ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel., WILLIAM HUDSON, Relator-Appellant,	*	CASE NO. 11-1680
-VS-	*	On Appeal from the Cuyahoga County Court of Appeals; Eighth Appellate District.
JUDGE JOHN D. SUTULA, et al., Respondents-Appellee.	*	C.A. CASE NO. 10-CA-096705

MERIT BRIEF OF RELATOR-APPELLANT WILLIAM HUDSON

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STATEMENT OF THE CASE AND FACTS

On March 17, 2006, Mr. Hudson was indicted for two counts (1 & 2) of Attempted Murder of Genaro Claudio, R.C. 2903.02(A) and 2903.02(B) with specifications, one count (3) of Felonious Assault, R.C. 2903.11(A)(1), one count (4) of Felonious Assault, R.C. 2903.11(A)(2), with specifications, two counts (5 & 6) of Aggravated Robbery, R.C. 2911.01(A)(1), and 2911.01(A)(3), and one count (7) of Weapons Under Disability, R.C. 2923.13.

The jury found Hudson guilty of all charges except the Aggravated Robbery counts.

The court merged all firearm specifications, but failed to consider the provisions of R.C. 2941.25(A) when it imposed concurrent sentences for counts 1 & 2, Attempted Murder instead of merging the sentences; concurrent sentences for counts 3 & 4, Felonious Assault instead of merging the sentences, and further ordering them consecutive to counts 1 & 2.

The trial court should have merged the convictions for sentencing.

Hudson filed a motion to correct the sentence that was contrary to law, and the trial court denied the motion.

Hudson then filed a mandamus and the court of appeals dismissed.

It is from that dismissal that Hudson appeals.

PROPOSITION OF LAW I:

THE COURT OF APPEALS ERRED IN DISMISSING RELATOR'S COMPLAINT/PETITION FOR WRITS OF MANDAMUS AND/OR PROCEDENDO TO CORRECT RELATOR'S SENTENCE THAT IS CONTRARY TO LAW PURSUANT TO R.C. 2941.25(A) THAT THE TRIAL COURT HAD A MANDATORY DUTY TO COMPLY WITH THE PROVISIONS THEREOF, VIOLATING RELATOR'S CONSTITUTIONAL GUARANTEE AGAINST DOUBLE JEOPARDY.

In the instant case, the trial court did not follow statutorily mandated provisions as et forth in R.C. 2941.25(A).

This Court has made it clear that when a sentence is imposed that does not comport with statutorily mandated provisions, it is void and subject to total re-sentencing. See, State v. Bezak (2007), 114 Ohio St.3d 94, 2007-Ohio-3250,

As this Court set forth in State v. Beasley (1984), 14 Ohio St.3d 74, 14 O.B.R. 511, 471 N.E.2d 774, a void sentence is a mere nullity, and it is as if it had never happened, and any attempted sentence must be considered void.

In State v. Payne, 114 Ohio St.3d 502, this Court opined that imposing a sentence outside the statutory range; contrary to statute, is outside a court's jurisdiction. Thereby, rendering the sentence void ab initio. See, footnote 2, ¶29.

This Court summed-up the situation regarding statutory mandates in State v. Fischer, Slip Opinion, 2010-Ohio-6238, 128 N.E.2d 92:

> "¶21 [J]udges are not imperial. We recognize that our authority to sentence in criminal cases is limited by the people through the Ohio Constitution, and by our Legislature through the revised code"; and
>
> ¶22 Judges have no inherent power to create sentences"; and
>
> ¶23 No court has the authority to impose a sentence that is contrary to law. quoting Colegrove v. Burns, 175 Ohio St., @ 438."

As this Court opined Fischer at ¶23 "No court has the authority to impose a sentence that is contrary to law. Colegrove v. Burns, 175 Ohio St. @ 438, 25 O.O.2d 447, 195 N.E.2d 811. We reaffirm that vital principle today and reinstate that a judge must conform to the general Assembly's mandates in imposing post release control sanctions as part of a criminal sentence. Although the interests of finality of a sentence are important, they cannot trump the interests of justice, which require a judge follow the letter of the law in sentencing a defendant." (Emphasis added).

While the instant case relates to allied offenses pursuant to R.C. 2941.25(A), and not post-release control, the principle of law is the same. No judge can disregard statutory mandates. When a judge imposes a sentence contrary to law, the judge is acting without authority and the resulting sentence is void.

> "We therefore hold that void sentences are not precluded from appellate review by principles of res judacata and may be reviewed at anytime, on direct appeal or by collateral attack." Fischer @ ¶40.

Clearly the Relator's void sentence is subject to collateral attack as it is contrary to law.

Because a sentence is authorized by law only if it comports with all mandatory sentencing provisions, it must comport with the protection of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution, which prevents multiple punishments for the same offense as codified by R.C. 2941.25. The statute states in pertinent part:

"(A) Where the same conduct by a defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

As set forth in State v. Underwood, 124 Ohio St. 365, 922 N.E.2d 923, @ 23:

"R.C. 2941.25(A) clearly provides that there may be only one conviction for allied offenses of similar import. Because a defendant may be convicted of only one offense for such conduct, the defendant may be sentenced for only one offense. This court had previously said that allied offenses of similar import are to be merged at sentencing. See, State v. Brown, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, @ ¶43; State v. McGuire (1997), 80 Ohio St.3d 390, 399, 686 N.E.2d 1112. Thus a trial court is prohibited from imposing individual sentences for counts that constitute allied offenses of similar import.***This is mandatory not discretionary***."

