

THE SUPREME COURT OF OHIO

10-0622

STATE OF OHIO,

) Case No. _____

Plaintiff-Appellee,

)

vs.

)

RONALD R. PHILLIPS, JR.,

)

On Appeal from the Summit
County Court of Appeals,
Ninth Appellate District

Defendant-Appellant.

)

Court of Appeals
Case No. 24198

)

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT RONALD R. PHILLIPS, JR.

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

The intervention of this Honorable Court is respectfully requested as this case presents three critical issues for the future of criminal case litigants: (1) whether Article IV, § 3(B)(1)(f) of the Ohio Constitution is utilized only for the purpose of the reconsideration of an appeal, or is it a separate avenue authorizing an appellate court to re-assume jurisdiction of the previous appeal in extraordinary circumstances for its complete determination; and (2) whether challenging the unconstitutionality of a statute qualifies as a jurisdictional challenge which falls under the *Blackledge/Menna* exception and therefore *not* deemed waived by a guilty plea; and (3) whether division (A)(2) of R.C. 2925.03, when the amount of the drug involved equals or exceeds one hundred times the bulk amount, thereby becoming subject to subdivision (C)(1)(f) of R.C. 2925.03 which “*automatically classifies*” an offender to be a major drug offender, is unconstitutional for attaching additional facts by the sentencing subdivision of (C)(1)(f) to an offender which had not been submitted to a jury and proved beyond a reasonable doubt, or admitted to by a guilty plea.

In this case, the Ninth District Court of Appeals held that the Application submitted to “assume original jurisdiction over this cause pursuant to Article IV, § 3(B)(1)(f) of the Ohio Constitution” was an application for reconsideration. The court of appeals also ruled that, since a guilty plea was entered in this case, any challenge that division (A)(2) of R.C. 2925.03 in relation to subdivision (C)(1)(f) is unconstitutional and therefore does not constitute an offense, was waived as a consequence of entering a guilty plea.

The decision of the court of appeals involves a substantial constitutional question by threatening the constitutional structure of not only the Ohio Constitutions application of its “original” jurisdiction section 3(B)(1)(f) provision allowing an appellate court to re-assume jurisdiction of an appeal for its complete determination - clearly being a separate avenue from an App.R. 26(A) reconsideration - but also the duty a court has in defending against the application of unconstitutional enforcements upon an

accused. By its ruling, the court of appeal's undermines the separational distinction between an App.R. 26(A) reconsideration and Ohio Constitution Article IV, § 3(B)(1)(f) allowance of “[a]ny cause on review as may be necessary to its *complete* determination” (*emphasis* added). Next, the court of appeals seemed as though it misunderstood the issues being submitted before it in the Article IV, § 3(B)(1)(f) application believing they were the same issues as previous counsel(s) for Appellant presented upon direct appeal, when, the issues, in fact, are wholly distinct of one another.

The claims previously brought by appellate counsels in the direct appeal and 26(B) application were essentially based upon the theory that the “court”, or judge for that matter, was not authorized to find Appellant guilty of being a major drug offender. In the Article IV, § 3(B)(1)(f) application to the court of appeals to assume original jurisdiction, however, the issue submitted was the distinct claim that “the statute section Appellant was charged with is unconstitutional and therefore does not constitute an offense under Ohio law due to the General Assembly in its enactment of the provisions added additional facts at sentencing which have not been submitted to a jury and proved beyond a reasonable doubt, or admitted to by a guilty plea, thereby making the guilty plea invalid”. Therefore, Appellant averred his appellate counsels were ineffective and his guilty plea was unknowing, unintelligent, and involuntarily entered because (1) he could not have plead to something found to be unconstitutional and therefore held not to constitute an offense under R. C. 2901.03(B), due to it will no longer contain a sentencing provision for the charge once declared unconstitutional, and (2) he was never charged with, found guilty by a jury of, or plead guilty to additional facts added under the sentencing provision which the Ohio General Assembly actually applied to him (not the court or the judge) within the given statute, giving rise to a similar circumstance which occurred in Apprendi v. New Jersey, 530 U.S. 466 (2000). Finally, in what Appellant believes was their misunderstanding of the issues submitted, the court of appeals decision deemed the guilty plea a waiver to bar any review of the issues, which, first, were never in fact “waived” as that term is properly understood, but also, as Appellant believes, fall under the *Blackledge/Menna* exception with respect to guilty pleas due to the

jurisdictional significance of the issues.

