

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio	:	S. Ct. Case No. 2012-1401
	:	C.A. Case No. E-93-072
Appellee	:	C.P. Case No. 1989-CR-119
v.	:	
Steven W. Yee	:	
Appellant	:	
	:	

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APPEAL FROM THE SIXTH APPELLATE DISTRICT  
ERIE COUNTY, OHIO

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**RESPONSE TO APPELLANT'S MOTION FOR RECONSIDERATION  
AND APPELLEE'S MOTION TO DISMISS**

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## MEMORANDUM

### STATEMENT OF THE CASE AND FACTS

On August 30, 1993, appellant, Steven W. Yee, entered pleas of “guilty” to Aggravated Murder under Count One of the indictment and Aggravated Robbery under Count Six. Appellant further entered pleas of guilty to two firearm specifications. As part of the plea agreement, the trial court imposed concurrent sentences for the aggravated murder and aggravated robbery offenses which were to run consecutive to the sentences imposed for the firearm specifications. Two sentences were imposed for the firearm specifications, which sentences were to run consecutive to each other as evidenced by the judgment entry filed September 17, 1993.

Appellant filed a timely notice of appeal in the Sixth District Court of Appeals for Erie County, Ohio, on the judgment entry filed September 17, 1993. The Sixth District Court of Appeals vacated the sentence which imposed two consecutive terms of actual incarceration for the firearm specification, as evidenced by the judgment entry filed November 18, 1994. The court further remanded the case to the trial court, which ordered sentences on the firearm specifications to be served concurrently with each other but consecutive to the underlying sentences. Furthermore, the court expressly stated that “[t]he trial court properly held the plea colloquy in conformity with Crim.R. 11.” State v. Yee, Case No. E-93-72, 1994 Ohio App. LEXIS 5142, 5 (Ohio App. 6 Dist. Nov. 18, 1994).

On July 27, 2004, appellant filed a motion for leave to withdraw guilty plea or, in the alternative, to vacate and set aside the judgment of conviction, which the trial court denied because appellant failed to demonstrate the existence of manifest injustice. The court also found

that “the trial court conducted a proper plea colloquy in conformity with Crim.R. 11 on August 30, 1993.” **See Judgment Entry journalized July 21, 2005.**

Appellant again filed a motion to vacate his conviction or withdraw his guilty plea on April 8, 2011. Appellant’s motion was denied by the trial court without a hearing by judgment entry journalized May 10, 2011. In its judgment entry, the trial court found that appellant’s motion was “barred by the doctrine of res judicata.” **Id.**

On February 29, 2012, appellant filed a Motion for De Novo Resentencing based upon **State v. Johnson**, 128 Ohio St.3d 153, 2010-Ohio-6314. Appellant argued that under **Johnson**, the trial court was required to merge the sentences for aggravated murder and aggravated robbery. Said motion was denied by the trial court. **See Judgment Entry journalized March 26, 2012.**

Appellant filed a notice of appeal with the Sixth Appellate District Court of Appeals for Erie County, Ohio, on April 18, 2012, in Case No. E-12-017, from the judgment entry of the trial court denying appellant’s motion for de novo resentencing based upon the same argument that **Johnson** required the merging of appellant’s sentences for aggravated murder and aggravated robbery, which case is currently pending.

Appellant filed Appellant’s Application for an Enlargement of Time and for a Delayed Reconsideration with the appellate court on April 24, 2012, on its decision filed November 18, 1994. Said application was denied by Decision and Judgment journalized July 11, 2012.

On August 15, 2012, appellant filed his notice of appeal with this Honorable Court from the decision of the appellate court journalized July 11, 2012.

On November 7, 2012, this Honorable Court dismissed the instant appeal as not involving any substantial constitutional question and denied appellant’s leave to appeal.

Appellant filed his Motion for Reconsideration with this Honorable Court on November 19, 2012.