This Court explained in State v. Cabrales, 118 Ohio St.3d 54, that elements of an offense are first to be compared in the abstract. Meaning the evidence of the case is not at issue. State v. Williams, 124 Ohio St.3d 381, 922 N.E.2d 937, 2010-Ohio-147. In order to commit the offense of attempted murder as defined in R.C. 2903.02(B), one must purposely or knowingly engage in conduct that, if successful, would result in the death of another as a proximate result of committing or attempting to commit an offense of violence. Felonious assault is an offense of violence, R.C. 2901.01(A)(9), the commission of an offense of violence, here felonious assault. Williams, supra, @ ¶23.

The next step in the Cabrales analysis requires a determination of whether the offenses were committed separately, or with the same animus. The Relator knowingly engaged in conduct that, if successful, would have resulted in the death of another as a proximate result of committing felonious assault. He did so by firing a gun at the victim allegedly striking him. Thus, he committed

the offense of attempted murder and felonious assault with a single animus. Accordingly, while he may be found guilty of both offenses, he may be sentenced for only one. State v. Whitfield (2010), 124 Ohio St.3d 319, 2010-Ohio-2 @ ¶17, 922 N.E.2d 182; See also, Williams, supra, @ ¶24.

As set forth in Walters v. Sheets, Slip Copy 2011 WL 4543889 (S.D. Ohio);

"In January 2010, the Supreme Court of Ohio applied the standard from Cabrales in State v. Williams, 124 Ohio St.3d 381, 386-87, 922 N.E.2d 937 (2010). In holding that felonious assault and attempted felony murder constitute allied offenses of similar import, the court considered the elements of the crimes in the abstract. Id.

In order to commit the offense of attempted murder as defined in R.C. 2903.02(B), one must purposely or knowingly engage in conduct that, if successful, would result in the death of another as a proximate result of committing or attempting to commit an offense of violence. Since felonious assault is an offense of violence R.C. 2901.01(A)(9), the commission of attempted murder, as statutorily defined, necessarily results from the commission of an offense of violence, here, felonious assault. Accordingly, felonious assault as defined in R.C. 2903.11(A)(1) is an allied offense of attempted murder as defined in R.C. 2903.02(B) and 2923.02.

Id. at 922 N.E.2d 937. In the present case, the Magistrate Judge recommended that habeas relief be granted relying on the reasoning of Williams and several post-Williams decisions from Ohio Courts of Appeal which held that felonious assault and felony murder are allied offenses of similar import. Report and Recommendation, at 30.

On the same day that the Magistrate Judge filed the Report and Recommendation in this case, the Supreme Court of Ohio explicitly overturned Rance's interpretation of Ohio Revised Code §2941.25. State v. Johnson, 128 Ohio St.3d 153, 161, 942 N.E.2d 1061 (2010). The interpretation of Ohio Revised Code §2941.25 in State v. Johnson requires a court to consider whether it is possible to commit both offenses with the same conduct, instead of whether it is possible to commit one without committing the other. Johnson, 128 Ohio St. at 162, 190 N.E. 389. If it is possible to commit both offenses with the same conduct, a court must then consider whether the offenses were committed by a single act and a single state of mind in the specific case. Id. In Johnson, the court used that interpretation of Ohio Revised Code §2941.25 to hold that child endangering and felony murder are allied offenses. Id. at 163, 190 N.E. 398. Because the abuse of the child was the conduct that caused the death of the child, the defendant could be sentenced for either child endangering or felony murder, but not both. Id.

The Magistrate Judge did not have the benefit of Johnson when making a recommendation in the case sub judice, but Johnson confirms the Magistrate Judges's conclusion that felonious assault and felony murder merge under Ohio Revised Code §2941.25. First, it is possible to commit both felonious assault and felony murder with the same conduct, especially where, as in this case, the felonious assault charge is the underlying felony in the felony murder charge. Second, in this case the same physical altercation and animus resulted in the victim's death. Just as the single beating in Johnson required that child endangering and felony murder merge, the single assault in this case merges with felony murder. Therefore, the magistrate Judges did not substitute her own interpretation of Ohio Revised Code §2941.25, but rather properly applied the Supreme Court of Ohio's current interpretation of the statute.

Beyond whether the Magistrate Judge applied the Supreme Court of Ohio's precedent correwctly, Respondent also objects to applying the recent reinterpretation of Ohio Revised Code §2941.25 to this case. In support, Respondent cites several cases for the proposition that habeas courts are bound by a state court's interpretation of the state's allied offense statute. Petitioner responds that Williams merely clarified Ohio Revised Code §2941.25 and therefore, Williams should have retroactive application.

