19-7482

ORIGINAL

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

VICTOR NUNEZ,

Petitioner,

vs.

SEAN BOWERMAN,

Respondent.

On petition for writ of certiorari to the

United States Court of Appeals for the Sixth Circuit

Originating case number 19-3582

PETITION FOR WRIT OF CERTIORARI

Victor Nunez #A572595
Toledo Correctional Institution
2001 East Central Ave.
Toledo, Ohio 43608
Phone: (419) 726-7977

TABLE OF CONTENTS

QUESTION(S) PRESENTED

I. QUESTION NUMBER ONE

Is it acceptable for a federal district court judge to deny a pro se prisoner's motion for a reasonable extension of time to file objections to a magistrate judge's report and recommendation? In the instant case, the district court judge prepared a Memorandum Opinion adopting the magistrate judge's report and recommendation prior to the expiration of time to file objections to the report and recommendation (when calculating that the fourteen day period did not begin until the Petitioner was served a copy of the report and recommendation, and that the Petitioner's motion for an extension of time to file objections invoked the "mailbox rule" as to date of filing).

After drafting the Memorandum Opinion adopting the magistrate's report and recommendation, but before filing it on the docket, the district court judge received the Petitioner's motion for an extension of time to file objections and incorrectly referred to it as "untimely" when in fact it was timely, and denied the motion stating as cause for the denial that the Petitioner "fails to indicate what objections he would lodge, if given additional time, and he fails to explain how additional time would alter the Court's conclusion[.]" (See Appendix B, pg. 3, footnote 4 - PageID #: 285). The Petitioner is not required to set forth such arguments in a motion for an extension of time, as Fed. R. Civ. P. 6(b)(1) only requires a party to set forth "cause" as to why an extension of time is needed, which was included in the motion. The 6th Circuit Court of Appeals erroneously denied Petitioner's motion for pauper status, which proffered this

issue in Section I. (See Appendix A).

II. QUESTION NUMBER TWO

Is a federal circuit court of appeals required to reverse a district court judge's decision adopting a magistrate's report and recommendation, when said report and recommendation found that the petitioner did not file a Traverse, when in fact the petitioner had filed a timely Traverse? In the instant case, the Petitioner filed a Traverse in Nunez I and a Supplemental Traverse in Nunez II. The magistrate's report and recommendation filed 05/17/19 specifically states in paragraph 1 that the "Petitioner did not file a Traverse in either case" and the district court judge adopted said report and recommendation without allowing the Petitioner to file objections. The Sixth Circuit Court of Appeals erroneously denied the Petitioner's motion for pauper status, which proffered this issue in Section II.

III. QUESTION NUMBER THREE

Is it acceptable for a clerk of a federal circuit court of appeals to resolve a pro se prisoner's motion for pauper status in a request to appeal a district court's rulings on a § 2254 petition for habeas corpus relief? In the instant case, the Order filed 11/17/19 denying the Petitioner's motion for pauper status is signed only by a clerk instead of a magistrate, judge, or panel of judges of the Sixth Circuit Court of Appeals. Additionally, the Order does not contain any information evidencing that a magistrate, judge, or panel of judges was involved in the decision or in the writing of the decision. (See Appendix A).

IV. QUESTION NUMBER FOUR

Is it acceptable for a federal circuit court of appeals to deny a pro se prisoner's instanter motion for an extension of time to file a petition for rehearing, and then refuse to file said petition for rehearing; when the instanter motion for an extension of time (and petition for rehearing) was filed only one day beyond the fourteen day deadline set forth in Fed. R. App. P. 40? In the instant case, the Order denying Petitioner's motion for pauper status was filed November 7, 2019. The Order was received/signed for by the Petitioner at the institution on November 14, 2019. The Petitioner placed the motion for an extension of time (and the petition for rehearing) in the institution's internal mailing system on November 22, 2019. On December 10, 2019, the Court "denied" the motion for an extension of time, and then stated that "[t]he petition for a rehearing is not accepted for filing." (See Appendix A). The motion for an extension of time clearly contained good cause for a one-day extension of time.

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Not applicable.

TABLE OF AUTHORITIES

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

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

The opinion of the United States court of appeals 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 United States district 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.

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

The opinion of the highest state court to review the merits 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 _____ 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.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was November 7, 2019.

[X] 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).

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

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] 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 V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentement or indictment of a Grand Jury ... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb ... nor be deprived of life, liberty, or property, without due process of law[.]"

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ... and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

... No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

NUNEZ I AND NUNEZ II STATEMENTS

STATEMENT OF THE CASE AND FACTS

In March of 2009, the Petitioner was charged by the Grand Jury of Cuyahoga County in a thirteen count indictment. The indictment alleged five counts of rape, in violation of R.C. 2907.02(A)(2), felonies of the first degree; four counts of kidnapping, in violation of R.C. 2905.01(A)(4), felonies of the first degree; three counts of intimidation of crime victim or witness, in violation of R.C. 2921.04 (B), felonies of the third degree; and one count of aggravated burglary, in violation of R.C. 2911.11(A)(1), a felony of the first degree.

In July of 2009, the Petitioner was tried by a jury, who acquitted him of all offenses except those that were alleged to have occurred in the early morning hours of February 14, 2009. As to those, the jury returned verdicts of guilty on one count of aggravated burglary, one count of intimidation of a crime victim or witness, three counts of rape, and two counts of kidnapping. At a sentencing hearing held on August 29, 2009, the Court imposed an aggregate prison sentence of twenty-two (22) years. The convictions and sentences were journalized in an entry filed on August 31, 2009.

The offenses to which the jury returned verdicts of guilty were all alleged to have occurred at around 3:30 a.m. on the morning of February 14, 2009, whereupon the Petitioner was said to have sexually assaulted two adult women [J.L. and N.J.], both of which were related to Petitioner's wife. Both testified at trial; J.L. being the sister of Petitioner's wife; and N.J. being their cousin who was visiting from Kentucky with her family, and was staying at J.L.'s apartment on

the morning of February 14, 2009.

J.L. and N.J. both testified that they had been partying with the Petitioner and his wife at J.L.'s apartment on February 13, 2009. At the conclusion of the evening of the 13th, the Petitioner and his wife left, as they were staying elsewhere. J.L. and N.J. further testified that around 3:30 a.m. on February 14, 2009, the Petitioner telephoned and said that he and his wife were at the door of J.L.'s apartment. They also testified that when J.L. opened the door, the Petitioner was the only one there, and he forced his way inside. They said that when J.L. went to her bedroom, the Petitioner followed her. She said that once inside the bedroom, they had oral sex, then vaginal intercourse, which she claimed was not consensual. And N.J. testified that she was on the couch in the living room, where she overheard the two in the bedroom.

