No. 19-5363

ORIGINAL

In The

SUPREME COURT of the UNITED STATES

RICHARD CURTIS

Petitioner

v.

LYNEAL WAINRIGHT

Respondent

On Petition for Writ of Certiorari

Ohio Supreme Court

Richard Curtis
In Propria Persona
Inmate No. 615995
Marion Correctional Institute
P. O. Box 57
Marion, Ohio 43301

QUESTIONS PRESENTED

I. Whether separately imposed sentences prior to merge, constitutes multiple sentences in violation of the Double Jeopardy clause; and

II. Whether this makes the sentence void.

LIST OF PARTIES

[X] All parties appear in the caption on the cover page.

Richard Curtis
Inmate No. 615995
Marion Correctional Institute
P. O. Box 57
Marion, Ohio

Petitioner

Lyneal Wainright, Warden
Marion Correctional Institute
P.O. Box 57
940 Marion Williamsport Road
Marion, Ohio 43301

Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Third District Court of Appeals court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[XX] For cases from **state courts:**

The date on which the highest state court decided my case was March 20, 2019
A copy of that decision appears at Appendix ___A___.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

Amendment 14

Section 1. [Citizenship Rights not to be abridged by States]

All persons are subject to jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within jurisdiction the equal protection of the laws.

Ohio Revised Code Ann. § 2941.25(A)

(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.

STATEMENT OF CASE

Richard Curtis' wife, Linda died on August 13, 1996. No arrest(s) were made

Both in 2001 and 2008, the investigation was reopened and in February of 2009, an indictment was handed down against Mr. Curtis; he was subsequently convicted of aggravated murder and murder by a petit jury.

At the sentencing hearing, defense counsel, Mr. Maus submitted "that agg. murder and murder would merge for purposes of sentencing." (page 2, ln. 25; page 3, ln.3-5)(Appx. C). In sentencing the defendant, the trial court stated:

> ... it will be the sentence of this Court as to Count 1, aggravated murder, in violation of 2903.01(A), that you serve a term of life imprisonment with no--eligibility , only after serving the first 20 years. In addition, as to the specification the Court will sentence you to an additional term of three years mandatory as it relates to Count 2...
>
> ... it will be the sentence of this Court, Sir, that you serve 15 years to life, on an indefinite term of imprisonment that you serve an additional three years on the handgun specification as a mandatory term of imprisonment...

(page 8, ln. 3-17)

> ... I will find, however, that the aggravated murder and murder offenses, typically murder is an offense of lesser included offenses. The Court finds that it arises of the same circumstances, the same criminal mens rea. And, as a result, the sentence as to Count 2 will merge into sentence as to Count 1.

(page 9, ln. 4-10)

> ... that the sentences are mandatory sentences pursuant to 2929.02 through 2929.04.

(page 10,ln. 17-19)

The trial court held a second hearing on September 28, 2009 as an addendum to the

Sentencing hearing. (Appx. D; page 2, ln. 5-12).

In this addendum, the trial court stated: "Mr. Curtis, I need to advise you, as to Count 2, the murder sentence which is an indefinite sentence of 15 years to life, that upon release from prison, that there is a five year mandatory Post Release Control... (Appx. D;page 2, ln. 18-25).

In May of 2018, the petitioner filed a writ of Haber corpus in the Marion County Court of Appeals, Case No. 09-18-14, which was denied on July 16, 2018 (Appx. B).

The petitioner next filed his Notice of Appeal on August 2, 2018. The Ohio Supreme Court upheld the lower court's decision, dated March 20, 2019 (Appx. A).

REASONS FOR GRANTING PETITION

The Fifth Amendment, United States Constitution provides that no person shall be twice put in jeopardy for the same offense. This guarantee, fundamental as it is to the American scheme of justice, applies against the states by virtue of the Fourteenth Amendment's Due Process clause. The Double Jeopardy clause also protects against multiple punishments for the same offense.

