

ORIGINAL

IN THE OHIO SUPREME COURT

STATE OF OHIO,  
Plaintiff-Appellee,  
-VS-  
Steven W. Yee,  
Defendant-Appellant.

) Supreme Court Case No.,

12-1401

) Sixth Judicial District Court of  
Appeal's Case No., E-93-072

) Erie County Court of Common Pleas  
Case No., 1989-CR-119

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF STEVEN W. YEE  
("Oral Argument Requested")

FOR THE PLAINTIFF-APPELLEE  
Erie County Prosecutor Office  
319 County Office Bldg.  
247 Columbus Ave.  
Sandusky, Ohio 44870

FOR THE DEFENDANT-APPELLANT

STEVEN W. YEE  
Steven W. Yee  
2500 South Avon Belden Road  
Grafton, Ohio 44044

FILED  
AUG 15 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

RECEIVED  
AUG 15 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page:</u>
<u>EXPLANATION OF WHY THIS CASE IS A CASE OF GREAT PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION</u> .....	1-4
<u>STATEMENT OF THE FACTS AND CASE</u> .....	4-6
<u>ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW</u> .....	6
<u>PROPOSITION OF LAW ONE:</u>	
<u>IS THE OFFENSE OF AGGRAVATED MURDER AND AGGRAVATED ROBBERY WHEN COMMITTED BY THE SAME CONDUCT AT THE SAME TIME ALLIED OFFENSES OF SIMILAR IMPORT SUBJECT TO MERGER UNDER THE NEW STATUTORY INTERPRETATION OF R.C. § 2941.25 State v. Johnson, 128 Ohio St.3d 153, 942 N.E.2d 1061</u> .....	6-8
<u>PROPOSITION OF LAW TWO:</u>	
<u>IS A CLAIM FOR AN ALLIED OFFENSE OF SIMILAR IMPORT NOW A JURISDICTIONAL CLAIM</u> .....	8-9
<u>PROPOSITION OF LAW THREE:</u>	
<u>IS THE RECENT CASE OF STATE V. JOHNSON, 128 Ohio St.3d 153, 942 N.E.2d 1061, A RETROACTIVE STATUTORY INTERPRETATION OF WHAT R.C. § 2941.25 HAS ALWAYS MEANT</u> .....	9-10
<u>CONCLUSION</u> .....	10
<u>SERVICE</u> .....	11
<u>APPENDIX:</u>	
<u>State v. Yee</u> , Case E-93-072, (July 11th, 2012, Decision & Judgment).(Appx.,1)	<u>Page:</u>

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

The Appellant before this court, Steven W. Yee, acting in propria persona with assistance says on November 18th, 2004 the Sixth District Court of Appeal's in State v. Yee, Case E-93-72 vacated in part the sentence imposed by the Erie County Court of Common Pleas and remanded this case to the trial court for merger of the firearm specifications that were committed as part of the same act or transaction.

At the time of Mr. Yee's appeal in 2004, the charges for Aggravated Murder and Aggravated Robbery were not an allied offense of similar import based on the "statutory interpretation" of the law at the time. See State v. Coley, 93 Ohio St.3d 253 at 264-265, citing State v. Reynolds, (1998) 80 Ohio St.3d 670; State v. Smith, (1997) 80 Ohio St.3d 89 and State v. Bickerstaff, (1984) 10 Ohio St.3d 61 at syllabus 66, (¶10).

These prior holdings were all based on the prior "statutory interpretation" that utilized the "comparison of the elements of the offense in the abstract." See explained State v. Anderson, 16 Ohio App.3d 251, 475 N.E.2d 492 (1st Dist.).

Subsequent to these holdings, the Ohio Supreme Court issued the new statutory interpretation of what R.C. § 2941.25 has always meant in the case of State v. Johnson, 128 Ohio St.3d 153, 942 N.E.2d 1061 at sylla 3.

This court's holding in Johnson, is "retroactive." Walters v. Sheets, 2011 WL 4543889 (S.D. Ohio) at \*5.

Under the "retroactive statutory interpretation of R.C. § 2941.25 this court in Johnson, syllabus 3 now holds:

"When determining whether two offenses are allied offenses of similar import subject to merger, court must ask: (1) whether it is possible to commit one offense and commit the other with the same conduct; (2) whether the offenses were committed 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. (Per Brown, C.J., with two justices concurring and four justices concurring in result). R.C. § 2941.25.

