

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO, ex rel.
JOSE AGOSTO,
Relator-Appellant,

CASE NO. 11-1604

-VS-

JUDGE HOLLIE L. GALLAGER, et al.,
Respondents-Appellees.

On Appeal from the Cuyahoga
County Court of Appeals, Eighth
Appellate District.

C.A. CASE NO. 10-CA-896670

MERIT BRIEF OF RELATOR-APPELLANT JOSE AGOSTO

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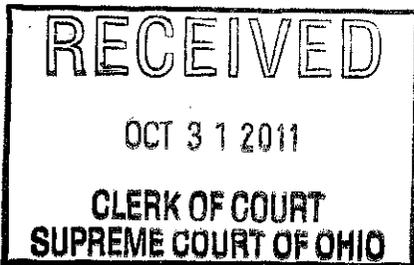


TABLE OF CONTENTS

Page No.

Table of Authorities.....ii

Statement of the Case and Facts.....1

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. THE TRIAL COURT ALSO
IMPROPERLY IMPOSED POST-RELEASE CONTROL.....1

Conclusion.....5

Certificate of Service.....5

Appendix:

Notice of Appeal.....A-1

Judgment, 8th Dist. Court of Appeals, September 02, 2011.....A-3 - 12

Judgment, Cuyahoga County Court of Common Pleas.....A-14

Walters v. Sheets, U.S. Dist. Court, S.D. No. 2:09-CV-446.....A-15

A-13 OMITTED

TABLE OF AUTHORITIES

Case Law:	Page No.
Colegrove v. Burns, 175 Ohio St. 438, 195 N.E.2d 811, 25 O.O.2d 447.....	2
State v. Beasley (1984), 14 Ohio St.3d 74, 471 N.E.2d 774.....	1
State v. Blankenship, 38 Ohio St.3d 116.....	2
State v. Fischer (2010), 128 N.E.2d 92, 2010-Ohio-6238.....	2
State v. Payne, 114 Ohio St.3d 502.....	1
State v. Underwood, 124 Ohio St.3d 365.....	2
Walters v. Sheets, 2011 WL 4543889.....	3

Statutes:

R.C. 2941.25.....	Passim
R.C. 2941.25(A).....	Passim

STATEMENT OF THE CASE AND FACTS

Jose Agosto, (hereinafter Appellant), was convicted of Murder, R.C. 2903.02, as charged in Count 2 of the indictment and Felonious Assault, R.C. 2903.11, as charged in Count 3 of the indictment.

The sentencing journal entry reflects that the counts were merged for sentencing, then a sentence was imposed of 15 years to life on each of Counts 2 & 3, contrary to law.

The entry further states Appellant is eligible for parole after 15 years, and then goes on to impose post-release control.

Appellant filed a Motion to Impose a Lawful Sentence on Defendant, which the trial court denied.

Appellant then filed a Complaint/Petition for Writs of Mandamus and/or Prodedendo with the Eighth Judicial Court of Appeals. That court dismissed Appellant's Writ.

It is from that dismissal that Appellant 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. THE TRIAL COURT ALSO IMPROPERLY IMPOSED POST-RELEASE CONTROL.

In the instant case, the trial court did not follow statutorily mandated provisions as set 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. 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 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 3, ¶29.

This Court summed up the situation regarding statutory mandates in State v. Fischer, Slip Opinion, ___ N.E.2d ___:

"¶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., at 438."

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, @ 26:

"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***."

The instant case is clearly a blatant disregard for the intention of R.C. 2941.25(A), and is clearly a violation of Appellant'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. Blakenship (1988), 38 Ohio St.3d 116.

The trial court had a clear legal; duty to sentence Appellant properly and

to record the sentence accurately in the Appellant's Journal Entry. In the instant case, the trial court failed to perform either duty.

The Appellant's sentence as imposed in the sentencing journal entry is clearly void as there is no statutory authority for the Felonious Assault sentence of 15 years to life, whether it is merged or not. Even though the journal entry states that Counts 2 & 3 are merged for sentencing, a sentence of 15 years to life is imposed on each of Counts 2 & 3. Pursuant to R.C. 2941.25, the court cannot impose a sentence on each count.

