ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHO

Plaintiff-Appellee,

vs.

BRUCE R. CHAMPSON

Defendant-Appellant.

Case No. 12-1217

On Appeal from the Montgomery County Court of Appeals Second Appellate District

C.A. Case No. 24782

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT BRUCE R. CHAMPISON

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Defendant-Appellant

FILED
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SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC AND/OR GREAT GENERAL INTEREST AND INVOLES A SUBSTANTIAL CONSTITUION QUESTION.

This cause present a critical issue for the future of public and great general interest in Ohio for felony cases:

Whether a new judicial ruling involving statutory interpretation of Ohio Revised Code statue §2941.25 may be applied retrospectively. In *Agee v. Russell, Warden*, 92 Ohio St.3d 540, 2001 Ohio 1279, 751 N.E.2d 1043 (2001), the Ohio Supreme Court held that the U.S. Supreme Court's holding in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), limiting the application of criminal rules to those cases which become final before the rules are announced, was not applicable to cases involving statutory interpretation. *Agee*, 92 Ohio St.3d at 543. In *Agee*, the Ohio Supreme Court explicitly stated,"*Teague* is inapplicable to cases in which a court determines the meaning of a statute enacted by the legislature." *Id.* (quoting *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2D 828 (1998)). Citied in *Tony Gaines, Petitioner, v. Warden, Mansfield Correctional Institution*, 2011 U.S. Dist. LEXIS 77574.

Additionally, the Ohio Supreme Court recently further clarified the proper interpretation of Ohio Revised Code § 2941.25. In *State v. Johnson*, 128 Ohio St.3d 153, 2010 Ohio 6314, 942 N.E.2d 1061 (2010), the Ohio Supreme Court held that under Ohio's allied offense statute the proper analysis involves two questions: first, whether it is possible to commit one offense and commit the other with the same conduct, and if so, whether the two offenses were actually committed with the same conduct. *Id.* at ¶ 49. If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged. *Id.* At ¶ 50.

In light of the changing interpretation of Ohio Rev. Code § 2941.25 in Ohio's case law, a state-law question in to be certified to the Ohio Supreme Court to determine the proper construction of the allied offense statute at the time of conviction and direct appeal, which the *State v. Logan* (1979), Ohio

St.2d 126, 135, 397 N.E.2d 1345 standard applied during the time of Appellant's direct appeal. Since then, several other interpretation were set forth by this Court clarifying Ohio Revised Code § 2941.25 plausibility to convictions that must merge under the statue preventing violations of Double Jeopardy. Ohio courts have consistently recognized the double jeopardy considerations involved when considering claims that offenses should have been merged as "allied offenses of similar import" under Ohio Rev. Code § 2941.25. The "allied offenses statute" is premised on protecting against multiple punishments for the same criminal conduct in violation of the Double Jeopardy Clauses of the United States and Ohio Constitutions.

The language of Appellant's state court appeal was taken directly from Ohio Revised Code § 2941.25, which the Ohio Supreme Court recently described as "a prophylactic statute that protects a criminal defendant's rights under the Double Jeopardy Clauses of the United States and Ohio Constitutions." *State v. Johnson*, 128 Ohio St.3d 153, 2010 Ohio 6314, at ¶ 45, 942 N.E.2d 1061 (2010). In a recent case, *Tony Gaines, Petitioner, v. Warden, Mansfield Correctional Institution*, 2011 U.S. Dist. LEXIS 77574, Federal Courts certified a question, "Whether a new judicial ruling involving statutory interpretation of Ohio Revised Code statue §2941.25 may be applied retrospectively." If the question is accepted and determined on the merit, this Court's ruling will be significantly relevant to the describes substantial core issue at hand. Several statutory interpretations of Ohio Revised Code §2941.25, only set clarity to the application of the statue and not alter the statue by no judicial means.

In sum, R.C. 2941.25 is enacted by the General Assembly to promote the purpose and preserve the integrity of the courts, to assure Double Jeopardy Clauses violations are prevented, to promote orderly and constructive sentencing guidelines, and to remove impediments on felony sentencing, this court must grant jurisdiction to hear this case and review the erroneous decision of the court of appeals regarding the statutory interpretation of Ohio Revised Code statue §2941.25, and may it be applied retrospectively.