When the Supreme Court of Ohio overrules its interpretation of a state statute, the correction has retroactive application. Agee v. Russell, 92 Ohio St.3d 540, 543, 751 N.E.2d 1043 (2001. In reviewing a previous statutory interpretation the court is not creating a new law, but rather deciding what the statute meant from its inception. Id. Additionally, Johnson and Cabrales make clear that decisions of lower Ohio courts had misinterpreted Ohio's statute governing allied offenses, thereby creating unreasonable results consistent with the Double Jeopardy Clause. See, Johnson, 128 Ohio St.3d at 158, 942 N.E.2d 1061; Cabrales, 118 Ohio St.3d at 59, 886 N.E.2d 181 (2008). Therefore, Johnson's interpretation of Ohio Revised Code §2941.25 has retroactive interpretation."

The instant case is almost identical in nature to Walters. Therefore, the Relator's sentence is clearly void as it violates the statutorily mandated provisions of R.C. 2941.25(A) and the constitutional guarantees against Double Jeopardy.

The Cuyahoga County Court of Common Pleas failed to make proper and accurate application of the allied offense issue. The Relator's offenses of which he was found guilty of are allied offenses of similar import, and the Cuyahoga County Court of Common Pleas must comply with the statutory mandated requirements of R.C. 2941.25(A).

The trial court in the instant case has exceeded its authority by disregarding R.C. 2941.25(A) and imposed a void sentence that is unauthorized by law. The Relator's sentence of ten (10) years concurrent for counts one & two, of attempted murder, R.C. 2923.02/2903.02 - F1, to be served consecutive to six (6) years concurrently for counts three & four, felonious assault, R.C. 2903.11 - F1, is an incorrect application of law. These offenses are clearly allied offenses of similar import and must have been merged.

As set forth in State v. Damron, 2011-Ohio-2268:

"[W]hen a defendant has been found guilty of allied offenses, R.C. 2941.25 prohibits the imposition of multiple sentences. Whitfield, 124 Ohio st.3d 319. Therefore, a trial court must merge the crimes into a single conviction and

impose for sentencing. State v. Brown, 119 Ohio St.3d 447. In this case, the sentencing court found Damon guilty of both offenses and sentenced him on both. The imposition of concurrent sentences is not the equivalent of merging allied offenses."

The instant case is clearly a blatant disregard for the intention of R.C. 2941.25(A), and clearly a violation of the Relator's constitutional guarantee against Double Jeopardy.

The effect of allied offenses is not a new or recently decided line of cases. One only need to look to State v. Balnkenship (1988), 38 Ohio St.3d 116.

The trial court had a clear legal duty to consider whether felonious assault, R.C. 2903.11(A)(1) and 2923.11(A)(2), and attempted murder, R.C. 2923.02/2903.02(A) and 2903.02/2903.02(B) constituted allied offenses of similar import, which they clearly are.

As this Court stated in Williams, at ¶28;

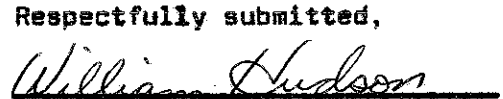
"Based on the foregoing, felonious assault as defined in R.C. 2903.11(A)(1) is an allied offense of attempted murder as defined in R.C. 2903.02(B) and R.C. 2923.02; and felonious assault as defined in R.C. 2903.11(A)(2) is an allied offense of attempted murder as defined in R.C. 2903.02(A) and 2923.02."

The Relator could only be sentenced on one of the counts of felonious assault or attempted murder, and it was up to the State to decide which count that they wanted to pursue sentencing on.

By the same line of reasoning, count seven, weapons under disability, R.C. 2923.13, should merge with either count four or the firearm specifications in counts 1, 2, 3, or 4. The charge equates to punishing the offender multiple times for the same offense; i.e., possessing a firearm. This puts the Relator in jeopardy multiple times for the same offense as the court imposed multiple sentences.

WHEREFORE, the Relator respectfully moves this Court to reverse the Court of Appeals decision and grant the Writ of Mandamus and/or Procedendo.

Respectfully submitted,



William Hudson
Relator-Appellant, Pro Se

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Merit Brief of Relator-Appellant WEilliam Hudson was forwarded, via regular U.S. Mail, to the Cuyahoga County prosecutor's Office, @ The Justice Center/9th Floor, 1200 Ontario Street, Cleveland, Ohio - 44113, on this 27th day of October, 2011.

William Hudson

William Hudson

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel., WILLIAM HUDSON, Relator-Appellant,	*	CASE NO. 11-1680
-VS-	*	On Appeal from the Cuyahoga County Court of Appeals; Eighth Appellate District.
JUDGE JOHN D. SUTULA, et al., Respondents-Appellees.	*	C.A. CASE NO. 10-CA-096705

NOTICE OF APPEAL OF RIGHT OF APPELLANT WILLIAM HUDSON
FROM ORIGINAL ACTION IN THE COURT OF APPEALS

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NOTICE OF APPEAL OF RIGHT OF APPELLANT WILLIAM HUDSON

Appellant, William Hudson, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals case no. 10-CA-096705 on September 14, 2011.

This appeal is an appeal of right from an original action in Mandamus and/or Procedendo that originated in the Eighth Appellate District Court of Appeals.