Apart from these considerations, the contention here is that previous appellate counsels, who pursued not only his direct appeal, but also exhausted any App.R. 26(B) avenue, raised issues which were wholly meritless; thus, by counsels failure to provide effective representation, Appellant submits he was in no better position than one who has no counsel at all. *Evitts v. Lucey*, 469 U.S. 387, 394, 105 S.Ct. 830, 83 L.Ed.2d 821. Consequently, a first appeal as of right is not adjudicated in accord with due process if the appellant does not have the effective assistance of counsel. *Id.* As a result, Appellant, by utilizing Article IV, § 3(B)(1)(f), was simply invoking what he believed was the only appropriate and adequate remedy left available for him - upon discovering the correct issues - to submit them for “its *complete* determination”, which should have been previously discovered and presented upon appeal by appellate counsels. Any comparison of the issues here will surely reveal their distinction concerning which issues raise the appropriate merits. In short, if allowed to stand, the court of appeals decision sets a precedent that would exclude litigants from utilizing the avenue of invoking the court of appeals original jurisdiction pursuant to Article IV, § 3(B)(1)(f) when faced with unprecedented and extraordinary circumstances and where reasons for granting the relief are compelling, such as here, only to have the court of appeals treat the request as a reconsideration which when properly reviewed will reveal does not ask for reconsideration.

The judgment of the court of appeals has great general significance also because, if affirmed, the decision would invite other appellate districts to turn litigants away when faced with extraordinary circumstances, for instance, like the issues here where appellate counsels have exhausted all avenues with meritless issues, thus, essentially depriving any proper and effective appellate review; or when a miscarriage of justice may have occurred, but was neglected by appellate counsels to be raised, i.e., the application of an unconstitutional statute having been imposed. Extraordinary issues, such as the ones here, are matters which should be re-assumed in an appeal for “its complete determination”, not to have a court of appeals simply postpone any review under the contention that an appellant has “waived”

such issues - only then to have some John Doe's case come next on its calendar for direct review and challenge the same claim , wherein it is then declared to be unconstitutional under the guise of being “timely”. This is only to delay the inevitable and could result in courts of appeals upholding an unconstitutional statute on account of being forced to or “indiscretionally” to apply such doctrines which Appellant believes falls under certain exceptions such as the *Blackledge/Menna* exception. The decision here undermines the effect of guilty pleas when faced with a fundamental miscarriage of justice or unconstitutional issues, only to affect every future litigant and attorney representing their client from obtaining the remedy mandated by law, or in such an instance an Appellant can show his appellate counsel(s) have exhausted his every avenue and potential for an effective review with meritless issues, that Article IV, § 3(B)(1)(f) must have foreseen being utilized for by its enactment.

In sum, this case puts in issue matters of first impression concerning (1) the application of Article IV, § 3(B)(1)(f) concerning criminal appeals and whether it may be utilized to challenge the constitutionality of a statute under the Ohio Revised Code in extraordinary circumstances, and (2) whether such avenue taken and issue raised are considered precluded or waived by one who enters a guilty plea, or do they concern such matters of a jurisdictional magnitude that it can never be waived and thereby falls under certain exceptions. Such issues ultimately will direct all lower appellate courts on their constitutional authority in relation to the Ohio Appellate Rules and declare the rights of all criminal litigants when faced with such concerns. Therefore, this court must grant jurisdiction to hear this case and review the erroneous and dangerous decision of the Ninth District Court of Appeals.

