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

In the United States and Ohio Constitutions violated when a trial court fails to comport to the statutory sentencing mandates set forth in Ohio Revised Code §2941.25 when sentencing an offender to separate sentences for offenses that arose out of the same set of facts and circumstances.

Robbery and Burglary are potentially allied offenses of similar import. Where an individual's immediate motive involves the commission of one offense, but in the course of committing that crime he must, a priori, commit another, then he may well possess but a single animus, and in that event may be convicted of only one crime.

When a defendant enters a guilty plea to multiple offenses of similar import and the trial court accepts the plea, the trial court must conduct a hearing before entering judgment of conviction and make a determination as to whether there are allied offenses of similar import committed with a single animus; whether there are offenses committed separately or with a separate animus as to each offense. If the court finds the offenses to be allied offenses, the court may enter a judgment of conviction for each offense.

The failure to hold a hearing to determine the applicability of the allied offense statute is plain error. If the trial judge fails to conduct the proper hearing, the judgment of conviction should be reversed, and the matter remanded, but only for the limited purpose of conducting a proper hearing to determine whether the defendant should be sentenced for one or all of the offenses to which he pled.

What remedy would the criminal defendant have if the trial court failed to hold such a hearing and it was not addressed by either trial or appellate counsel either prior to the trial court imposing sentence or after sentence is imposed and the issue not being raised on direct appeal.

This Court has repeatedly held that the failure of the trial court to sentence a criminal defendant pursuant to statutory mandates renders a sentence void and requires a new sentencing hearing.

Appellant Darrell Dukes challenges the determination by the Trial Court Judge ordering him to serve consecutive sentences without first determining whether his crimes were allied offenses of similar import. The state contends that Dukes waived his right to appeal when no objection was made on that subject at the sentencing hearing, if any error arose, it was harmless because the facts clearly support the holding that Robbery is a separate offense from Burglary.

In Dukes direct appeal from the Motion to Alter, Amend, or Vacate a Void Sentence he argued that while he pleaded guilty to the charges of Robbery and Burglary, they were potentially allied offenses of similar import and he should only have been convicted of, and sentenced for, one crime. He contended that the judge should have inquired into the nature of the offenses before sentencing pursuant to Revised Code §2941.25.

In that appeal, the state contended that by failing to raise the issue at the time of sentencing, Dukes waived his right to assign it as error. Further, the State claims, any failure to address the issue at sentencing is harmless error and cites as authority State of Ohio v. Comen (1990), 50 Ohio St.3d 206, 553 N.E.2d 640.

Appellant Darrell Dukes presents that the State of Ohio misapprehends the facts, background and holding of Comen when applied to himself. In Comen, following a jury trial, the defendant was given concurrent sentences for what he claimed to be allied offenses. The Franklin County Appellate Court, in State of Ohio v. Comen (January 5, 1989), Franklin App. No. 88 AP-660, unreported, addressed the issue of allied offenses although no objection had been raised at the trial level, and found, through the transcript, the aggravated burglary and receiving stolen property were clearly not allied offenses and denied the assignment of error. Justice Douglas in reviewing the appeal, declined to address the same issue stating:

Notwithstanding the fact that appellant raised this issue before the court of appeals, this court need not address this proposition of law as appellant failed to object to the convictions or sentencing at the trial level. Appellant's failure to raise this issue in the trial court constitutes a waiver of the error claimed. See, State

v. Williams (1977), 151 Ohio St.2d 11 (sic),  
117-117.

Id. at 211.

A review of the Williams case reveals an attempt to introduce, at the Supreme Court level, assignments of error not raised at either the trial or appellate level. Chief Justice O'Neil stated:

This court need not address this proposition of law as the appellant failed to object to the jury instructions. He likewise failed to raise any of these issues in the Court of Appeals. The court has consistently held that an appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at the time such error could have been avoided or corrected by the trial court."

State v. Williams, 51 Ohio St.2d 112, 116-117, 364 N.E.2d 1364. Chief Justice O'Neil, however, later went on to find a miscarriage of justice in the case.