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Mansfield, Ohio - 44901
Relator-Appellant, Pro Se

SERVICE

This is to certify that a true and correct copy of the foregoing Notice of Appeals was forwarded, via regular U.S. Mail, to the Cuyahoga County Prosecutor's Office, @ The Justice Center/9th Floor, 1200 Ontario St., Cleveland, Ohio - 44113, on this 27th day of September, 2011.

William Hudson

SEP 14 2011

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

S/O EX REL., WILLIAM HUDSON

Relator

COA NO.
96705

ORIGINAL ACTION

-vs-

JUDGE JOHN D. SUTULA, ET AL.

Respondent

MOTION NO. 447016

Date 09/14/11

Journal Entry

Complaint dismissed. See journal entry and opinion of same date signed by Eileen A. Gallagher, J.; Melody J. Stewart, P.J., and James J.Sweeney, J., concur.

FILED AND JOURNALIZED
PER APP.R. 22(C)

SEP 14 2011

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

Presiding Judge MELODY J. STEWART,
Concurs

Judge JAMES J. SWEENEY, Concurs

Judge EILEEN A. GALLAGHER

SEP 14 2011

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 96705

STATE OF OHIO, EX REL. WILLIAM HUDSON

RELATOR

vs.

JUDGE JOHN D. SUTULA, ET AL.

RESPONDENTS

JUDGMENT: COMPLAINT DISMISSED

Writ of Mandamus
Motion No. 444515
Order No. 447016

RELEASE DATE: September 14, 2011

FOR RELATOR

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EILEEN A. GALLAGHER, J.:

Relator, William Hudson, is the defendant in *State v. Hudson*, Cuyahoga Cty. Court of Common Pleas Case No. CR-478205, which has been assigned to respondent judge. Hudson complains that respondent judge "did not properly address the issue of allied offenses." Complaint, ¶5. He contends that the sentence is void. He requests that this court compel respondent judge and respondent court of common pleas to return him before that court, issue a "lawful sentence" and enter "a valid final judgment." Complaint, Ad Damnum Clause. For the reasons stated below, we deny Hudson's request for relief in mandamus and/or procedendo.

The requirements for mandamus are well-established: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief and (3) there must be no adequate remedy at law. Mandamus may compel a court to exercise judgment or discharge a function, but it may not control judicial discretion, even if that discretion is grossly abused. Additionally, mandamus is not a substitute for appeal and does not lie to correct errors and procedural irregularities in the course of a case. If the relator has or had an adequate remedy, relief in mandamus is precluded — regardless of whether the relator used the remedy. *State ex rel. Smith v. Fuerst*, Cuyahoga App. No. 86118, 2005-Ohio-3829, at ¶4.

The criteria for relief in procedendo are well-established. The relator must demonstrate: (1) a clear legal right to proceed in the underlying matter; and (2) the lack of an adequate remedy in the ordinary course of the law. See, e.g., *State ex rel. Charvat v. Frye*, 114 Ohio St.3d 76, 2007-Ohio-2882, 868 N.E.2d 270, at ¶13.

Respondents have filed a motion to dismiss and argue that: Hudson does not have a clear legal right to relief; respondents do not have a clear legal duty to perform the requested relief; and Hudson has or had an adequate remedy at law.

In *State ex rel. Martin v. Russo*, Cuyahoga App. No. 96328, 2011-Ohio-3268, Martin sought relief in mandamus and argued "that the consecutive sentences for receiving stolen property and failure to comply are void because they involve allied offenses." Id. at ¶1. This court observed, however, that "allied offense claims and sentencing issues are not jurisdictional. Thus, they are properly addressed on appeal and not through an extraordinary writ. *Smith v. Voorhies*, 119 Ohio St.3d 345, 2008-Ohio-4479, 894 N.E.2d 44; *State ex rel. Dye v.. Alvis* (1949), 86 Ohio App. 137, 90 N.E.2d 416; *State v. Newell*, Cuyahoga App. No. 89016, 2007-Ohio-400; and *State ex rel. Oden v. Character* (Sept. 26, 1994), Cuyahoga App. No. 67734." Id. at ¶8 (footnote deleted).

Likewise, in this action, Hudson argues that he is entitled to relief in mandamus and/or procedendo because respondent judge imposed consecutive sentences for attempted murder, felonious assault and having weapons while under disability. Yet, as *Martin* demonstrates, Hudson had an adequate remedy by way of an appeal to assert that he was convicted of allied offenses and to challenge the propriety of his sentence. As a consequence, relief in mandamus and/or procedendo is not appropriate.

Additionally, Loc.App.R. 45(B)(1)(a) requires that a complaint in an original action be verified and supported by an affidavit specifying the details of the claims. "It is well-established that a relator's conclusory statement in an affidavit does not comply with the requirement of Loc.App.R. 45(B)(1)(a) that an affidavit specify the details of the claim. Failure to do so is a basis for denying relief. See, e.g., *State ex rel. Castro v. Corrigan*, Cuyahoga App. No. 96488, 2011-Ohio-1701." *State ex rel. Wright v. Cuyahoga Cty. Court of Common Pleas*, Cuyahoga App. No. 96397, 2011-Ohio-2159, at ¶4.

