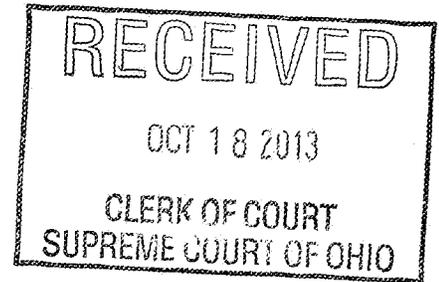


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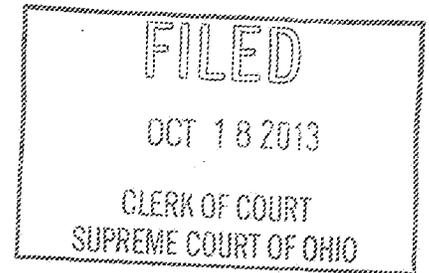
In the Supreme Court of Ohio

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



This is a death penalty case

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



RESPONSE TO JAMES MAMMONE'S MOTION TO
CORRECT OR MODIFY THE RECORD

JOHN D. FERRERO, #0018590
PROSECUTING ATTORNEY,
STARK COUNTY, OHIO

By: KATHLEEN O. TATARSKY
Sup. Ct. Reg. No. 0017115

RENEE M. WATSON
Sup. Ct. Reg. No. 0072906
Assistant Prosecuting Attorney
110 Central Plaza, South - Suite 510
Canton, Ohio 44702-1413
(330) 451-7897
FAX: (330) 451-7965

Counsel for Appellee

ROBERT LOWE
Sup. Ct. Reg. No. 0072264
Office of the Ohio Public Defender
250 E. Broad Street
Sup. Ct. Reg. No. 0064902
Suite 1400
Columbus, Ohio 43215
(614) 466-5394

ANGELA MILLER
Sup Ct. Reg. No. 0064902
322 Leeward Drive
Jupiter, Florida 33477
(561) 529-0545

Counsel for Appellant

Mammone's Motion Should be Denied

The state respectfully requests this Court deny Mammone's request to correct or modify the record as the same is groundless and further, simply an attempt to raise another assignment of error at the eleventh hour.

Mammone was not sentenced on different theories of aggravated murder for the killings of his children Macy and James, nor were they allied offenses. Rather, he received one sentence of death for each murdered child. What is more, he specifically does not challenge his sentence of death for the aggravated murder of Margaret Eakin. Like his victims, Mammone has but one life to give. Any ambiguity, even if any, in the language of the sentencing entry for the aggravated murder of his children is therefore harmless and of no meaningful consequence.

History of the Case

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

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

Mammone was further charged with two counts of aggravated burglary,

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

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

The guilt phase of the trial began on January 11, 2010. At the conclusion of four days of trial, the jury found Mammone guilty as charged in the indictment.

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

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

On January 22, 2010, Mammone returned to the trial court for a sentencing hearing. The trial court independently reviewed the evidence of the aggravating circumstances and the mitigating factors and found that the aggravating circumstances outweighed the mitigating factors. Accordingly, the trial court accepted the jury's recommendations and imposed three consecutive sentences of death; one for each aggravated murder.¹

¹Opinion of the Court, Jan. 26, 2010, A-13-22, Appellant's Merit Brief.

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

The trial court issued a written opinion pursuant to R.C. 2929.03(F).

Mammone filed a direct appeal and the matter is now set for oral argument on this Court's December, 2013 calendar. At this eleventh hour, Mammone now files this motion to correct or modify the record.

Mammone's Claim of Ambiguity

Mammone caused the death of three persons, his children Macy and James IV and their maternal grandmother, Margaret Eakin. He received the sentence of death for each of the killings. Mammone has no dispute with the trial court's entry relating to the sentence of death for the killing of Margaret Eakin. Instead, Mammone challenges the trial court's sentencing entry as it relates to the killing of Macy and James Mammone IV. Mammone argues that the use of the disjunctive "and/or" created an ambiguity. Mammone complains that he does not know whether he was sentenced for killing Macy and James IV with prior calculation and design under R.C. 2903.01(A) or whether he was sentenced for killing Macy and James IV because they were under the age of thirteen under R.C. 2903.01(C).

Yet, Mammone did not raise this issue in the trial court below or in Mammone's brief to this Court filed in April, 2011. Indeed, Mammone raises it for the first time two months before his case is set for oral argument using S.Ct. Prac.R. 11.03(E), a rule reserved for correcting the record. Accordingly, it is not properly preserved for review.

More important, it is groundless. Mammone was convicted of three counts of aggravated murder for the killing of three persons. Any ambiguity which Mammone claims is resolved by the jury's verdicts and interrogatories. The trial court was meticulous in ensuring that the jury entered verdicts on all charges raised in the indictment. Take, for example, the verdict forms on the killing of Macy - Count III.

The jury found Mammone guilty of the offense of aggravated murder in violation of R.C. 29093.0(A), prior calculation and design, and/or R.C. 2903.01(C), purposely causing the death of a child under thirteen years of age as alleged in the indictment. Two separate verdict forms contained the specifications alleged in the indictment - course of conduct R.C. 2020.04(A)(5) and under thirteen years of age, R.C. 2929.04(A)(9). In separate interrogatories, the jury found that Mammone purposely caused the death of Macy with prior calculation and design and that Macy was under the age of thirteen.

By signing these separate verdict forms and answering "yes" to the interrogatories, each juror found that Mammon acted with prior calculation and design in the killing of his children under the age of thirteen.

Still, the evidence in the case does not reasonably suggest any ambiguity. Mammone told the jury in his statement lasting five hours how he schemed and plotted the deaths of his toddler children.