### ARGUMENT

Pursuant to Rule 11.6 of the Ohio Supreme Court Rules of Practice, (hereinafter “S.Ct. Prac.R.”), application for reopening, an application shall contain the following:

(1) The Supreme Court case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(2) A showing of good cause for untimely filing if the application is filed more than ninety days after entry of the judgment of the Supreme Court;

(3) One or more propositions of law or arguments in support of propositions of law *that previously were not considered on the merits in the case or that were considered on an incomplete record because of the claimed ineffective representation of appellate counsel*;

(4) An affidavit stating the basis for the claim that appellate counsel’s representation was ineffective with respect to the propositions of law or arguments raised pursuant to S.Ct. Prac. R. 11.6(B)(3) and the manner in which the claimed deficiency prejudicially affected the outcome of the appeal, which affidavit may include citations to applicable authorities and references to the record;

(5) Any relevant parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies. (Emphasis added)

In the case at bar, appellant has failed to address any propositions of law that previously were not considered on the merits or were considered on an incomplete record because of the claimed ineffective representation of appellate counsel. Appellant’s motion is, in effect, a rebuttal argument of appellee’s jurisdictional memorandum. The only new argument presented by appellant is moving this Honorable Court to accept jurisdiction in light of the case of State v. Williams, Case No. 2011-0619, which is pending before this Honorable Court and discusses the issues of merger and allied offenses. See **Appellant’s Motion for Reconsideration, 1**. However, appellant fails to recognize that the case of Williams is factually distinguishable from

the case at bar. **Williams** is a case that deals with the merging of a defendant's rape and kidnapping convictions. See **State v. Williams**, 2011 Ohio App. LEXIS 829, 2011-Ohio-925, 21, ¶61 (Ohio App. 8 Dist.).

In the case at bar, appellant entered guilty pleas to aggravated murder and aggravated robbery. As demonstrated in appellee's Memorandum in Opposition of Jurisdiction, this Honorable Court has stated that:

*Also, the constitutional protection against double jeopardy does not preclude a defendant from being separately punished for an aggravated murder and for felonies involved in that murder. In order to commit murder, neither aggravated robbery nor kidnapping need be committed. This court has repeatedly rejected similar double-jeopardy claims and held that aggravated murder is not an allied offense of similar import to an underlying aggravated robbery. **State v. Reynolds** (1998), 80 Ohio St.3d 670...; **State v. Smith** (1997), 80 Ohio St.3d 687...; See, also, **State v. Bickerstaff** (1984), 10 Ohio St.3d 61..., syllabus. (Emphasis added)*

**State v. Coley**, 93 Ohio St.3d 253, 2001-Ohio-1340, 264-265. Additionally, **State v. Johnson**, 128 Ohio St.3d 153, 2010-Ohio-6314, also *specifically states* that aggravated murder and aggravated robbery are not allied offenses:

*The basic thrust of R.C. 2941.25, regarding allied offenses of similar import, is to prevent "shotgun" convictions. For example, a thief theoretically is guilty not only of theft but of receiving stolen goods, insofar as he receives, retains, or disposes of the property he steals. Under this section, he may be charged with both offenses but he may be convicted of only one, and the prosecution sooner or later must elect as to which offense it wishes to pursue. On the other hand, a thief who commits theft on three separate occasions or steals different property from three separate victims in the space, say, of 5 minutes, can be charged with and convicted of all three thefts. In the first instance the same offense is committed three different times, and in the second instance the same offense is committed against three different victims, i.e. with a different animus as to each offense. Similarly, an armed robber who holds up a bank and purposely kills two of the victims can be charged with and convicted of one count of aggravated robbery and of two counts of aggravated murder. Robbery and murder are dissimilar offenses, and each murder is necessarily committed with a separate animus, though committed at the same time. (Emphasis added)*

**Johnson**, 128 Ohio St.3d at headnote 4.

Finally, appellant's arguments are also barred by the doctrine of *res judicata*: As recognized in **State v. Marshall**, 2007 Ohio App. LEXIS 5958, 2007-Ohio-6830, 2-3, ¶5 (Ohio App. 8 Dist.):