STATEMENT OF THE CASE AND FACTS

This case arises from an attempt of Appellant Ronald R. Phillips, Jr. (“Phillips”) to invoke the court of appeals “original” jurisdiction pursuant to Article IV, § 3(B)(1)(f) of the Ohio Constitution. On December 5, 2005, the grand jury indicted Defendant with multiple offenses. Initially, Phillips plead not guilty to all of the charges, but changed his plea before trial. On December 13, 2006, Phillips came before the trial court with his trial counsel for a plea and sentencing hearing. Phillips then plead

to the following charges: (1) two counts of aggravated possession, pursuant to R.C. 2925.11(A); (2) possession of marijuana, pursuant to R.C. 2925.11(A); and (3) complicity to commit trafficking, pursuant to R.C. 2925.03(A)(2) and R.C. 2923.03(A)(2)/(3), with a major drug offender specification, pursuant to R.C. 2941.1410. The trial court dismissed the remaining charges against Phillips and sentenced him to an agreed upon sentence of fifteen years in prison.

On March 24, 2008 the Court of Appeals ruled that the December 18, 2006 sentencing entry failed to comply with Crim.R. 32(C) and, thus, instructed Phillips to obtain a final appealable order from the trial court. On April 17, 2008, the trial court issued a *nunc pro tunc* final judgment entry in the case.

On May 8, 2008, Phillips, represented by a public defender, appealed the April 17, 2008 *nunc pro tunc* final judgment entry of conviction after the trial court was ordered to correct its failure to comply with Crim.R. 32(C) by a March 24, 2008 order of the Ninth District Court of Appeals. On appeal, appellate counsel submitted Assignment of Error I as “THE TRIAL COURT ERRED WHEN IT FOUND APPELLANT TO BE A MAJOR DRUG OFFENDER BECAUSE THE STATUTORY ELEMENTS WERE NOT SATISFIED”, and for Assignment of Error II: “THE COURT’S IMPOSITION OF THE MAJOR DRUG OFFENDER SENTENCE IS VOID”, but these arguments did not involve any challenge that the statute was being unconstitutional applied in violation of the Due Process Clause for adding additional facts which had not been submitted to a jury and proved beyond a reasonable doubt, or admitted to by a guilty plea. On December 23, 2008, the Court of Appeals affirmed the judgment of the trial court. Phillips timely filed a notice of appeal from the Court of Appeals decision to the Ohio Supreme Court.

Meanwhile, on February 18, 2009, Phillips, represented by the Office of the Ohio Public Defender, filed a App.R. 26(B) application to reopen his direct appeal alleging his appellate counsel was ineffective due to his failure to raise the following issues on appeal:

1. A trial court had no authority to impose the major drug offender add-on sentence. *State v. Foster*, 109 Ohio St. 1; *State v. Chandler*, 109 Ohio St.3d 223.
2. Trial counsel was ineffective for failing to properly raise Mr. Phillips' challenge to his major drug offender specification.
3. The trial court committed plain error by convicting Mr. Phillips of a major drug offender specification.

On March 3, 2009, the Court of Appeals denied the 26(B) application. Phillips timely appealed the Court of Appeals decision to the Ohio Supreme Court.

Thereafter, Phillips timely proceeded into the United States District Court by filing a 28 U.S.C. § 2254 petition for writ of habeas corpus on August 7, 2009 with the issues raised and pursued in the State courts by the public defenders. However, part way through the pursuit of the federal habeas action, Phillips was transferred in November to another institution wherein he inquired some assistance of the institutions legal clerk to check over his case. At that point it was pointed out to Phillips that all the issues pursued previously were meritless and not the correct issues of error. All of the issues in essence challenged that the judge or the court erred in imposing the major drug offender specification, when, in fact, it was the General Assembly's enactment of the statute which added additional facts within the "automatic classification" of the sentencing provision concerning the definition of the major drug offender classification.