STATEMENT OF THE CASE AND THE FACTS

According to the surviving victim, Beverly Williams, Champion and Jackson, both of whom were known to her, entered her residence on May 30, 1997. George Robinson was also in the residence at that time. After entering, Champion said, "I'm tired. It's been a rough day. I need some money," pulled out a black revolver, and laid it on the table. Jackson, following Champion's instructions, taped Robinson's wrists and ankles.

Champion then told Jackson to tape Williams's hands. When Williams refused to cooperate, Champion [*3] picked up the gun and ordered her to turn around. Jackson taped Williams's mouth and wrists, but taped her wrists loosely. Champion mocked Jackson, asking him if he had learned how to tape in the Boy Scouts; then Champion re-taped Williams's hands more tightly.

While this was going on, Williams's phone rang, and Jackson answered the phone. Juan Crawford was calling to tell Williams he was on his way to her house. Jackson hung up the phone, and told Champion that Crawford would be coming over shortly. Champion handed Jackson the gun, and told him to get behind the door. When Crawford knocked, Jackson, whom Crawford knew, opened the door. Crawford saw the gun, Jackson, and Williams on the floor, with her mouth taped. He fled. He did not see Champion.

Champion then pulled the phone cord out of the wall, wrapped the cord around Williams's neck, and began to choke her. Since Williams was struggling, Champion took his gun back from Jackson. He continued choking Williams, and demanding money. When Williams finally told Champion that she had money in her bra, he tore her sweater to get the money. He also took her watch and ring, and then began choking her again with the phone cord. Despite the fact that Williams was able to get her fingers under the phone cord, Champion continued choking her until she passed out.

When Williams regained consciousness, she crawled to a neighbor's house, and police were notified. The police officers responding to the call found Robinson lying dead on the floor. Two spent .38

caliber bullets were found near the body. Additional .38 bullets and bullet fragments were retrieved during the autopsy. The cause of death was multiple gunshot wounds. Robinson had wounds to his leg, hands, abdomen and chest.

Williams identified Champion and Jackson, both of whom she knew previously, as the perpetrators. Crawford, who had previously known Jackson by sight but not by name, picked Jackson's photograph from a photo spread, without having had the opportunity to talk to Williams beforehand. Crawford was positive in his identification of Jackson as the man standing behind the door with the gun; he had had no opportunity to observe the other perpetrator.

Champion and Jackson were apprehended in Kentucky, and charged in connection with these offenses. Champion was tried separately from Jackson. Specifically, Champion was indicted upon one count of Aggravated Burglary, two counts of Kidnapping, two counts of Aggravated Robbery, and one count of Aggravated Murder. At trial, a police officer was permitted to testify, over Champion's objection, that Jackson had admitted his presence at Williams's house at the time of the offense. A jury found Champion guilty of all counts, except the Aggravated Murder count, of which Champion was acquitted. The jury also found Champion guilty of firearm specifications with respect to all of the counts for which he was convicted. A judgment of conviction was entered upon the jury's verdict, and Champion was sentenced accordingly. From his conviction and sentence, Champion appeals.

The record reflects that Champion was convicted and sentenced in March 1998 on two counts of aggravated robbery, two counts of kidnapping, one count of aggravated burglary, and firearm specifications. This court affirmed on direct appeal, rejecting, among other things, an allied-offense argument. *See State v. Champion*, 2d Dist. Montgomery No. 17176, 1999 Ohio App. LEXIS 841, 1999 WL 114973 (March 5, 1999). Champion then unsuccessfully sought post-conviction relief. This court again affirmed. *See State v. Champion*, 2d Dist. Montgomery No. 18394, 2001 Ohio App. LEXIS 219, 2001 WL 62388 (Jan. 26, 2001).