N.J. further testified that when the Petitioner emerged from the bedroom, she pretended to be asleep on the couch. She said that the Petitioner digitally penetrated her vagina, then had vaginal intercourse with her. She said that he then left the apartment, but she did not tell anyone what had happened until after she had returned to Kentucky. When she told a friend thereafter what had happened, the family ultimately got involved, and they all went to the Kentucky State Police. They also called J.L.'s family, which resulted in J.L. telling everyone what had happened to her as well.

The Petitioner said that he and his wife's sister (J.L.) had been having an affair for some time before the allegations were made. He contended that all of their sexual encounters were consensual. The Petitioner's wife testified that J.L. and the Petitioner spent alot

of time together (partying - going to the store together - etc.). She said that J.L. and the Petitioner got along very well, but she didn't know that the two were having an affair. The Petitioner's sister also testified that J.L. and the Petitioner got along well and spent alot of time together, but she also said that she did not know that the two were having an affair.

Recently, J.L.'s mother (who is also N.J.'s aunt) came forward by way of affidavit and made the following statement:

> "At trial, my niece [N.J.] testified that she did not stay at my house on February 14, 2009, but that statement regarding that matter was not true. [N.J.] and her mother did in fact stay at my house and slept in the living room until the following day, February 15, 2009, till 6:00 a.m., at which time they both left to return to Kentucky."

Essentially, this affidavit attests that J.L.'s mother and N.J.'s mother can testify that they were both with N.J. throughout the period that N.J. testified that the Petitioner raped her. Given that we are talking about the mothers of the two alleged victims here, the affidavit must be deemed credible and dispositive. The affidavit provides clear and convincing evidence that it is literally impossible for the Petitioner to have committed either of the two offenses involving N.J. (i.e., Counts 12, rape, and 13, kidnapping, both felonies of the first degree).

It is equally important to understand that it was N.J.'s testimony at trial that bolstered J.L.'s accusations against the Petitioner. This is so because all of the offenses to which Petitioner was convicted (Counts 7 - 13) were alleged to have occurred on that same morning - at J.L's apartment - where J.L. and N.J. testified that they were both

staying. However, now we have both J.L.'s mother and N.J.'s mother stating through an affidavit that N.J. was not even at J.L.'s apartment on that morning because they were all staying at J.L.'s mother's house. Thus, this new testimony that completely invalidates the offenses related to N.J. also substantially undermines the convictions on remaining offenses, which are all related to J.L. and were alleged to have occurred on that same morning.

It is also important to understand that these new facts further support Petitioner's defense at trial, which was that he had a relationship with J.L. - who was his wife's sister. The relationship had been going on for quite some time, and included occasional sexual encounters that were all consensual. Petitioner has been receiving affidavits over the years from friends of those involved in this case, which attest that J.L. and Petitioner had a consensual and ongoing mutual affair, unbeknownst to Petitioner's wife and other members of the family. Since these affidavits (including the one received from J.L.'s mother) were unsolicited, they are presumed to be the result of a crisis of conscience.

Nevertheless, the growing pile of unsolicited affidavits certainly supported Petitioner's defense at trial that the affair was consensual, however they were not of the type substantiating grounds for a new trial - at least in and of themselves. But this recent affidavit from J.L.'s mother attesting that N.J., N.J.'s mother, and J.L.'s mother were all together during the late night/early morning in question, is most definitely grounds for a new trial. Thus Petitioner gathered all of the accumulated evidence, together with the affidavit from J.L.'s mother, and filed a motion for a new trial with the trial court on

April 6, 2016. The errors asserted therein later comprised Nunez II, and are Grounds for Relief 5, 6, and 7 herein.

Shortly after trial the Petitioner filed his first motion for a new trial, and although he had acquired some of the new evidence at that time, he had not yet received the affidavit from J.L.'s mother. The first habeas petition included the first new trial motion, and included the claims from Petitioner's direct appeal. One of the claims resulted in relief from this Court. The Petitioner had alleged in the petition that he was deprived of his right to appeal from his resentencing hearing. The Court ordered the State to produce a transcript of the resentencing hearing, confirmed that the allegation was true, and ordered the State court of appeals to honor the Petitioner's right to appeal. (See Nunez v. Kelly, N.D. Ohio No. 1:12-CV-0903, 2014 U.S. Dist. LEXIS 178938 (Nov. 21, 2014).

On remand by writ issued by the U.S. District Court, the Eighth District Court of Appeals granted Petitioner's motion for a delayed appeal under Ohio's App. R. 5(A). (Appeal Case No. CA-15-102946). The Petitioner asserted four grounds for relief in the appeal, however in a journal entry and opinion filed March 3, 2016, the appellate court overruled all four assignments of error. The Petitioner timely appealed to the Supreme Court of Ohio in a memorandum in support of jurisdiction filed on March 30, 2016. (Ohio Supreme Court Case No. 2016-0470). The Petitioner sought jurisdiction on the same four grounds for relief that were presented to the appellate court. However, the Court declined to accept jurisdiction in an entry filed on June 15, 2016. The Petitioner presented the following for the Ohio court's consideration and determination in regards to his resentencing hearing, which would later be-

come Nunez I in the second habeas corpus petition. The resentencing was necessitated by the appellate court's holding in State v. Nunez, 8th Dist. No. 93971, 2010-Ohio-5589:

> ¶15. Appellant was indicted in a 13-count indictment on five counts of rape, four counts of kidnapping, three counts of intimidation of a crime victim or witness, and one count of aggravated burglary. After a trial by jury, appellant was found guilty of aggravated burglary, three counts of rape, two counts of kidnapping with sexual motivation specifications, and one count of intimidation of a crime witness or victim.

It was held that the sentences for kidnapping merged with the sentences for rape as allied offenses of similar import. (Id. at ¶¶40-42). As a result, the matter was remanded for a new sentencing hearing, which is the subject of the Nunez I habeas claims.

At the new sentencing hearing, the State opted to proceed for sentencing on the rape counts - therefore chosing that the kidnapping counts (10 and 13 respectively) be merged into the rape counts (8 and 9 respectively). Thus, the trial court proceeded to sentencing and imposed the following sentences as follows:

Count 7, aggravated burglary, F-1	-	4 years
Count 8, rape, F-1	-	8 years
Count 9, rape, F-1	-	8 years
Count 11, intimidation, F-3	-	2 years
Count 12, rape, F-1	-	8 years

(T. 26-28). With respect to whether the sentences would run concurrent or consecutive, the trial court stated as follows:

> Count 8's 8 years would run consective to Count 7.
> Count 9's 8 years would run consecutive to Counts 7 and 8.

> Count 11's 2 years would run consecutive to Counts 7 and 9 [the court did not say "Count 8"]
>
> Count 12's 8 years would run concurrent with all remaining counts.

