

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:
Appellee,	: Case No. 10-0576
-vs-	: Appeal taken from Stark County Court of Common Pleas
JAMES MAMMONE, III,	: Case No. 2009-CR-0859
Appellant.	: This is a death penalty case.

Appellant's Motion for Reconsideration

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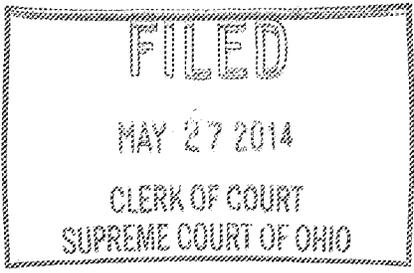
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Appellant's Motion for Reconsideration

Appellant, James Mammone, requests that this Court reconsider its merits ruling of May 14, 2014, affirming both his convictions and death sentence. This request is made under Sup. Ct. Prac. R. 18.02. The reasons in support of this motion are more fully set forth in the attached memorandum.

Respectfully submitted,

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Memorandum In Support

Reason #1 Requiring Reconsideration

Proposition of Law No. II

The service of jurors at the penalty phase who are biased in favor of the death penalty violates a capital defendant's rights to due process, freedom from cruel and unusual punishment, and a fair and reliable sentence. U.S. Const. Amends VIII, XIV; Ohio Const. Art. I, §§ 9, 10, and 16.

This Court rejected Mammone's argument that biased jurors served on his capital trial. In rejecting this claim, this Court determined that the trial court is to be accorded deference because it sees and hears the jurors firsthand. *State v. Mammone*, ___ Ohio St. 3d ___, 2014-Ohio-1942, slip op. at 25, 28 (2014). In reaching this decision, this Court goes against the principles set out in *Morgan v. Illinois*, 504 U.S. 719, 735 (1992). In *Morgan*, the United States Supreme Court stated that all questions concerning bias must be evaluated. It is not enough to ask the juror if he or she would be fair or follow the law. *Id.*

This principle was further demonstrated in *White v. Mitchell*, 431 F.3d 517, 541 (6th Cir. 2005). Although on direct appeal this Court found no error as the juror was willing to attempt to follow the law¹, the Sixth Circuit reviewed the transcript and found "highly troubling and contradictory statements" as to the juror's ability to be fair and granted White relief. *Id.*

This Court was recently reversed again in *Trimble v. Bobby*, Case No. 5:10-cv-00149 2012 U.S. Dist. LEXIS 125964 (N.D. Ohio March 20, 2013) for similar reasons.² In *Trimble*, this Court did not find error where the trial court seated a juror who gave several inconsistent statements regarding his feelings toward the case but felt he could "be fair." *Id.* at *88. The federal district court found that Trimble was denied his right to a fair trial because this juror could not fairly consider other options besides death. Indeed, the juror's answers as a whole and

¹ *State v. White*, 82 Ohio St. 3d 16, 20, 693 N.E.2d 772, 778 (1998).

² *State v. Trimble*, 122 Ohio St. 3d 297,308-09, 911 N.E.2d 242, 260 (2009).

his dialogue with the court reflected a pro-death stance even though the juror occasionally retreated from it. This same scenario existed in Mammone's case. Like Trimble and White, Mammone was tried by jurors who could not fairly consider life options at the penalty phase.

In this case, Juror 418's answers were certainly troubling and contradictory. When asked about the ability to consider a life sentence, Juror 418 repeatedly explained that she believed in the rule of "an eye for an eye," especially when small children are involved. (VD, Vol. 1, pp. 233-35). Juror 448 stated that his moral code was also "an eye for an eye" and that the death penalty is proper in all cases of aggravated murder. (VD, Vol. 2, p. 236-50). Juror 448 further stated that the facts of Mammone's case would affect his ability to be fair and he was not sure if he would be able to disregard what he already heard and discussed with others about the case. (VD, Vol. 2, p. 211). These responses cannot be ignored because the jurors eventually made a statement they could be fair and the trial court saw those jurors.

The trial court's failure to excuse these two jurors for cause was prejudicial as the record shows that both jurors, in almost all circumstances, would automatically vote for death. *See Trimble* at *60. It is clear from *White* and *Trimble* that a reviewing court must evaluate the entirety of the jurors' responses. It is because jurors often given inconsistent responses and likely have not had to square their moral beliefs with the law that "[b]oth the trial court and the Ohio Supreme Court, and this Court, need to consider all of the juror's voir dire examination. Both the trial court and reviewing courts should not search for an isolated statement that the juror could fairly apply Ohio's death penalty law." *Trimble* at *87-88. The failure of this Court to review the entirety of each juror's responses is an error that upon reflection necessitates reconsideration. *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, Slip Opinion No. 2014-Ohio-1940, para. 9 (2014).

The trial court erred when it failed to dismiss Jurors 418 and 448 due to their biases. Mammone's death sentence is based on deliberations of two jurors who were biased to impose death upon conviction alone. This Court's ruling failed to review the entirety of each juror's responses and simply decided this issue by giving deference to the trial court's decision. Mammone respectfully requests that this Court reverse its opinion and vacate his sentence.

