posted comments: "this (sic) man needs NO sympathy at all. theres (sic) kids every day livin (sic) with out (sic) there (sic) father and some with out (sic) a mother too, and doin (sic) good, may be (sic)

he didn't want to pay child support.”; “This man is pure evil. Give him what he deserves.” 2) Shane Hoover, *Jail Letter on Mammone Case Turned over to Authorities*, CantonRep.com, Aug. 25, 2009. Article about and reprints Mammone's letter from jail. Posted comments (90 comments): “God WILL have his vengeance (sic) on you [Mammone], and I along with countless others will be happy to see you get what you deserve. You have no remorse, because you are evil. ...but don't YOU [Mammone] ever speak the name of God again. You are a sick person, and 100% evil. Be gone.”; “This man deserves no trial. Only a fool would consider him not guilty.”; “We were hooked and waiting on the next tidbit of information, sitting on the edge of our seats like some twisted soap opera. We speculated, made our judgements (sic), and even in our own little way, mourned for the victims.”; “THE ONLY THING I WANT TO READ ABOUT THAT JERK IS WHEN THEY PULL THE SWITCH.”; “...all I can say is Mr. Mammone will get his day in court and hopefully they find this lunatic guilty and they put a couple of needles in him...i (sic) would rather pay for the injections than his worthless butt staying in jail for the rest of his life, getting his vegetarian meals.” 3) Shane Hoover, *Mammone in Letter: Killing His Children was 'the Most Merciful Thing,'* CantonRep.com, Aug. 25, 2009. Posted comments (152 comments): “Ok boys, time to plug in ole 'Sparky.'”; “He is such an ugly puke...Someone needs to wipe this smirk from his face.”; “Kill him like he did those poor babies.” “Any possibility the legislature can bring back burning at the stake?”; “This man has some serious issues and hopefully we will be able to help him by sticking a needle in his arm and ending his suffering.”; “Some people don't deserve sympathy. Let his last meal be a plate of raw, bloody meat.”; “...I find it outrageous and hypocritical that James is spouting such false zealous religious claims for a man who tried to pick up girls that he delivered pizzas to and was in strip clubs 3-4 times a week after work!”; “Put him in a black bear outfit and let him go. Problem fixed!”; “EXECUTE, EXECUTE, EXECUTE, EXECUTE. No appeals, no waiting. No holds barred EXECUTE. Do not care what his reasoning is or was. EXECUTE. He killed his own children. EXECUTE!!!!”; “This guy needs to be dropped kicked to a remote place on earth, preferable (sic) someplace that has big nasty animals and bugs. He doesn't deserve to live. He deserves an awful death.” 4) Staff report, *Triple-Murder Suspect to Appear in Court Wednesday*, CantonRep.com, Jun. 9, 2009. 5) Staff report, *Mammone Facing Additional Criminal Charges in Triple-Murder Case*, CantonRep.com, Jun. 9, 2009 (includes picture of police draping tarp over car with dead children inside). 6) Shane Hoover, *Canton Man Faces Death Penalty if Convicted of Murder*, CantonRep.com, Jun. 17, 2009. Article states that “James Mammone III planned to kill his children and mother-in-law, and last week he carried it out.” Police state that “Mammone III confessed to the killings, saying he wanted to ‘inflict sever emotional pain.’” 7) Staff writer, *Police: Slaying Suspect Confesses, Admits Bearing 'Ill-Will' Toward Ex-Wife*, CantonRep.com, Jun. 9, 2009. 8) Staff report, *Mammone Divorce, at Times, a Turbulent One*, CantonRep.com, Jun. 9, 2009. Article recounts interview with neighbor where Marcia Mammone (e-wife) “came to his [neighbor's] home crying” and asked, “Will you keep an eye out for me? I'm going through a divorce. She was afraid Mammone III, might bother her.” 9) Staff report, *Triple-Murder Suspect's Ex-Wife: 'He's Been Acting Crazy All Night*, CantonRep.com, Jun. 8, 2009. Article details 911 call of ex-wife to police the night of the homicides. 10) Editorial, *The Unthinkable Happens Again*, CantonRep.com, Jun. 8, 2009. (90 posted comments.

Posting had to be stopped due to escalating nature of the comments.): Mammone is a “monster time-bomb”; “monster”; “nutcase”; “creep”; “lunatic”; “piece of ----”; “animal”. “Let’s start with him [judge that granted parenting time to Mammone]. “Give us the information, interview him [the domestic relations judge] and find out why he chose to let this nut have visitation? ; “No doubt I can give him a fair trial...right.”; “To heck with the Constitution says about this, there should be special circumstances where the jury of his peers are allowed to determine how this creep meets his maker.”