What determines whether the constitutional prohibition against multiple punishments has been violated is the states legislature's intent. The Double Jeopardy clause does no more that prevent the sentencing court from proscribing greater punishments than the legislature has intended. Ohio courts apply the Ohio Revised Code Ann. § 2941.25 to ascertain legislature's intent.

By allowing this judgment to stand would be in contradiction of the state legislature's intent, and allow countless defendants to be twice put in jeopardy; contrary to both the Ohio and United States Constitutions.

The Ohio Supreme Court's affirmation of the lower court are contrary to the findings as found in Jackson v. Smith, 745 F. 3d 206 (6th Cir.2014); State v. Rance, 85 Ohio St. 1999-Ohio-291, 710 N.E. 2d 699 (Ohio 1999).

The Ohio Supreme Court has affirmed a decision by the Third District Appellate Court of Ohio in conflict with several of its previous holdings on the same important matter and issue, has decided important federal questions in a way that it conflicts with it own previous decisions.

Imprisonment is not unlawful unless the sentence is a nullity, void, and then a writ lies. Thomas v. Cowdry,13 Ohio App. 59, 31 OLA 133, 65 BULL 307 (Ed. 1920).

Habeas corpus is the proper remedy where the imprisoned person is illegally held, regardless of the circumstances of commitment, the only limitation being that the order of commitment be absolute void. State ex rel. Kelly v. Frick ,14 Ohio 305 (App.).

A judgment of conviction may be attacked collaterally and the accused discharged on habeas in any court of jurisdiction. In re: Brown, 6 OO 44 (CP).

When a defendant has been found guilty of offenses that are allied, O.R.C. 2941.25 prohibits the imposition of multiple sentences. State v. Whitfield, 124 Ohio St. 319, 2010-Ohio-2, 922 N.E. 2d 182, at ¶ 12. Therefore, a trial court must merge crimes into a single conviction and impose a sentence that is appropriate for the offense chosen for sentencing. State v. Brown, 119 Ohio St. 3d 447, 2008-Ohio-4569, 893 N.E. 2d 149, at ¶ 41-43.

We must take notice to the word "normally" in that a writ of habeas corpus is only appropriate when there is no alternative legal remedy, citing, State ex rel. Jackson v. McFaul, 1995-Ohio-223. However, "when a court's judgment is void because it lacked jurisdiction, habeas is still an appropriate remedy despite the availability of an appeal." Leyman v. Bradylan, 2016-Ohio-1093, 146 Ohio St. 3d 522, 59 N.E.3d 1236, at ¶ 9, quoting, Gaskins v. Shiat, 74 Ohio St. 3d 149, 151, 1996-Ohio-262, 656 N.E. 2d 1282 (1995).

Here, in the Ohio Supreme Court's decision (Appx. A; page 1,ln. 3-5); it claims that allied defense claims are non-jurisdictional, citing, Smith v. Voorhies, 119 Ohio St. 3d 345, 2008-Ohio-4479,

894 N.E. 2d 44 (Appx. A; page 10,ln. 7-12).

This is in contradiction as the Ohio Supreme Court has consistently recognized a narrow exception to the general rule that sentencing errors are not jurisdictional. Colgrove v. Burns, 175 Ohio St. 437, 95 N.E. 2d 811 (1964); State v. Fischer, 128 Ohio St. 3d 42, 2010-Ohio-638, 942 N.E. 2d 332 (the judge's role at sentencing: "crimes are statutory, as are the penalties. Therefore, the only sentence which a trial court may impose is provided for by statute. A court has no power to substitute a different sentence for that provided for by statute or any that is either greater or lessor than that provided for by law."). And applying this principle in State v. Beasely, 14 Ohio St. 2d 74,75, 471 N.E.2d 774 (1984) (the court stated that any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity,void.). Fischer, at ¶ 8.