On May 27, 2011, Champion filed a motion for resentencing. He argued that his aggravated robbery and kidnapping offenses were allied offenses of similar import under *State v. Johnson*, 128 Ohio St.3d 153, 2010 Ohio 6314, 942 N.E.2d 1061. Therefore, he claimed they were subject to merger at sentencing. The trial court overruled the motion, holding that *Johnson* has prospective application and does not apply to convictions like Champion's that became final long ago. The trial court also denied reconsideration.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

<u>First Proposition of Law</u>: The Trial Court abused its discretion when it failed to address the Defendant-Appellant's claim of Allied Offenses on it's merits using *State v. Johnson*, 128 Ohio St.3d 1513, 2010-Ohio-6314, and the Trial Court also abused it failed to address if *Plain Error* existed when presented with a claim of Allied Offenses Pursuant to R.C. 2941.25 Allied Offenses; when it is clear that The Second Appellate District and the Supreme Court of Ohio recognizes that Allied Offenses constitutes *Plain Error*: *State v. Underwood*, 124 Ohio St.3d 365, 922 N.E.2d 923, 2010-Ohio-1, ¶ 31.

<u>Second Proposition of Law</u>: The Trial Court failed to apply the *Plain Error Doctrine* when it clearly exist in this case. It will be explained within the entire argument that once it is determined that Allied Offenses exist, Allied Offenses Constitutes Plain Error. The Defendant-Appellant will clearly show that a substantial constitutional right has been violated in his case.

<u>Third Propositional of Law</u>: The Trail Failed to recognize Aggravated Robbery and Kidnapping are Allied Offenses of similar import pursuant to R.C. 2941.25 in the Defendant-Appellant's case and it clearly was the duty of the trial court to correct this sentencing error. The Defendant-Appellant would be prejudiced by having more convictions than are authorized by law, and in this particular case the defendant-Appellant was sentenced to an additional 10 years, which is contrary to law and are not authorized by law.

The defendant-Appellant respectfully respectfully request this court recognize that there are three separate assignment of errors, but they all coincide with each other.

The Plain Error Doctrine forces the Trial Courts to review the merits of the case to see if there is a legitimate claim of Allied Offenses of similar import pursuant to R.C. 2941.25, by using the standards that the Supreme Court of Ohio set forth in "*Johnson*." The Defendant-Appellant believes that when

the Trial Court failed to assess if "*Plain Error*" existed pursuant to Crim.R.52(B), that the Trail Court abused its discretion.

The term abusive discretion "connotes more than error of law or judgment; it implies that the Court's attitude is unreasonable, arbitrary or unconscionable. *Snyder v. Snyder* (1985), 27 Ohio App.3d 1, 3.

Champion understood for the beginning that according to law, he waived any rights to appeal except if "Plain Error" existed; however, the Ohio Supreme Court has said the imposition of multiple sentences for Allied Offenses of similar import is "Plain Error." *State v. Underwood*, 12 Ohio St.3d 365, 2010-Ohio-1, ¶ 31.

On March 5, 1999, in the Court of Appeals for Montgomery County, Ohio they rendered a decision in the Defendant's case on Allied Offenses and Stated:

- "Bruce rips out the phone cord, comes over to me with the ripped out cord. Bruce starts choking me and says where's the money at, bitch. He says I know you've got some money. Where's your check."

Under the new analysis in *Johnson*, "[w]hen determining whether two offenses are allied offenses of similar import subject to merge under R.C. 2941.25, the conduct of the accused must be considered. We must remind the court that even though we continue to say that the courts in *Johnson* has a new analysis, the Supreme Court of Ohio made a very clear statement in *Johnson*:

- {¶ 16} R.C. 2941.25 has never been amended

Which means that whatever standard is set forth by the Supreme Court of Ohio in regards to determining whether two offenses are allied offenses of similar import subject to merge under R.C. 2941.25 should be analyzed across the board when brought to the attention of the court. The Supreme Court has made it clear that no legislation has ever change and there should only be one standard followed. When the Defendant-Appellant brought his claims of Allied Offenses of similar import pursuant to 2941.25 and Plain Error pursuant to Crim.R.52(B), to the Trial Courts attention, he believes

that it was the Trial Court's duty to address each issue to see if the merits of the case fit "*Johnson.*"

Which is:

- "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offenses and commit the other with the same conduct, not whether it is possible to commit one without committing the other. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting the commission of one offense constitutes [the] commission of the other, than the offenses are of similar import.

- "If the multiple offenses can be committed by the same conduct, the court must determine whether the offenses were committed by the same conduct, i.e. 'a single act, committed with a single state of mind.'" * * *

- "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merge.

This court didn't even take Allied Offenses or Plain Error under consideration. That is what constitute abusive discretion on their part.