Hudson's affidavit states, in part: "The statements contained in paragraph 1 through 11 in the Complaint/Petition for Writs of Mandamus and/or Procedendo are accurate representations of the actual events in the Relator's Criminal case[.]" Hudson Affidavit, ¶2 (capitalization in original). Hudson's affidavit does not contain any averments specifying the details of the claim. His

failure to comply with Loc.App.R. 45(B)(1)(a) is a sufficient basis for denying relief.

Accordingly, respondents' motion to dismiss is granted. Relator to pay costs. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

Complaint dismissed.

EILEEN A. GALLAGHER, JUDGE

MELODY J. STEWART, P.J., and
JAMES J. SWEENEY, J., CONCUR

FILED AND JOURNALIZED
PER APP.R. 22(C)

SEP 14 2011

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

44230143

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED

THE STATE OF OHIO
Plaintiff

WILLIAM HUDSON
Defendant

2007 MAR 12 A 9:01

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

Case No: CR-06-478205-A

Judge: JOHN D SUTULA

INDICT: 2903.02 ATTEMPTED, MURDER /NPC /RVOS /FRM1 /FRM3
2903.02 ATTEMPTED, MURDER /NPC /RVOS /FRM1 /FRM3
2903.11 FELONIOUS ASSAULT /NPC /RVOS /FRM1 /FRM3
ADDITIONAL COUNTS...

JOURNAL ENTRY

DEFENDANT IN COURT WITH COUNSEL NICHOLAS R. SIDOTI. COURT REPORTER PRESENT.
ON A FORMER DAY THE JURY FOUND THE DEFENDANT GUILTY OF ATTEMPTED MURDER RC 2923.02/2903.02 F-1 WITH FIREARM SPECIFICATION - 1 YEAR (2941.141), FIREARM SPECIFICATION - 3 YEARS (2941.145) UNDER COUNTS 1, 2 OF THE INDICTMENT.
ON A FORMER DAY THE JURY FOUND THE DEFENDANT GUILTY OF FELONIOUS ASSAULT RC 2903.11 F-1 WITH FIREARM SPECIFICATION - 1 YEAR (2941.141), FIREARM SPECIFICATION - 3 YEARS (2941.145) UNDER COUNTS 3, 4 OF THE INDICTMENT.
ON A FORMER DAY THE COURT FOUND THE DEFENDANT GULTY OF HAVING WEAPONS WHILE UNDER DISABILITY RC 2923.13 F-3 AS CHARGED IN COUNT 7 OF THE INDICTMENT.
ON A FORMER DAY THE COURT FOUND THE DEFENDANT GUILTY OF REPEAT VIOLENT OFFENDER SPECIFICATIONS AND NOTICE OF PRIOR CONVICTION SPECIFICATIONS AS CHARGED IN COUNTS 1, 2, 3 AND 4 OF THE INDICTMENT.
DEFENDANT AND PROSECUTOR ADDRESS THE COURT.
THE COURT CONSIDERED ALL REQUIRED FACTORS OF THE LAW.
THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R.C. 2929.11.
THE COURT IMPOSES A PRISON SENTENCE AT THE LORAIN CORRECTIONAL INSTITUTION OF 24 YEARS.
DEFENDANT SENTENCED TO 3 YEARS ON THE FIREARM SPECIFICATIONS (ALL 1 AND 3 YEAR FIREARM SPECIFICATIONS IN COUNTS 1, 2, 3 AND 4 MERGE FOR SENTENCING) TO BE SERVED PRIOR TO AND CONSECUTIVE TO 10 YEARS ON EACH OF THE BASE CHARGES OF COUNTS 1 AND 2, COUNTS 1 AND 2 TO RUN CONCURRENT WITH EACH OTHER; 6 YEARS ON EACH OF THE BASE CHARGES OF COUNTS 3 AND 4, COUNTS 3 AND 4 TO RUN CONCURRENT WITH EACH OTHER; 5 YEARS ON COUNT 7; ALL COUNTS TO RUN CONSECUTIVE TO EACH OTHER FOR A TOTAL OF 24 YEARS.
NO JUDICIAL RELEASE.
POST RELEASE CONTROL IS PART OF THIS PRISON SENTENCE FOR 5 YEARS FOR THE ABOVE FELONY(S) UNDER R.C. 2967.28
DEFENDANT TO RECEIVE CREDIT FOR TIME SERVED, SHERIFF TO CALCULATE.
DEFENDANT ADVISED OF APPEAL RIGHTS.
DEFENDANT INDIGENT. COURT APPOINTS MARGARET ROBEY AS APPELLATE COUNSEL.
TRANSCRIPT AT STATE'S EXPENSE.
DEFENDANT TO PAY COURT COSTS.
DEFENDANT TO PAY RESTITUTION IN AN AMOUNT EQUAL TO ANY LOST WAGES OR MEDICAL EXPENSES OF THE VICTIM AS DETERMINED BY PROBATION DEPARTMENT.
DEFENDANT REMANDED.
SHERIFF TO TRANSPORT. DEFENDANT IS A WHITE/MALE; DOB 9/26/1971.