(T. 27-28). The trial court then stated that the total sentence imposed was twenty-two (22) years. (T. 28). However, a total sentence of 22 years would only have been achieved if Count 11's sentence was to be consecutive to all other counts. If Count 11 was run concurrently with Count 8, as was imposed, then the aggregate sentence would be 20 years, not 22 years. (4 + 8 + 8 as opposed to 4 + 8 + 8 + 2).

The journal entry of the sentence stated that Count 11 was run consecutively to all other counts - which is not what the trial court stated in open court. Compare journal entry of December 28, 2010 sentencing hearing with T. 27 ("the Court sentences the defendant to two years, and that will be consecutive to counts seven and nine.").

The appeal of the resentencing was a delayed appeal mandated by a writ of federal habeas corpus issued by the United States District Court for the Northern District of Ohio (Case No. 1:12-CV-0903). The Eighth District Court of Appeals granted leave to file a delayed appeal in accordance with the mandate in the writ issued by the federal district court.

The first two issues raied herein were presented in the Appellant's Brief that was filed subsequent to the appeal of the resentencing hearing per federal mandate. The third and fourth issues presented herein were filed pursuant to the Appellant's Supplemental Brief, which was approved by the court of appeals following oral argument. Thus, each of the 4 issues comprising Nunez I have been fully presented in the appeal ordered by the federal writ.

GROUND FOR RELIEF NO. 1: THE TRIAL COURT ERRED, AND DUE PROCESS WAS DENIED, WHEN THE COURT FAILED TO MAKE THE REQUISITE FINDINGS REQUIRED BY R.C. 2929.14(C) WHEN IMPOSING CONSECUTIVE SENTENCES, THUS THE SENTENCE IS CONTRARY TO LAW.

The trial court imposed consecutive sentences in this case without making the required findings under R.C. 2929.14(C)(4). Failure to make the findings before imposing consecutive sentences is a denial of due process under the Fourteenth Amendment to the Constitution of the United States. Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986)(failure to uphold State created liberty interest violates due process).

Where, as here, a case has been remanded for a new sentencing hearing as a result of the failure to merge allied offenses of similar import, the trial court cannot impose consecutive sentences without making the R.C. 2929.14(C)(4) findings anew. State v. Wilson, 8th Dist. No. 99260, 2013-Ohio-4035, 2013 WL 5310444.

A review of the record reveals that the trial court did not make the required findings. (T. passim. particularity T. 25-32). The record is devoid of any mention of the trial court's having considered any of the criteria listed under R.C. 2929.14(C)(4). Instead, the trial court discussed other aspects of sentencing, including the Adam Walsh Act (T. 21-25), the sentences imposed on each count (T. 27-28), post-release control (T. 28), and credit for time served (T. 29).

The failure to make the statutory findings requires the sentences to be vacated, and the case must be remanded to the trial court for a new sentencing in which the trial court must consider the requisite criteria, and make the necessary findings, if it concludes that thereafter, consecutive sentences are both warranted and required.

GROUND FOR RELIEF NO. 2: THE JOURNAL ENTRY INCREASED THE AGGREGATE SENTENCE BY TWO YEARS ABOVE THAT IMPOSED AT THE RESENTENCING HEARING, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The trial court erred in imposing a sentence via its journal that had not been pronounced in open court. Doing so violated Petitioner's due process rights under the Fourteenth Amendment; his Sixth Amendment right to be present for sentencing, accord, Crim. R. 43; and his Fifth Amendment right to not be twice punished for the same offense. See State v. George, 8th Dist. No. 43933, 1983 WL 5685 (concurrent sentence that was pronounced in open court could not be changed to consecutive in the journal entry). See also State v. Miller, 127 Ohio St.3d 407, 2010-Ohio -5705 (holding similarly).

The journal entry of the resentencing hearing stated that the two year sentence for Count 11 was imposed consecutive to all other counts - which is not what the trial court stated in open court. Compare the journal entry of December 28, 2010 with T. 27. Accordingly, the sentences imposed in Counts 8 and 11 must run concurrently. It should be noted that Ground For Relief No. 2 is not moot if Ground For Relief No. 1 is sustained, because the concurrent nature of the sentences for Counts 8 and 11 will be the presumptive sentence on remand. State v. Quinones, 8th Dist. No. 97054, 2010-Ohio-1939, 2012 WL 1564514.

GROUND FOR RELIEF NO. 3: THE TRIAL COURT ERRED, AND DUE PROCESS WAS DENIED, WHEN THE COURT FAILED TO MERGE COUNTS 8 AND 9, AS THEY ARE ALLIED OFFENSES OF SIMILAR IMPORT TO ONE ANOTHER, AS WELL AS BEING ALLIED OFFENSES OF SIMILAR IMPORT TO COUNT 10.

In the direct appeal, the Court adressed the rape (Counts 8 and 9) and the kidnapping (Count 10) of J.L. in paragraphs 41 and 42. The

court of appeals determined that "these offenses" were allied because they were committed with a single animus. (Id. at ¶41). Any ambiguity about whether the appellate court was simply holding that the kidnapping was allied with the two separate rape counts, or whether the two rape counts and the kidnapping were all allied offenses to one another was resolved in the next paragraph. There, the court of appeals stated that the matter was to be remanded for the State to determine which single "charge" the State wished to pursue at sentencing. (Id. at ¶42).

Any argument to the contrary cannot be upheld because to do so would violate the law of the case doctrine. Under the law of the case doctrine, the "decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." Pipe Fitters Union Local No. 392 v. Kokosing Constr. Co. Inc. (1998), 81 Ohio St.3d 214, 218, 690 N.E.2d 515. Stated another way, if the State wanted to argue against the court of appeals decision, the time to do so was in the direct appeal. Failing to do so, the State's argument could not be considered in the appeal of the resentencing.

Regardless, the two rape counts must be merged in accordance with the analysis set forth in 2010 by the Ohio Supreme Court in the case State v. Johnson, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, which was decided after the original sentencing, but before the resentencing hearing was held. Accordingly, for both dispositive reasons set forth above, the case must be remanded for resentencing as to Counts 8, 9, and 10, with instructions to merge the three counts into a single count that "the State shall choose ... it wishes to proceed under." (See direct appeal, ¶ 42).

State v. Johnson did not change R.C. 2941.25 (the allied offense statute), it was merely acknowledged therein that the lower courts had been misinterpreting the statute, and case law developed therefrom. In fact, the Ohio Supreme Court specifically stated that:

> "The current allied-offenses standard is so subjective and divorced from the language of R.C. 2941.25 that it provides virtually no guidance to trial courts and requires constant ad hoc review by this court. It is time to return our focus to the plain language and purposes of the merger statute." (Johnson, at P40-P41).
>
> In 1972, the General Assembly enacted R.C. 2941.25 in order to guide courts in the determination of offenses subject to merger. State v. Logan (1979), 60 Ohio St.2d 126, 131, 14 O.O.3d 373, 397 N.E.2d 1345 ("the statute has attempted to codify the judicial doctrine *** sometimes referred to as the doctrine of merger, and other times as the doctrine of divisibility of offenses" [footnotes omitted]). (Id. at P12)
>
> R.C. 2941.25 provides [in pertinent part]: Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment may contain counts for all such offenses, but the defendant may be convicted of only one." (Id. at P13-P14).