Upon this discovery, Phillips immediately moved the federal district court to amend his habeas action on February 26, 2010, and also simultaneously filed a Motion for Leave to Withdraw Guilty Pleas on February 26, 2010 with the Summit County Court of Common Pleas, including, in addition, filing the present application in the Ninth District Court of Appeals to assume original jurisdiction pursuant to Article IV, § 3(B)(1)(f) of the Ohio Constitution to allow the proper issues concerning the unknowing, involuntary, and unintelligent entering of the guilty pleas due to the unconstitutionality of R.C. 2925.03(A)(2) as purviewed subdivision (C)(1)(f). On March 23, 2010, the court of appeals denied the application to assume original jurisdiction of Appellant's appeal for its complete

determination, pursuant to Article IV, § 3(B)(1)(f), to review the constitutionality of the statute's application of facts being applied which had not been submitted to a jury and proved beyond a reasonable doubt, or admitted to by the guilty plea, thus, contending his guilty pleas were invalid in violation of the Due Process Clause of the Ohio and United States Constitutions.

The court of appeals erred in treating Phillips request as a motion for reconsideration when he specifically invoked Article IV, § 3(B)(1)(f) of the Ohio Constitution and not App.R. 26(A). The court of appeals also erred in not only failing to review the claim that a statute was being unconstitutionally applied and caused injury, but also erred in holding that Phillips waived the issue by pleading guilty.

In support of its proposition of these issues, the Phillips presents the following arguments of his propositions submitted for this Court's review.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Article IV, § 3(B)(1)(f) of the Ohio Constitution is not the equivalent to an App.R. 26(A) application and may be utilized in extraordinary circumstances.

The fountainhead of jurisdiction and authority of courts of appeals is to be found in Section 3 of Article IV of the Ohio Constitution, which, so far as pertinent to the issues here, reads:

“(B) (1) The courts of appeals shall have original jurisdiction in the following:

“* * *

“(f) In any cause on review as may be necessary to its complete determination.”

It is contended here that this is one of those cases which is contemplated by the Modern Courts Amendment where the original jurisdiction of the Court of Appeals may be invoked. The visionaries who drew Section 3(B)(1)(f), Article IV must have foreseen what this Court has before it in this

case. The court of appeals seemingly by their judgment entry recognized Phillips was utilizing the constitutional provision above to invoke their original jurisdiction. However, the court of appeals elected to treat Appellant's application as a motion for reconsideration. This court has long recognized, “[W]hile the phrase 'any cause on review' will sound to some, I am sure, like language of appellate jurisdiction, it is clearly not so. Had the drafters meant the subsection to apply to the appellate jurisdiction of this court, it would have been easy enough to so provide. All that would have been needed was to drop down five or so lines and place the provision in Section (B)(2)-the appellate jurisdiction section. Since this was not done, the section obviously pertains to the court's original jurisdiction.” *Burger v. City of Cleveland Heights*, 87 Ohio St.3d 188, 718 N.E.2d 912, 1999 -Ohio- 319 (1999); *State v. Steffen*, 70 Ohio St.3d 399, 639 N.E.2d 67 (1994). Here, the court of appeals did not treat it or address it as such.

In this case, previous appellate counsels exhausted not only Phillips direct appeal, but also his only other avenue through an App.R.26(B) application. In their attempted efforts, appellate counsel(s) incorrectly assessed and raised meritless issues while exhausting these avenues, which if compared with the challenges currently submitted by Phillips, it is believed this Court will perhaps recognize the differences in theories, i.e., the issues raised by appellate counsels claimed the “court” or “judge” erred; whereas, the correct issue and theory raised presently by Phillips is the General Assembly's enactment and application of the statute is unconstitutional as it allows additional facts to be added upon sentencing an offender which were never found by a jury or admitted by a plea.

Upon discovering this discrepancy, Phillips diligently submitted the instant application requesting the court of appeals to assume original jurisdiction of his previous appeal to allow a review of these issues “for its complete determination”, since essentially Phillips was denied an effective appeal in this case. However, upon submitting the application, it is believed the court of appeals misconstrued the issues thinking Phillips was raising the same arguments as previous counsels raised on the prior appeals and, therefore, determined the issues waived when, in fact, the issues are distinct.