A-10

MISC
03/08/2007

Sheriff Signature MS 3-13 07 LORCI & Cost

William Hudson
CR 478205

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CPSKM 03/09/2007 10:33:35

Judge Signature Date

THE STATE OF OHIO
Cuyahoga County } SS. I. GERALD E. FUERST, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY.

HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL Journal Entry 478205
NOW ON FILE IN MY OFFICE.
WITNESS MY HAND AND SEAL OF SAID COURT THIS 28
DAY OF April A.D. 10

GERALD E. FUERST, Clerk
By R Cuthbert Deputy

MISC
03/08/2007

A-11
Sheriff Signature JMS 3-13-07 Lorc 1 + cost

United States District Court,

S.D. Ohio,
Eastern Division.

Michael WALTERS, Petitioner,

v.

Michael SHEETS, Warden, Respondent.

No. 2:09–cv–446.
Sept. 29, 2011.

Stephen Paul Hardwick, Ohio Public Defender's Office, Columbus, OH, for Petitioner.

OPINION AND ORDER

MICHAEL L. WATSON, District Judge.

*1 On December 29, 2010, the Magistrate Judge issued a *Report and Recommendation* recommending that the petition for a writ of habeas corpus be granted on claim four and that the matter be remanded to the state trial court for resentencing. ECF No. 21. Both Respondent and Petitioner have filed objections to the Magistrate Judge's *Report and Recommendation,* ECF Nos. 24, 25, and Petitioner has filed a reply to Respondent's objections, ECF No. 28. For the reasons that follow, Respondent's objections, ECF No. 25, and Petitioner's objections, ECF No. 24, are **OVERRULED.** The *Report and Recommendation* is **ADOPTED** and **AFFIRMED.** The Court **ISSUES** a conditional writ of habeas corpus on claim four. The State of Ohio shall release Petitioner from custody unless, **WITHIN NINETY (90) DAYS OF THE ISSUANCE OF THIS ORDER,** the State of Ohio vacates one of Petitioner's convictions and resentences Petitioner based solely on the remaining conviction in accordance with this Order. The remainder of Petitioner's claims are hereby **DISMISSED.**

In claim one, Petitioner alleges that he was denied a fair trial because the trial court denied his motion to sever his trial from that of his co-defendant. FN1 In his objections, Petitioner again raises the same arguments raised before the Magistrate Judge. For the reasons detailed in the Magistrate Judge's *Report and Recommendation,* this Court is not persuaded that Petitioner has established that the trial court's denial of his request for a severance warrants federal habeas corpus relief.

FN1. As the Magistrate Judge noted, Petitioner's claim three appears-not as a separate claim-but only as support for Petitioner's first claim.

In claim two, Petitioner alleges that he was denied a fair trial because the trial court refused to grant him a continuance in order to review material untimely disclosed by the prosecution under *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In rejecting this claim, the Magistrate Judge concluded that the state court had not erred in finding no *Brady* violation; the Magistrate Judge also concluded that the record failed to indicate prejudice to Petitioner. *Report and Recommendation,* at 25. Referring in his objections to *District Attorney's Office for Third Judicial District v. Osborne,* —— U.S. ——, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009), Petitioner contends that the Supreme Court of the United States has not limited *Brady* to merely post-trial disclosures; Petitioner also argues that he was prejudiced by the prosecution's disclosure of evidence on the eve of trial and by the trial court's refusal to grant a continuance in order to permit him to further examine this material.

In *District Attorney's Office v. Osborne,* the Supreme Court of the United States held that *Brady* does not apply to post-

conviction collateral proceedings. *Id.* at 2319–2320.[FN2] That holding has no application to the facts of this case. Here, the record reflects that the prosecutor did disclose the material at issue on the day before *voir dire* began. *See State v. Walters*, No. 06AP–693, 2007 WL 3026956, at *11–12 (Ohio App. 10th Dist. Oct. 18, 2007) ("Prior to *voir dire*, defendant noted that on the previous evening the prosecutor had provided him with access to 22 police informational summaries, including inculpatory and exculpatory statements that defendant, McKenzie, or other witnesses made."). Further, upon review of the entire record, this Court is not persuaded that Petitioner can establish prejudice.

FN2. In *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), referred to in the Magistrate Judge's *Report and Recommendation*, the Supreme Court commented that *Brady* applies to information, produced after trial, which had been known to the prosecution but unknown to the defense.

*2 For all these reasons, Petitioner's objections are **OVERRULED.**

In his claim four, Petitioner alleges that his separate convictions and sentences on charges of felony murder and felonious assault relating to the victim, Richard J. Strojny, violate the **Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.** The Magistrate Judge agreed and recommended that the petition for a writ of habeas corpus be granted as to this claim and the case be remanded to the state court for re-sentencing.

In his objections, Respondent argues both that the Magistrate Judge substituted her own interpretation of Ohio legislative intent for the Ohio courts' interpretation and that the Magistrate Judge should not have applied *State v. Williams*, 124 Ohio St.3d 381, 922 N.E.2d 937 (2010), or other cases decided after Petitioner's conviction had become final. Petitioner argues that the Magistrate Judge properly followed the state court interpretation and because *Williams* merely clarified the proper application of Ohio's allied offenses statute, Ohio Revised Code § 2941.25, the Magistrate Judge was correct to apply *Williams*.