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. 2903.029B), 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 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 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 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 Appellant'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 applications of the allied offense issue. The Appellant'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 improper imposition of post-release control relates to the sentence for felonious assault. While the sentencing journal entry imposes a sentence of 15 to life on each of the murder conviction, Count 2, and the felonious assault conviction, Count 3, and merges the counts for sentencing, it is ambiguous as to what the Appellant was actually sentenced on. While no sentence of 15 years to life exists for felonious assault, one can assume that is the count that

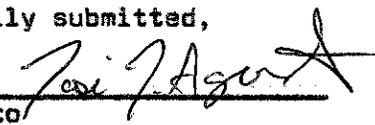
was merged. However, no assumptions should have to be made to guess what a sentencing journal entry means. It must be clear and unambiguous. The improper imposition of post-release control in the journal entry also adds to the confusion, as does the imposition by the trial court. (Tr. Pg. 10, Lines 8-17).

"...the Adult Parole Authority and not this Court will place you on post-release control, and if you choose to violate those terms and conditions, Mr. Agosto, the Adult Parole Authority and not this Court may impose a prison -- may incarcerate you up to one-half the original sentence I just imposed, sir."

Clearly the trial court has a clear legal duty to re-sentence the Appellant regarding this matter, and announce a proper sentence and allow the State to elect which allied offense it wishes to proceed on.

WHEREFORE, the Appellant respectfully moves this Court to reverse the decision of the Eight Judicial Court of Appeals and to grant the Writs of Mandamus and/or Procedendo.

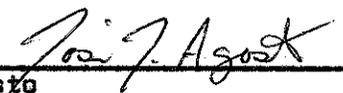
Respectfully submitted,



Jose Agosto
#493-626 Mansfield C.I.
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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 Jose Agosto 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.



Jose Agosto

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. JOSE AGOSTO,
Relator-Appellant,

CASE NO. 11-1604

On Appeal from the Cuyahoga
County Court of Appeals; Eighth
District.

--VS--

JUDGE HOLLIE L. GALLAGER, et al.,
Respondents-Appellees.

C.A. CASE NO. 10-CA-096670

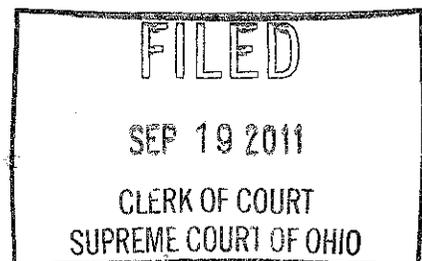
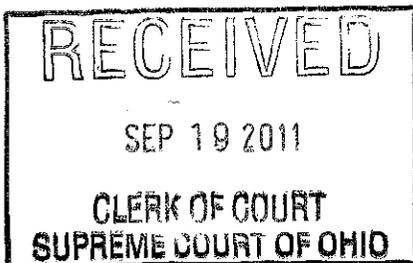
NOTICE OF APPEAL OF RIGHT OF APPELLANT JOSE AGOSTO
FROM ORIGINAL ACTION IN THE COURT OF APPEALS

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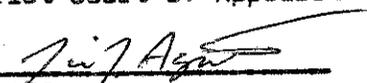
WILLIAM D. MASON
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THE JUSTICE CENTER/9TH FLOOR
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CLEVELAND, OHIO - 44113



NOTICE OF APPEAL RIGHT OF APPELLANT JOSE AGOSTO

Appellant Jose Agosto, 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-96670 on September 02, 2011.

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



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#493-626 Mansfield C.I.
Post Office Box 788
Mansfield, Ohio - 44901
Defendant-Appellant, Pro Se

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeals has been sent by regular U.S. Mail to, the Cuyahoga County Prosecutor's Office, @ The Justice center/9th floor, 1200 Ontario Street, Cleveland, Ohio - 44113, on this 13th day of September, 2011.



Jose Agosto

A-2

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 96670

STATE OF OHIO EX REL.
JOSE AGOSTO

RELATOR

vs.

JUDGE HOLLIE L. GALLAGHER, ET AL.

