

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,
Plaintiff-Appellee,

:

12-0347

CASE NO. _____

v.

:

On Appeal from the Hamilton
County Court of Appeals,
First Appellate District

CAMERON McGLOTHIN,
Defendant-Appellant.

:

C.A. CASE NO. C100727

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT CAMERON McGLOTHIN

Cameron McGlothlin #516-550
Warren Corr. Inst.
P.O. Box 120
Lebanon, Ohio 45036
DEFENDANT-APPELLANT, PRO SE

Hamilton County Prosecutor's Office
230 East Ninth Street Suite 4000
Cincinnati, Ohio 45202
COUNSEL FOR APPELLEE, STATE OF OHIO

FILED
FEB 28 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A CONSTITUTIONAL QUESTION.....	1
STATEMENT OF THE CASE AND FACTS.....	2
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	4
<u>Proposition of Law No. I: UPON REMAND FOR RESENTENCING, DID THE TRIAL COURT ERR AND/OR ABUSE THEIR DISCRETION BY FAILING TO CON- SIDER WHETHER APPELLANT'S CONVICTIONS FOR MURDER AND AGGRAVATED ROBBERY WERE ALLIED OFFENSES OF SIMILAR IMPORT PROHIBITED BY THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION AND ORC 2941.25?.....</u>	4
<u>Proposition of Law No. II: DID THE APPELLATE COURT ERR AND/OR ABUSE THEIR DISCRETION BY FAILING TO REOPEN APPELLANT'S DIRECT APPEAL, FOLLOWING RESENTENCING, AFTER APPELLANT RAISED A 'COLOR- ABLE CLAIM' OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN COUNSEL FAILED TO RAISE THE CLAIM THAT APPELLANT'S SENTENCES FOR MURDER AND AGGRAVATED ROBBERY WERE ALLIED OFFENSES OF SIMILAR IMPORT PROHIBITED BY THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION AND ORC 2941.25?.....</u>	6
<u>Proposition of Law No. III: WHEN A TRIAL COURT FAILS TO CONSIDER BEFORE IMPOSING SENTENCE, THE STATUTORY REQUIREMENTS SET FORTH IN ORC 2941.25, DOES THAT NEGLIGENCE CREATE A 'VOID SENTENCE' THAT CAN BE ATTACKED AND CORRECTED AT ANY TIME?.....</u>	8
CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	9
APPENDIX.....	

First District Court of Appeal Entry Denying Application
for Reopening dated January 31, 2012 (Case No. C-100727)

**EXPLANATION OF WHY THIS IS A CASE
OF PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case presents three significant questions for this Courts' consideration. First, did the trial court have a statutory duty to consider, before imposing a sentence on a criminal defendant, whether certain offenses were allied offenses and prohibited by ORC 2941.25? Secondly, did the court of appeals in the instant case err and/or abuse their discretion by not reopening Appellants' direct appeal, pursuant to App.R.26(B), when Appellant clearly raised a 'colorable claim' of ineffective assistance of appellate counsel? And finally, are sentences imposed on criminal defendants' that are contrary to ORC 2941.25, sentences that are "void" and subject to review and correction at any given time and not barred by res judicata?

In the case at bar, Appellant in this case unsuccessfully attacked his conviction and sentence on direct appeal, but was successful in an App.R.26(B) application for reopening and the court of appeals reopened Appellants' direct appeal and remanded the case back to the trial court for resentencing in accordance with ORC 2941.25. Appellants' sentences for aggravated robbery and robbery were deemed allied offenses of similar import and subject to merger. To sentence a criminal defendant for allied offenses of similar import is not only offensive to the Ohio Revised Code Section 2941.25, but it is also in violation of the Double Jeopardy Clause of the United States Constitution. Appellant demonstrated a 'colorable claim' of ineffective assistance of appellate counsel and the appellate court clearly erred by not reopening Appellants' direct appeal that followed his resentencing hearing.