In this case as outlined in the statement of the facts and case Post, Mr. Yee committed the crimes of Aggravated Murder while committing the crime of Aggravated Robbery at the same time, by the same conduct and in accordance with Johnson, supra the two charges are required to be merged, pursuant to the Ohio and United States Constitutions. R.C. § 2941.25.

Moreover, all of the "pre Johnson cases and their progeny are no longer the law in Ohio and never were."

The imposition of multiple sentences for allied offenses of similar import under Ohio law is Plain Error. Crim. R. 52 (B).

Moreover, the imposition of multiple sentences for allied offenses of similar import is a sentence contrary to law, outside of the statutory range and void, open to collateral attack at any time and waiver, res judicata and/or law of the case have no application.

In light of the "retroactive statutory interpretation" of Johnson, supra Mr. Yee filed a delayed motion for reconsideration, pursuant to Ohio App. R. 26 (A), coupled with his motion for an enlargement of time to file, pursuant to Ohio App. R. 14. State v. Finley, 2012 WL 4243406, 2012-Ohio-5203 (1st Dist.) at (¶16)(delayed reconsideration and enlargement granted based on change in statutory interpretation allied offense of similar import claims); Deutsche Bank National Trust Co., v. Knox, 2011 WL 334508, 2011-Ohio-421 (7th, Dist.) at (¶2)3).

Ohio App. R. 26 (A) is not jurisdictional. Chandler v. C & A Hickman and Sons Inc., (July 18, 1996) 4th Dist. No., 94CA12, citing Ohio App. R. 14.

On July 11th, 2012, the Sixth District Court of Appeal's decided Mr. Yee's motion wherein the court held his application for an enlargement and for a delayed reconsideration was untimely and that he failed to set forth good cause.

Moreover, the court of Appeal's held that Mr. Yee did not claim in his original appeal that these two underlying felonies of Aggravated Murder and Aggravated Robbery were required to be merged and therefore they did not make any determination of such.

The court went on holding that Mr. Yee did not appeal the re-sentencing decision issued by the trial court when he was re-sentenced and that any arguments are barred by res judicata. See (Decision and Judgment, July 11th, 2012, Attached, Appx., 1).

The decision of the Sixth District Court of Appeal's is not in harmony with the law as it exists today based on the evolution of an allied offense of similar import claim.

Mr. Yee had no knowledge that he could have appealed his re-sentencing as it was held in absentia and even if he could have appealed in years past this was not the law and therefore he had no basis to support his claim.

However, the offenses of Aggravated Murder and Aggravated Robbery when committed by the same conduct at the same time are now allied offenses of similar import that must be merged and it is Plain Error in failing to do so, in violation of the Ohio and United States Constitutions.

In fact, based on the statutory interpretation of what R.C. § 2941.25 has always meant as set forth in Johnson, supra allied offenses are now a jurisdictional claim.

In State v. Fischer, 128 Ohio St.3d 92, 942 N.E.2d 332 at #18 the Ohio Supreme Court holds that when a judge fails to impose statutorily mandated post release control as part of a defendant's sentence, that part of the sentence is void and must be set aside (emphasis added).

More recently in the case of State v. Harris, 2012-Ohio-1908, 2012 Ohio LEXIS 1000 (decided May 3rd, 2012) the Ohio Supreme Court using this portion of Fischer, supra at (\*16) held "...Although we explicitly limited our decision

to those cases in which a court does not properly impose a statutorily mandated period of post release control, Id., at ¶31, we find the same logic in Fischer, to be controlling when it comes to other statutorily mandated terms..."

Based on the "retroactive statutory interpretation of what R.C. § 2941.25 has always meant, Mr. Yee's sentence is outside of the statutory range, contrary to law and void and the doctrine of res judicata and/or law of the case have no application."

Mr. Yee says this is a good procedural case that can be decided summarily in accordance with S.Ct. R. Prac., 3.6 (B), as this decision will state the law as to whether Aggravated Murder and Aggravated Robbery when committed at the same time by the same conduct under the new statutory interpretation of R.C. § 2941.25, Johnson, supra are allied offenses of similar import subject to merger.

To date, there are no other Ohio Supreme Court decisions post Johnson, that specify whether Aggravated Murder and Aggravated Robbery are now an allied offense of similar import under the new statutory interpretation and as a result, the lower courts are improperly utilizing the pre Johnson, authority in error.

Moreover, this case presents the question whether an allied offense claim is jurisdictional ~~in light~~ of the evolution of case authority issued by this court on a statutorily mandated terms Harris, supra.

Mr. Yee asks the court to summarily decide this case for the conservation of judicial resources and other litigation expenses on all parties and in the event the court orders briefing an oral argument is requested.