The evidence and the separate verdict-interrogatory forms resolves any ambiguity in the use of and/or in the sentencing entry. *State v. Sneed*, 63 Ohio St.3d 3, 584 N.E.2d 1160 (1992)

(holding that use of disjunctive and/or in verdict form of no consequence where jury signed separate verdict form finding that defendant personally performed every act constituting the offense of aggravated murder).

Contrary to Mammone's claim, there is no uncertainty in this record. His own exhibits reveal that the jury unanimously found, in regard to the aggravated murders of Macy and James, that he acted with prior calculation and design and killed two victims under the age of thirteen. Indeed, both subsections applied.

No Double Jeopardy Violation

Mammone further attempts to spin his request for a correction of the record into a Double Jeopardy violation where none exists. He accurately notes that per R.C. 2941.25(A) he may be charged with multiple counts based on the same conduct, but ultimately convicted of only one. Yet he plainly has not received multiple punishments for the same offense. He was charged with one count of aggravated murder per child and sentenced on one count of aggravated murder per child.

As to aggravating circumstances, they must be merged for purposes of sentencing only when they "arise from the same act or indivisible course of conduct and are...duplicative." *State v. Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264 (1984) paragraph five of the syllabus, certiorari denied, 472 U.S. 1032, 87 L.Ed.2d 643 (1985). Aggravating circumstances that are allied offenses of similar import are "duplicative" within the meaning of *Jenkins*. *State v. Waddy*, 63 Ohio St.3d 424, 448, 588 N.E.2d 819(1992) certiorari denied, 506 U.S. 921, 121 L.Ed.2d 255 (1992). "Allied offenses of similar import are those offenses whose elements correspond to such a degree that the commission of one offense will result in the commission of the other." *Id.* at 448, quoting *State v. Mitchell* (1983), 6 Ohio St.3d 416, 418.

Mammone appears to argue that the aggravating circumstances are allied offenses and thus the trial court had to pick one of the two aggravating circumstances the jury determined existed for each count of aggravated murder. He provides, however, no analysis and cites no support for that proposition.

The aggravating circumstances for James and Macy were the same – that Mammone committed each murder 1) as a course of conduct involving the killing of two or more persons and 2) that each child was under the age of 13 and Mammone was the principal offender. One may kill two or more persons in the same course of conduct without murdering a child. These are not allied offenses and thus merger was not required. Still, one may kill a child under the age of thirteen without prior calculation and design. Here, Mammone did both.

Further, the cases cited by Mammone in support compare apples to oranges. Mammone cites *State v. Dunlap*, 73 Ohio St.3d 308, 652 N.E.2d 988 (1995) and *State v. Huertas*, 51 Ohio St.3d 22, 553 N.E.2d 1058 (1990) for his proposition that it was necessary for the trial court here to merge multiple counts. Yet neither case furthers Mammone's cause. In each case, the defendants were charged with two counts of aggravated murder for a single victim, each containing a separate aggravating specification. That is not the case here.

Moreover, there is only one order of execution per victim. Thus there can be only one conviction. As noted by Mammone, "conviction" includes both the guilt determination and the penalty imposition. Only one penalty of death was given to Mammone per child. Thus, only one conviction per child actually occurred. *State v. Poindexter*, 36 Ohio St.3d 1, 5, 520 N.E.2d 568, 52 (1988).

CONCLUSION

Because there were no counts to merge for purposes of sentencing in this matter, there is no need to correct the record and further, no Double Jeopardy violation. The record truly discloses what occurred in the trial court – the jury found both specifications to each count of aggravated murder were applicable, that Mammone killed his children under the age of thirteen with prior calculation and design and the trial court subsequently correctly sentenced Mammone to one sentence of death per child. There is, therefore, no omission or misstatement to be corrected pursuant to Rules of Practice 11.03(E).

This Court should view Mammone’s motion for what it is - a last ditch attempt to raise a groundless assignment of error to a brief that was filed in 2011 and a case set for December’s oral argument calendar. The State respectfully requests that the motion be overruled.

JOHN D. FERRERO, #0018590
PROSECUTING ATTORNEY,
STARK COUNTY, OHIO

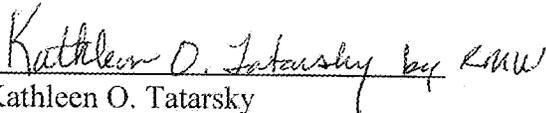
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Kathleen O. Tatarsky
Sup. Ct. Reg. No. 0017115

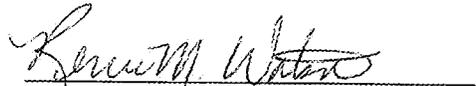
Renee M. Watson
Renee M. Watson
Sup. Ct. Reg. No. 0072906
Assistant Prosecuting Attorney
Appellate Section
110 Central Plaza, South - Suite 510
Canton, Ohio 44702-1413
(330) 451-7897
FAX: (330) 451-7965

Counsel for Appellee

PROOF OF SERVICE

A copy of the foregoing RESPONSE TO JAMES MAMMONE'S MOTION TO CORRECT OR MODIFY THE RECORD was sent by ordinary U.S. mail, postage prepaid, this 17th day of October, 2013, to ROBERT LOWE, counsel for defendant-appellant, at The Office of the Ohio Public Defender - 250 East Broad Street, Suite 1400, Columbus, Ohio 43215 and ANGELA MILLER, counsel for defendant-appellant, at 322 Leeward Drive, Jupiter, Florida 33477.


Kathleen O. Tatarsky
Sup. Ct. Reg. No. 0017115


Renee M. Watson
Sup. Ct. Reg. No. 0072906

Assistant Prosecuting Attorney
Appellate Section
110 Central Plaza, South - Suite 510
Canton, Ohio 44702-1413
(330) 451-7897
FAX: (330) 451-7965

Counsel for Appellee