Trial court in Ohio are required to consider all applicable statutes before imposing sentences on criminal defendants. When a trial court fails to do so

the sentence is contrary to law and the trial court retains jurisdiction to correct the sentence so that it conforms to the statutory requirements of the Revised Code. Finally, Appellant is requesting this Court to accept jurisdiction to determine whether sentences that are contrary to ORC 2941.25 that prohibits sentencing a criminal defendant for allied offenses of similar import, are void sentences and must be corrected by the trial court when brought to the courts' attention.

For the above mentioned reasons, Appellant respectfully requests that this Honorable Court accept jurisdiction of his case and bring clarity to cases in which a criminal defendant has been erroneously sentenced for allied offenses of similar import. Not only is this a state law issue, it also presents a federal constitutional Double Jeopardy Clause issue and this Honorable Court should accept jurisdiction of Appellants' case.

STATEMENT OF THE CASE AND FACTS

In September of 2005, Appellant was indicted by the Hamilton County Grand Jury on the following charges: Murder under RC 2903.02(B), Having Weapons Under Disability under RC 2923.12(A)(2), Aggravated Robbery under 2911.01(A)(3), and Robbery under RC 2911.02(A)(2). The matter proceeded to a jury trial in which verdicts of guilty were returned on all counts as outlined in the indictment.

The trial court proceeded to impose sentence as follows: 18 years to life on the Murder charge with the firearm specification, 9 years on the Aggravated Robbery (with three consecutive years on the firearm specification which was merged with the firearm specification on the murder charge), seven years on the Robbery charge (with three years consecutive on the firearm specification which was merged with the firearm specification on the murder charge) to run concurrent to the sentence on the Aggravated Robbery, and one year on the Weapons Under Disability charge. The murder, aggravated robbery, and weapons

under disability charges were ordered to be served consecutive for an aggregated prison term of 28 years to life.

Appellant appealed his conviction under Case No. C060145 and the conviction and resulting sentences were affirmed on direct appeal. However, Appellant subsequently filed a Application for Reopening pursuant to App.R.26(B) and the application was granted and Appellants direct appeal was reopened and teh case was remanded to the trial court to determine whether parts of Appellants sentence was in violation of the Revised Code statute that prohibits allied offenses of similar import, i.e., RC 2941.25. On remand, the trial court determined that Appellants sentence for Aggravated Robbery and Robbery were allied offenses of similar import and the State had to elect which to sentence on. The State elected the Aggravated Robbery and the Robbery charges was merged for the purposes of sentencing. Appellant timely appealed the resentencing but that appeal was unsuccessful and Appellant filed a App.R.26(B) application for reopening in which he asserted taht his appellate counsel was ineffective for failing to identify and raise the issue of whether Appellants' conviction for murder and aggravated robbery are allied offense of similar import. In **State v. Abdi**, the Twelfth District Court of Appeals considered the issue of whether Murder and Aggravated Robbery could be allied offenses of similar import. See **State v. Abdi** , 2011 Ohio 3550 (12th Dist.) Appellant asserted in his App.R.26(B) that appellate counsel was ineffective for failing to raise the allied offense issue as it pertained to the murder and the aggravated robbery. The court of appeals denied Appellants' reopening application on the basis that those issues could have been raised in Appelants' initial 26(B) application. It is from the denial of that 26(B) application that Appellant appeals to this Court.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: UPON REMAND FOR RESENTENCING, DID THE TRIAL COURT ERR AND/OR ABUSE THEIR DISCRETION BY FAILING TO CONSIDER WHETHER APPELLANT'S CONVICTIONS FOR MURDER AND AGGRAVATED ROBBERY WERE ALLIED OFFENSES OF SIMILAR IMPORT PROHIBITED BY THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION AND ORC 2941.25?