The Supreme Court of Ohio has stated that under the doctrine of *res judicata*, “[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” **Grava v. Parkman Twp.** (1995), 73 Ohio St.3d 379, 1995 Ohio 331, ... syllabus. *Res judicata* promotes the principle of finality of judgments by requiring plaintiffs to present every possible ground for relief in the first action. **Natl. Amusements, Inc. v. Springdale** (1990), 53 Ohio St.3d 60, 62....” **Kirkhart v. Keiper**, 101 Ohio St.3d 377, 378, 2004 Ohio 1496.... Moreover, *res judicata* prevents repeated attacks on a final judgment and applies to issues that were or might have been previously litigated. **State v. Sneed**, Cuyahoga App. No. 84964, 2005 Ohio 1865; **State v. Brown**, Cuyahoga App. No. 84322, 2004 Ohio 6421.\*\*\*

In the case at bar, appellant previously appealed his sentence to the Sixth District Court of Appeals in **State v. Yee**, Case No. E-93-72, 1994 Ohio App. LEXIS 5142 (Ohio App. 6 Dist. Nov. 18, 1994). In **Yee**, the appellate court reviewed the trial court's failure to improperly merge firearm specifications. However, the court expressly stated:

*The effect of this decision is not to set aside appellant's conviction or his sentence beyond a temporary vacation of one firearm specification. Rather, again following the analogous allied offenses example, see **State v. Kent**, supra, at 156; **State v. Mangrum** (1993), 86 Ohio App.3d 156, 158...we remand the matter to the trial court to either conduct an evidentiary hearing or accept a stipulated statement of facts and from such facts determine whether or not the felonies and firearm specifications of which appellant was convicted were part of the same transaction or act. See **State v. Wills**, supra. (Emphasis added)*

**Yee** at 8. While reviewing appellant's sentence, the appellate court could have taken notice of the trial court's failure to merge appellant's offenses under Crim.R. 52(B), if merger was indeed warranted, as “the imposition of multiple sentences for allied offenses of similar import is plain error.” **State v. Underwood**, 124 Ohio St.3d 365, 2010-Ohio-1, 372, ¶31, **recon. denied**, 124

Ohio St.3d 1494, 2010-Ohio-670, citing State v. Yarbrough, 104 Ohio St.3d 1, 2004-Ohio-6087, ¶96-102.

This argument was recently recognized by the appellate court in the case at bar in response to appellant's "Application for Enlargement of Time and for a Delayed Reconsideration." In its Decision and Judgment journalized July 11, 2012, the court specifically noted that "[i]n his appeal from his convictions, appellant did not claim that the two underlying felonies of aggravated murder and aggravated robbery merged." Id. at 2, citing Yee, supra. The court also stated:

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 Russo, 130 Ohio St.3d 269, 2011-Ohio-5516... (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.

Id. at 3.

### CONCLUSION

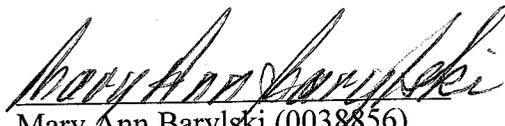
Appellant has failed to address any propositions of law that previously were not considered by this Honorable Court in the jurisdictional briefs. Furthermore, the memorandum fails to demonstrate any valid new issues or case law. Therefore, appellee respectfully moves this Honorable Court to deny appellant's motion

Respectfully submitted,

  
Mary Ann Barylski #0038856  
Assistant Prosecuting Attorney

**CERTIFICATION**

This is to certify that a copy of the foregoing response was mailed to Steven W. Yee, Inmate #A424573, GCI, 2500 S. Avon Belden Rd., Grafton, Ohio 44044, this 21<sup>st</sup> day of November, 2012, by regular U.S. mail.

  
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