In *State v. May*, Slip Copy, 2011 Wl 4842452 (Ohio App. 11Dist.) 2011-Ohio-5233, it states in part:

- In *Underwood*, the state argue the trial court's sentence on each count of the allied offenses had no practical of prejudicial effect on the defendant, because he received concurrent terms for his offenses. The Supreme Court of Ohio disagreed, explaining that "even when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law." Id. at ¶ 29, 922 N.E.2d 923.

In the current case, the Defendant-Appellant was sentenced 10 years for *Aggravated Robbery* and 10 years for *Kidnapping* and the Trial Court ordered those two counts to be ran consecutively to one another, but they are Allied Offenses of similar import pursuant to R.C. 2941.25 and the standards that should be applied should be from "*Johnson.*"

It also states in *May* in part that:

- "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

offenses for such conduct, the defendant may be sentenced for only one offenses. This court has 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, 1997-Ohio-335, 686 N.E.2d 1112. thus, the Trial Court is prohibited from imposing individual sentences for counts that constitute allied offense of similar import. A defendant's plea to multiple counts does not affect the court's duty to merge those allied counts at sentencing. This duty is mandatory, not discretionary." Id. At ¶ 26, 686 N.E.2d 1112.

If this duty in mandatory and not discretionary, it should still be mandatory because it would fall under the Plain Error Doctrine. The facts of the case has not change. The two burdens or prejudicial effects that's placed on the Defendant-Appellant does not change.

1.) Champion received 10 more years for the second conviction; and
2.) Champion is prejudiced by having more convictions on his record than what is authorized by law.

The Second Appellate District takes this very serious. There are cases that a defendant did not even appeal their sentence pursuant to R.C. 2941.25 Allied Offenses and the Second Appellate District took it upon themselves to review the issue and remanded the case back to the trial court for re-sentencing. In *State v. Bridgeman*, Slip Copy, 2011 WL 2175224 (Ohio App. 2 Dist.), 2011-Ohio-2680, the Court of Appeals of Ohio, Second District, Champaign County took it upon themselves two major issues that should have been recognized by the Trial Court:

1.) The Ohio Supreme Court held that "R.C. 2941.25(A) clearly provides that there may be only one conviction for allied offenses of similar import.
2.) A Trial Court is prohibited from imposing individual sentences for counts that constitute allied offenses of similar import.
3.) Due to the fact Allied Offenses existed in "*Bridgman*," it constitute "Plain Error."

This what states in part in *Bridgeman*:

- {¶ 44} Although Bridgeman has not argued on appeal that his convictions should have been merged as allied offenses of similar, we *sua sponte* take notice of the error. See State v. Jones, Montgomery County App. No. 23926, 2011-Ohio-1984,

¶ 4 (noticing the potential error of failing to merge allied offenses of similar import).

- {¶ 46} We have previously held that a trial court's failure to merge allied offenses of similar import constitutes plain error. State v. Coffey, Miami App. No. 97 CA43. Furthermore, the Ohio Supreme Court has held that "R.C. 2941.25(A) clearly provides that there may be only conviction for allied offenses of similar import. Because a defendant may be of only one offense for such conduct, the defendant may be sentenced for only one offense. Allied offenses of similar import are to be merged at sentencing. * * * Thus, a trial court is prohibited from imposing individual sentences for counts that constitute allied offenses of similar import." (Emphasis in original; internal citation omitted) *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 26.

- {¶ 50} "R.C. 2941.25 codifies the double jeopardy protections in the federal and Ohio constitutions, which prohibit courts from imposing cumulative or multiple punishments for the same criminal conduct unless the legislature has expressed an intent to impose them. R.C. 2941.25 expresses the legislature's intent to prohibit multiple convictions for offenses which are allied offenses of similar import per paragraph (A) of that section, unless the conditions of paragraph (B) are also satisfied." *State v. Barker*, 183 Ohio App.3d 414, 2009 Ohio 3511, ¶22, 917 N.E.2d 324, citing *State v. Rance*, 85 Ohio St.3d 632, 1999 Ohio 291, 710 N.E.2d 699, overruled on other grounds by *State v. Johnson*, 128 Ohio St.3d 153, 2010 Ohio 6314, 942 N.E.2d 1061.