In the case at bar, Appellant successfully challenged his convictions for Aggravated Robbery and Robbery in an App.R.26(B) application for reopening (Case No. C-060145). At that time the Ohio First District Court of Appeals remanded the cause to the trial court for a new sentencing hearing. See *State v. McGlothlin*, 1st Dist. No. C-060145 (Sept. 24, 2012). At that time, the State elected to merge the conviction for Robbery with the conviction for Aggravated Robbery and imposed a nine-year prison term. By and through counsel, a timely appeal ensued and the court of appeals affirmed Appellants' sentences (Case No. C-100727). Appellant filed a timely application for reopening pursuant to App.R.26(B). In that application, Appellant asserted that his appellate counsel was constitutionally ineffective for failing to raise the issue that the trial court erred by failing to consider whether Appellants' convictions for Murder and Aggravated Robbery were allied offenses of similar import and subject to merger.

In the case at bar, Appellant was convicted of Murder, pursuant to ORC 2903.02(B) which states that "[N]o person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code." RC 2903.02(B). The offense of violence was the Aggravated Robbery. The State also prosecuted Appellant for an Aggravated Robbery as well. The result is multiple punishments for allied offenses. A clear violation of the Double Jeopardy Clause as well as the statutory protections against 'shotgun convictions', as "as explained in

the statutes' [RC 2941.25] Legislative Commissions comments." See **Maumee v. Geiger** (1976), 45 Ohio St.2d 238, 74 O.O. 2d 380, 244 N.E. 2d 133.

In **State v. Adbi**, 2011 Ohio 3550 (12th Dist.) that appellate court held that depending on the particular facts of the case, Murder and Aggravated Robbery may constitute allied offenses of similar import and subject to the judicial doctrine of merger.

As this Court is well aware, there is a lengthy history of jurisprudence addressing the issue of allied offenses of similar import, and that history has, hopefully concluded with this Courts' disposition in **State v. Johnson**, (2010), 128 Ohio St.3d 153, 2010 Ohio 6314, 942 N.E. 2d 1061. In **Johnson**, this Court made it clear that the General Assembly's intent when enacting RC 2941.25 was to "[I]nstruct courts to consider offenses in light of the defendant's conduct. **Maumee v. Geiger**, *Id.*

Appellants' assertions here are unique because not only is he challenging the trial courts' imposition of sentences for Murder and Aggravated Robbery based on his conduct, Appellant further challenges the charging instrument as being fundamentally offensive to the Double Jeopardy Clause, as well as RC 2942.25 protections because the Murder indictment was based on the premise that Appellant caused the death of the victim 'as a proximate result' of committing an Aggravated Robbery, then the State further indicts and obtains independent convictions for the same Aggravated Robbery that was used as the underlying offense in the Murder. See **RC 2903.02(B)**. Clearly, this is also a situation that the Framers of the Constitution had in mind when designing the Double Jeopardy Clause, as well as a situation that the General Assembly envisioned when drafting RC 2941.25, Ohio's allied offense statute.

Proposition of Law No. II: DID THE APPELLATE COURT ERR AND/OR ABUSE THEIR DISCRETION BY FAILING TO REOPEN APPELLANT'S DIRECT APPEAL, FOLLOWING RESENTENCING, AFTER APPELLANT RAISED A "COLORABLE CLAIM" OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN COUNSEL FAILED TO RAISE THE CLAIM THAT APPELLANT'S SENTENCES FOR MURDER AND AGGRAVATED ROBBERY WERE ALLIED OFFENSES OF SIMILAR IMPORT PROHIBITED BY THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION AND ORC 2941.25?

In addressing claims of ineffective assistance of counsel, the United States Supreme Court has developed a two-prong test for determining whether counsel was ineffective. First, a defendant must show that counsel's performance was deficient. Secondly, a defendant must show that the deficient performance prejudiced the proceedings. **Strickland v. Washington** (1984) 466 U.S. 668; see also **State v. Bradley** (1989) 42 Ohio St.3d 136.