It therefore follows: that when a trial court concludes that an accused has been found guilty of an allied offense of similar import, it can not impose a separate sentence for each offense. Rather, a court has a duty to properly merge the allied offenses by imposing a single sentence, that comports with statute of the offense; and the imposition of separate sentences for those offenses—even if imposed concurrently is contrary to law because of the mandates of O.R.C. 2941.25(A); State v. Damron, 129 Ohio St. 2d 86, 2011-Ohio-2268, 950 N.E. 2d 512, at ¶ 17 (the imposition of concurrent sentences is not equivalent of merging allied offenses into a single sentence). In the absence of a statutory remedy, those sentences are void. State v. Singleton, 124 Ohio St. 2d 173, 2009-Ohio-6434, 920 N.E. 2d 958 at ¶ 25, quoting: State v. Williams, 2016-Ohio-7658, at ¶ 28.

A prisoner serving a truly void sentence is entitled to be released through a writ of habeas corpus. Williams, supra, at ¶ 65. The Ohio Supreme Court stated in Williams: "for all of the foregoing reasons, the majority expanded the void sentence doctrine by declaring "Williams' sentence void."at ¶ 83-84. Matters dealing with R.C. 2941.25 sets forth that a court only has authority to impose a sentence that conforms to law; and R.C. 2941.25 prohibits the imposition of multiple sentences

For allied offenses of similar import and that sentence must comport to the statute of the offense.

When viewing the sentencing hearing transcripts of September 25, 2009 (Appx. C); and the addendum hearing transcripts of September 28, 2009 (Appx. D); what we do not find is: (1)- the state electing which of the allied offenses of similar import it seeks sentencing for; (2)- the trial court disposing of the remaining count before sentencing the defendant on Count 1 and Count 2; (3)- the imposition of a single-sentence, that comports with statute; and 4)- and what is clear is that the trial court inflicted penalties on each count prior to the merger.

The sentences could not be merged; as it is clear on the face of the sentencing hearing transcripts is that the defendant has been given concurrent sentences. This becomes even more clear in the addendum hearing transcripts; what we do see is an additional imposition on Count 2 of postrelease-control sanctions. This begs the question: "how can this be a single conviction, a single sentence.

For the purposes of statute, generally barring multiple sentences for allied offenses of similar import, it is the state that chooses which of the allied offenses to pursue at sentencing. R.C. 2941.25; State v. Whitfield, supra., at ¶ 12. Once the state elects which allied offense it will pursue, the trial court shall dispose of the other count. Id.

In the Ohio Supreme Court's decision, (Appx. A;page 2, ln.1-7), it found after the merging of the offenses for purposes of sentencing, the trial court sentenced him to life imprisonment...-- ... the trial court later entered a nunc pro tunc entry to delete ambiguous language regarding merger and to delete a reference to postrelease control. The petitioner begs to differ; "these inflicted penalties were prior, not after." (Appx. C,D,E,F).

In State v. Holmes, 2014, 2014 Ohio App. LEXIS 3742; Holmes' first assignment of error, he contends that the trial court erred by denying his motion to set aside his conviction and sentence

because the sentencing journal entries were void and violated his constitutional rights of due process of law and the protection against Double Jeopardy. Specifically, he challenged the trial court's imposition of a sentence on a count that the court found to be allied and subject to merger, and contended that the challenge to allied offenses should not be barred by res judicata. Here, in this instant case, the petitioner, Richard Curtis has the same challenges that exists. In the third paragraph of the petitioner's Judgment Sentencing Entry, the trial court imposed the following sentence on Mr. Curtis:

> ... it is therefore ordered that the Defendant serve a term on Count 1 of life I imprisonment with parole eligibility after serving twenty years imprisonment. The Court further orders that the Defendant serve a consecutive term of imprisonment for three years on Specification One, and on Count 2, an indefinite sentence of 15 years to life imprisonment. The Court further orders that the Defendant serve a consecutive term of imprisonment for three years on Specification One, all of which are mandatory prison terms pursuant to Revised Code 2929.13(F). The sentence in Count 2 is merged with Count 1 for purposes of sentencing. The Court further orders to Count 2 that the Defendant shall be subject to 5 years mandatory post release control is mandatory in this case, as well as the consequences for violating conditions of post release control....