- {¶ 52}*Johnson* states that ***HN11***."the intent of the General Assembly is controlling." Id. at ¶46. "We determine the General Assembly's intent by applying R.C. 2941.25, which expressly instructs courts to consider the offenses at issue in light of the defendant's conduct." Id. The trial court must determine prior to sentencing whether the offenses were committed by the same conduct. The court no longer must perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger. Id. at ¶47 "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other. If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import." Id. at ¶48 (internal citation omitted).

Under the facts of this case, it is apparent that the charges of Aggravated Robbery and Kidnapping are allied offenses of similar import and is covered under the State and Federal Constitution. Despite the misalignment of offenses in the abstract in the Defendant-Appellant's case, the facts shows that the victim was restrained for one purpose and on purpose only, and that purpose was to rob the victim.

Consequently, Champion should have only been sentenced for either Aggravated Robbery or Kidnapping.

The Defendant-Appellant needs this court to recognize that this issue is already in the middle of being decided by the Supreme Court of Ohio. The issue is whether *Johnson* is:

A.) A newly declared constitutional rule:or

B.) Does it merely clarify an existing law established in "Rance"?

In *Gain v. Warden, Madison Correctional Institution*, Slip Copy 2010 WL 7023564 (S.D. Ohio, 2010), the District Court stated:

> 1.) Under Ohio Law, newly declared constitutional rules in criminal cases are applied prospectively, not retrospectively and thus "only to cases that are pending on the announcement date." *State v. Colon*, 119 Ohio St.3d 204, 893 N.E.2d 169, 170 (Ohio 2008), overruled on other grounds by *State v. Horner*, -- N.E.2d --, Nos. 2009-0079 and 2009-0311, 2010 WL 3447686 (Ohio Aug. 27, 2010) (to be published): or
>
> 2.) Does it merely clarify existing law established in Rance in resolving a conflict that had developed among the intermediate state courts in the wake of Rance for discerning the legislature intent in analogous factual context.

Because there are not any case law definitively answering that question or, for that particular matter, the District Court in *Gaines v. Warden, Mansfield Correctional Institution*, Slip Copy, 2011 WL 2884913 (S.D. Ohio), on or about July 18, 2011 decided to Certify the State Law question back to the Ohio Supreme Court. Due to the fact that the question of how Allied Offenses of similar import pursuant to 2941.25 in Johnson relates to the State and Federal Constitution of Double Jeopardy is now being decided in the Ohio Supreme Court. This cases should be held in abeyance until the decision in made in *Gaines v. Warden, Mansfield Correctional Institution*, Slip Copy, 2011 WL 2884913 (S.D. Ohio), by the Ohio Supreme Court.

CONCLUSION

In conclusion, it is very clear that when the Trial Court sentenced Mr. Champion, they did so using "Logan" which resulted in sentencing the Defendant-Appellant in the abstract. The results of using the wrong interpretation, which the Ohio Supreme Court admitted in *Johnson*, resulted in the Defendant-Appellant having multiple convictions for same conduct. It also violated the Defendant-Appellant's State and Federal Constitutional Rights against Double Jeopardy and Allied Offenses, which lead to the Defendant-Appellant's being sentenced to an additional 10 years that was not authorized by law. The Defendant-Appellant's case is clearly against the General Assembly's Intent, Legislative Intent, and against his own constitutional rights. In *Johnson*, they were very clear to admit that R.C. 2941.15 in now clarified, and if that is true than when the Ohio Supreme Court made the ruling in *Johnson*, they were only clarifying an existing rule that would make that retroactive in nature because no Constitutional Rule was disturbed. It is clear that when a Constitutional Rule is not disturbed or charge, and an existing rule is only clarified than it would be retroactive.

The Defendant-Appellant recognizes that the District Courts has requested clarity where this issue is at question. When this court hands down its decision clarifying the question between "New Constitutional Rule" or "Clarifying an existing rule" and whether it will be retroactive or retrospective according to *Gaines v. Warden, Mansfield Correctional Institution*, Slip Copy, 2011 WL 2884913 (S.D. Ohio) constitutional question.

This case holds a substantial question of law challenging the applicability of sentencing guidelines standards. The appellant requests this court to accept jurisdiction of this case so the important issue presented will be reviewed on the merits.