Moreover, the court of appeals construed Phillips application as a motion for reconsideration, when surely this is not the case being Appellant was invoking their original Article IV, § 3(B)(1)(f) authority.

Other courts of appeal have recognized the significance of this extraordinary avenue, even in the face of a previous history of having exhausted numerous avenues. See *State v. Turpin*, 19 Ohio App.2d 116, 250 N.E.2d 94 (1969) (“We hold that, by reason of the long habeas corpus history, this cause here on review is such that it is necessary to its complete determination for us to exercise the jurisdiction and determine whether the indictment was valid or invalid, or sufficient or insufficient, to charge an offense under Ohio law. Therefore, in the interest of finality and a complete determination, we do consider that issue.”). Moreover, speaking in reference to this original jurisdiction provided under Section 3, paragraph (B), (1), (f), Article IV of the Ohio Constitution, wherein delaying a matter would have been unreasonable, Judge PUTMAN, a profound reasoner of the Fifth Appellate District conspicuously honored and distinguished the laws jurisprudence by holding:

We hold that because of the “modern courts” amendment to the Ohio Constitution, we are not required to say, in substance:

‘For reasons which are known only to those learned in the law we cannot tell you the answer now. You must come back again many months and dollars later along a path we cannot disclose but which you must discover. If you choose correctly, we will tell you then what we now believe to be obvious to all.’

We hold the constitutional amendment was calculated in this particular to avoid the great loss in time and treasure occasioned by litigation formerly made necessary by technicalities in procedure.

Pauli v. Keller, 20 Ohio App.2d 33, 49 O.O.2d 59(1969), *Id* at 35. Phillips respectfully hopes that this Court would adopt such reasoning in accepting jurisdiction of this case for review, and to determine the question of first impression of whether a denial from invoking this avenue is an appeal as of right.

For these reasons, this Court should accept jurisdiction of this case to direct the lower appellate courts of the constitutional authority and reverse the judgment of the court of appeals in this case.

Proposition of Law No. II: A challenge to the constitutionality of a statute is a jurisdictional challenge which falls under the *Blackledge/Menna* exception and therefore is not deemed waived by the entering of a guilty plea.

Although a guilty plea is a complete admission of factual guilt, Crim.R. 11(B)(1), the plea does not bar challenges to the state's ability to prosecute. Cf. *State v. Wilson*, 58 Ohio St.2d 52, 55 (1979) (holding that a defendant may contest the constitutionality of a statute after entering a guilty plea). See, also, *Menna v. New York*, 423 U.S. 61 (1975) (permitting double jeopardy challenge) and *Blackledge v. Perry*, 417 U.S. 21 (1974) (permitting challenge to state's institution of felony prosecution in trial de novo appeal from misdemeanor conviction). Essentially, therefore, a guilty plea does not bar assertion of constitutional violations which go to the right and power of the state to place the defendant on trial. See *Blackledge v. Perry*, and *Menna v. New York*, supra. Thus, a constitutional claim which, if raised, would have wholly barred a trial is not foreclosed by a guilty plea. See *State v. Wilson*, supra, wherein it was held in the first paragraph of the syllabus that "While a counseled plea of guilty is an admission of factual guilt which removes issues of factual guilt from the case, a defendant is not precluded from raising on appeal other issues which attack the constitutionality of the statute under which he has been convicted." *Id* at 54.

