

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO  
Appellee,

:

C.A Case No. 26891

:

vs.

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

:

MICHAEL CLAY  
Appellant.

:

13-0994

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT MICHAEL CLAY

Michael Clay, A533-044  
1150 North Main Street  
Mailing Address: P.O. Box 788  
Mansfield Correctional Inst.  
Mansfield, Ohio 44901-0788

Counsel for the Appellant: Pro Se.

Sherri Bevan Walsh, Pros. Attorney  
Summit County Prosecutor's Office  
53 University Avenue, 7<sup>th</sup> Floor  
Akron, Ohio 44308

Counsel for Appellee

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~~(June 27th 2013)~~

*May 15th 2013*

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(March 22<sup>nd</sup> 2013)

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

This cause presents three critical issues for future litigants in Ohio: (1) Whether a sentence constitutes an illegal sentence, under the illegal sentencing doctrine, adopted by this Court in the case of *State vs. Fischer*, 128 Ohio St. 3d 92, and later extended to *State vs. Harris*, 132 Ohio St. 3d 318, when a trial court finds allied offense, but fails to merge the sentence pursuant to statute. And instead, orders the sentence to be served concurrent; (2) Whether a motion to correct an illegal sentence, as explained in *Fischer*, Id at 25, and *Harris*, Id at 17, is the proper remedy when all other legal remedies, i.e direct appeal, and/or Application for reopen appeal, and/or Petition for Post-conviction are no longer available; And (3) Whether a motion to correct an illegal sentence can be construed as a petition for post-conviction pursuant to this Court's decision in *State vs. Reynolds*, 79 Ohio St. 3d 158, when concerning the issue of allied offenses, under Revise Code 2941.25.

In this case, the trial court believes merger and concurrent sentencing are the same, with respect to revise code 2941.25. And though finding the offenses in this case to be allied offenses of similar import, the trial court while attempting to merge the offenses, sentenced Mr. Clay to concurrent sentences, i.e multiple punishments for offenses that were considered allied by the trial court, pursuant to R.C.2941.25.

The Summit County Ninth Appellate District, dismissing Mr. Clay's appeal claiming untimeliness, failed to address the merits of the appeal. And refused to reconsider it's decision to dismiss based upon untimeliness, denying his motion for reconsideration. However, other appellate courts have recently reaffirmed a line of decisions holding that a failure to raise an allied-offenses argument on direct appeal bars any attempt to raise an allied- offenses argument in a petition for postconviction relief. *Kelly*, 8th

Dist. No. 97673, 2012 Ohio 2930. See also *State v. Castro*, 8th Dist. No. 97451, 2012 Ohio 2206; *State v. Gresham*, 2012 Ohio 5079; *State v. Rice*, 6th Dist. 2012 Ohio 6250. The principles of res judicata barred the assertion of those claims in the petition for postconviction relief. A motion to correct an illegal sentence is "an appropriate vehicle for raising the claim that a sentence is facially illegal at any time." *Harris*, 132 Ohio St.3d 318, 2012 Ohio 1908, 972 N.E.2d 509, ¶ 17. "Where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence \*\*\*, such a motion is a petition for postconviction relief as defined in R.C. 2953.21.", *State v. Young*, 6th Dist. No. E-08-041, 2009 Ohio 1118, ¶ 16; *State v. Cale*, 11th Dist. No. 2000-L-034, 2001 Ohio App. LEXIS 1385, 2001 WL 285794 (Mar. 23, 2001).

However, the decision of the trial court, threatens the structure of the constitutional safeguard against Double Jeopardy, which the Ohio General Assembly, has encoded in R.C. 2941.25. By its ruling the trial court undermines legislative intent, ignores the plain meaning of the statute, and crates its own unsupported view of how the statute operates. Moreover, the trial court's decision establishes the illogical, and untenable rule that a court can ignore clearly established law set forth by the Supreme Court of Ohio, by imposing individual sentences for offense that are allied offenses of similar import. Finally, the decision of the trial court, overshadows the Ohio Supreme Courts opinion that judges are not imperial. That authority to sentence in criminal cases is limited by the people through the Ohio Constitution and by our legislators through the Revised Code. And, that judges have no inherent power to create sentences. But rather, judges are duty-bound to apply sentencing laws as they are written. That a judge must conform to the General Assembly's mandate. And although, the interests in finality of a sentence are important, they cannot trump the interests of justice, which require a judge follow the letter of the law in sentencing a defendant.