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#### STATEMENT OF THE FACTS AND CASE

The facts of this case are as follows, per State v. Yee, 1994 WL 645744 (Ohio App. 6th Dist.).

The victim, who was driving a van, was taken into the van, shot to death

and his body thrown from the van. The van, appellant continues, was driven by one or more of the assailants. "~~to~~ to a motel approximately One Hundred (100) to One Hundred Fifty (150) yards away and left there."

On these facts, appellant contends that the offenses to which he plead guilty (the murder and theft of the van) were committed as part of a single transaction.

The trial court accepted Mr. Yee's guilty plea and sentenced him to life imprisonment without parole eligibility for twenty years on the aggravated murder charge and concurrent sentence of ten to twenty-five years on the aggravated robbery charge. The two three-year terms of actual incarceration imposed for the firearm specifications pursuant to R.C. § 2929.71 were to be served consecutively to each other. Id at \* 1, 2.

The court found that the trial court erred by failing to merge the two firearm specifications and the Sixth Judicial District Court of Appeal's vacated in part, at \* 3.

Under the prior statutory interpretation of R.C. § 2941.25, the trial court was authorized to impose concurrent sentences for aggravated murder and aggravated robbery. See cases cited herein Page 1.

The prior holdings were all based in the prior statutory interpretation that utilized the "comparison of the elements of the offense in the abstract."

[H]owever, subsequent to the prior holdings, the Ohio Supreme Court issued the new statutory interpretation of what R.C. § 2941.25 has always meant in Johnson, supra and that decision is "retroactive." Sheets, supra.

As a result, Mr. Yee utilized Ohio App. R. 14, Ohio App. R. 26 (A), Finley, supra, Knox, supra wherein he asked for an enlargement of time and for the granting of a delayed reconsideration of the decision rendered by the Sixth District Court of Appeal's in Yee, supra.

In part, Mr. Yee argued that in light of the intervening superior court

decision on allied offense claims wherein this court determined what the statute R.C. § 2941.25 has always meant, that the court of appeal's must grant him an enlargement of time and a delayed reconsideration.

Moreover, within Mr. Yee's motion he argued that in light of the intervening superior court decisions his concurrent sentence for Aggravated Murder and Aggravated Robbery are now contrary to law, outside of the statutory range and void, open to collateral attack at any time.

He even demonstrated how the Ohio Supreme Court has held it is Plain Error when a trial court imposes multiple sentences for allied offenses of similar import to no avail. In fact, based on the evolution of case authority out of this court an allied offense claim is now jurisdictional, however the Sixth District Court of Appeal's rejected Mr. Yee's arguments.

Mr. Yee now appeal's to the Ohio Supreme Court and asks that the court summarily grant the propositions of law raised herein and/or to accept this jurisdictional memorandum and order full briefing, including, but not limited, to all of the costs herein to be taxed to the appellee and/or any other relief this court deems just.

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#### ARGUMENT IN SUPPORT

##### PROPOSITION OF LAW ONE:

IS THE OFFENSE OF AGGRAVATED MURDER AND AGGRAVATED ROBBERY WHEN COMMITTED BY THE SAME CONDUCT AT THE SAME TIME ALLIED OFFENSES OF SIMILAR IMPORT SUBJECT TO MERGER UNDER THE NEW STATUTORY INTERPRETATION OF R.C. § 2941.25, State v. Johnson. 128 Ohio St.3d 153, 942 N.E.2d 1061.

The appellant incorporates pages 1 through 6 of this brief herein as if re-written.

As stated, the former decisions of Coley, Reynolds, Smith, Bickerstaff, supra and/or any and all of their progeny were all overruled when the Ohio Supreme Court rendered the intervening decision of State v. Johnson, 128 Ohio

St.3d 153, 942 N.E.2d 1061 at syllabus 3.

Under the new statutory interpretation of what R.C. § 2941.25 has always meant the courts are now directed to ask: (1) whether it is possible to commit one offense and commit the other with the same conduct; (2) whether the offenses were committed 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. (Per Brown C.J., with two justices concurring and four justices concurring in result).

In the case sub judice, Mr. Yee committed the offense of Aggravated Murder at the same time he committed the offense of Aggravated Robbery with the same conduct.

In accordance with Johnson, supra the offenses are allied offenses of similar import requiring merger. The answer to the question posed herein must be yes for this proposition of law.