The Comen case, therefore, does not stand for the proposition that an appellate court is prohibited from reviewing an issue not introduced at the trial level, merely that an appellate court has the discretion to accept such issue and determine its merits. "Need not address" does not mean "cannot address". (see, State v. Hawkins (1993), 66 Ohio St.3d 339, 612 N.E.2d 1227, cert. denied, 510 U.S. 984, 114 S.Ct. 486, 126 L.Ed.2d 436). Criminal Rule 52(B) allows the Supreme Court the discretion to address plain error or defects affecting a defendant's (appellant's) substantial rights. When this court has found that the issue was waived, the Supreme Court, nevertheless, clarified why the appellant's substantial rights were not violated. In State of Ohio v. Perkins (1994), 93 Ohio App.3d 672, 639 N.E.2d 833, the appellate court pointed out that they had previously held that tying a victim to facilitate an escape was a kidnapping separate from the offense of robbery. In State v. Williams (1995), 105 Ohio App.3d 471, 664 N.E.2d 576, this Court noted consistently that trafficking in drugs by preparing for shipment was not an allied

offense with possession (see, *State of Ohio v. Powell* (1993), 87 Ohio App.3d 157, 621 N.E.2d 1328). In *State of Ohio v. Hamann* (1993), 90 Ohio App.3d 654, 630 N.E.2d 384, it was found that thirty theft offenses against distinct victims at different times could not be considered allied offenses. The Supreme Court found that aggravated robbery and attempted murder are not allied offenses in *State of Ohio v. Lockhart*, 1999 Ohio App. LEXIS 4281 (September 16, 1999), Cuyahoga App. No. 74113, unreported. Indeed, in *State of Ohio v. Smith*, 1992 Ohio App. LEXIS 6259 (December 10, 1992), Cuyahoga App. No. 61464, unreported, in holding that forgery and uttering were allied offenses of similar import, we found that failure to raise the issue before the trial court constituted ineffective assistance of counsel and remanded the case for resentencing.

"In plain error analysis, the court determines prejudice by asking whether the error created a manifest injustice or seriously affected the 'fairness, integrity or public reputation of [the] judicial proceedings.'" (see, *State of Ohio v. Fields* (1994), 97 Ohio App.3d 37, 646 N.E.2d 866, quoting *United States v. Olano* 1992), 507 U.S. 725, 113 S.Ct. 1770, 1777-1778, 123 L.Ed.2d 508; see, also, *State of Ohio v. Waddell* (1996), 75 Ohio St.3d 163, 661 N.E.2d 1043; *State v. Gideons* (1977), 32 Ohio App.2d 70, 77, 368 N.E.2d 67). A reviewing court must determine: 1) whether error is present; 2) whether it is plain error; and 3) whether the defendant was prejudiced by this error (see, *Fields*, supra). The Supreme Court of Ohio, however, is mindful that "notice of plain error is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." (see, *State of Ohio v. Landrum* (1990), 53 Ohio St.3d 107, 559 N.E.2d 710).

The Constitutions of both the United States and Ohio prohibit a criminal defendant from being convicted two times for the same offense. Ohio Revised Code §2941.25 was the statutory enactment embodying that protection. It provides:

(A) Where the same conduct by defendant can be construed to constitute two or more offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) 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 all of them."

The elements of the crimes to which Dukea pleaded should be or should have been compared pursuant to the 2010 Johnson Standard for offenses of similar import. After aligning the elements, the question then becomes, do they correspond to such a degree that the commission of one crime -- the aggravated robbery -- will result in the commission of the other -- the burglary. If the crimes are allied offenses of similar import, a defendant cannot be convicted of both unless the facts reveal that they were committed separately or with a separate animus; in other words, was the intention for each crime different (see, *State v. Jones* (1997), 78 Ohio St.3d 12, 676 N.E.2d 80; see, also, *State v. Blankenship* (1988), 38 Ohio St.3d 116, 526 N.E.2d 816).

When a criminal defendant enters a guilty plea to multiple offenses of similar import and the trial court accepts the plea, the trial court must conduct a hearing before entering a judgment of conviction and make a determination as to whether there were allied offenses of similar import committed with a single animus; whether there were offenses committed separately or with a separate animus as to each offense. If the offenses are found to be allied offenses, a judgment of conviction may be entered for only one offense. If the offenses are found not be allied offenses, a judgment of conviction may be entered for each offense.

The question then becomes whether the failure to hold a hearing to determine the applicability of the allied offense statute is plain error. If the trial judge fails to conduct the proper hearing, the judgment of conviction should be reversed, and the matter should then be remanded for the sole purpose of conducting the proper hearing to determine whether the defendant should have been sentenced for one or all of the offenses

to which he pled (see, State of Ohio v. Kent, (1980) 68 Ohio App.2d 151, 428 N.E.2d 453). In Kent, the court held: "when accepting a plea a trial court must conduct a hearing before entering a judgment of conviction to make a determination as to whether R.C. 2941.25 is applicable regardless of whether anything was said by either the prosecutor or defendant. More recently, in State of Ohio v. Stephens, 1993 Ohio App. LEXIS 2945 (June 10, 1993), Cuyahoga App. Nos. 62555, 62556, unreported."