(Appx. E)

It is clear on the face of the petitioner's Judgment Sentencing Entry: that the trial court has imposed multiple sentences on the petitioner, and that they were to be run concurrent, except for the Specification One(s) that were imposed on Count 1 and Count2, which were to be run consecutively (Appx. E).

Ohio Revised Code Ann. § 2929.14, in pertinent part states: "if not stated in the sentence, the offenses are be served concurrently. The imposition of concurrent is not equivalent of "merging" allied offenses of similar import. in effect, the imposed are concurrent sentences because the trial court failed to state how the imposed were to be served, other than "merged." Further, because the trial court added the post release control sanctions to Count 2 in the addendum (Appx. D), when imposing the sentences on the defendant, and failing to dismiss/

dispose of the remaining count.

Here, in this instant case, it is legislature's intent that all allied offenses of similar import that are deemed to merge: that the state elect the allied offense of similar import to pursue, that that the trial court to dispose of the remaining count, and the defendant sentenced to only one allied offense of similar import. R.C. 2941.25(A); Holmes, supra., at ¶ 11 and 25.

Here, in this instant case, and as found in Holmes, at ¶ 18; both of trial courts found the offenses allied, yet imposed a sentence on both counts prior to ordering that the counts merge."

Thus, a trial court is prohibited from imposing individual sentences for counts that constitute allied offenses of similar import. This duty is mandatory, not discretionary. State v. Underwood, 124 Ohio St. 2d 365, 1010-Ohio-1, 922 N.E.2d 923, at ¶ 26. A sentence that contains an allied offense error is contrary to law. State v. Wilson, 120 Ohio St. 2d 214, 2010-Ohio-2669, 951 N.E.2d 381, at ¶ 14. In Underwood, the court found because a sentence is authorized be only if it comports with all sentencing provisions, the directive in R.C. 2941.25 contains such mandatory provisions. Id., at ¶ 23-30.

In Rhynard v. Gardner, 7 Oapp. 262, 1916, Ohio App. LEXIS 120; the petitioner was granted a writ of habeas corpus for an illegal sentence, but delayed the time that the writ became effective and ordered a copy to be sent and furnished to the trial judge sentencing the prisoner. Also see Thomas v. Cowdry, supra. In each case, it delayed the taking of effect of the order until such time as the proper authorities could be notified and have the opportunity to take action to resentence the prisoner. Id.

The petitioner contends in this argument that while his conviction is lawful, that his sentence is illegal, void; and because of this, the lower court should have given proper notice to the Brown County Ohio Court of Common Pleas, in Case No. 2009-2041, proper and reasonable

notice to resentence the petitioner before discharging Mr. Curtis in a writ of habeas corpus. In re: Brown (1936) 1936 Ohio Misc. LEXIS 1087, 6 Ohio App. 44, 31 Ohio ABS 345 (the United States Supreme Court has considered a situation where the sentence is illegal, but the conviction is lawful, and confronted with the practical question of what shall be done with a petitioner where the writ of habeas is issued... ... the answer is where the conviction is lawful, but the sentence imposed is illegal, reasonable opportunity will be given ... the proper to resentence before discharging in a habeas corpus becomes effective...).

In so far as the trial court, in this case stated: "the sentence in Count 2 is merged with Count 1 for purposes of sentencing, continuing on stating: 'the trial court further orders as to Count 2 that the defendant shall be subject to 5 years mandatory post release control is mandatory in this case...'" This clouds the sentencing that was imposed and is contrary to law because the trial court's failure to properly merge the offense prior to the merger and into a single offense as required by law. Underwood, supra., at ¶ 26., citing State v. Gibson,8th Dist. Cuyahoga No. 92275, 2009-Ohio-3984, at ¶ 29 (even when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions that are authorized by law.").