Important to the instant petition for a writ of habeas corpus (which must be based upon state violations of federal constitutional rights) is the Johnson Court's acknowledgment that R.C. § 2941.25 "protects a criminal defendant's rights under the Double Jeopardy Clauses of the United States and Ohio Constitutions... [Thus] there is a constitutional protection underlying the proper application of R.C. 2941.25[.]" (Johnson, at P45). See also Rutledge v. United States (1996), 517 U.S. 292; and Ball v. United States (1985), 470 U.S. 853. Having therefore established the foundation forming the basis for allied offenses of similar import in Ohio, the Johnson Court then provided the "[p]rospective analysis of allied offenses:"

> In determining whether two offenses should be merged, the intent of the General Assembly is controlling. 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. at P46).
>
> Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct... If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were commited by the same conduct ... If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged. (Id. at P47-P50).
>
> We recognize that this analysis may be sometimes difficult to perform and may result in varying results for the same set of offenses in different cases. But different results are permissible, given that the statute instructs courts to examine a defendant's conduct - an inherently subjective determination. (Id. at P52).

When applying this analysis to the instant case, it is clear that Counts 8 and 9 are indeed allied offenses of similar import under R.C. 2941.25, and thus should have been merged prior to sentencing. At the trial, J.L. testified that the Petitioner forcibly placed his penis in her mouth and then in her vagina. The testimony clearly alleged that this was one uninterupted continuous course of conduct constituting the offense of rape. In fact, when the court of appeals held that the kidnapping offense in the instant case was required to merge with the rape offense, the court reasoned that:

> [Appellant] engaged in one continuous course of action, and thus he could be sentenced for only one of the two allied offenses... [T]he evidence reveals that appellant committed these offenses with a single animus, and thus he was improperly convicted and sentenced for allied offenses. (Nunez I, at ¶ 40-41).

The reasoning that the appellate court formed its basis for the determination that the kidnapping and rape offenses should merge is

the best argument as to why the two rape offenses at issue should be merged, at least according to the Johnson Court's prospective analysis. It is equally significant to note that the indictment did not offer any factual basis to distinguish one rape offense from the other. It was only through the trial testimony of J.L. and the jury instruction that the Petitioner was able to construe what facts differentiated Counts 8 and 9. This is so because both Counts 8 and 9 contain the same identical language, which is that:

> On or about February 14, 2009, the Defendant[s] unlawfully did engage in sexual conduct with Jane Doe I by purposely compelling her to submit by force or threat of force. (Indictment filed on April 1, 2009, page 5 of 7, Counts 8 and 9).

To be sure, the indictment violated Petitioner's due process rights to proper notice of the crimes charged with sufficient specificity as they allege multiple, identical, undifferentiated charges. Valentine v. Koneth, 395 F.3d 626 (6th Cir. 2005). Regardless, when the Eighth District Court of Appeals was presented squarely with the allied offenses claim in the resentencing appeal for Counts 8 and 9, the appellate court held that because the two rape offenses involved "different types of sexual activity" they were not allied offenses, despite being committed "during the same sexual assault." (Decision, at ¶ 20). The Eighth District cited cases in support, but this is not the proper approach.

As the Johnson Court clearly instructed, the proper analysis "may result in varying results for the same set of offenses in different cases." (Johnson, at P52). "But different results are permissible, given that the statute instructs courts to examine a defendant's conduct - an inherently subjective determination." (Johnson, at P52).

The Petitioner, like the Eighth District Court of Appeals, can cite cases supporting his position. See, for example, State v. Rice, 54 Ohio St.3d 703, 561 N.E.2d 543 (8th Dist. 1990); State v. Kebe, 1998 WL 787393 (8th Dist.); State v. Rogers, 2013-Ohio-3235, 994 N.E. 2d 499 (8th Dist.); State v. Lusby, 1997 WL 642988 (1st Dist.); and State v. Fenwick, 2000 WL 331388 (6th Dist.). However, the Ohio Supreme Court clearly mandated in State v. Johnson that the proper analysis for allied offenses under R.C. 2941.25 requires the court to consider the defendant's conduct on a case by case basis, and "[i]f the multiple offenses can be committed by the same conduct ... [and] were committed by the same conduct ... then the offenses are allied offenses of similar import and will be merged." (Johnson, at P49-P50). When such analysis is applied to the facts adduced at trial in the instant case, it is untenable that Counts 8 and 9 should have been merged. No other conclusion can be founded in law, logic, or common sense.

GROUND FOR RELIEF NO. 4: TRIAL COUNSEL WAS INEFFECTIVE AT RESENTENCING FOR FAILING TO ASSERT THAT COUNTS 8, 9, AND 10 ARE ALLIED OFFENSES OF SIMILAR IMPORT AND MUST MERGE FOR THE PURPOSES OF SENTENCING.

The argument proffered in Ground For Relief No. 3 was not made at the resentencing hearing. (T. passim, particularly T. 20 ff.). Defense counsel's failure to make this argument in light of the court of appeals holding in the direct appeal (and State v. Johnson, which had just been decided), constitutes ineffective assistance of counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States, as well as Article I, Section 16 of the Ohio Constitution. See generally, Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

GROUNDS FOR RELIEF RAISED IN NUNEZ II

On April 6, 2016, Victor Nunez (hereinafter "Defendant") filed a pro se motion for a new trial based on "new evidence material to the defense" pursuant to Crim. R. 33(A)(6). The Defendant attached twelve exhibits in support of the motion - the most significant of which is an affidavit from Linda Legg. Important here is that Linda Legg is "the biological mother of Jennifer Legg [J.L.] and the aunt of Naomi Smith [N.J.]." (Exhibit E, item no. 1). First understand that the Defendant was acquitted on all counts except for those that are related to J.L. and N.J. which were said to have occurred during the time period discussed by Linda Legg in her affidavit.

Linda Legg, mother of J.L. and aunt of N.J., attests in her affidavit that all offenses against N.J. could not have happened because she was with N.J. during the entire time period relevant to the offenses. Furthermore, because N.J. lied and said that she was instead staying at J.L.'s (where the offenses were alleged to have occurred to both N.J. and J.L.), Linda Legg's affidavit also puts the convictions related to J.L. in such a different light as to undermine those verdicts as well. In fact, Linda Legg's affidavit completely negates all convictions relative to her niece N.J., and casts serious doubts regarding the convictions related to her own daughter, J.L. (See Exhibits A and E). The Defendant's motion also raised two other unrelated claims for relief that are based on void judgment grounds.