RESPONDENTS

**JUDGMENT:
WRITS DENIED**

Writ of Mandamus and/or Procedendo
Motion No. 444365
Order No. 446666

RELEASE DATE: September 2, 2011

FOR RELATOR

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ATTORNEYS FOR RESPONDENTS

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By: James E. Moss
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Cleveland, Ohio 44113

COPIES MAILED TO COUNSEL FOR
ALL PARTIES. COSTS TAKEN

MARY J. BOYLE, J.:

Relator, José Agosto, Jr.,¹ is the defendant in *State v. Agosto*, Cuyahoga County Court of Common Pleas Case No. CR-455886, which has been assigned to respondent judge.² The grand jury issued a three-count indictment. The state nolleed one count, and the jury found him guilty of the two remaining counts, murder and felonious assault. The court of common pleas issued a sentencing entry on November 3, 2005. This court affirmed Agosto's conviction in *State v. Agosto*, Cuyahoga App. No. 87283, 2006-Ohio-5011, and the Supreme Court of Ohio dismissed Agosto's appeal as not involving any substantial constitutional question. *State v. Agosto*, 114 Ohio St.3d 1414, 2007-Ohio-2632, 867 N.E.2d 846.

In this action, Agosto contends that the November 3, 2005 sentencing entry is void because: (1) it does not contain a disposition of count 1; (2) the trial court improperly imposed sentence on allied offenses of similar import; and (3) the trial court improperly imposed postrelease control. He requests that this court issue a writ of mandamus and/or procedendo "compelling the Respondents' [sic] to cause the Relator to be physically brought back before the Cuyahoga

¹ The caption of relator's complaint stated his name as "Jose Agosto, Jr." By separate order, this court instructed the clerk to correct the caption to reflect the proper spelling of relator's last name as "Agosto."

² Agosto has also named the "Cuyahoga County Court of Common Pleas" as a respondent.

County Court of Common Pleas to be sentenced to a lawful sentence and cause to be rendered and filed as a valid final judgment in the Relator's case sub judice." Complaint, Ad Damnum Clause (capitalization in original).

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 also 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.

Initially, we note that Agosto previously sought — and this court denied — relief in mandamus and procedendo regarding the same November 3, 2005

sentencing entry. He requested "that this court compel respondents to 'cause to be rendered and filed a valid final judgment in the Relator's above-cited criminal case.' Complaint, ad damnum clause." *State ex rel. Agosto v. Cuyahoga Cty. Court of Common Pleas*, Cuyahoga App. No. 90631, 2007-Ohio-6806, ¶1, affirmed *State ex rel. Agosto v. Cuyahoga Cty. Court of Common Pleas*, 119 Ohio St.3d 366, 2008-Ohio-4607, 894 N.E.2d 314 ("Case No. 90631"). In Case No. 90631, Agosto complained that the sentencing entry was "defective because it does not mention his plea and 'the entry does not set forth the Relator's verdicts; it sets forth a *description* of the Relator's verdicts * * *.' Relator's Brief in Opposition to Respondents' Motion to Dismiss, at 2. Emphasis in original." Case No. 90631, 2007-Ohio-6806, ¶2.

Although, in Case No. 90631, Agosto asserted a different basis for holding that the November 3, 2005 sentencing entry was defective, he requested the same relief as he requests in this action. That is, he wants this court to compel respondents to issue a final appealable order. Not only did this court reject his request for relief in mandamus and/or procedendo, the Supreme Court affirmed and held: "Thus, based on [*State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163], neither the common pleas court nor the judge either refused to render or unduly delayed rendering a judgment in the criminal case, and Agosto is thus not entitled to the requested extraordinary relief in mandamus and

procedendo.” 2008-Ohio-4607, ¶10. Additionally, the Supreme Court held that Agosto had an adequate remedy by way of appeal. “In fact, Agosto has already exercised his right to appeal the judgment in the criminal case, albeit unsuccessfully, and he could have raised his present claims in that appeal.” *Id.*, ¶12 (citation deleted).

In light of the Supreme Court’s prior determination in Agosto’s appeal of this court’s decision in Case No. 90631, we must hold that *res judicata* bars this action.

Agosto also erroneously argues that the absence of the state’s nolle from the sentencing entry is a defect. The trial court is not required to state the means of exoneration in the sentencing entry. See *State v. Robinson*, Cuyahoga App. No. 90731, 2008-Ohio-5580, ¶18. This ground does not provide a basis for relief in mandamus or procedendo. See *State ex rel. Davis v. Cuyahoga Cty. Court of Common Pleas*, 127 Ohio St.3d 29, 2010-Ohio-4728, 936 N.E.2d 41.