The petitioner contends that the Nunc Pro Tunc Judgment Entry on August 26, 2015 is also ineffective/invalid. This was more than five years after the sentencing, and not a clerical error. (Appx. F). While the nunc pro tunc entry eliminated the imposition of the post release control sanctions; it changed the wording and structure of the defendant's sentence. And to some degree, the state still has: (1)-failed to elect which of the allied offenses it chooses to pursue sentencing; (2)-the trial court still has failed to properly dispose of the remaining count; (3)-the trial court still has failed to impose a single sentence, when it stated: "that Count 2 is merged with Count 1 for purposes of sentencing;" and (4)-the defendant was not present at the hearing, makes

the nunc pro tunc alone defective/ineffective, void. Nothing must remain of the absorbed offense. Gates Mills v. Yomtovian, 8th Dist. Cuyahoga No. 88942, 2007-Ohio-6303, at ¶ 23, quoting Whitfield, supra., at ¶ 8.

It is important to distinguish "final conviction" from "void ones..." A void conviction is never considered a "final conviction." It can be attacked at any time. Williams,supra. In Williams, the Ohio Supreme Court expanded the void sentence doctrine, by declaring Williams' sentences void, stating: "that a technical mistake in a trial court's judgment entry makes a sentence void. 'Today trial courts are applying complex sentencing guidelines mandated by the General Assembly. This holding by the majority will open up new avenues for a defendant whose deadlines for filing direct appeals have long expired to argue that their sentences are void because the trial court, when imposing a mandatory sentence provision mistakenly used the wrong word in the journal entry.' By expanding the void-sentencing doctrine beyond the postrelease-control cases and cases in which the trial court abridges the sentencing of the General Assembly, the decision will spawn new wave of void-sentence litigation and severally undermine res judicata which promotes the principles of finality and judicial economy by preventing endless re litigation of an issue on which the defendant has already received a full and fair opportunity to be heard." Id. ; Holmes,supra. ¶ 94-95

Further, quoting Williams, the court stated: "Today's majority decisions, brings new life into claims, that a technical mistake in the trial court's judgment makes a judgment void and it is incongruent with our precedent." Id., at ¶ 84.

It is clear on the face of the sentencing judgment entry (Appx. E) that the defendant was found guilty on both counts as contained in the indictment and the jury's vote; that it was determined at the sentencing hearing that the counts were subject to merge; that the judge

sentenced the defendant on both counts, that these inflictions were made before they were ordered to merge; that makes this sentence illegal and void. The merger shall take place after the verdict and before imposing the sentence. Holmes,supra., at ¶ 18; Whitfield,supra; State v. Johnston, 2013 Ohio App. LEXIS 4636 (2d Dist. September 30, 2013).

The petitioner has a void sentence and judgment because while the trial court merged Count 2 with Count 1, it imposed multiple inflictions, including two separate specification one offenses; and in the addendum sentencing, the trial court included post release control sanctions on the defendant-petitioner outside of the statutory mandates as provided in Ohio Revised Code Ann. § 2941.25; denying the defendant due process of law with the implications of Double Jeopardy, in violation of his rights as found in Ohio Constitution, Article IV,Section 10, and Fifth and Fourteenth Amendments, United States Constitution.

The decision, affirmation by the Ohio Supreme Court is contrary to other Ohio Appellate Court's decisions, federal court decisions, and contrary to its own holdings.

Wherefore, as Petitioner has a void sentence, twice been sentenced, placing him in Double Jeopardy. a constitutional violation of his rights, this Court is respectfully being asked to grant a Writ of Certiorari.

CONCLUSION

Former Sixth Circuit Judge Nathaniel R. Jones said, "but I am reminded of the observation of Justice Douglas in Furman v. Georgia, 408 U.S. 238 (192) that 'it is the poor, the sick, the ignorant, the powerless, and hated who are executed.' Id. at 251." In re: Byrd, 287 F.3d 520, 528 (2002); (a sentence of life imprisonment is, unequivocally, execution; it is execution by time. Where life hinges upon court review of constitutional claims there should be no denial of relief on meritorious constitutional claims, regardless when they may be discovered and submitted for review.)(Undoubtedly, court rules do not define the Constitution; it is the Constitution that defines the rules.)

"Wisdom too often never comes, and so one ought not reject it merely because it comes late." Bollenbach v. United States, 66 S.Ct. 402 (1946).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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pro-se

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04/17/2019