The State filed a response in opposition on June 6, 2016, which meticulously addressed all evidence attached to the motion, except for the portion of Linda Legg's affidavit summarized above. Thus, the Defendant filed a reply to the State's response on June 21, 2016, and

pointed out this fact to the trial court. However, the trial court denied the motion on August 8, 2016, without providing any findings of fact or conclusions of law. (Cuyahoga County Common Please Case No. CR-09-522573). The Defendant timely appealed to the Eighth District (Case No. CA-16-104917) which was denied on June 29, 2017. The Defendant timely appealed to the Ohio Supreme Court (Case No. 2017-0965), who declined jurisdiction over the case on October 11, 2017.

GROUND FOR RELIEF NUMBER FIVE- THE STATE'S FAILURE TO GRANT THE DEFENDANT'S MOTION FOR A NEW TRIAL, OR AT LEAST HOLD A HEARING ON THE MOTION, VIOLATED THE CONSTITUTION OR LAWS OR TREATIES OF THE UNITED STATES.

The Defendant has always maintained his innocence, and evidence supporting this fact has been accumulating since trial. The Defendant's most recent motion for a new trial (which is the subject of the instant action) was filed pursuant to Crim. R. 33(A)(6), which states in the relevant parts:

> A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
> ....
> (6) When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length as is reasonable under all the circumstances of the case.

See also R.C. 2953.23(A)(1). The Defendant also sought leave of court as described in State v. Blalock, 2014-Ohio-934, 2014 Ohio App. LEXIS (8th Dist. No. 100194), at P44. See Exhibit M attached to petition.

In March of 2009, the Defendant was indicted on five counts of rape, in violation of R.C. 2907.02(A)(2), felonies of the first degree; four counts of kidnapping, in violation of R.C. 2905.01(A)(4), felonies of the first degree; three counts of intimidation of crime victim or witness, in violation of R.C. 2921.04(B), felonies of the third degree; and one count of aggravated burglary, in violation of R.C. 2911.11(A)(1), a felony of the first degree.

In July of 2009, the jury acquitted the Defendant on all counts except those that were alleged to have occurred on February 14, 2009 to J.L. and N.J. As to those, the jury found the Defendant guilty on one count of aggravated burglary, one count of intimidation of a crime victim or witness, three counts of rape, and two counts of kidnapping. At the sentencing hearing held August 26, 2009, the trial court imposed an aggregate prison sentence of twenty-two (22) years, which was journalized in an entry filed August 31, 2009.

The offenses which the jury returned verdicts of guilty were based on the allegation that the Defendant sexually assaulted J.L. and N.J. - both of which were related to the Defendant's wife. Both testified at trial - J.L. being the sister of the Defendant's wife Rachel, and N.J. being their cousin, who was visiting from Kentucky with her family and was staying at J.L.'s apartment. The Defendant was staying with his wife Rachel at her mother's house (Linda Legg).

J.L. and N.J. both testified that they had been partying with the Defendant and his wife (J.L.'s sister) at J.L.'s apartment on February 13, 2009. At the conclusion of the evening, the Defendant and his wife left for her mother's house, and N.J. stayed with J.L. in her apartment. J.L. and N.J. also testified that around 3:30 a.m. the Defendant telephoned and said that he and his wife were at the

door of J.L.'s apartment. They testified that when J.L. opened the door, the Defendant was the only one there, and he forced his way in the apartment. She (J.L.) said that she went to her bedroom to get away from the Defendant but he followed her inside. She said that the Defendant forced her to perform oral sex on him, then forced her to have vaginal sex with him. She said it was not consensual. And N.J. testified that she was on the couch in the living room of J.L.'s apartment during this time and overheard J.L. and the Defendant in the bedroom.

N.J. further testified that when the Defendant emerged from the bedroom, she pretended to be asleep on the couch. She said that the Defendant digitally penetrated her vagina while she pretended to be asleep, and then had vaginal sex with her. She said that the Defendant then left the apartment, but she did not tell anyone what had happened until after she returned to Kentucky. When she arrived back in Kentucky, she told a friend about the incident, and ultimately the family got involved and went to the Kentucky State Police. They also called J.L.'s family, and thereafter J.L. told everyone what had happened to her as well.

The Defendant said that he and his wife's sister (J.L.) had been having an affair for quite some time before the allegations were made. He contended that all of their sexual encounters had always been consensual, and as to this there could be no doubt. He also admitted to having one sexual encounter with N.J., but that too was most definitely consensual. The contention was that when the consensual encounters were discovered, the two then claimed they were forced. The Defendant's wife testified that J.L. and the Defendant spent alot of time together - partying - going to the store together (and the like). She said that

J.L. and the Defendant got along very well, but she did not know that they were having an affair. The Defendant's sister also testified that J.L. and the Defendant got along well and spent alot of time together, but she also said that she did not know that the two were having an affair.

The only other pertinent evidence adduced at trial was the phone records that the State used to show that the Defendant called J.L. far more often than J.L. called the Defendant. The State attempted to show that the records further proved that the Defendant was pursuing J.L., and not the other way around, or that the relationship was consensual. However, recent discoveries show that one of the two compact disks containing the phone records was not submitted as evidence, and that this second disk proves that J.L. telephoned the Defendant excessively, and that if anything were to be inferred from the sum of the phone records, it could only be reasonable doubt.

The State also told the jury that the Defendant's forceful penetration of N.J. caused vaginal bleeding. However, recently discovered documents prove that this is completely false. More important still is that, over the years, many witnesses have come forward by way of affidavit with material evidence that - considered collectively with the evidence adduced at trial - could reasonably be taken to cast the entire case in such a different light as to undermine confidence in the verdict such that a new trial is warranted.

Crim. R. 33(A)(6) only requires that the defendant "produce at the hearing on the motion [for a new trial] ... the affidavits of the witnesses" who have new evidence material to the case. However, the Defendant in the instant case attached the affidavits to the petition (Exhibits B-G), which constitutes much of the new evidence that will

substantiate a reasonable probability of a different outcome at trial. Other Exhibits attached thereto (Exhibits H-I) were obtained by the Defendant through diligent research, and the freedom of information act. Exhibit A (defense counsel's statement) and Exhibits J-L support additional grounds as to why the Defendant did not receive a fair trial.