A convicted defendant is entitled to counsel on an appeal as of right. **Douglas v. California** (1963), 372 U.S. 353. A defendant whose counsel fails to provide effective representation, however is in no better position than one who has no counsel at all. **Evitts v. Lucey** (1985), 469 U.S. 387, 396. Therefore, an appeal as of right is not adjudicated in accord with due process if the appellant does not have effective assistance of appellate counsel. **Evitts**, supra.

In Appellant's App.R.26(B) application, Appellant asserted that his appellate counsel J. Rhett Baker provided ineffective assistance of counsel for failing to present a claim that his convictions for Murder and Aggravated Robbery were allied offenses of similar import. At the time of Appellant's resentencing and subsequent App.R.26(B) application, this Court has decided **Johnson**, therefore **Johnson** was controlling and the fact that the court of appeals had already remanded Appellant's case back to the trial court to consider whether Appellant's convictions for Aggravated Robbery and Robbery were allied offenses (the trial court answered in the affirmative), appellate counsel, as well as the court of appeals should have been alerted to the possibility that the Murder and Aggra-

vated Robbery were also allied offenses of similar import. It is understandable that the jurisprudence pertaining to allied offenses had become somewhat convoluted and if appellate counsel was negligent in recognizing that possibility that the Murder and the Aggravated Robbery were allied offenses (based on Appellant's conduct), it should nevertheless been cognizable with the court of appeals, especially when Appellant provided the court of appeals persuasive authority by citing the 12th District Court of Appeals reasoning in **State v. Adbi**, 2011 Ohio 3550. Even this Court has previously stated that "[a]llied offenses of similar import are to be merged at sentencing." See **State v. Brown**, (2008), 119 Ohio St.3d 447, 2008 Ohio 4569, 895 N.E.2d 149 at ¶43.

In spite of the fact that Appellant's argument may be novel, the trial and appellate court were not relieved of their duties to consider all applicable sentencing provisions before imposing sentence, whether this be at the initial sentencing hearing or at a resentencing hearing. "[A] trial court does not have the discretion to exercise its jurisdiction in a manner that ignores mandatory statutory provisions. See **State v. Simpkins** (2008), 117 Ohio St.3d 420 at ¶27.

Although, Appellant has maintained his innocence throughout his court proceedings, that fact has no bearing on whether the trial court had to consider the statutory mandates of RC 2941.25 before imposing sentence, whether at the initial sentencing hearing, or at a resentencing hearing. Based on Appellants conduct (founded in part on the States' presentation of their case-in-chief), the trial court had a duty to consider Appellants' conduct and determine whether the Murder and Aggravated Robbery were allied offenses subject to merger. Furthermore, the fact that Appellant already received punishment for the Aggravated Robbery when he was indicted and convicted of Murder as outlined in RC 2903.02(B), that fact also establishes the fact that Appellants sentences are contrary to

the statutory provisions set forth in RC 2941.25 as well as the Double Jeopardy Clause of the United States Constitution and Appellants' appellate counsel was constitutionally ineffective for failing to raise this issue on appeal from Appellants resentencing and that ineffectiveness violated Appellants' Sixth Amendment rights to effective assistance of counsel. **Evitt v. Lucey**, supra.

Proposition of Law No. III: WHEN A TRIAL COURT FAILS TO CONSIDER BEFORE IMPOSING SENTENCE, THE STATUTORY REQUIREMENTS SET FORTH IN RC 2941.25, DOES THAT NEGLIGENCE CREATE A "VOID SENTENCE" THAT CAN BE ATTACKED AND CORRECTED AT ANY TIME?

Although this Court has not addressed the questions posed in this Proposition of Law

of Law, Appellant request that this Honorable Court accept jurisdiction and answer the forementioned question.