The Double Jeopardy Clause prohibition against multiple punishments for the same offense prevents state courts from imposing a punishment greater than what the state's legislature intended. *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). "[W]hen a legislature signals its intent to either prohibit or permit cumulative punishments for conduct that may qualify as two crimes ... the legislature's expressed intent is dispositive." *State v. Ranee*, 85 Ohio St.3d 632, 635, 710 N.E.2d 699 (1999) (citing *Ohio v. Johnson*, 467 U.S. 493, 499, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984), *overruled on other grounds by State v. Johnson*, 128 Ohio St.3d 153, 161, 942 N.E.2d 1061 (2010)). Therefore, a violation of Ohio Revised Code § 2941.25 is a violation of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. *Hunter*, 459 U.S. at 366. Habeas is properly granted under the Antiterrorism and Effective Death Penalty Act (AEDPA) whenever a state court has reached a result contrary to clearly established Federal Law. 28 U.S.C. § 2254(d)(1).

Ohio's allied offenses statute, Ohio Revised Code § 2941.25, reads:

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment of information may contain counts for all such offenses, and the defendant may be convicted of all of them.

Ohio Rev.Code § 2941.25.

The Supreme Court of Ohio's interpretation of the allied offenses statute has evolved over the years. When the Tenth District Court of Appeals for the State of Ohio decided Petitioner's appeal of his conviction, Ohio state courts interpreted Ohio Revised Code § 2941.25 under the standard set forth in *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699 (1999). In *Rance*, the Supreme Court of Ohio held that Ohio Revised Code § 2941.25 required courts to consider the statutory elements of each crime in the abstract. *Rance*, 85 Ohio St.3d at 638, 710 N.E.2d 699. If in the abstract, the commission of one crime resulted in the commission of the other, the crimes were considered allied offenses of similar import. *Id.* If the offenses were allied, a defendant could be convicted of both only if the defendant committed the crimes separately or with separate

animus. *Id.* at 638–39, 710 N.E.2d 699.

*3 Using the *Rance* standard, several Ohio courts, including the Tenth District Court of Appeals in Petitioner's appeal, held that felonious assault is not an allied offense of similar import to felony murder. *State v. Walters*, No. 06AP–693, 2007 WL 3026956, at *20 (Ohio Ct.App. 10 Dist. Oct. 18, 2007); *see also State v. Jones*, No. 21522, 2007 WL 706632, at *3 (Ohio Ct.App. 2 Dist. March 9, 2007); *State v. Carroll*, Nos. CA2007–02–030, CA2007–03–041, 2007 WL 4555782, at 10 (Ohio Ct.App. 12 Dist. Dec. 28, 2007). The Tenth District held that the two crimes did not merge "because felony murder involves causing death while committing a first or second-degree felony of violence, but felonious assault requires knowingly causing serious physical harm to another, [so] the commission of one crime does not result in the commission of the other." *Walters*, 2007 WL 3026956, at *20 (internal citations omitted). In other words, in the abstract it is possible to commit either crime without committing the other, so under the *Rance* approach the two crimes do not merge.

The Supreme Court of Ohio has since revisited the *Rance* court's interpretation of Ohio Revised Code § 2941.25. In *State v. Cabrales,* the Supreme Court of Ohio clarified that when comparing elements of two crimes in the abstract, the elements need not align exactly in order to be allied offenses. 118 Ohio St.3d 54, 59–61, 886 N.E.2d 181 (2008). Rather, the elements merely need to be so closely aligned that the commission of one necessarily results in the commission of the other. *Id.*

In January 2010, the Supreme Court of Ohio applied the standard from *Cabrales* in *State v. Williams*, 124 Ohio St.3d 381, 386–87, 922 N.E.2d 937 (2010). In holding that felonious assault and attempted felony murder constitute allied offenses of similar import, the court considered the elements of the crimes in the abstract. *Id.*

> In order to commit the offense of attempted murder as defined in R.C. 2903.02(B), one must purposely or knowingly engage in conduct that, if successful, would result in the death of another as a proximate result of committing or attempting to commit an offense of violence. Since felonious assault is an offense of violence, R.C. 2901.01(A)(9), the commission of attempted murder, as statutorily defined, necessarily results from the commission of an offense of violence, here, felonious assault. Accordingly, felonious assault as defined in R.C. 2903.11(A)(1) is an allied offense of attempted murder as defined by R.C. 2903.02(B) and 2923.02.

Id. at 386, 922 N.E.2d 937. In the present case, the Magistrate Judge recommended that habeas relief be granted relying on the reasoning in *Williams* and several post- *Williams* decisions from Ohio Courts of Appeal which held that felonious assault and felony murder are allied offenses of similar import. *Report and Recommendation,* at 30.