The implications of the decision of the trial court affects every future defendant in Ohio, and touch the lives of tens of thousands, post State vs. Johnson, incarcerated inmates in the state. The public's interest in the orderly operation of government performing their duties pursuant to established law is profoundly affected by a holding that is supereminent to the Constitutional safeguard against Double Jeopardy, and Due Process. Such a ruling would sabotage the integrity of the sentencing structure, and undermine the fundamental principle that the rule of law constrains government as well as citizens. Similarly, the public interest is affected if the plain meaning of the statute duly adopted by the General Assembly, can be judicially altered to subvert the legislature's intent that sentencing courts do not exceed, by device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the power to define crimes and prescribe punishments, be controlled by certain uniform principles.

Apart from these tribunal considerations, which make this case one of great public interest, the decision in like cases has broad general significance. Thousands, and thousands of citizens of Ohio, cycle through the criminal justice system. The General Assembly has recognized their right to Due Process, while having their case adjudicated, and ensuring that the proper punishment is imposed according to the law, has codified a clear and orderly process before imposing sentence. Under this codification, a tribunal can, determine whether offenses brought against a defendant are of similar import, (allied offenses). The resulting determination, is one in compliance with due process.

The decision of the trial court sets a precedent that would exclude correction of this matter. Under the ruling, defendants would be denied the right to redress one of the most significant issues substantially affecting their liberty. The result of this ruling would be preposterous. Trial courts finding offenses to be allied of similar import, but sentencing defendants to multiple sentences and

ordering the sentence to be served concurrently, irrespective of the plain wording of the statute, and unconstrained by the state, or federal constitution imposes significant danger to defendants.

Not surprisingly, the conclusion of the trial court is contrary to the statutory scheme of R.C. 2941.25 and to all legal authority. The Ohio Supreme Court, and courts throughout the country have endorsed the proposition that where a trial court imposes a sentence in direct contravention of a statute that sentence is a nullity if it is illegal for being at variance with the controlling sentencing statute. Similarly, the Ohio appellate courts have recognized the mandatory merging nature of the statute.

The judgment of the trial court has great general significance also because it undermines federal precedent, circumventing clearly established law. If trial courts had exclusive jurisdiction to impose sentences over what the legislature intended, the force and value of the justice system and the objectives of the system, would be severely compromised. Trial courts could negate at will, mandates set forth by the statute. Such a prospect is contrary to current case law and the stated purpose of separation of powers doctrine.

Finally, this case involves a substantial constitutional question. The decision offends Ohio's Constitutional scheme by promoting imperialism, i.e. by elevating judicial authority granted by the Ohio Constitution, Article IV Section 18 over the fundamental constitutional right to redress granted by Ohio Constitution Article I Section 16. The constitutional imbalance is contrary to this Court's holding in *Greer-Burger vs. Temesi*, 116 Ohio St. 3d 324; 879 N.E.2d 174.

Contrary to the holding in *Greer-Burger*, the lower court's interpretation to the mode of redress impairs the function of this Court to provide a legitimate means for litigants burdened with an illegal sentences. Subsequent, direct appeal, litigants must be afforded an opportunity to show that there is an objective bases for their claims of an illegal sentence. By allowing this per se standard to stand, would

undermine the right to petition for redress by permitting lower tribunals the right to disregard the legal authority of this Court. Thereby, misconstruing reasonably based motions filed in the court as petitions for post-convictions under 2953.21, and establishing its own pseudo supremacy, irrespective of this Court's Supremacy.

This Court's holding in Greer-Burger, emphasizes the significance of the Right to Redress; *The right to petition one's government for the redress \*\*\* is enshrined within the First Amendment to the United States Constitution. It reads, "Congress shall make no law \* \* \* abridging \* \* \* the right of the people \* \* \* to petition the Government for a redress." In our own jurisprudence, we recognize that the "ability to seek redress in the courts is a fundamental right, guaranteed by the due process provision of the Fourteenth Amendment to the United States Constitution, and restrictions on such a right require 'close scrutiny' by the judiciary." Krause v. State (1972), 31 Ohio St.2d 132, 150, 60 O.O.2d 100, 285 N.E.2d 736 (Brown, J., dissenting).*

If allowed to stand, the decision would ravage a litigants right to redress an illegal sentence pursuant to the remedy provided by this Court in the case of State vs. Fischer, 128 Ohio St.3d 92, 942 N.E.2d 332, and State vs. Harris, 132 Ohio St.3d 318; 972 N.E.2d 509, A *summo remdio ad inferiorem actionem non habetur regressus Neque auxilium, (from the highest remedy to an inferior action there is no recourse)*. Under the decision, the interests in finality of a sentence, and more importantly, the interests of justice, are compromised, further nurturing chaotic and uncertain sentencing results. The entire sentencing process under revise code 2941.25(A), designed to produce a single conviction for offenses of similar import, would be frustrated if decision of the court is permitted to stand.