It is already firmly established in Ohio that sentences that are contrary to law are considered void and can be corrected at any time. See **State v. Simpkins**, 117 Ohio St.3d 420 (citing **Colegrove v. Burns** (1964), 175 Ohio St. 437, 438, 195 N.E.2d 811. A trial court retains jurisdiction to correct a void sentence. See **State ex rel. Cruzado v. Zaleski**, 111 Ohio St.3d 353, 2006 Ohio 5795 at p.18-19. Therefore, when a sentencing court imposes a sentence that disregards and is not in accordance with statutorily mandated terms, that sentence is void and the defendant must be resentenced to a lawful sentence. See **Simpkins**, at ¶27 (Every judge has a duty to impose lawful sentences").

Therefore, Appellant request that this Honorable Court answer the question of whether sentences are void when they are not in accordance with RC 2941.25 and when it is determined that these sentences are contrary to law, are criminal defendant entitled to resentencing hearing to correct their invalid sentences.

CONCLUSION

WHEREFORE, for the foregoing reasons, Appellant respectfully requests that this Honorable Court accept jurisdiction of his appeal and permit Appellant an opportunity to fully brief the issues presented for this Courts review.

Respectfully Submitted,



Cameron McGlothlin #516-550
Warren Corr. Inst.
P.O. Box 120
Lebanon, Ohio 45036

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing was sent to the Hamilton Co. Prosecutor's Office at 230 E. Ninth St., Ste. 4000 Cincinnati, Ohio 45202, by regular mail this 23rd day of February, 2012.



Cameron McGlothlin #515-550

APPENDIX

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-100727
	:	TRIAL NO. B-0508457
Plaintiff-Appellee,	:	
vs.	:	
CAMERON MCGLOTHIN,	:	<i>ENTRY DENYING</i>
	:	<i>APPLICATION FOR</i>
Defendant-Appellant.	:	<i>REOPENING.</i>

We consider this cause upon defendant-appellant Cameron McGlothin's App.R. 26(B) application to reopen this appeal and upon the state's response.

An application to reopen an appeal must be granted if the applicant establishes "a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998); App.R. 26(B)(5). The standard for determining whether an applicant was denied the effective assistance of appellate counsel is that set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *State v. Reed*, 74 Ohio St.3d 534, 535, 660 N.E.2d 456 (1996). The applicant must prove "that his counsel [performed deficiently in] failing to raise the issues he now presents and that there was a reasonable probability of success had [counsel] presented those claims on appeal." *State v. Sheppard*, 91 Ohio St.3d 329, 330, 744 N.E.2d 770 (2001), citing *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus.

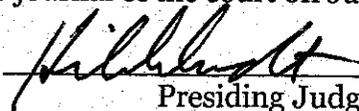
In his application, McGlothlin contends that he was denied the effective assistance of counsel on appeal, because his appellate counsel failed to present an assignment of error challenging, under R.C. 2941.25, the trial court's imposition of sentences for both murder and aggravated robbery. But McGlothlin's proposed allied-offenses challenge to his murder and aggravated-robbery sentences could have been raised in his initial appeal from his judgment of conviction. *See State v. McGlothlin*, 1st Dist. No. C-060145 (Sept. 14, 2007), superseded upon reconsideration by *State v. McGlothlin*, 1st Dist. No. C-060145 (Sept. 24, 2010). Therefore, the challenge would have been barred under the doctrine of res judicata if appellate counsel had presented it in this appeal, taken from McGlothlin's 2010 resentencing pursuant to our remand upon reconsideration of our 2007 decision in his initial appeal. *See State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus.

Because the proposed assignment of error would have offered no prospect of success had it been advanced on appeal, McGlothlin has failed to demonstrate a genuine issue as to whether he has a colorable claim of ineffective assistance of counsel on appeal. Accordingly, the court denies his application to reopen this appeal.

To the clerk:

Enter upon the journal of the court on January 31, 2012

per order of the court



Presiding Judge

(COPIES SENT TO ALL PARTIES.)