On the same day that the Magistrate Judge filed the *Report and Recommendation* in this case, the Supreme Court of Ohio explicitly overturned *Rance'* s interpretation of Ohio Revised Code § 2941.25. *State v. Johnson*, 128 Ohio St.3d 153, 161, 942 N.E.2d 1061 (2010). The interpretation of Ohio Revised Code § 2941.25 in *State v. Johnson* requires a court to consider whether it is possible to commit both offenses with the same conduct, instead of whether it is possible to commit one without committing the other. *Johnson*, 128 Ohio St. at 162, 190 N.E. 389. If it is possible to commit both offenses with the same conduct, a court must then consider whether the offenses were committed by a single act and a single state of mind in the specific case. *Id.* In *Johnson,* the court used that interpretation of Ohio Revised Code § 2941.25 to hold that child endangering and felony murder are allied offenses. *Id.* at 163, 190 N.E. 389. Because the abuse of the child was the conduct that caused the death of the child, the defendant could be sentenced for either child endangering or felony murder, but not both. *Id.*

*4 The Magistrate Judge did not have the benefit of *Johnson* when making a recommendation in the case *sub judice,* but *Johnson* confirms the Magistrate Judge's conclusion that felonious assault and felony murder merge under Ohio Revised Code § 2941.25. First, it is possible to commit both felonious assault and felony murder with the same conduct, especially where, as in this case, the felonious assault charge is the underlying felony in the felony murder charge. Second, in this case the same physical altercation and animus resulted in both crimes. Defendant's physical fight with the victim met the elements of felonious assault and resulted in the victim's death. Just as the single beating in *Johnson* required that child endangering and felony murder merge, the single assault in this case merges with felony murder. Therefore, the Magistrate Judge did not substitute her own interpretation of Ohio Revised Code § 2941.25, but rather properly applied the Supreme Court of Ohio's current interpretation of the statute.

Beyond whether the Magistrate Judge applied the Supreme Court of Ohio's precedent correctly, Respondent also objects to applying the recent reinterpretation of Ohio Revised Code § 2941.25 to this case. In support, Respondent cites several

cases for the proposition that habeas courts are bound by a state court's interpretation of the state's allied offenses statute. Petitioner responds that *Williams* merely clarified Ohio Revised Code § 2941.25 and therefore *Williams* should have retroactive application.

When the Supreme Court of Ohio overrules its interpretation of a state statute, the correction has retroactive application. *Agee v. Russell*, 92 Ohio St.3d 540, 543, 751 N.E.2d 1043 (2001). In reviewing a previous statutory interpretation the court is not creating new law, but rather deciding what the statute meant from its inception. *Id.* Additionally, *Johnson* and *Cabrales* make clear that decisions of lower Ohio courts had misinterpreted Ohio's statute governing allied offenses, thereby creating unreasonable results inconsistent with the Double Jeopardy Clause. *See Johnson*, 128 Ohio St.3d at 158, 942 N.E.2d 1061; *Cabrales*, 118 Ohio St.3d at 59, 886 N.E.2d 181 (2008). Therefore, *Johnson's* interpretation of Ohio Revised Code § 2941.25 has retroactive interpretation.

Habeas courts are required to follow an Ohio court's determination of the legislature's intent only if it is undisturbed by the Supreme Court of Ohio. *Banner v. Davis*, 886 F.2d 777, 780 (6th Cir.1989). Respondent is correct that in general a habeas court is required to follow an Ohio court's determination of whether the Ohio legislature intended that a single act receive multiple punishments. *Id.* The Sixth Circuit, however, stated that the general rule applies only to an interpretation by a majority of a state's courts "undisturbed" by the state's highest court. *Id.* In this case, the Supreme Court of Ohio disturbed the former prevailing interpretation of Ohio Revised Code § 2941.25 through its holding in *Johnson.*

*5 Therefore, the interpretation of Ohio Revised Code § 2941.25 in *Johnson* applies retroactively to this case and convicting Petitioner of both felonious assault and felony murder violates Ohio's statute and the Double Jeopardy Clause. In this case, multiple sentences for one offense is a result contrary to clearly established federal law which qualifies Petitioner for a writ of habeas corpus under AEDPA, 28 U.S.C. § 2254(d)(1). Accordingly, Respondent's objections are **OVERRULED.**

Pursuant to 28 U.S.C. § 636(b), this Court has conducted a *de novo* review. For these reasons and for the reasons set forth in the Magistrate Judge's *Report and Recommendation,* the parties' objections, ECF Nos. 24, 25, are **OVERRULED.** The *Report and Recommendation* is **ADOPTED** and **AFFIRMED.** The Court **ISSUES** a conditional writ of habeas corpus based on claim four. The State of Ohio shall release Petitioner from custody unless, **WITHIN NINETY (90) DAYS OF THE ISSUANCE OF THIS ORDER,** the State of Ohio vacates one of Petitioner's convictions and resentences Petitioner based solely on the remaining conviction in accordance with this Order. The remainder of Petitioner's claims are hereby **DISMISSED.**

The Clerk shall enter **FINAL JUDGMENT.**

IT IS SO ORDERED.

S.D.Ohio,2011.
Walters v. Sheets
Slip Copy, 2011 WL 4543889 (S.D.Ohio)

Motions, Pleadings and Filings (Back to top)

• 2:09cv00446 (Docket) (Jun. 5, 2009)
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