Contrary to the court of appeals decision, waiver requires an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Nowhere during Appellant's guilty plea colloquy did he waive, nor within Crim.R. 11 does it express or inform the trial court to notify an accused that he would be waiving his right to challenge the constitutionality of a statute. In fact, a guilty plea does not foreclose claims for constitutional deprivations arising *subsequent* to entry of a guilty plea. See, e.g., *United States v. Bunch*, 80 Fed.Appx. 846, 847 (4th Cir.2003) (unpublished disposition) (holding that *Tollett* rule did not apply to bar double jeopardy challenge to sentence because sentence was imposed after entry of guilty plea);

Nachamie v. Dalsheim, 1979 U.S. Dist. LEXIS 10721, at *6 (S.D.N.Y.1979) (holding that guilty plea did not bar challenge to sentencing because claim depended on events occurring subsequent to guilty plea). Indeed, in 1 Wright, Federal Practice and Procedure: Criminal § 175b, a jurisdictional exception is recognized to the general rule of guilty plea waivers:

*A defendant who has pleaded guilty is not barred from claiming that the indictment or information failed to state an offense, or **that the statute under which he was charged is unconstitutional**, or that the pleading showed on its face that the prosecution was barred by the statute of limitations. The plea of guilty does waive, however, all nonjurisdictional defects in the proceeding. In particular, it bars any claim that the prosecution obtained evidence unlawfully, or that the defendant was illegally detained, or that the prosecution constituted double jeopardy. (footnotes omitted and **emphasis** supplied)*

Likewise, the Federal Sixth Circuit Court, examining a similar issue before them, explained:

In the instant case, the controlling question is not of niceties in pleading or of refinement in construction or application; it is the broad general question of whether the acts described do or do not constitute an offense against the criminal law. If the railway company is right in its contentions, its plea could not be taken as a final admission of the offense, because no offense was charged; it could not be guilty of a crime, because no crime had been committed. It seems to be the settled rule that, even after explicit plea of guilty, defendant may urge, in the reviewing court, such an objection (Carper v. Ohio, 27 Ohio St. 572; Com. v. Hinds, 101 Mass. 209; 12 Cyc. 353, note 35); and we are satisfied that the plea of nolo contendere should not be construed as a waiver of a right which the plea of guilty does not waive (U.S. v. Hartwell, 26 Fed.Cas. 196, 201, 3 Cliff. 221; Com. v. Horton, 9 Pick. (26 Mass.) 206; Com. v. Grey, 2 Gray (68 Mass.) 501, 61 Am.Dec. 476). We must therefore examine on their merits the questions presented.

Hocking Val. Ry. Co. v. U. S., 210 F. 735, 738, 127 C.C.A. 285, 285 (C.C.A.6 (Ohio) Feb 03, 1914) (NO. 2351). This court in Carper v. State, 27 Ohio St. 572, 1875 WL 208, cited by the federal court above, also agreed by holding, “... notwithstanding the plea of guilty, the defendant may object ... that no offense was charged against him; but not for any defect of form or manner of stating the facts, if there was a substantial charge of an offense.” Id at 575.

The court of appeals in their decision applied a waiver doctrine claiming it was due to Phillips guilty plea. Whether the court of appeals correctly understood the distinct differences of the current issue from past appellate issues, Phillips cannot accurately say. However, Phillips submits the position that his guilty plea does *not* waive the challenge to the statute's constitutionality presented in his

application for the court of appeals to re-assume jurisdiction of the matter “for its complete determination”.

For these reasons, this Court should accept jurisdiction of this case to determine whether a challenge concerning the constitutionality of a statute is (1) jurisdictional, and (2) whether it is waived by a guilty plea or it qualifies under the *Blackledge/Menna* exception, and either reverse the judgment of the court of appeals in this case, or alternatively address the issues before this Court.

Proposition of Law No. III: R.C. 2925.03(A)(2) as purviewed through subdivision (C)(1)(f) is unconstitutional for attaching additional facts not having been found by a jury or admitted to by a guilty plea, making any guilty plea unknowing, involuntary, and unintelligently entered under the Fourth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Section 1, 9, 10, and 16 of the Ohio Constitution.