. **Indeonline.com:** 1) Doug Staley, *Mammone Waives His Right to a Speedy Trial*, Indeonline.com, Jul. 1, 2009. 2) Doug Staley, *Not Guilty Plea in Murder of Kids, Their Grandma*, Indeonline.com, Jul. 19, 2009. 3) Doug Staley, *Death Penalty Sought in Triple Murder*, Indeonline.com, Jun. 17, 2009. 4) Doug Staley, *Grand Jury Indicts Canton Man Who Admitted to Killing Children, Mother-in-Law*, Indeonline.com, Jun. 17, 2009. 5) Staff report, *Judge Denies Reduced Bond for Suspect in Triple Murder*, Indeonline.com, Jun. 10, 2009. 6) Doug Staley, *Key to Preventing Domestic Violence: Listen to Concerns*, Indeonline.com, Jun. 10, 2009. 7) Doug Staley, *Suspect Wanted to ‘Inflict Pain’ on Wife*, Indeonline.com, Jun. 9, 2009.

. **Fox8.com:** 1) Staff writer, *In Letter, Man Explains Why He Killed His Kids*, Fox8.com, Jun. 10, 2009. Article states that Mammone’s motive as to inflict as much emotional pain on his wife as possible. 2) Staff writer, *Confessed Triple Murder Arraigned in Canton*, Fox8.com, Jun. 10, 2009. “[Mammone] appeared as if he didn’t have a care in the world.” (Link provided to ex-wife’s 911 call.) 3) Jack Shea, *Father Charged With Murdering 2 Children & Mother-in-Law in Canton*, Fox8.com. “Police were horrified.” “Those who knew them are heartbroken.” 4) Bill Sheil, *Twisted Motive*, Fox8.com. Mammone’s motive in killings to inflict emotional harm on ex-wife.

. **The-Review.com:** 1) Associated Press, *Two Children and Grandmother are Slain in Canton*, The-Review.com, Jun. 9, 2009. “It is a horrendous case,” McKimm said. “He said the officers who made the arrest are struggling with what occurred.” 2) Associated Press, *Police Claim Canton Man Calmly Confesses to Killing of 2 Children and an Adult*, The-Review.com, Jun. 10, 2009. (Excerpt from 911 call). 3) Associated Press, *Canton Man Calm at Court Hearing on Triple Murders*, The-Review.com, Jun. 11, 2009.

. **WKYC.com:** 1) Associated Press, *Canton: Father Charged in Deaths of Children, Ex-Mother-in-Law*, WKYC.com, Jun. 9, 2009. “Police Department is devastated by the crime.” 2) Associated Press, *Canton Police: Man Confesses in Deaths of His Children, Former Mother-in-Law*, WKYC.com, Jun. 9, 2009. “[Mammone] calmly confessed shortly after his arrest.” (Excerpt from ex-wife’s 911 call). Comments: “What a sick, sick, person, i (sic) have no compassion for people like this.”; “This evil, sorry excuse for a human being should suffer, just as his poor children and their grandmother did. Why waste money on a trial and keeping this piece of trash alive? He did it. Execute him”; “I suppose this nutcase will be let go to live on the taxpayers funding for the rest of his life.”; “I say just stab his main artery as he did his children ... no sedative or last meal or even a visit from his clergyman. DIE, DIE, DIE you sick excuse of a human being!”

### **Radio and Television Shows**

(11/12/09 Hrg., Exhibits C, D, E, F, H)

. **Radio Station Q-92:** Talk show host comments about the “triple homicide all over the news everywhere.” Host notes that the Mammone story is in every newspaper and at the beginning of every newscast.

Radio conversation escalates “this douche bag can face trial.” And, “Have you seen pictures of this guy...looks like a motherf’ing nut bag.”

Radio host notes that Mammone’s letter and story encompassed  $\frac{3}{4}$  of the front page of the local paper. Links are provided to previous stories and crime scene photos.

“This psychopath is sitting in Stark County writing letters...”. Radio host talks about how published letters taints the jury pool.

Talk show host opens different program focused on Mammone’s letter published in the Canton Repository. Mammone described as a “freak,” a “freaking psycho A-hole.” Radio program goes on to compare Mammone to Jeffrey Daumer, Green River Killer and Ted Bundy. Comparison of Mammone’s letter to the Zodiac letters and the BTK letters.