In sum, this case puts in issue the essence of the right to redress and the fate of a litigant burdened by a illegal sentence, thereby affecting the felony sentencing scheme in Ohio. To promote the purpose and preserve the integrity of the Ohio Felony sentencing scheme, to assure uniform application of the

sentencing provisions, to promote orderly and justified sentences, and to remove impediments to the multiple count statute subsection (A), this Court must grant jurisdiction to hear this case and review the erroneous and dangerous decision of the trial court.

### **STATEMENT OF THE CASE AND FACTS**

The case arises from a frantic Michael Clay, calling 911 at approximately 9:39am on August 28, 2007 (T.R.839) in regards to his infant daughter being unresponsive. Having found her lying face down in her play pen, Michael attempts to perform CPR prior to making the call for help. He then calls out to his mother,(T.R.838-840) a registered nurse who is living in the home, to help with Makaila. (T.R.827-828) Shortly after the initial call for help, emergency workers arrive at the home and alleviate Ms. Cunningham of CPR. And begin their own resuscitative methods on Makaila.(T.R.840) Realizing the severity of the matter, the emergency workers transported Makaila to the hospital. Unfortunately in the end, the medical staff at the hospital could not revive Makaila. (T.R. 836-846)

Upon the families arrival from the hospital, Twinsburg police detectives were awaiting the family, and beginning to investigate Makaila's death. Cooperating with the detectives, Michael provides answers to their questions, and a written statement of that mornings events. That at approximately 9:00am, he got up from bed to make his eight month old daughter a bottle(T.R. 611)(T.R.837). Her mother Cindy Jones, having left for work one hour before, conveyed to Michael, while still sleep in bed, that she had not feed Makaila that morning, and that he would need to do so(T.R.377-378). Returning from preparing the bottle, Michael finds Makaila lying face down in her play pen.(T.R.611, 615) Further into their investigation, Twinsburg police detectives discover that prior to her death in the county of Portage. Where the family had resided before moving to Twinsburg, (Summit county). Makaila had suffered first degree burns while being bathed by Michael, Portage County Child Services was called and notified of

the matter. As well as the Portage County sheriff detectives. Upon a full investigation by both agencies, in tandem with Akron Children's hospital's, child abuse expert Dr. Stenier's medical findings that the burns were an accident. (T.R.543) No charges were ever filed, and the case was closed. Notwithstanding, Michael passed a polygraph in regards to the matter, further supporting the accidental nature of the matter. (T.R.604) Later, on or about the month of October, the coroners autopsy report is released, stating that the cause of death was blunt force impacts to the head, with brain and soft tissue injuries. Homicide. On December 9<sup>th</sup> 2006, Michael was arrested for the murder of Makaila Clay.

On the December 14<sup>th</sup> 2006, Mr. Clay was secretly indicted on several charges. On February 20<sup>th</sup> 2007, the indictment was supplemented by the state of Ohio. The matter proceeded to trial on the following charges.

1. Count 1- Murder, a special felony and a violation of R.C.2903.02(B);
2. Count 2- Endangering Children, a felony of the second degree and a violation of R.C. 2912.22(B)(1);
3. Count 3- Felonious assault, a felony of the second degree and a violation of R.C. 2903.11(A)(1);
4. Count 6- Endangering Children, a misdemeanor of the first degree a violation of R.C. 2919.22(A);
5. Count 7- Obstruction of official business a misdemeanor of the second degree and a violation of R.C. 2921.31(A);
6. Count 8- Aggravated Murder, a special felony and a violation of R.C. 2903.01(C);
7. Tampering with evidence, a felony of the third degree and a violation of R.C. 2931.12(A)(1);
8. Count 10- Endangering Children, a misdemeanor of the first degree and a violation of R.C. 2919.22(B)(1)

While the above mentioned charges were pending before the trial court, Mr. Clay remained incarcerated in the Summit County jail. On January 23, 2007, Mr. Clay maintained his innocence, and

he case proceeded to trial on August 18 2007. On August 17<sup>th</sup> 2007, a jury found Mr. Clay guilty of murder, a special felony, endangering children, and felonious assault. The trial court sentenced Mr. Clay on August 20, 2007, and ordered that the endangering children and felonious assault will merge. Sentencing Mr. Clay to 2 years on both offense, to be served concurrently to the sentence of 15 years to life for the offense of murder. (T.R.1049-1050) Mr. Clay timely appealed.

On March 14th 2013, Mr. Clay filed a motion to Correct a factually illegal sentence to the trial court, for failure to properly merge his sentence, thus producing an illegal sentence. The trial court denied Mr. Clay's motion adopting the state's argument that the motion is a petition for post conviction. He now appeals the denial of his motion.

#### **ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

#### **PROPOSITION OF LAW I: A MOTION TO CORRECT AN ILLEGAL SENTENCE IS THE PROPER REMEDY TO CORRECT AN ILLEGAL SENTENCE, AND SHOULD NOT BE CONSTRUED AS A PETITION FOR POST CONVICTION.**

Mr. Clay directs this Court's attention to the holding this Court made in the case of *State vs. Reynolds*, 79 Ohio St. 3d 158, In *Reynolds*, this Court considered a vaguely titled 'Motion to Correct or Vacate Sentence' and not a motion filed pursuant to a specific rule of criminal procedure. Since there was no controlling rule or statutory provision governing or providing for a Motion to Correct or Vacate Sentence, this Court looked at the contents of the defendant's motions and determined that substantively it was a petition for post conviction relief and then treated it as such". Cf *State vs. Bush*, 96 Ohio St.3d 235. However, in the instant matter, as cited on the cover page of his motion, Mr. Clay moved the trial court pursuant to Criminal Rule 47, i.e. where an application to the court for an order shall be by motion. In tandem with, the opinion of this Court in *State vs. Fischer*, 128 Ohio St.3d 92 ¶ 24, an opinion which was later extended to *State v. Harris*, 132 Ohio St. 3d 318, ¶ 17

In Harris, this Court stated, “we find the same logic in Fischer to be controlling when it comes to other statutorily mandatory terms.”

"A motion to correct an illegal sentence 'presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence.'" *Edwards v. State* (1996), 112 Nev. 704, 708, 918 P.2d 321, quoting *Allen v. United States* (D.C.1985), 495 A.2d 1145, 1149. It is, however, an appropriate vehicle for raising the claim that a sentence is facially illegal at any time. Id. The scope of relief based on a rule \* \* \* is likewise constrained to the narrow function of correcting only the illegal sentence. *Id.* 17

Though the illegal sentencing doctrine is uncommon to the legal landscape of this state, the doctrine in itself is not new. It has long been established that a sentence is a nullity, if it is illegal for being at variance, with the controlling sentencing statute. See *Bozza v. United States*, (1947) 330 U.S. 160, 166-67, 67 S. Ct. 645 (1947); Finding the doctrine persuasive, and having applied the doctrine, it can be presumed that this Court recognizes the critical aspect for relief in cases where a trial court imposes a sentence in direct contravention of a statute. And, has created an avenue for redress, with a “motion to correct an illegal sentence.”

The state, and trial court's, premeditated manipulation of Mr. Clay's motion, is nothing more than superfluous babble. As a petition for post-conviction, is set upon a claim of denial and/or infringement of the person's rights. See *State v. Reynolds*, 79 Ohio St. 3d 158; cf *Bush* *Id.* at 9. Mr. Clay has made no such assertion to the trial Court. Nor has he claimed that his sentence was void or voidable. But, simply implied that the sentence was illegal. Mr. Clay was aware of the fact, that a petition for post-conviction in regards to any such claim would be, ultimately, untimely, and relief would be denied. Therefore, his motion though titled with a slight difference, then what this Court has provide in Fischer and Harris

supra, should not have been misconstrued as a petition for post-conviction. Especially, when Mr. Clay clearly, expressed, by what criminal rule the motion was governed.

The denial of Mr. Clay's motion, speaks volumes, to the trial court's refusal to follow the legal premise of this Court, and the illegal sentencing doctrine. So then, the inquiry becomes;

- (1) Once a trial court makes the determination that allied offenses exist without merging thereafter, the allied offenses into a single conviction, is the trial court authorized to impose sentencing?
- (2) If it is found that the trial court does not have the authority to act, when imposing a sentence, can the error be raised by any party at any time?
- (3) If a trial court proceeds to sentencing irrespective of its finding of allied offenses, does the sentence constitute an illegal sentence, pursuant to the illegal sentencing doctrine? And if so, the constitutional question in this case is, what remedy (redress), is required to cure the admitted violation?

This is not a case, where Mr. Clay, is seeking for the first time, for a Court, to make findings, of whether or not, allied offenses, is an issue in this case. *The trial court has already made that determination. (T.R.1049-1050)* This is a case surrounding, specifically, the issue of sentencing. And therefore, Mr. Clay asserts that his motion to correct an illegal sentence, was properly submitted to the trial court, as it discussed the limited error, in sentencing only. And, not alleged errors in the proceedings, that occurred prior to the imposition of sentence, i.e. the findings of whether or not, allied offenses are an issue in the case.

In addition, the trial court contends that Mr. Clay's "claim either were or could have been raised on appeal and that they are now barred by res judicata. And, but for the constitutional error, no fact-finder would have found him guilty at trial of the offenses." First, it must be borne in mind that in such a situation, we are not dealing with the fundamental *fact-finding processes* inherent in the jury concept. The fact-finding processes of a jury, as to whether there has been proof beyond a reasonable doubt of the requisite facts encompassed in the crimes, would be exactly the same. Second, this Court provided,

"[W]here no statutory authority exists to support a judgment, res judicata does not act to bar a trial court from correcting the error." *Simpkins*, 117 Ohio St.3d 420, 2008 Ohio 1197, 884 N.E.2d 568, P 30 *State v. Ramey*, Franklin App. No. 06AP-245, 2006 Ohio 6429, P 12. See also *State v. Barnes*, Portage App. No. 2006-P-0089, 2007 Ohio 3362, P 49-51 ; *State v. Rodriguez* (1989), 65 Ohio App.3d 151, 154, 583 N.E.2d 347 "We reject the application of issue preclusion to sentences that do not comport with statutory mandates, as those sentences are illegal and subject to collateral attack or direct appeal at any time." *Fischer*, at ¶ 35 And third, Mr. Clay agrees with the trial court's assertion that this claim could have been raised on direct appeal. However, once again, the trial court fails to procure the details of this case. Which is, the objective factor, and external impediment, which prevented him from raising the matter on appeal. Clearly, by making, and relying on its prior statement, the trial court inadvertently admits that Mr. Clay received ineffective assistance of counsel on his direct appeal. And, further viewing the matter in it's totality, counsel was ineffective at sentencing, for failing to correct the trial court of its mistake, as it relates to merging the sentence. Therefore, Mr. Clay contends that he should not be procedurally defaulted from bring this matter before the court. The procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State. *Murray v. Carrier*, 477 U.S., at 488; 106 S. Ct. 2639. In other words, it is not the gravity of the attorney's error that matters, but that it constitutes a violation of Mr. Clay's right to counsel, so that the error must be seen as an external factor, i. e., "imputed to the State." See also *Evitts v. Lucey*, 469 U.S. 387, 396, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985); cf *Coleman v. Thompson*, 501 U.S. 722; 111 S. Ct. 2546

Therefore, Mr. Clay request that this Court provide clarification of whether, once a trial court makes the determination that allied offenses exist without merging thereafter, the allied offenses into a single

conviction, is the trial court authorized to impose sentencing? And, if it is found that the trial court does not have the authority to act when imposing a sentence can the error be raised by any party at any time? And Lastly, does an error in sentencing for allied offense such as the error in this case, constitute an illegal sentence, pursuant to the illegal sentencing doctrine. And, if a motion to correct an illegal sentence pursuant to this Court's opinion, is an appropriate remedy to cure the constitutional violation?

**PROPOSITION OF LAW II: A MERGED CONVICTION FOR PURPOSES OF R.C. 2941.25(A) IS NOT SYNONYMOUS WITH CONCURRENT SENTENCING, AND THEREFORE THE IMPOSITION OF A CONCURRENT SENTENCE FOR PURPOSES OF R.C. 2941.25(A) PRODUCES AN ILLEGAL SENTENCE .**

Merger, dealing with allied offenses is mandatory for sentencing purposes under the Multiple Count statute, R.C.2941.25(A). The statutory scheme of the Multiple Count statute, makes this clear, therefore a court has a duty to merge allied offenses of similar import.

R.C. 2941.25(A) sets forth the findings the trial court must make prior to sentencing a defendant for the offenses charged against him. Under that statute, when a trial court finds offenses to be allied of similar import, the defendant may be convicted of only one offense, (merge the convictions).

R.C. 2941.25 (B), which provides:

Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

Clear and concise, the revise code codifies a distinction between offenses of similar, and dissimilar import, as well as the duty of the trial court based upon their findings. The issue presented today, is whether the paradox created by the trial court, at Mr. Clay's sentencing hearing, produce an illegal sentence. When the trial court fails to procure the difference between merging and concurrent sentencing.

Here, Mr. Clay is not asserting to this court, that the trial court failed to consider if allied offenses was an issue in this case. The trial court has already made that determination, as reflected in the record;

**COUNSEL:** "I believe the law defines the felonious assault and the child endangering as part of the murder as allied offenses of similar import, at least they merge according to State, I believe Cherry, the Ninth District Court of Appeals. I believe there is one sentence to provide Mr. Clay as a result of the jury's verdict." (T.R.1048)

**COURT:** "The court will merge the endangering children, and felonious assault. I will give you two-year sentence on each one to run concurrently with the murder charge." (T.R. 1049-1050)

With no objection from the State of Ohio, their tacitness reflects their concurrence to not only defense counsel's assertion to the sentences being merge as allied offenses. But, also to the trial court's ruling, to merge the sentence. Moreover, Mr. Clay illustrates the major difference between merger, and concurrent sentencing.

**CONCURRENT:** The imposition of a concurrent sentence normally means that the sentence being imposed is to run concurrently with the undischarged portion of the previously imposed sentence." (Emphasis sic.) *State ex rel. Gray v. Karnes*, 10th Dist. No. 10AP-789, 2010 Ohio 5364, ¶ 5, quoting *State v. Bellamy*, 181 Ohio App.3d 210, 2009 Ohio 888, 908 N.E.2d 522, quoting *Bianco v. Minor* (June 6, 2003), M.D.Pa. No. Civ.A. 303CV0913, 2003 U.S. Dist. LEXIS 12596. Accordingly, "[t]he fact that sentences run concurrently merely means that the prisoner is given the privilege of serving each day a portion of each sentence. However, if the sentences which are to run concurrently are different lengths, the prisoner cannot be discharged until he has served the longest sentence." *Brinklow v. Riveland* (Colo., 1989), 773 P.2d 517.

**MERGER:** Merge' in criminal law is defined as, '[t]he absorption of a lesser included offense into a more serious offense when a person is charged with both crimes, so that the person is not subject to double jeopardy.' Black's Law Dictionary (8 Ed. Rev.2004) 1009"). In *State vs. Botta*, (1971), 27 Ohio

St.2d 196, this Court describes the concept of merger as "the penal philosophy that a major crime often includes as inherent therein the component elements of other crimes and that these component elements, in legal effect, are merged in the major crime. Simply put, as a matter of law, once the jury returned its verdicts, the court could sentence only as to one offense and would have to dismiss the other. Id. Cf *State vs. Johnson*, 128 Ohio St.3d 153 ¶ 10

The difference between concurrent sentencing and merger is conspicuously clear, with concurrent sentencing, there are multiple sentences, and the prisoner is given the privilege of serving each day a portion of each sentence. With merger, there is only one sentence, period. Here, the trial court created an illegal sentence, when it violated, the mandate of the revise code, imposing sentences on all three counts, which it subsequently, found to be allied offenses of similar import. See (T.R. 1049-1050) Because the trial court found that the offenses were allied, a step that occurred prior to imposing a sentence, the trial court could only sentence Mr. Clay on the offense selected by the State. *State v. Damron*, 129 Ohio St. 3d 86 at ¶ 17. The trial court apparently attempted to achieve this result when it ordered concurrent sentences. This sentencing scheme, however, does not negate the error caused by imposing sentences on each count. It is well established that ordering sentences for allied offenses to run concurrently fails to satisfy the merger doctrine because the trial court has no authority to enter a sentence on any charge other than the one selected by the state for sentencing. *Damron* at ¶ 17. cf *State v. Jones*, 2012 Ohio 2694 ¶ 9 The imposition of concurrent sentences is not the equivalent of merging allied offenses. Id. at 17

With respect to 2941.25, even when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law. *State v. Gibson*, Cuyahoga App. No. 92275, 2009 Ohio 4984, P 29; *State v. Coffey*, Miami App. No. 2006 CA 6, 2007 Ohio 21, P 14; *State v.*

*Thompson* (July 23, 1999), Washington App. No 98 CA 10, 1999 Ohio App. LEXIS 3568, 1999 WL 552646, \*7; *State v. Gilmore, Hamilton* App. Nos. C-070521 and C-070522, 2008 Ohio 3475, P 17. Cf *State vs. Underwood* 124 Ohio St. 3d 365 ¶ 31; *State v. Lozada*, (8<sup>th</sup> Dist.) 2012 Ohio 8 ¶ 6 And, it is prejudicial plain error to impose multiple sentences. *State v. Burl* (Dec. 16, 1992), 1992 WL 380020; *State v. Brown* (Mar. 18, 1992), 1992 WL 52716; The prejudice is a "criminal record [that] will reveal convictions for [three] felonies" when the defendant has committed only one criminal act. *State v. Burl* (Dec. 16, 1992), 1992 WL 380020. Notwithstanding, Mr. Clay suffers an additional prejudice, by way of post release control sanctions, had the trial court properly merged the sentences according to law. Post release control wouldn't apply, as murder is a unclassified felony. See *State v. Clark*, 119 Ohio St. 3d 239 ¶ 35-36; *State v. Gordon*, (9<sup>th</sup> Dist) 2010 Ohio 6308 [\*P7]; cf *State v. Davis*, 2011 Ohio 2526 [\*P12]

So, the constitutional question in this matter, is once the trial court finds offenses to be allied, but fails to properly merge the sentence, and orders concurrent sentences. Does the sentence of the court, constitute an illegal sentence, pursuant to the illegal sentencing doctrine?

Furthermore, "When a legislature signals its intent to either prohibit or permit cumulative punishments for conduct that may qualify as two crimes . . . the legislature's expressed intent is dispositive." *State v. Rance*, 85 Ohio St. 3d 632, 635, 1999 Ohio 291, 710 N.E.2d 699 (1999) (citing *Ohio v. Johnson*, 467 U.S. 493, 499, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984), overruled on other grounds by *State v. Johnson*, 128 Ohio St. 3d 153, 161, 2010 Ohio 6314, 942 N.E.2d 1061 (2010)). Therefore, a violation of Ohio Revised Code § 2941.25 is a violation of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. *Hunter*, 459 U.S. At 366. citing *Walters v. Sheets*, 2011 U.S. Dist. LEXIS 111631

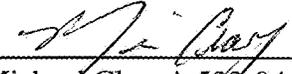
The Double Jeopardy Clause protects against successive prosecutions and against multiple punishments for the same offense. Thus, to ensure that there are not improper cumulative punishments for allied offenses, courts must be cognizant that R.C. 2941.25(A) requires that "the trial court effects the merger at sentencing." *State v. Whitfield*, 124 Ohio St. 3d 319 *State v. Gapen*, 104 Ohio St.3d 358, 2004 Ohio 6548, 819 N.E.2d 1047, P 135. See also *State v. Palmer* (1997), 80 Ohio St.3d 543, 572, 1997 Ohio 312, 687 N.E.2d 685

Therefore, Mr. Clay propounds, that the trial courts' failure to properly merge his sentence, resulted in a decision that was contrary to, clearly-established controlling Supreme Court precedents pertaining to double jeopardy, "multiple punishment". As well as, clearly-established controlling Ohio Supreme Court precedent. And it is paramount in the interest of fairness and justice that he be remanded to the trial court to have the sentence properly merged.

**CONCLUSION:**

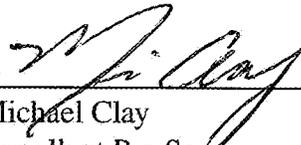
For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant request that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

  
\_\_\_\_\_  
Michael Clay, A 533-044  
Appellant Pro Se.

**CERTIFICATE OF SERVICE**

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. Mail to the appellee, Sherri Bevan Walsh, and Richard Kasay Assistant prosecuting attorney, Summit County Safety Building 53 University Avenue, 6<sup>th</sup> Floor Akron, Ohio 44308.

  
\_\_\_\_\_  
Michael Clay  
Appellant Pro Se.

STATE OF OHIO )  
COUNTY OF SUMMIT )

COURT OF APPEALS  
DANIEL M. [unclear]  
)ss:  
2013 MAY 15 PM 2: 14

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

SUMMIT COUNTY  
CLERK OF COURTS

C.A. No. 26891

Appellee

v.

MICHAEL F. CLAY

Appellant

JOURNAL ENTRY

The State of Ohio has moved to dismiss this attempted appeal as untimely. Appellant has responded in opposition. Upon review, the motion is granted, and the attempted appeal is dismissed.

Under App.R. 4(A), a notice of appeal must be filed "within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure." If a notice of appeal is not filed in accordance with App.R. 4(A), this court does not have jurisdiction to consider the appeal. *See Transamerica Ins. Co. v. Nolan*, 72 Ohio St.3d 320 (1995), syllabus.

Here, the trial court denied appellant's petition for post-conviction relief on March 23, 2013. Appellant did not file his notice of appeal until April 23, 2013. Because the notice of appeal was not filed in accordance with App.R. 4(A), this court is without jurisdiction to consider the attempted appeal.

The attempted appeal is dismissed. Costs are taxed to appellant.

The clerk of courts is ordered to mail a notice of entry of this judgment to the parties and make a notation of the mailing in the docket, pursuant to App.R. 30, and to provide a

certified copy of the order to the clerk of the trial court. The clerk of the trial court is ordered to provide a copy of this order to the judge who presided over the trial court action.

*Carla Moore*

Judge

Concur:

Whitmore, J.

Hensal, J.

DANIEL M. HERRIGAN

2013 MAR 22 AM 10:40

SUMMIT COUNTY  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

STATE OF OHIO,	)	CASE NO. CR 2006 12 4417
	)	
Plaintiff,	)	JUDGE TAMMY O'BRIEN
	)	
VS.	)	
	)	
MICHAEL CLAY,	)	<b><u>ORDER</u></b>
	)	
Defendant.	)	
	)	

This matter comes before the Court on the Motion to Correct a Factually Illegal Sentence filed *pro se* by Defendant Michael Clay ("Defendant") on March 14, 2013. In his Motion, Defendant argues that his August 20, 2007 sentence is "factually illegal." Defendant specifically asserts that "[t]he trial court misapplies the law, when superimposing it's own sentence in place of statutory law. An act which is also, contrary to clearly established federal law." See Defendant's Motion to Correct a Factually Illegal Sentence at 2.

In response to Defendant's Motion, the State filed a Motion to Dismiss on March 19, 2013. The State argues that Defendant's March 14, 2013 Motion is an untimely petition for post-conviction relief and, like his first two motions, must be denied. The State asserts that Defendant's "motion is a petition for post-conviction relief, R.C. 2953.21(A)(1)(a), and it is untimely and successive." See State's Motion to Dismiss at 2.

The Court has considered the parties' arguments, the facts of this matter, and applicable law. Upon due consideration, the Court DENIES Defendant's Motion to Correct a Factually Illegal Sentence and GRANTS the State's Motion to Dismiss.

**ANALYSIS**

A jury found Defendant guilty on August 20, 2007 of murder, felonious assault, and child endangering. See August 21, 2007 Journal Entry. After his convictions, the Court sentenced Defendant to fifteen years to life in prison. *Id.* The Court of Appeals affirmed in *State v. Clay*, 9th Dist. No.23889, 2008-Ohio-2158.

Thereafter, an untimely petition for post-conviction relief was denied on November 24, 2008. A second petition was denied on January 7, 2009.

Due to a post-release control issue, Defendant was resentenced on or about December 18, 2010. Defendant's original sentence of fifteen (15) years to life, plus post-release control, remains. See *State v. Clay*, 9th Dist. No.25743, 2011-Ohio-5370. Now before the Court is Defendant's third petition for post-conviction relief.

Defendant argues in his Motion to Correct a Factually Illegal Sentence that he was sentenced for allied offenses under R.C. 2941.25. As set forth in the State's Motion, R.C. 2941.25 is grounded in the Double Jeopardy Clause. See *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶45. Accordingly, Defendant's Motion is a petition for post-conviction relief, pursuant to R.C. 2953.21(A)(1)(a), and is untimely and successive.

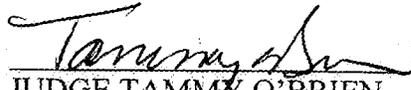
The Ninth District held in *State v. Williams*, 9th Dist. No.25879, 2011-Ohio-6141, that allied offense claims are subject to 2953.23. The Ninth District has also held post *Johnson* that a trial court does not have authority to merge sentences in a post-release control sentencing governed by *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332. The initial sentence, in which the sentences were not merged, stands. See *State v. Martin*, 9th Dist. No.25615, 2011-Ohio-5634. See also *State v. Yeager*, 9th Dist. No.24125, 2010-Ohio-3848, ¶15. The failure to merge allied offenses or specifications does not result in a void sentence. See *State v. Abuhilwa*, 9th Dist. No.25300, 2010-Ohio-5997, ¶ 8. The Court does not have authority to now merge Defendant's sentences.

The Court also finds that Defendant's present claims either were or could have been raised on appeal and that they are now barred by *res judicata*. It is further found that Defendant cannot prevail under R.C. 2953.23 because he cannot show that, but for constitutional error, no fact-finder would have found him guilty at trial of the offenses. R.C. 2953.23(A)(1)(b). Allied offenses are a sentencing and not a guilt consideration. The jury may return verdicts of guilt on allied offenses but there can only be one sentence. See *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, paragraph three of the syllabus; ¶¶12, 17.

### CONCLUSION

WHEREFORE for the reasons set forth above and upon due consideration, the Court DENIES Defendant's Motion to Correct a Factually Illegal Sentence and GRANTS the State's Motion to Dismiss. Costs shall be taxed to Defendant.

IT IS SO ORDERED.

  
\_\_\_\_\_  
JUDGE TAMMY O'BRIEN

Assistant Prosecuting Attorney Richard S. Kasay  
Michael Clay, Defendant, #A 533-044, Mansfield Correctional Inst., P.O. Box 788, Mansfield  
OH 44901-0788