Ohio Revised Code 2901.03(B) codifies the doctrine, well settled for more than two centuries, that there are no common law crimes in Ohio. The section also codifies the corollary to the doctrine: that criminal liability must be based on a statute or ordinance which, (1) makes a prohibition or imposes a duty, and (2) provides a penalty for dereliction. In the instant case, on May 1, 2006, the grand jury returned a second supplemental indictment charging Defendant, and a co-defendant, with complicity to commit aggravated trafficking in drugs in violation of R.C. 2923.01, pursuant to R.C. 2925.03(A)(2) and R.C. 2923.03(A)(2)/(3), with a major drug offender specification (“Count Seven”).

The examination of concern here is, that R.C. 2925.03(A)(2), when charged as a first degree felony, and being a Schedule II Controlled Substance in an amount that equals or exceeds one hundred times the bulk amount under division (C)(1)(f), creates a problem which lies in this penalty provision by “*automatically classifying*” the offender as a Major Drug Offender (“MDO”). The problem with this classification is that the definition of a MDO under R.C. 2929.01(X) only allows an MDO to be

applied when the defendant has been either convicted of or plead guilty to the fact of either *the possession of, sale of, or offer to sell* any drug. Because (1) division (A)(2) of R.C. 2925.03 does not contain any fact in its language of *the possession of, sale of, or offer to sell*, and/or (2) the definition of a MDO alternatively does *not*, pursuant to R.C. 2929.01(X), include such facts as contained in the language of (A)(2) of R.C. 2925.03 such as *Prepare, ship, transport, or deliver* within said definition, then, as the law stands, and as the Defendant has been purportedly charged, the application of the sentencing statute automatically adds additional facts at sentencing which have not been submitted to a jury and proved beyond a reasonable doubt, or admitted to by a guilty plea, thus, creating a violation of the Due Process Clause and making the statute unconstitutional. As a result, by eliminating the sentencing provision from the statute in such case, the acts alleged would actually then not constitute an offense for failure to prescribe a penalty in accordance with R.C. 2901.03(B).

Consequently, the definition of a Major Drug Offender clearly establishes that such a labeling may *only* be applied when the facts charged establish either *the possession of, sale of, or offer to sell* any drug. Thus, in order for an offender to be classified as a major drug offender such fact of *possession, sale, or offer to sell* must either be found by a jury or admitted to by the Defendant by pleading guilty. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (“In order for any fact to be applied against a defendant, it must be either (1) admitted to; (2) found by a jury, or; (3) agree to judicial fact-finding.”); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (“Judge’s role in sentencing is constrained at its outer limits by facts alleged in indictment and found by jury.”); see also *Id.*, at 499, 120 S.Ct. 2348 (SCALIA, J., concurring) (“[A]ll the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury.”). A criminal defendant is entitled to jury determination that he is guilty of every element of crime with which he is charged, beyond reasonable doubt. See *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Here, Defendant was purportedly charged with R.C. 2925.03(A)(2) for trafficking, not possession. No where in division (A)(2) of 2925.03, or in the language of the indictment, is there any fact indicating the possession of, sale of, or offer to sell being mentioned, and as would be needed, to be classified as a major drug offender as that term is defined. For this reason, and since (1) under the punishment provision for the facts charged in this case place Phillips under (C)(1)(f) of R.C. 2925.03, and (2) because that division *automatically classifies* an offender as a major drug offender - which due to the given facts in this case Phillips cannot be classified as because the facts of the possession of, sale of, or offer to sell are no where mentioned under division (A)(2) of R.C. 2925.03 or charged in the indictment - and (3) since there is no other division establishing a punishment for the alleged conduct as described in the purported indictment in this case, then, consequently, there is no offense making the act described against Phillips an offense under Ohio law as required by R.C. 2901.03(B).