Moreover, in this case the trial court utilizing the law at the time of sentencing committed plain error when the court sentenced Mr. Yee concurrently for these charges. See State v. Underwood, 124 Ohio St.3d 365, 922 N.E.2d 923, 2010 Ohio LEXIS 2 (HN 17); Crim. R. 52 (B).

This court in Underwood, (HN 17) holds that even when a defendant's sentences are to be served concurrently, the defendant is prejudiced by having more than are authorized by law. (same) State v. Damron, 129 Ohio St.3d 86, syllabus 1.

Just for arguendo, the Underwood court went on at (HN 18) holding courts indulge every reasonable presumption against waiver of fundamental constitutional rights and do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.

Mr. Yee did not waive his constitutional rights and agree to be sentenced to a greater sentence than allowed by law, nor did he agree to be sentenced

concurrently for an allied offense claim, in violation of the Ohio and United States Constitutions.

This court in State v. Wilson, 2011-Ohio-2669, 2011 WL 2274628 (Ohio) at ¶114 holds "...A sentence that contains an allied offense error is contrary to law..."

In accordance with Johnson, supra the offenses of Aggravated Murder and Aggravated Robbery are allied offenses of similar import requiring merger and the trial court committed plain error when it sentenced Mr. Yee concurrently in violation of Underwood, supra, Damron, supra, the Ohio and United States Constitutions.

Mr. Yee asks the court to sustain this proposition of law and answer the question posed as a yes, including, but not limited to all costs to be taxed to the appellee's and/or any other relief this court deems just according with the law.

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PROPOSITION OF LAW TWO:

**IS A CLAIM FOR AN ALLIED OFFENSE OF SIMILAR IMPORT NOW A JURISDICTIONAL CLAIM.**

The appellant incorporates pages 1 through 8 of this brief herein as if re-written.

The Ohio Supreme Court has long held as stated in State v. Beasley, 14 Ohio St.3d 74, 471 N.E.2d 774 at ¶114, 1984 LEXIS 1247 (HN 3, 4), that crimes are statutory as are the penalties therefore, and the only sentence that a trial court may impose is that provided for by statute. A court has no power to substitute a different sentence for that provided for by law. Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void. Accord State v. Garretson, 140 Ohio App. 3d 544, 748 N.E.2d 560 (12th Dist.).

Since the court has rendered this well reasoned decision in Beasley, supra

the line of cases involving void judgments has evolved and in the recent line the court in State v. Fischer, 128 Ohio St.3d 92, 942 N.E.2d 332 at ¶18 holds that when a judge fails to impose statutorily mandated post release control as part of a defendant's sentence, that part of the sentence is void and must be set aside. (emphasis added).

In State v. Harris, 2012-Ohio-1908, 2012 Ohio LEXIS 1000 (decided May 3rd, 2012) this court using this well reasoned portion of Fischer, supra at (¶16) held..."Although we explicitly limited our decision to those cases in which a court does not properly impose a statutorily mandated period of post release control, Id., at ¶31, we find the same logic in Fischer, to be controlling when it comes to other statutorily mandated terms..."

With this new logic, common sense dictates that when a trial court sentences a defendant to a greater sentence than authorized by law with respect to an allied offense of similar import, the sentence is outside of the statutory range and void! R.C. § 2941.25, Wilson supra.

Mr. Yee's concurrent sentences are contrary to law and void and in light of the well reasoned decision in Harris, supra the void sentence is open to collateral attack at any time, Fischer, supra and res judicata and/or law of the case have no application.

Mr. Yee asks the court to sustain this proposition of law and answer the question with a yes, including, but not limited to all costs to be taxed to the appellee's and/or any other relief this court deems just according with the law.

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PROPOSITION OF LAW THREE:

IS THE RECENT CASE OF STATE V. JOHNSON, 128 Ohio St.3d 153, 942 N.E.2d 1061, A RETROACTIVE STATUTORY INTERPRETATION OF WHAT R.C. § 2941.25 HAS ALWAYS MEANT.

The appellant incorporates pages 1 through 10 of this brief herein as if re-written.

In the case of State v. Johnson, 128 Ohio St.3d 153, 942 N.E.2d 1061 the Ohio Supreme Court rendered a statutory interpretation of what R.C. § 2941.25 has always meant and that interpretation is "retroactive." See Walters v. Sheets, 2011 WL 4543889 (S.D. Ohio) at \*5.

[A]s stated in Sheets, supra, at \*5, citing Agee v. Russell, 92 Ohio St.3d 540, 543, 751 N.E.2d 1043, when the Supreme Court of Ohio overrules its interpretation of a state statute, the correction has a retroactive application.