Respectfully submitted,

Bruce R. Champion
Inmate Number 354-713
Pro Se litigant

London Correctional Institution
1580 State Route 56 SW
P.O. Box 69
London, Ohio 43140

Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to the Montgomery County Prosecutor Office located at 301 West 3rd Street, 5th Floor, Dayton, Ohio 45422 on this 23rd day of July 2012.

Bruce R. Champion 354-713

Bruce R. Champion
Inmate Number 354-713
Pro Se litigant
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P.O. Box 69
London, Ohio 43140

Defendant-Appellant

IN THE SUPREME COURT OF OHIO

STATE OF OHO

Plaintiff-Appellee,

Case No. _____

On Appeal from the Montgomery County Court of Appeals Second Appellate District

vs.

BRUCE R. CHAMPSON

Defendant-Appellant.

C.A. Case No. 24782

APPENDIX TO:

MEMORANDUM IN SUPPORT OF JURISICTION OF APPELLANT BRUCE R. CHAMPION

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	
Plaintiff-Appellee	Appellate Case No. 24782
v.	Trial Court Case No. 1997-CR-1509
BRUCE R. CHAMPION	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	**FINAL ENTRY**

. . . . . .

Pursuant to the opinion of this court rendered on the 8th day of June, 2012, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

Mike Fain

MIKE FAIN, Judge

MARY E. DONOVAN, Judge

MICHAEL T. HALL, Judge

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Hon. Michael Tucker
Montgomery County Common Pleas Court
41 N. Perry Street
Dayton, OH 45422

45 days: 7-23

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	
Plaintiff-Appellee	Appellate Case No. 24782
v.	Trial Court Case No. 1997-CR-1509
BRUCE R. CHAMPION	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	

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OPINION

Rendered on the 8th day of June, 2012.

. . . . . .

MATHIAS H. HECK, JR., by KIRSTEN A. BRANDT, Atty. Reg. #0070162, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
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BRUCE R. CHAMPION, #354-713, London Correctional Institution, Post Office Box 69, London, Ohio 43140
Defendant-Appellant, *pro se*

. . . . . .

HALL, J.

{¶ 1} Bruce R. Champion appeals pro se from the trial court's decision, entry, and order overruling his motion for resentencing to merge allied offenses of similar import.

{¶ 2} Champion advances three assignments of error on appeal. First, he contends the trial court erred in refusing to address the merits of his allied-offense argument and an argument about plain error. Second, he claims the trial court erred in failing to apply the plain-error doctrine. Third, he asserts that the trial court erred in failing to recognize that aggravated robbery and kidnapping are allied offenses of similar import.

{¶ 3} The record reflects that Champion was convicted and sentenced in March 1998 on two counts of aggravated robbery, two counts of kidnapping, one count of aggravated burglary, and firearm specifications. This court affirmed on direct appeal, rejecting, among other things, an allied-offense argument. *See State v. Champion*, 2d Dist. Montgomery No. 17176, 1999 WL 114973 (March 5, 1999). Champion then unsuccessfully sought post-conviction relief. This court again affirmed. *See State v. Champion*, 2d Dist. Montgomery No. 18394, 2001 WL 62388 (Jan. 26, 2001).

{¶ 4} On May 27, 2011, Champion filed a motion for resentencing. He argued that his aggravated robbery and kidnapping offenses were allied offenses of similar import under *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. Therefore, he claimed they were subject to merger at sentencing. The trial court overruled the motion, holding that *Johnson* has prospective application and does not apply to convictions like Champion's that became final long ago. The trial court also denied reconsideration.

{¶ 5} Although Champion raises three assignments of error on appeal, he acknowledges that they are related. The essence of his appellate argument is that the failure to merge his aggravated robbery and kidnapping convictions as allied offenses of similar import under *Johnson* constituted plain error. We reject this argument for at least

two reasons.

{¶ 6} First, the trial court correctly held that *Johnson* has only prospective application. In *Johnson*, the Ohio Supreme Court announced a new test for determining when offenses are allied offenses of similar import that must be merged pursuant to R.C. 2941.25. In *State v. Parson*, 2d Dist. Montgomery No. 24641, 2012-Ohio-730, ¶ 11, this court rejected retroactive application of *Johnson* to a conviction that became final long ago. On the authority of *Parson*, we hold that the test set forth in *Johnson* has no applicability to Champion.