However, because the Defendant is incarcerated, he is unable to receive (and attach to the petition) the second compact disk that contains the balance of the telephone records. The Defendant's family has the compact disk in their possession and it will be submitted at the hearing, should it be determined that a hearing on this motion will be necessary. The Defendant asserts that because he had attached the relevant affidavits and documents thereto, and because their sum is sufficient grounds for a new trial, that a hearing is not necessary as a new trial is already warranted. Nevertheless, the Defendant had also attached his affidavit - which attests that he has discovered and procured the "missing" compact disk containing the "actual" phone records, which will be available at the new trial - or submitted at the hearing on the motion should a hearing be chosen in the alternative to a new trial.

The following proffers the significance of each of the documents attached to the petition as Exhibits A-M. The Defendant contends that this newly discovered material evidence, when considered collectively with the material evidence adduced at trial (as summarized above), could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict, or otherwise create a reasonable probability of a different result. Thus, a new trial is both warranted and required. No other conclusion can be founded in law, logic, or common sense.

EXHIBIT A: STATEMENT BY DEFENSE COUNSEL ERIC NORTON

Exhibit A is a statement / response made by the Defendant's trial counsel Eric Norton. Even though the statement / response is in regards to another matter, pages 1, 3, and 4 (of the Exhibit) are relevant to the matter at bar. First, however, it should be noted that counsel stated therein that losing this particular trial was something that "I feel very badly about, and I still believe in Nunez's innocence." (Pg. 1, par. 2). Counsel also stated that the Defendant's aggregate sentence of twenty-two years "appears to be shockingly harsh, and presumably will be the subject of Nunez's appeals." (Pg. 3, par. 1). But even though the appeals did challenge the sentence and resulted in a remand for resentencing (and further appeals), nevertheless, the twenty-two year aggregate sentence still remains.

Counsel admits that "[i]n all candor, I did make two mistakes during the trial. First, I missed a potential opportunity to persuade the trial judge to reconsider her decision to exclude evidence of other individuals' DNA on the underwear of [N.J.]." (Pg. 3, par. 5). The error to which counsel referes involves the "[d]ifferential extraction of the cutting from the underwear (Item 1.3.1S1) resulted in a mixture consistent with contributions from ... Victor Nunez Jr. and at least two other unknown individuals." (See Exhibit I, item 3, under the section titled "Results"). Also important to the matter at bar is counsel's acknowledgment of his other significant trial error, which in his own words is as follows:

> "Second [mistake], I stipulated to the admissibility of a computer disk containing a version of [J.L.'s] cellular phone records that turned out to be materially different than the set that the phone company mailed directly to my office.

> The paper phone records that Verizon Wireless provided to me before the trial (assuming they were accurate) suggested that Nunez and [J.L.] had a consensual sexual/romantic relationship. The records showed that [J.L.] made numerous calls to Nunez, particularly during the two weeks leading up [to] the February 14 rape accusation. [J.L.'s] obvious preoccupation with Nunez during the January-February 2009 period certainly would raise reasonable doubt as to the February 14 accusation.
>
> Unbeknownst to me at the time, Verizon Wireless sent a different set of records in response to the same subpeona in this case directly to the Clerk of Courts. I picked up that disk from the Clerk's offices, but did not review and compare it against the first set sent to my office on the assumption that the records were one and the same.
>
> As it turned out, the disk mailed to the Clerk contained different records than the set sent to the office. The second set of records indicated that Nunez called [J.L.] a lot more than she called him (instead of vice-versa). This obviously undercut our defense that [J.L.] was romantically preoccupied with Nunez." (Exhibit A, pg. 4, par. 2 through par. 5).

As noted earlier herein, through diligent research and the freedom of information act, the Defendant was able to locate and procure the compact disk containing the phone records to which counsel refers. In other words, the phone records that were submitted as evidence and used against the Defendant at trial were incomplete or inaccurate and supported the prosecution. However, the compact disk recently obtained by the Defendant supports his defense at trial, and as counsel puts it, "certainly would raise reasonable doubt as to the February 14 accusation." (Exhibit A, pg. 4, par. 3).

This newly discovered material evidence alone warrants a new trial because it: (1) demonstrates that false evidence was entered at trial and used against the Defendant (undermining his defense); and because it (2) "certainly would raise reasonable doubt as to the February 14 accusation" according to counsel. The jury would have been required to acquit as to the February 14 accusation, just as it

had for the other accusations, had there been this evidence entered that, as counsel maintains, "would raise reasonable doubt."

EXHIBIT B: AFFIDAVIT OF JOSEPH MUNLEY

Joseph Munley is the first of many to come forward in support of the Defendant's contention that he was, in fact, having an affair with J.L. that had been going on for some time and was consensual. He attests that the two "would come over to my house" together, and he also notes that:

> "From my personal history with Victor, I believe him to be a rational and kind hearted individual, never could I foresee him being accused of this. To me, it is simply not in his nature."

EXHIBIT C: AFFIDAVIT OF ANTONIO MANGO

Antonio Mango is another person falsely accused of rape by J.L. and he has also come forward on the Defendant's behalf. He not only attests to the consensual relationship between the Defendant and J.L., but also swears under penalty of perjury that, "[t]o the extent [J.L.] claims that she was sexually assaulted by me or Nunez ... she is lying."

EXHIBIT D: AFFIDAVIT OF RACHEL NUNEZ

This is the Defendant's wife, who swears under penalty of perjury to events giving rise to evidence of a possible pay off of a State's witness by the alleged victim J.L., who is also Rachel's sister.

EXHIBIT E: AFFIDAVIT OF LINDA LEGG

This is the mother of J.L. who was also a State's witness. She has since come forward and swears under penalty of perjury "that the prosecutor Brian McDonough, made me take the stand and changed my words around to help manipulate and persuade the jury to convict." She also states that:

> "At trial, my niece [N.J.] testified that she did not stay at my house on February 14, 2009, but that statement regarding that matter was not true. [N.J.] and her mother did in fact stay in my house and slept in the living room until the following day, February 15, 2009, till 6:00 a.m., at which time they both left to return to Kentucky."

EXHIBIT F: AFFIDAVIT OF SHANNON COCHRAN

Shannon recently came forward stating that she "want[s] to be a witness to [what] went on between [J.L.] and Victor Nunez, they were lovers and tried to hide it around certain people but not around me or Stephen Cochran[.] They showed their affection in my house[.]"

EXHIBIT G: AFFIDAVIT OF VICTOR NUNEZ

Here the Defendant attests (1) that all of the documents that were with the motion are true copies and have not been altered in any way; (2) that his family has the "missing" compact disk of the phone records to which counsel refers in Exhibit A, which is available for submission at a hearing if required; and (3) that he has at all times acted diligently in pursuit of evidence of his innocence.