In reviewing a previous statutory interpretation the court is not creating new law, but rather deciding what the statute meant from its inception.

Accord Taylor v. Ernst & Young, LLP, 130 Ohio St.3d 411, 958 N.E.2d 1203 at syllabus.

Mr. Yee asks the court to sustain this proposition of law and answer the question posed as a yes, including, but not limited to all costs to be taxed to the appellee's and/or any other relief this court deems just according with the law.

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#### CONCLUSION

Wherefore, Mr. Yee asks the Ohio Supreme Court to summarily sustain each and every proposition of law raised herein, pursuant to S.Ct. R. Prac. 3.6 (B) and/or in the alternative to order further briefing and an oral argument for the determination of this appeal, including but not limited to all costs to be taxed to the appellee's and/or any other relief this court deems just according with the law.

Respectfully submitted,



Steven W. Yee  
2500 South Avon Belden Road  
Grafton, Ohio 44044

SERVICE

A true copy of the foregoing was sent out today 8-12, 2012, by regular U.S. mail to the Erie County Prosecutor's Office at 319 County Office Bldg., 247 Columbus Ave., Sandusky, Ohio 44870.

Respectfully submitted,

STEVEN W. YEE

Steven W. Yee  
2500 South Avon Belden Road  
Grafton, Ohio 44044

FILED  
COURT OF APPEALS  
ERIE COUNTY, OHIO

2012 JUL 11 PM 1:24

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IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
ERIE COUNTY

State of Ohio

Court of Appeals No. E-93-072

Appellee

Trial Court No. 1989-CR-119

v.

Steven W. Yee

DECISION AND JUDGMENT

Appellant

Decided: JUL 11 2012

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Appellant, Steven W. Yee, has filed an "Application for an Enlargement of Time and for a Delayed Reconsideration." Appellant claims that under *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6315, this court should reconsider the issues in his direct appeal regarding the merger of offenses which we determined in *State v. Yee*, 6th Dist. No. E-93-72, 1994 WL 645744 (Nov. 18, 1994). Appellee, the state of Ohio, opposes the application.

App.R. 26 states that an application for reconsideration "shall be made in writing before the judgment or order of the court has been approved by the court and filed by the

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court with the clerk for journalization or within ten days of the announcement of the court's decision, whichever is later."

In this case, the ten-day time limit for filing a motion for reconsideration expired in November 1994, well before the filing of appellant's current motion. Although App.R. 26(B) provides for a reopening of appellant's appeal on ineffective assistance of appellate counsel claims, nothing in the appellate rules permits the filing of a motion for reconsideration after the expiration of the ten-day time period.

Moreover, even presuming that reconsideration was permitted, appellant has failed to set forth good cause for such motion. In his appeal from his convictions, appellant did not claim that the two underlying felonies of aggravated murder and aggravated robbery merged. *See State v. Yee*, 6th Dist. No. E-93-72, 1994 WL 645744 (Nov. 18, 1994). Rather, he argued that the two three-year consecutive sentences imposed for the firearm specifications should have been merged with the underlying felonies. *Id.* In our 1994 decision, we remanded to the trial court for it to determine factual and evidentiary issues regarding "whether or not the felonies and firearm specifications of which appellant was convicted were part of the same transaction or act." *Id.* Therefore, we did not make any determination regarding merger of the offenses nor did we apply the Ohio Supreme Court's merger analysis which was in effect prior to *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6315. Consequently, nothing in that case relates to appellant's current arguments regarding the merger of offenses.

Moreover, appellant did not appeal from the determinations made or the decision issued by the trial court on remand when he was resentenced. Therefore, any arguments regarding his sentencing for the two firearm specifications which could have been raised in an appeal from that judgment entry are res judicata, and no reconsideration, delayed or otherwise is proper. *See State v. Harris*, 2d Dist. No. 24739, 2011-Ohio-1853. *See also State ex rel. Martin v. Russo*, 130 Ohio St.3d 269, 2011-Ohio-5516, 957 N.E.2d 769 (holding that defendant's claims of sentencing error via writ of mandamus, including allied-offense claim, barred by res judicata). Contrary to appellant's claims, he has failed to establish a valid cause for granting his motion for reconsideration.

Accordingly, appellant's application for extension of time and for delayed reconsideration is not well-taken and is denied. All further pending motions are rendered moot and denied.

Peter M. Handwork, J.

Thomas J. Osowik, J.

Stephen A. Yarbrough, J.  
CONCUR.



JUDGE



JUDGE



JUDGE