{¶ 7} Second, *Johnson* would provide Champion no relief even if it did apply retroactively. "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other." (Citation omitted.) *Johnson* at ¶ 48. "If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import." *Id.*

{¶ 8} "If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' " (Citation omitted.) *Id.* at ¶ 49. "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." *Id.* at ¶ 50. "Conversely, if the court determines that the commission of one offense will never result in the commission of the other, *or if the offenses are committed separately, or if the defendant has a separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge.*" (Emphasis added.) *Id.* at ¶ 51.

{¶ 9} When resolving Champion's direct appeal in 1999, this court determined that his aggravated robbery and kidnapping offenses were not allied offenses of similar import because he exposed his victims "to a significantly greater risk of harm than was necessary for the accomplishment of the aggravated robbery offense." *Champion* at *4. This fact established the existence of a separate animus. *Id.* at *3-4; *see also State v. Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979), syllabus ("Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions."); *State v. Gilbert*, 7th Dist. Mahoning No. 08 MA 206, 2012-Ohio-1165, ¶ 47 ("Separate animus also exists if the restraint or movement of the victim substantially increases the risk of harm to the victim."). Even under *Johnson*, the existence of a separate animus for each offense allows the imposition of separate sentences. *Johnson* at ¶ 51. Therefore, the new test articulated in *Johnson* does not help Champion.

{¶ 10} Finally, we reject Champion's request to hold the present appeal in abeyance until the Ohio Supreme Court decides whether *Johnson* has retroactive application. Champion contends the United States District Court certified that state-law question to the Ohio Supreme Court in *Gaines v. Warden, Mansfield Correctional Inst.*, No. S.D.Ohio 1:07cv347, 2011 WL 2884913 (July 18, 2011). We decline to hold the present appeal in abeyance for three reasons. First, it is not clear that the question certified by the federal district court would address retroactive application of *Johnson*.[1] Second, the Ohio Supreme

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[1]In *Gaines*, the federal district court stated that it would certify the following state-law question to the Ohio Supreme Court:

Court's on-line docket does not indicate that the certified question has been accepted for review. Third, even if the Ohio Supreme Court were to hold that *Johnson* has retroactive application, that holding would not help Champion for the reason set forth above.

{¶ 11} Champion's assignments of error are overruled, and the judgment of the Montgomery County Common Pleas Court is affirmed.

. . . . . .

FAIN and DONOVAN, JJ., concur.

Copies mailed to:

Mathias H. Heck
Kirsten A. Brandt
Bruce R. Champion
Hon. Michael Tucker

> Whether in this case, which involved a single automobile accident resulting in the death of one victim, Ohio Rev.Code §2941.25 could be construed at the time of petitioner's conviction and direct appeal in 2005 as permitting a "strict textual comparison" of the elements and a finding, in accordance with the First District Court of Appeals' later decision in *State v. Hundley*, No. C-060374, 2007 WL 2019804, at *2-3 (Ohio Ct.App. 1 Dist. July 13, 2007) (unpublished), appeal dismissed, 116 Ohio St.3d 1441, 877 N.E.2d 991 (Ohio 2007), that the two aggravated vehicular homicide charges brought against petitioner under Ohio Rev.Code §§2903.06(A)(1)(a) and 2903.06(A)(2) are dissimilar when compared in the abstract; or whether, conversely, at the time of petitioner's conviction and direct appeal in 2005, the proper construction of Ohio Rev.Code §2941.25 required a finding that the two offense[s] are of similar import in accordance with the subsequent clarification in *Cabrales* of the *Rance* "abstract elements comparison test," as well as *State v. Palmer*, 120 Ohio St.3d 322, 898 N.E.2d 960 (Ohio 2008), and the First District Court of Appeals' decision in *State v. Moore*, No. C-70421, 2008 WL 3544342 (Ohio Ct.App. 1 Dist. Aug. 15, 2008) (unpublished), appeal dismissed, 120 Ohio St.3d 1490, 900 N.E.2d 200 (Ohio 2009), overruling *Hundley*.

Gaines at *9.