Reason #2 Requiring Reconsideration

The Sentencing Entry in this Case is Invalid

Appellate counsel argued that Mammone's sentencing entry does not specify which aggravated murder theory was the basis of Mammone's sentence. (See Mammone's Motion to Correct Record). This Court has *sua sponte* raised issues in death penalty cases and therefore, this Court is not barred from considering this issue. See *State v. Yarbrough*, 104 Ohio St. 3d 1, 1-2, 817 N.E.2d 845, 848 (2004) (Sua Sponte raising issue of subject matter jurisdiction.) This Court needs to reconsider its opinion to protect the integrity of these proceedings and correct the sentencing entry in this case.

Mammone's sentencing entry utilizes "and/or" language in the two counts of aggravated murder related to James Mammone, IV, and Macy Mammone. Specifically, the sentencing entry provides:

...Aggravated Murder, 2 Cts. [R.C. 2903.01(A) **and/or** (C) (Death)
(With Two Death Specifications) [R.C. 2929.04 (A) (5) and 2929.04 (A)
(9).....

(See 2/16/10 Entry) (Emphasis added).

In short, the different theories of aggravated murder advanced by the state as to two of the victims (James IV and Macy), were never resolved.² The trial court's sentencing entry was improper as it did not state whether the jury found that James Mammone was guilty of aggravated murder because he acted with prior calculation and design (R.C. 2903.01 (A)) or because he killed two victims under the age of thirteen (R.C. 2903.01 (C)).

² This issue does not exist with Margaret Eakin. While charged under different theories (R.C. 2903.01(A) "and/or" R.C. 2903.01(B)), Mammone was found guilty under R.C. 2903.01(B).

The trial transcript does not provide any clarification. The jury simply reported that they found Mammone guilty of two counts of aggravated murder as to James Mammone, IV, and Macy Mammone and that they found Mammone guilty of both death penalty specifications as to each of the counts of aggravated murder. (Tr. Vol. VIII, pp. 140-141). Likewise, the sentencing transcript explains the death penalty specifications but does not set forth which subsection Mammone was found guilty of committing, R.C. 2903.01(A) or R.C. 2903.01(C), for a valid conviction. (Sentencing Tr. Vol. III, pp. 565-567).

The verdict forms provide no clarification either. Again, the same “and/or” language is employed and the jurors do not state which theory of aggravated murder they found the state proved beyond a reasonable doubt. Appellee’s brief also does not provide any answers on this point. On page two of Appellee’s Brief it simply states that, “At the conclusion of four days of trial, the jury found Mammone guilty as charged in the indictment.” (Appellee’s Brief, p. 2).

The interrogatories submitted to the jurors provide some insight as to their findings. However, that insight does not resolve the trial court’s failure to specify the aggravating circumstances Mammone was found guilty for purposes of sentencing Mammone. Specifically, the interrogatories asked the jurors if they found prior calculation and design and if they found that two of the victims were under the age of thirteen. T.p. Vol. 8, pp. 111-14. The jurors answered “yes” to both interrogatories. Id. pp. 145-47. This usage of “and/or” in this way created ambiguity and is strongly disfavored by this Court. *See State v. Noling*, 98 Ohio St. 3d 44, 57, 781 N.E.2d 88, 105 (2002). (“The form of the charge and the specifications, combining aggravated robbery and/or aggravated burglary, was unnecessary and perilous.”). This “and/or” ambiguity in Mammone’s sentencing entry must be corrected as it is axiomatic that a court

speaks through its entries. *State ex rel. Worcester v. Donnellon*, 49 Ohio St. 3d 117, 551 N.E.2d 183 (1990).

The trial court must explicitly merge the aggravated murder theories and approve one single death sentence for each victim. *State v. Huertas*, 51 Ohio St. 3d 22, 28, 553 N.E.2d 1058, 1066 (1990). Thus, Mammone's conviction and sentencing on two counts/theories of aggravated murder for a single victim violated R.C. 2941.25 and the Double Jeopardy Clauses of the Ohio and United States Constitutions.

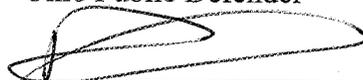
The sentencing entry in its current form, containing "and/or" language as to the two victims, cannot stand. Mammone respectfully requests that this Court reconsider its opinion and remand his case back to the trial court for issuance of a proper sentencing entry.

Conclusion

For each of the forgoing reasons, Appellant James Mammone requests that this Court reconsider its decision on the merits issued on May 14, 2014.

Respectfully submitted,

Office of the
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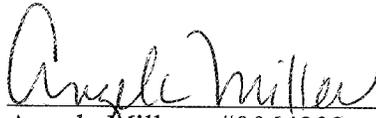


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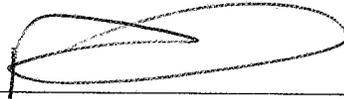


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Certificate Of Service

I hereby certify that a true copy of the foregoing Motion for Reconsideration was forwarded by first-class, postage prepaid U.S. Mail to Kathleen O. Tatarsky, Assistant State County Prosecuting Attorney, Stark County Prosecutor's Office, 110 Central Plaza, South, Suite 510, Canton, Ohio, 44702, on the 27th day of May, 2014.



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