EXHIBIT H: ST. CLAIRE REGINAL MEDICAL CENTER REPORT

These two pages were recently discovered by the Defendant through diligent research and the freedom of information act. The report is based on the examination of N.J. following the accusations made against

the Defendant in reference to February 14, 2009. The two pages of the report being attached are significant because the prosecution submitted to the jury that the Defendant's vaginal rape of N.J. was so forceful and violent that it caused bleeding. However, it is clear from the documents discovered by the Defendant that there was "[n]o vaginal bleeding noted." (Pg. 1, last line). And on the second page of the exhibit, item 20 asks if there was "[a]ny injuries to victim resulting in bleeding?" The answer is plainly listed as "NO."

Although the Defendant has no formal legal education or training whatsoever, and is proceeding pro se, he has done his best to obtain the foregoing newly discovered evidence with due diligence. It is apparent from the documents attached to the motion that new evidence has been emerging and accumulating over the years since trial. It was apparent to the Defendant that any single piece of this evidence - standing alone - may not have been enough to undermine the verdict such that a new trial is warranted. However, it is eqully apparent that the sum of the new evidence does warrant a new trial.

Certainly the Defendant grasps that the timing of this motion for a new trial is as important as the content. The Defendant understood that he must wait until enough evidence emerged that a new trial would be required, but he must also file this motion as soon as was possible thereafter so that it could not be said that the State would be prejudiced by any unnecessary delay. The Defendant has done his best to balance these factors accordingly. And, it must be understood that much of this new evidence has emerged by way of affidavit. Such evidence cannot be obtained in any way that is of the control of the Defendant. Each witness is in total control of the time in which they decide that they must step forward. In other words, the Defendant has

not been in contact with any of those whose affidavits are attached hereto. Each affiant sought the Defendant when circumstances (known only to them) compelled them to provide an affidavit to the Defendant.

In 2009, the Defendant filed his first motion for a new trial based on newly discovered evidence, which contained some of the evidence attached hereto. However, the trial court did not believe that there was enough new evidence to undermine confidence in the verdict such that a new trial was warranted. Obviously other evidence has emerged since then, but none so compelling and dispositive as the affidavit of Linda Legg. (See Exhibit E attached to the motion).

Linda Legg is the mother of J.L. and the aunt of N.J., and her affidavit provides clear and convincing evidence that the offenses related to N.J. could not have occurred because she was with her during the entire time period when the offenses were said to have occurred. This completely undermines the remaining convictions, which were all related to J.L., because all of the offenses to which the Defendant was convicted were said to have occurred during the same time period, and N.J. testified that she witnessed (or at least heard) the assault on J.L. - yet J.L.'s mother has come forward and sworn that N.J. was not even there.

Review of the record shows that the Defendant was acquitted on all counts except those related to J.L. and N.J., that were alleged to have occurred during the time period that J.L.'s mother now swears N.J. was with her. Review of the record also shows that it is reasonable to conclude that the Defendant would have been acquitted on those counts as well, had it not been that J.L. and N.J.'s testimony corroborated each other's allegations, giving each credibility.

Certainly this sworn and notarized affidavit must be deemed to be extremely significant since it was provided by the person who is the mother of one of the victims and the aunt of the other. This is especially so when Linda Legg also states in the affidavit that the prosecutor "made me take the stand and changed my words around to help manipulate and persuade the jury to convict." Clearly this affidavit alone undermines the verdict such that a new trial is warranted, or at the very least, a hearing should be held to further explore these extremely significant allegations. And when this affidavit was considered collectively with all the other evidence that had emerged since trial, the Defendant became convinced that a second motion for a new trial should be filed as soon as possible.

Thus, on April 6, 2016, the Defendant filed a second pro se motion for a new trial, which contained the same argument provided herein, as well as the same exhibits in support. Furthermore, the Defendant also filed a motion for leave of court to file the motion for a new trial. (Habeas petition - Exhibit M). The State responded in opposition on June 6, 2016, and the Defendant filed a reply on June 21, 2016. On August 8, 2016, the trial court denied the motion without providing any findings of fact or conclusions of law.

When the Defendant appealed the decision, the appellate court did not remand for findings of fact or conclusions of law (or a hearing), but instead came up with its own reasons to deny relief and imputed them upon the trial court. Significant here is the appellate court's following findings and conclusions:

> "In this case, Nunez failed to file a motion seeking leave to file his motion for a new trial. A motion for leave is a necessary prerequisite for filing a

> delayed motion for a new trial... In his motion for new trial, Nunez stated that he "also filed in a separate motion (concurrently with this motion) which seeks leave of court to file this motion beyond the one hundred twenty day period prescribed by Crim. R. 33(B)." However, no such motion for leave is present in this record. Because Nunez filed his motion for a new trial without first seeking leave of court, he failed to comply with the necessary procedural steps set forth in Crim. R. 33(B). As a result, the trial court properly overruled his motion for a new trial." (State v. Nunez, 8th Dist. No. CA-16-104917, decided 6/29/17, ¶ 20, internal citations omitted).

As noted above, the Defendant did in fact file a motion seeking leave to file his motion for a new trial, attached to the petition as Exhibit M. Additionally, as the appellate court noted, the Defendant stated in his motion for a new trial that he filed "a separate motion (concurrently with this motion) which seeks leave of court to file this motion ***" (Id., ¶ 20). It is not the Defendant's fault that the court of common pleas clerk did not provide the court with a copy of both motions - they certainly received both as they were mailed to the court in the same envelope. Regardless, the appellate court's own finding that there was "a separate motion" filed "concurrently" should have compelled the court to look into the matter further, and follow through to a proper resolution.

Furthermore, when the appellate court reviewed the most significant of the new evidence attached to the motion - that being the affidavit of Linda Legg - the court held that the Defendant did not explain "how he was unavoidably prevented from discovering the information within 120 days of his verdict." (Id., ¶ 33). When this Court reviews the state court record, it will discover that the Defendant (1) did file both motions with the trial court contemporaneously;

and (2) that both motions contained a reasonable explanation why he was unavoidably prevented from discovering the information set forth in L.L.'s affidavit. Additionally, the balance of the appellate courts reasons dismissing L.L.'s affidavit actually substantiate grounds as to why a hearing should have been held on the matter.

RELIEF SOUGHT FOR GROUND FIVE

The primary relief sought for Ground Five is for this Court to issue a writ vacating the Defendant's judgment of conviction and sentence, and order a new trial. If the Court determines instead that a hearing should be held for further fact development, then the Defendant respectfully requests that this Court hold the hearing and appoint counsel to represent him at the hearing. Given the State's mishandling of this case thus far (of which this Court has already discovered and issued a writ thereon), this request should be deemed reasonable and warranted. However, if the Court is not inclined to grant this request, then in the alternative to all of the above, the Defendant respectfully requests a hearing on this matter in the state trial court.

In addition to the foregoing grounds for a new trial based on newly discovered evidence, the Defendant submits two additional claims that warrant relief. Although the following two claims for relief do not rely on newly discovered evidence, both are of the type that may be raised at any time by direct attack, and are not barred by res judicata or the doctrine of the law of the case.