Numerous news stories are aired regarding Mammone’s motive to “inflict as much emotional pain as possible.”

. **WKYC News:** Television interview with two women who were victims of domestic violence. Women were attacked, tortured and held hostage by their husbands. Commentary is that the Mammone case is “eerily similar” to the stories of the female victims. Graphic photos of the female victims displayed.

. **Fox 8 News:** Great deal of commentary on television show concerning Mammone’s demeanor at arraignment “smiling” and “smirking.” Extensive coverage provided of the funerals and calling hours as well as the pain suffered by family and neighbors. Story notes that Mammone “appeared as if he didn’t have a care in the world” when he was formally charged. News anchor also states that Mammone’s actions constituted a “very sick crime that affected a lot of people...”

Thus, Mammone’s attorneys had good cause to seek a change of venue. Especially troubling are the responses to the articles by members of the public from which Mammone’s jury had to be chosen. Indeed, at one point the comments were so heated and visceral that the comment section had to be shut down for awhile and many of the comments “scrubbed.” (Motion #47, Change of Venue, CantonRep.com attachment). Without doubt, the pretrial

publicity surrounding Mammone's case is not the detached, factual reporting that the state claims. Further, it is not the single newspaper article or non-inflammatory broadcasts described in State v. Fairbanks, 32 Ohio St. 2d 34, 289 N.E.2d 352 (1972). And, unlike Fairbanks, nearly all of the jurors were familiar with the Mammone case and at least four of the jurors (who served) had formed opinions about Mammone and his case before they even walked into the courtroom. At least one juror (Juror #448) served when he stated he could not be fair and would have a problem fairly deliberating the case. (TP 1/5/2010, p. 233).<sup>1</sup> Additionally, after questioning numerous jurors, the judge made appeals to the jurors' "duty as citizens" and reminded them not to ask to be excused just because Mammone's case was a "tough case" and to "think it [jury duty] over." (TP 1/5/2010, pp. 202; 233-34). It is in this context that the state asks this Court to rely on the jurors "self-assessments" that they could be fair.

Mammone's case is akin to the facts in Sheppard v. Maxwell, 384 U.S. 333 (1966). As in Sheppard, numerous stories about the "murder motive" appeared in all media outlets. Additionally, pictures of Mammone, particularly ones where Mammone is "smirking" or "smiling" appeared provoking outrage in the community along with links to Marcia Mammone's (Mammone's ex-wife) 911 call the night of the homicides. Numerous opinions as to why Mammone was guilty were published or posted online. The media was allowed in the courtroom and daily blogging as well as videos of pretrial hearings were made accessible to the public through various links on numerous websites. Finally, as in Sheppard, very few precautions were taken to guard against the jury's exposure to the pretrial publicity. For example, continuances to

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<sup>1</sup> The state asserts Juror #448 had not formed an opinion about the Mammone case. (Appellee's Brief, p. 18). This is incorrect. Further, Juror #448 was equivocal at best when further questioned regarding the ability to set aside any opinion. (TP 1/6/2010, pp. 210-212). Juror #448 would only state that he would "try" to set aside his opinion aside but it "might" affect his ability to be fair and impartial. The juror was also careful to note that he had a small child at home that might affect his decision making.

allow the publicity to abate or sequestering the jurors throughout the trial are steps a court can take to help insure a defendant's right to an impartial jury. See Sheppard at 363. Neither of those precautions was taken here. Rather, the trial court operated on a very tight schedule and had no interest in delaying the trial in an effort to allow the extensive pretrial publicity to die down. (TP 11/12/2009, p. 36). Additionally, the jury was not sequestered throughout the trial. Rather, the court denied Mammone's motion to sequester jurors throughout the trial and only sequestered jurors during deliberations. (TP 1/12/2010, p. 246; TP 10/7/2009, Motion #41). The only precaution given at Mammone's trial was that jurors were told not to listen to media accounts or discuss the case. This antiquated, general directive of the trial court fell far short of the control the state attempts to portray in its brief – especially in light of the stunning rise of technology.

Next, the state argues that despite the voluminous media coverage Mammone did not have any jurors who were actually biased and, thus, he received a fair trial. (Appellee's Brief, p. 20). Mammone's case however, contains the pervasive and inflammatory media coverage that this Court looks for when examining this issue. In State v. Treesh, 90 Ohio St. 3d 460, 739 N.E.2d 749 (2001), most prospective jurors had read something or seen an article about the case but had been exposed to relatively little pretrial publicity. See also, State v. Landrum, 53 Ohio St. 3d 107, 559 N.E.2d 710. Further, each juror stated they had not formed an opinion or would set any opinion aside and focus on the law and evidence. Treesh, at 464. Unlike Treesh and Landrum, Mammone can show that the publicity in his case was so pervasive that it impaired the ability of at least one juror to deliberate fairly and impartially.

Death is different; for that reason more process is due, not less. See Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976). Here, extensive media

coverage coupled with a large degree of public engagement exponentially expanded the depth and breadth of the prospective jurors' knowledge of what they perceived to be the facts of the case. A presumption of prejudice is well-established by the volume and content of the media's coverage of this case. The transcript also reflects at least four jurors seriously questioned whether they should sit as jurors on Mammone's case.<sup>2</sup> And, at least one juror never could state with any certainty that he could be fair and impartial.

Thus, it was impossible for Mammone to receive a fair trial before a jury composed of impartial persons who learn of the case through evidence properly admitted at trial. Mammone's convictions and sentences must be vacated and his case remanded for a new trial.

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<sup>2</sup> Mammone also argues that his counsel were ineffective during voir dire. See Prop. III).

## PROPOSITION OF LAW NO. VIII

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

Dr. Jeffrey Smalldon testified that Mammone was suffering from a severe mental disorder at the time of this offense. (PP, Vol. 2, p. 374). He diagnosed Mammone with a personality disorder not otherwise specified with schizotypal, borderline and narcissistic features. (PP, Vol. 2 pp. 407-08). Mammone was also diagnosed with passive aggressive and obsessive compulsive personality traits.

Evolving standards of decency indicate that execution of the severely mentally ill should be barred by the Eighth Amendment. State v. Lang, 2011 Ohio 4215, 2011 Ohio LEXIS 2161 (Aug. 31, 2011) (Lundberg Stratton, J., concurring). Connecticut prohibits the execution of the mentally ill. Legislators in Kentucky and North Carolina have introduced bills to bar the execution of defendants who at the time of the offense met certain criteria for severe mental disorder and disability. Id., \*P361, \*\*121. Indiana and Tennessee have taken measures to prohibit the execution of the severely mentally ill. Id., \*P362-3, \*\*121-22. Leading professional organizations have adopted policy statements recommending prohibition of execution of persons with severe mental illness at the time of the offense.<sup>3</sup>

As noted in the concurring opinions in Lang and State v. Ketterer, 111 Ohio St. 3d 70 (2006), the defendants are not sympathetic individuals. They committed brutal, horrifying

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<sup>3</sup> The American Bar Association, the American Psychiatric Association, the American Psychological Association, the National Alliance on Mental Illness, and Mental Health America. State v. Lang, 2011 Ohio at \*P364, 2011 Ohio LEXIS at \*\*122-23 (Lundberg Stratton, J., concurring), citing Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier* (2009), 50 B.C.L.Rev. 785, 789.

crimes. But there are “other facts also vital to understanding this apparently senseless murder.” Ketterer, at 101 (Lundberg Stratton, J., concurring). This should be considered even though “the state argued that Ketterer could have controlled his behavior.” Id., at 102.

Ketterer did not meet the standard for being found not guilty by reason of insanity. Under our current law, the evidence supported a finding of guilty. However, we can never truly know whether Ketterer would have committed this senseless crime against a long-time friend had he not been seriously mentally ill. The undisputed testimony regarding Ketterer’s serious mental illness places him in a very different category from persons without a mental illness.

This “terrible illness” can effect the defendant even where the facts seem to show an ability to plan and act. Id. Testimony about Mammone’s mental illness was similarly undisputed at trial.

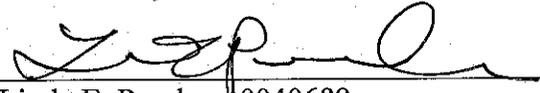
“Our law requires ‘a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual.’” Id., at 105, citing Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). Mammone’s psychological profile and behavior show an individual suffering from a mental illness.

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

## CONCLUSION

For the reasons set forth in his merit brief and for each of the foregoing reasons in this reply brief, Appellant Mammone's convictions and death sentence should be reversed.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing REPLY BRIEF OF APPELLANT JAMES MAMMONE was forwarded by first-class, postage prepaid, U.S. Mail to Kathleen Tatarsky and Renee Watson, Assistant Prosecuting Attorneys, Stark County, 110 Central Plaza South, Suite 510, Canton, Ohio 44702, on this 27th day of October, 2011



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