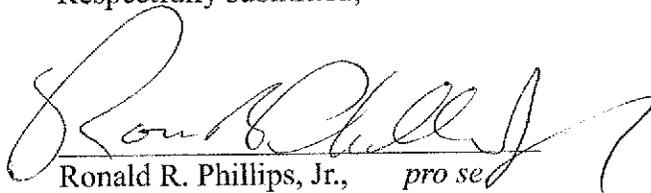
Therefore, upon allowance by the court of appeals of re-assuming jurisdiction under the invoking the original jurisdiction of division (f) of Article IV, § 3 (B)(1), the Court, nevertheless, under its “appellate” jurisdiction under division (2) of Article IV, § 3 (B), would have then had the discretion to consider the constitutional arguments raised by Phillips under a plain-error analysis as set forth by this Court. See *In re M.D.*, 38 Ohio St.3d 149, 151, 527 N.E.2d 286 (1988); *State v. Chapple*, Montgomery App. No. 22198, 2008-Ohio-1157, ¶ 14. An error qualifies as “plain error” only if it is obvious and but for the error, the outcome of the proceeding clearly would have been otherwise. *State v. Macias*, Darke App. No. 1562, 2003-Ohio-1565, citing *State v. Yarbrough*, 95 Ohio St.3d 227, 245, 2002-Ohio-2126, 767 N.E.2d 216. Indeed, if this Court determines, as Phillips so believes the issue will prove to be sustained, that the statute is unconstitutional and therefore does not charge an offense, surely then, the outcome of the proceeding clearly would have been otherwise.

For these reasons, this Court should accept jurisdiction of this case to reverse the judgment of the court of appeals in this case, or to alternatively hear this case to determine the constitutionality of the statute in question.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

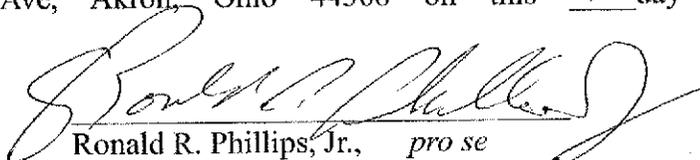

Ronald R. Phillips, Jr., *pro se*

Lorain Correctional Institution, (#520-779)
2075 South Avon Belden Road
Grafton, Ohio 44044

Defendant-Appellant.

Certificate of Service

I hereby certify that a true copy of this **MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT RONALD R. PHILLIPS, JR.** was sent to the Summit County Prosecutor's Office at 53 University Ave, Akron, Ohio 44308 on this 6 day of April, 2010.


Ronald R. Phillips, Jr., *pro se*

COPY

STATE OF OHIO

COURT OF APPEALS
DANIEL M. FIORIGAN
JSS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COUNTY OF SUMMIT)

DECEMBER 23 AM 10:35

STATE OF OHIO

SUMMIT COUNTY
CLERK OF COURTS

C.A. No. 24198

Appellee

v.

RONALD R. PHILLIPS, JR.

Appellant

JOURNAL ENTRY

Appellant has moved this Court to "assume original jurisdiction over this cause pursuant to Article IV, § 3(B)(1)(f) of the Ohio Constitution or for leave to issue an order allowing for leave to issue an order allowing the Summit County Court of Common Pleas to determine defendant's motion to withdraw guilty pleas due to unconstitutionality of statute to constitute an offense." Appellee has responded to the motion.

Upon consideration of Appellant's direct appeal, this Court determined that Appellant pleaded guilty and thereby waived his arguments that the State failed to prove he was a major drug offender. *State v. Phillips*, 9th Dist. No. 24198, 2008-Ohio-6795, ¶4-10. Appellant now asks this Court to conclude that his guilty plea did not amount to a waiver, or in the alternative, to allow him to withdraw his plea. Appellant's motion essentially amounts to an application for reconsideration. Even if this Court were to construe Appellant's motion as such, however, it would be untimely as this Court issued its decision in this case on December 23, 2008. See App.R. 26(A) (providing that an application for reconsideration must be filed within ten days after the announcement of the court's decision). To present further arguments upon the merits of his case, Appellant should have

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filed either a timely application for reconsideration or a timely appeal in the Ohio Supreme

Court. Appellant's motion is denied.



Judge

Concur:

Carr, P.J.

Belfance, J.