Appellant herein now prays that this Court accept jurisdiction of the instant matter to prohibit a manifest injustice by the trial courts of Ohio in violating the U.S. and Ohio Constitutional Rights of offenders who have committed several offenses which are committed with a single animus constituting merger pursuant to Ohio Revised Code §2941.25(A).

#### STATEMENT OF CASE AND FACTS

Appellant Darrell L. Dukes, was convicted in the Portage County Court of Common Pleas in Criminal Case Number 2009 CR 0491 for his alleged involvement in one (1) count of Aggravated Burglary in violation of Ohio Revised Code §2911.11(A)(1)(b) a Felony of the First Degree; and one (1) count of Aggravated Robbery in violation of Ohio Revised Code §2911.01(A)(3) a Felony of the First Degree.

IN Criminal Case Number 2009-CR 0405, the Defendant was arrested for his alleged involvement in one (1) count of Possession of Criminal Tools in violation of Ohio Revised Code §2923.24(A)(C) a Felony of the Fourth Degree; and two (2) counts of Trafficking in Cocaine in violation of Ohio Revised Code §2925.03(A)(C)(4)(c) a Felony of the Fifth Degree.

Defendant was sentenced to a prison term to be served within the Ohio Department of Rehabilitation and Correction in the amount of one (1) year for each felony four and felony five count to be served concurrent to seven years for the Aggravated Burglary charge and eight (8) years for the Aggravated Robbery charge set forth herein above. Each sentence was ordered to be served consecutive to one another and each case number set out above are to be consecutive to one another for a total term of

fifteen (15) years incarceration within the Ohio Department of Rehabilitation and Correction.

Appellant herein filed a Motion to Alter, Amend or Vacate a Void Sentence to the Trial Court pursuant to Ohio Revised Code §2941.25 and further requested a De Novo Sentencing Hearing due to the fact that the trial court failed to hold a hearing to make a determination as to whether the aforementioned offenses were offenses of similar import and which should have merged at the time of sentencing. Said Motion as filed was denied on October 29, 2011 without a hearing and Appellant herein timely filed an Appeal to the Eleventh District Court of Appeals indicating several assignments of error. Said Appeal as filed was denied in that court on or about the 29th day of June, 2012. The Appellants Propositions of Law for this Court's review follow.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The Appellate Court Erred in Denying the Appellant his Right to a Hearing to Determine whether the multiple separate offenses constitute offenses of similar import in violation of Ohio Revised Code §2941.25 and his Rights to be free from Double Jeopardy in violation of the Fifth Amendment to the United States Constitution.....

Standard of Review - Merger of Allied Offenses. A trial court's failure to merge allied offenses of similar import is plain error (see, State of Ohio v. Miller, 2011-Ohio-1161, ¶57, footnote 1, citing State of Ohio v. Yarbrough, 104 Ohio St.2d 1, 17; see, also, State of Ohio v. Underwood, 124 Ohio St.3d 365, 372, 922 N.E.2d 923).

Ohio Revised Code §2941.25 is recognized as "a prophylactic statute that protects a criminal defendant's rights under the Double Jeopardy Clause of the United States Constitution" (see, State of Ohio v. Johnson, 128 Ohio St.3d 153, ¶45). Further, the Supreme Court of Ohio has "consistently recognized that the purpose of Ohio Revised Code §2941.25 is to prevent 'shot-gun' convictions, that is, multiple findings of guilt and corresponding punishments heaped on a defendant for closely related offenses arising from the same occurrence such as Appellant committing an Aggravated Burglary for the sole purpose of committing an Aggravated Robbery (see, Id. at ¶43, citing Maumee v. Geiger, 45 Ohio St.2d 238, 242).

In Johnson, a case decided after Appellant's guilty plea and the trial court's sentence, this Court overruled State of Ohio v. Rance, 85 Ohio St.3d 632, which had required trial court's to engage in a comparison of statutory elements solely in the abstract under Ohio Revised Code §2941.25. Under the new standard, the Johnson Court held that the trial court must now consider the defendant's conduct when determining whether two or more offenses are allied offenses of similar import subject to merger under the statute (see, Johnson, supra at ