ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No.: 15-0419
Plaintiff-Appellee,	:	
	:	On Appeal from the
-vs-	:	Lawrence County Court of Appeals
	:	Fourth Appellate District
DANA K. CLAY,	:	Court of Appeals
Defendant-Appellant.	:	Case No. 14CA34
Pro se.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF

DEFENDANT-APPELLANT DANA CLAY

Pro Se Appellant:

Dana Clay # A 614 375

N.C.I. D-1

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EXPLANATION OF WHY THIS CASE PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION AND MATTERS OF PUBLIC OR GREAT GENERAL INTEREST

This Court should accept jurisdiction to address both a substantial constitutional question and matters of public or great general interest.

The State of Ohio has enjoyed unequal access to trial and appellate courts to vacate unlawful sentences and to re-sentence offenders who are still serving their prison terms for those offenses even in cases in which the State had successfully argued on appeal that the same sentence was "lawful" for almost a decade now. Since the General Assembly enacted O.R.C. 2929.191 Ohio's Prosecutors have had trial courts re-sentence tens of thousands of offenders by asserting that "It is well settled that an unlawful sentence is void and must be vacated", as presented in and affirmed on appeal in **State v. Singletone, 2009-Ohio 6434, 2009WL 4932715, and State v. Simpkins, 2008, 117 Ohio St.3d 470, 884 N.E.2d 568,** "because a sentence that does not conform to statutory [or constitutionally] mandated [laws and rights], ... is a nullity and void,"...

However, in tens of thousands of cases in which criminal defendants have presented and sought to have unlawful sentences vacated and to enjoy the same due process and meaningful access to the courts for a remedy, all but a few criminal defendants|| even though they were still serving these unlawful and unconstitutional sentences, were not afforded the same and equal protection and benefits (as is required by the Due Process and Equal Protection Clauses in Ohio's and the U.S. Constitutions; **U.S. Const. 5th & 14th Amendments, Ohio Const. Art. I, Section 2, 16).** And under Ohio's current and ongoing practices these offenders, like this Appellant have not been afforded Equal Protection and benefit, have not had meaningful access to the courts, Have not enjoyed the right to a remedy from violations of Due Process and Constitutional rights.

Under Ohio's current practices the State is enjoying the right to remedy offenders' sentences that they desire to modify with additional time or PRC, by petitioning the State courts and asserting that said sentences are unlawful and are therefore void. However, in violation of due process and the Equal Protection Clauses, this Appellant and thousands of other similarly situated offenders have been denied even the basic meaningful access to courts to have unlawful sentences vacated. See: **Frank v. Mongum, 237 U.S. 309, 335 (1915); New York ex rel. Whitman v. Wilson, 318 U.S. 688, 690 (1943).**

In this case the Appellant has sought a lawful remedy via the lower courts to no avail. And any law relied upon as grounds to deny this equal protection cannot stand when it directly denied a criminal defendant equal protection and benefit. Closing the doors to all the people on one side of the battle lines while the other party (State) enjoys doors that are not just open - but eager to provide meaningful access and full remedies from unlawful and void sentences is a matter of such great importance and general interest in Ohio that this Court should accept jurisdiction in this and all similar cases to fully litigate the issues in the State's highest court.

In this case, the Appellant has a valid claim of serving an unlawful sentence. A sentence that violates the Appellant's Double Jeopardy rights by ordering consecutive sentences and in violation of the Appellant's Sixth Amendment rights when the trial court failed to merge these allied offenses and prejudiced the Appellant with consecutive prison terms that increased his aggregate sentence.

See Ohio Supreme Court's admission that Ohio's practices prior to 2011 violated Double Jeopardy rights, as were violated in this case, **State v. Johnson, 128 Oh. St.3d 554, 559, 748 N.E. 2d 1061;** and prodigy

As well as U.S. Supreme Court findings of trial courts making "additional fact findings" to increase punishments, are violations of Sixth Amendment rights, **Apprendi v. New Jersey, (2000) 530 U.S. 466; Blakely v. Washington (2005) 542 U.S. 296; United States v. Booker (2005) 542 U.S. 296; Oregon v. Ice (2009) 555 U.S. 160.**

As this case presents a collection of all these important issues - this Court should accept jurisdiction.

APPELLANT'S STATEMENT OF CASE AND FACTS

Pro Se Appellant, Dana Clay was indicted in Lawrence County case number: 11CR000138 on July 11, 2011 on 3 counts of Felonious assault with firearm specification (F-2) for an incident on his property in which he was convicted at a jury trial on a single date and time - with a single shot (muzzle loader) into a vehicle with three persons present. Although none were hit by the bullet, all three asserted at trial that they suffered minor cuts from the windshield when the bullets truck the windshield. (Clay asserts that the entire matter was an accident - that the weapon discharged when he tripped over his dog.)

Dana Clay is not educated in any matters of law and this was and is his first serious offense and legal matter. Of note is the fact that throughout the entire trial and appellate process he has not been afforded the effective assistance of counsel, and has in fact been lied to and misled by various attorneys appointed to represent him. These acts have prejudice him in that he has NOT been informed of their actions and not received briefs or even rulings and Entries - and was lied to about filing his appeals.

The jury trial resulted in Clay being convicted of all 3 counts with 3 firearm specifications (as each count carried one such charge). The jury verdicts are entered in the record on 10/07/2011.

On 10/20/11 the trial court records record his sentencing for a total of 15 years in prison. In this first sentencing the trial court found (on its own) that the defendant serve two (2) years for each felonious assault consecutive to each other- plus three(3) years for each firearm specification also consecutive to each other and consecutive to the other sentences.

Appellant counsel was appointed - but failed to file the proper appeal - and new counsel was appointed - and also failed to file timely and orders were issued to each of these two appointed lawyers by the Court of Appeals. Both also

failed to communicate and be honest with this Appellant.

On Appeal, case number: 11CA23, counsel's appeal brief was poorly constructed. The Fourth Appellate District's eventual Decision is full of frustration and language that shows their having to reach deep to understand what counsel was arguing on each issue. Acting Sua Sponte, on an issue that counsel did not raise nor properly argue - that Court in its Decision, (entered on 10/09/13) , that because the "indictment did not comply with R.C. 2941.145, that statute did not authorize the court to impose three-year prison terms upon Clay." for the three firearm specifications. Thus, the ORDER on remand was to vacate those three 3-year terms and to impose the lessor felony 1-year terms for each of these three.

Noting that on March 21, 2012 Clay had to file a "Motion to Remove Appointed Counsel and Appoint New Counsel" with the courts due to the above mentioned issues and lack of communication. See also: MAGISTRATE'S ORDER 11CA23 - dated: Sep. 10, 2012 for failure to file briefs and to comply with the Court's Orders. The Court therein removed counsel, Aaron M. McHenry and appointed Attorney David Sams of West Jefferson.

The trial court vacated these three 3-year prison terms and imposed three 1-year terms for these three counts, and thereby reduced the aggregate prison term from 15 years to 9 years on December 13, 2013. At that time, the Court again gave the appellate rights notice and counsel - having NEVER provided any rulings, briefs, decisions, to Clay - stated he would file another Notice of Appeal over the three felonious assault charges not being merged.

Counsel Sams never did perform this task and continued to inform Clay's family that he was filing this Notice. Eventually, Clay realized that this second appeal may not have been filed. He wrote the clerk and after two or three requests received the Docket Sheet., But Never received a Judgment Entry for this date.

Clay, acting pro se from prison, motioned the trial court in July/August, 2014 to receive a copy of the Judgment Entry so that he could file his own delayed appeal. The trial court refused to acknowledge and provide this. (Motion was denied after he filed his Notice of Appeal/ Delayed Appeal application.)

Clay's Delayed Appeal was filed in the Fourth District on or about October 21, 2014 - presenting his right to Equal Protection to attack and seek a remedy from the unlawful and therefore void sentences of three 2-year terms for the not merged allied offenses of felonious assault.

That Application- was denied by an Entry, "DECISION AND JUDGMENT ENTRY" on the merits (noting that the Court of Appeals first granted his motion to submit the court's docket sheet in lieu of judgment - never provided by the trial court), of his DELAY on Feb. 2, 2015.

Again, the actual merits of the violations of double jeopardy and due process rights have not been addressed - as the first appellate brief (case 11CA23 not this case 14CA34) were so poorly presented by appointed counsel that the Fourth District did not provide a fair and full or meaningful review on the issue itself.

Herein, the pro se Appellant submits this timely Notice of Appeal and ask the Court to accept jurisdiction.

ARUMENT

PROPOSITION OF LAW ONE

ALL CRIMINAL DEFENDANTS ARE TO BE AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS OF LAW, MEANINGFUL ACCESS TO THE COURT FOR RELIEF FROM INJURIES AND EQUAL PROTECTION AND BENEFITS.

The Sixth Amendment to the U.S. Constitution provides that every criminal defendant at every stage of his or her proceedings enjoy the benefit of effective assistance of counsel. And when counsel's performance falls short of this - it is said to prejudice of the defendant - if, as it has here - prejudiced and harmed him with an increased prison term. Such violations of Due Process require the State's lower courts to afford the injured defendant meaningful access to the courts to litigate their issues and to seek and obtain full and fair litigation and enforcement of his or her's constitutional rights.

SEE: Avery v. Alabama (1940), 308 U.S. 444, 446; Strickland v. Washington (1984) 466 U.S. 668 , 685; Blockburger v. U.S. (1932) 284 U.S. 299; prejudice presumed in United States v. Cronic (1984), 466 U.S. 648; on violation of Double Jeopardy rights- and increased punishment: State v. Fields (1994), 97 Ohio App.3d 337 664 N.E.2d 866 and U.S. v. Davis (6th Cir. 2002) 306 F.3d 398; and on appeal: Roe v. Flores-Ortega (2000) 528 U.S. 470

On Equal Protection, ; Meaningful Access and Review; Due Process see: Frank v. Mongum (1915) 237 U.S. 309 335; New York ex rel. Whitman v. Wilson (1943) 318 U.S. 688 690; Ross v. Moffitt (1974) 417 U.S. 600 ; Galloway v. Stephenson (M.D. N.C. 1981) 510 F.Supp. 840-842; Evitts v. Lucey (1985) 469 U.S. 387 at 402-405;

Younger v. Ragan (1949) 337 U.S. 235 - failure to so provide an effective remedy foc a violation of the U.S. Constitution is, in itself a violation of due process.

In the case-at-bar the Appellant has suffered from these failures and

violations at the lower courts and is now entitled to a meaningful review in this - the State's highest court.

PROPOSITION OF LAW TWO

ALL CRIMINAL DEFENDANTS AND THIS APPELLANT MUST HAVE A FAIR AND EQUAL RIGHT TO VACATE UNLAWFUL SENTENCES AS THEY ARE VOID. AND AS ALL SENTENCES IMPOSED IN VIOLATION OF THE CONSTITUTIONS ARE UNLAWFUL THE COURTS MUST PROVIDE REMEDY TO VOID THESE UNLAWFUL SENTENCES.

In the case-at-bar the Appellant's sentence was imposed in violation of the Double Jeopardy Clause and therefore violates due process and is therefore void and must be vacated.

The Appellant's sentence violates Double Jeopardy as the sentences and offenses were a single act and require a single punishment not the multiple sentences he has been subjected to. **State v. Johnson, supra.**

Additionally the trial court violated the Appellant's Sixth Amendment Rights when it engaged in additional fact findings not found by the jury at trial - to increase his sentence and punishment. See **Apprendi, Blakely, Booker, Ice supras.**

The trial courts and courts of appeals must be open to the injured Appellant and provide meaningful review on the merits to address these unlawful sentences as long as he is still serving that sentence. **See: State v. Garretson (2000) 140 Ohio App.3d 554 559 748 N.E.2d 560; Jones v. United States (1999) 526 U.S. 227.**

CONCLUSION

For the reasons set forth herein, Defendant-Appellant respectfully requests this Court to accept jurisdiction and decide this appeal on its merits.

Dana K. Clay Se Appellant

Dana Clay

N.C.I. D-1

15708 McConnelsville Rd.

Caldwell, Ohio 43724

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the foregoing Memorandum In Support of Jurisdiction upon the:

Lawrence County Prosecutor

At:

by U. Mail, postage paid this 9th day of March 2015

Signed: Dana K. Clay Pro Se

Dana Clay

APPENDIX

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COURT OF APPEALS

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

2015 FEB -2 PM 2:11
MIKE PATTERSON
CLERK OF COURTS
LAWRENCE COUNTY

State of Ohio,	:	Case No. 14CA34
Plaintiff-Appellee,	:	
v.	:	
Dana K. Clay,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

Appellant Dana K. Clay has filed a motion to comply with deficiency notice to submit court's docket sheet in lieu of judgment. Upon consideration, the Court **GRANTS** this motion. Clay has also filed a motion for leave to file a delayed appeal, pursuant to App.R. 5(A). For the reasons that follow, we **DENY** the motion. We also **DENY** any other pending motions as moot.

A jury found Clay guilty of three counts of felonious assault, each with a firearm specification. The Lawrence County Court of Common Pleas sentenced Clay to fifteen years in prison: three years for each firearm specification, to be served consecutively to one another; and two years for each felonious assault conviction, to be served consecutively to one another and consecutively to the firearm specification sentences. Clay timely appealed his convictions and sentence. This Court overruled the assigned errors but sua sponte recognized error in the trial court's sentencing Clay to three-year prison terms for the firearm specifications. We vacated the trial court's judgment sentencing Clay to mandatory three-year terms for the firearm specifications, directed that one-year sentences for the firearm specifications should be imposed, and remanded that portion of the trial court's judgment for re-sentencing. *State v. Clay*, 4th Dist. Lawrence No. 11CA23, 2013-Ohio-4649.

The trial court re-sentenced Clay to a one-year sentence on each gun specification, consecutive to each other and to the sentences on each of the three counts of felonious assault, for a total of nine years of incarceration. The sentencing entry was journalized on December 13, 2013. Clay filed a motion for leave to file delayed appeal, pursuant to App.R. 5(A), on October 21, 2014; however, the notice of appeal was deficient because a copy of the judgment entry being appealed was not attached. The Clerk of Courts issued a deficiency notice and, when Clay still did not file the entry, this Court issued a Magistrate's Order directing Clay to file a copy of the judgment or order being appealed as required by Loc.R.1 or the appeal would be dismissed.

In response to this order, Clay filed a motion to comply with deficiency notice to submit court's docket sheet in lieu of judgment. In this motion, Clay states that his counsel never sent him a copy of the re-sentencing entry and - despite making several requests for the entry to the trial court – he had not been able to obtain a copy. Thereafter, the Clerk of Courts filed a copy of the judgment entry of December 13, 2013 in this appeal so the deficiency is now corrected. Accordingly, the Court grants the motion to comply with deficiency notice. We now turn to the motion for leave to file delayed appeal.

App.R. 5(A), which governs appeals by leave of court, states:

> (1) After the expiration of the thirty day period provided by App.R. 4(A) for the filing of a notice of appeal as of right, an appeal may be taken by a defendant with leave of court to which the appeal is taken in the following classes of cases:
>
> (a) Criminal proceedings;
>
> ***
>
> (2) A motion for leave to appeal shall be filed with the court of appeals and shall set forth the reasons for the failure of the appellant to perfect an appeal as of right. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App.R. 3 and shall filea copy of the notice of appeal in the court of appeals. ***

A delayed appeal should be granted only where it appears on the face of the record that denying leave would result in a miscarriage of justice. *State v. Bednarik*, 101 Ohio App. 339, 123 N.E.2d 31 (7th Dist.1954). Whether to grant or refuse leave to file a delayed appeal is within the sound discretion of the appellate court. See, e.g., *State v. Fisher*, 35 Ohio St.3d 22, 26, 517 N.E.2d 911 (1988). When requesting leave to file a delayed appeal, the movant is required to explain his failure to perfect a timely appeal so this court can determine whether there was sufficient justification for the failure to do so. In support of his motion, Clay states that his appointed counsel failed to file a timely notice of appeal after the re-sentencing despite telling Clay in court that he would file the appeal. Clay further states that, if allowed to appeal, he would challenge his conviction for multiple counts of felonious assault and firearm specifications based on a single shot and weapon in violation of his statutory and due process rights.

We conclude that Clay has not presented an adequate explanation to justify granting him leave to file a delayed appeal over nine months after his re-sentencing. Clay contends that his appointed counsel indicated that he would file the notice of appeal but failed to file it. However, the re-sentencing entry specifically states that Clay was advised of his right to appeal at no cost and to obtain appointed counsel but "[a]s a result of these admonishments and the Defendant's replies thereto, appellate counsel was not requested nor appointed." Therefore, the re-sentencing entry refutes Clay's contention that counsel was to file an appeal. Moreover, Clay does not explain why – if he had in fact asked counsel to file an appeal – it took him over nine months to determine the appeal had not been filed and file a motion for delayed appeal.

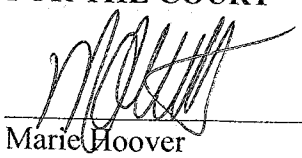
Additionally, Clay has not demonstrated that the denial of a delayed appeal will result in a miscarriage of justice. Clay asserts that, if allowed to appeal, he would challenge his conviction for multiple counts of felonious assault and firearm specifications based on a single act.

However, in his initial appeal, Clay argued that the trial court should have merged the three felonious assault convictions because each conviction arose from a single act. We rejected this argument, recognizing that R.C. 2941.25 authorized the trial court to punish Clay for each count because the single act injured three individuals. *Id.* at ¶¶ 84-85. Accordingly, Clay is barred from re-arguing this assignment of error under the doctrine of res judicata. *State v. Abernathy,* 4th Dist. Scioto No. 10CA3341, 2011-Ohio-1056, at ¶ 14 ("The doctrine of res judicata bars an issue from being raised in a subsequent appeal if it was also raised, and disposed of on the merits, in a previous appeal.") And, as previously discussed, our earlier opinion already examined and corrected the sentence regarding the firearm specifications. Because Clay could not raise this issue and the trial court's re-sentencing merely imposed a sentence in compliance with our earlier decision, no miscarriage of justice will result from our denial of this delayed appeal.

Accordingly, we **GRANT** the motion to comply with deficiency notice to submit court's docket sheet in lieu of judgment. However, we **DENY** the motion for leave to file delayed appeal, pursuant to App.R. 5(A). We also **DENY** any other pending motions as **MOOT.** The clerk shall serve a copy of this order on appellant by certified mail and on all counsel of record at their last known addresses by ordinary mail. **IT IS SO ORDERED.**

Harsha, J. & Abele, J.: Concur.

FOR THE COURT



Marie Hoover
Presiding Judge