Agosto also contends that the trial court improperly imposed sentence on allied offenses of similar import. “[A]llied offense claims and sentencing issues are not jurisdictional. Thus, they are properly addressed on appeal and not through an extraordinary writ.” *State ex rel. Martin v. Russo*, Cuyahoga App. No. 96328, 2011-Ohio-3268, ¶8 (citations deleted). We must, therefore, hold that

Agosto's contention that he was improperly sentenced on allied offenses does not provide a basis for relief in mandamus and/or procedendo.

Likewise, his argument that the sentencing entry is void because the court of common pleas improperly imposed postrelease control is not well taken. The November 3, 2005 sentencing entry stated: "Post release control is part of this prison sentence for the maximum time allowed for the above felony(s) under R.C. 2967.28." In *State ex rel. Shepherd v. Astrab*, Cuyahoga App. No. 96511, 2011-Ohio-2938, the sentencing entry included comparable language regarding "the maximum period allowed." *Id.* at ¶3. In *Shepherd*, we denied the request for relief in mandamus and/or procedendo and held that the language of the sentencing entry provided sufficient notice that postrelease control was part of the sentence. That is, the relator had an adequate remedy by way of appeal. In this action, we must reach the same conclusion and hold that Agosto had sufficient notice that postrelease control was part of his sentence and had an adequate remedy by way of appeal to raise any purported errors.

Accordingly, respondents' motion for summary judgment 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).

Writs denied.



MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, A.J., and
MELODY J. STEWART, J., CONCUR

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

SEP 02 2011

GERARD H. FURST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.



36360576

IN THE COURT OF COMMON PLEAS CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

JOSE AGOSTO, JR
Defendant

www
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Case No: CR-04-455886-A

Judge: JEFFREY P HASTINGS

INDICT: 2903.01 AGGRAVATED MURDER
2903.02 MURDER
2903.11 FELONIOUS ASSAULT

JOURNAL ENTRY

DEFENDANT IN COURT WITH ATTORNEY MARK RUDY & GIAN DE CARIS.
 COURT REPORTER PRESENT.
 ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF MURDER / 2903.02 - MU AS
 CHARGED IN COUNT(S) 2 OF THE INDICTMENT.
 ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF FELONIOUS ASSAULT / 2903.11 - F1
 AS CHARGED IN COUNT(S) 3 OF THE INDICTMENT.
 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 15 YEARS TO LIFE.
 (COUNTS MERGED FOR SENTENCING; 15 YEARS TO LIFE ON EACH OF COUNTS 2 AND 3) SENTENCE IS WITH
 ELIGIBILITY FOR PAROLE AFTER 15 FULL YEARS. SENTENCE IN CR 455886 TO BE SERVED AFTER SENTENCES IN
 CR 422860 AND CR 442256.
 POST RELEASE CONTROL IS PART OF THIS PRISON SENTENCE FOR THE MAXIMUM TIME ALLOWED FOR THE
 ABOVE FELONY(S) UNDER R.C.2967.28.
 THE DEFENDANT IS ORDERED TO PAY RESTITUTION.
 THE DEFENDANT IS ORDERED TO PAY A FINE IN THE SUM OF \$ 15,000.00.
 DEFENDANT ADVISED OF APPEAL RIGHTS.
 DEFENDANT INDIGENT, COURT APPOINTS THOMAS A REIN AS APPELLATE COUNSEL.
 (RESTITUTION- DEFENDANT TO PAY FOR ANY MEDICAL EXPENSES AND FINANCIAL EXPENSES)
 DEFENDANT IS TO PAY COURT COSTS.
 DEFENDANT REMANDED.
 SHERIFF ORDERED TO TRANSPORT DEFENDANT JOSE AGOSTO, JR, DOB: 12/16/1975, GENDER: MALE, RACE:
 OTHER.

10/28/2005
CPJEB 11/01/2005 14:40:53

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	
<i>Journal Entry CR 455886</i>	
NOW ON FILE IN MY OFFICE.	
WITNESS MY HAND AND SEAL OF SAID COURT THIS <u>12</u>	
DAY OF <u>July</u> A.D. 20 <u>07</u>	
GERALD E. FUERST Clerk	
By <u>R. Ruthen</u>	Deputy

Judge Signature

11-2-05
Date

SENT
10/28/2005 SHERIFF'S SIGNATURE DM 11-4-05

Exhibit A-14
work 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 resentsences 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. ^{FNI} 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.

^{FNI} 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. Rance, 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 or 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 resentsences 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)

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