GROUND FOR RELIEF NUMBER SIX: THE INDICTMENT IS FATALLY DEFECTIVE BECAUSE IT ALLEGES MULTIPLE, IDENTICAL, AND UNDIFFERENTIATED COUNTS, IN VIOLATION OF THE DOUBLE JEOPARDY AND DUE PROCESS CLAUSES OF THE OHIO AND UNITED STATES CONSTITUTIONS.

The Defendant's constitutional rights were violated when he was charged in a multiple count indictment that contains no factual basis or distinction between the counts. Like offenses were identically charged, and there was no further information included to differentiate one like count from another. The indictment fails to connect the Defendant to individual, distinguishable incidents (i.e., compare Counts 8 and 9, Exhibit K, pg. 5). The problem here is that, of the like offenses, there is absolutely no distinctions made that would: (1) provide the Defendant with adequate notice to defend himself; or (2) protect the Defendant from double jeopardy. See Valentine v. Koneth, 395 F.3d 626 (6th Cir. 2005), a case directly on point with the instant case, which resulted in the convictions on like offenses to be vacated and dismissed with prejudice.

The trial in the instant case actually resulted in the type of confusion that is the hallmark of cases such as Valentine v. Koneth. As the jury in the instant case began to deliberate, they were unable to distinguish the like counts to the degree that the Court was required to go back on the record to advise that there was a question

from the jury: "Does Count number 11 refer to Jennifer, Naomi, or both victims?" (Exhibit J, trial pg. 904). The question required a conference in chambers with the Court, the prosecution, and defense counsel, who were only at this late hour determining "that Count number 11 refers to [N.J.]." (Id.). This cannot stand.

"Where the statutory definition of an offense employs generic terms, it is not sufficient to charge the offense in the same terms employed by the statute; the indictment must descend to particulars." United States v. Sullivan, 919 F.2d 1403, 1411 (10th Cir. 1990). See also Hamling v. United States, 418 U.S. 87 (1974), in which the Supreme Court of the United States held that "the language of the statute may be used in the general description of the offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." (Id. at 117-18).

"The Due Process Clause of the Fourteenth Amendment mandates that whatever charging method the state employs must give the criminal defendant fair notice of the charges against him to permit adequate preparation of his defense." Madden v. Tate, 830 F.2d 194, at *3 (6th Cir. 1987). In the instant case, it is untenable that like offenses, such as Counts 8 and 9, are not anchored to distinguishable criminal offenses to which one could adequately prepare a defense. Thus, it is clear that many of the like offenses (such as Counts 8 and 9) are to be deemed fatally defective as charged, as they violate the Defendants Fifth and Fourteenth Amendment rights under the Constitution of the United States.

The Defendant has standing to raise this claim at this time as the defects in the indictment are of the type that render the affected

counts Void Ab Initio (or void upon inception or creation). As such, the trial court was (and is) without subject matter jurisdiction over said counts. Subject matter jurisdiction is a "condition precedent to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void." Patton v. Diemer, 35 Ohio St.3d, 518 N.E.2d 941 (1988), at ¶3 of the syllabus. Because subject matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time. United States v. Cotton, 535 U.S. 625, 630 (2002); State v. Headley, 6 Ohio St.3d 475, 453 N.E.2d 716 (1983).

GROUND FOR RELIEF NUMBER SEVEN: THE INSTRUCTION PROVIDED TO THE JURY WHEN THE JURY ADVISED THAT IT WAS "HUNG ON THE INDICTMENT OR COUNT" VIOLATED THE CONSTITUTION OR LAWS OF THE UNITED STATES.

On July 21, 2009, during jury deliberations in the instant case, the jury sent out the following question: "If the jury is hung ... what happens? Are we to deliberate until everyone is in agreement? Does it have to be unanimous either way?" (See Exhibit L, trial pg. 905, lines 19-23, attached to petition).

In response, the Court indicated that it had "prepared a written response which I'm going to send back to the jury that indicates that -- and this goes to the jury instruction themselves -- because this is a criminal case, the law requires that all 12 of you be in agreement before you can consider that you have reached a verdict." (See Exhibit L, trial pg. 906, par. 1).

The trial court committed plain error, and prejudicial error, by deviating from the jury deadlock instruction approved by the Ohio Supreme Court in State v. Howard, supra. (See also Fourth District

District Court of Appeals, case State v. Graham, 2014-Ohio-3149, at P11-P21). "When a jury informs a judge that it is deadlocked, the judge must determine whether to declare a mistrial and dismiss the jury or give a supplementary instruction emphasizing the duty of the jury to make reasonable effort to agree." Katz, Martin, Lipton, Gianelli, and Crocker, Baldwin's Ohio Practice Criminal Law, Section 65:5 (3d Ed. 2013).

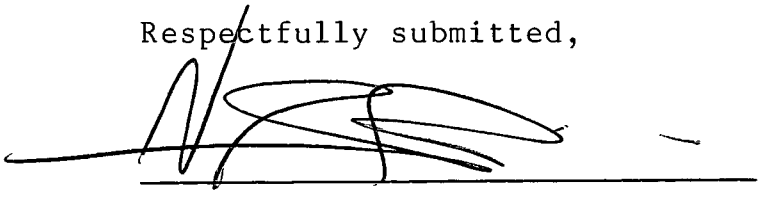
Although the trial court in the instant case was permitted to give a supplementary instruction, the Ohio Supreme Court mandates that the instruction must - at least in substance - fully conform to the instruction provided in State v. Howard, supra - commonly referred to as the "Howard instruction." The Defendant submits that the reply to the jury question as set forth in Exhibit L (Tr. pgs. 905-906) does not meet the "Howard instruction" requirement. Thus, the subsequent judgment therefrom is void and the Defendant is entitled to a new trial. (See State v. Graham, supra).

The Supreme Court of Ohio also mandates that there is no point in time beyond which a void judgment becomes valid, and a motion to vacate a void judgment is not subject to a time limitation. GMS Management Co. v. Axe, 5 Ohio Misc.2d 1, 449 N.E.2d 43 (1982). A void judgment is a judgment that has no force or effect, the invalidity of which may be asserted by any party whose rights are affected at any time, whether directly or collaterally. From its inception, a void judgment continues to be null. It is incapable of being confirmed, ratified, or enforced in any manner, or to any degree.

CONCLUSION

Resting therefore on the foregoing, the Petitioner respectfully requests that the Court grant his petition for a writ of certiorari.

Respectfully submitted,



Victor Nunez #A572595
Toledo Correctional Institution
2001 East Central Ave.
Toledo, Ohio 43608
DEFENDANT-PETITIONER, PRO SE

Date: January 10, 2020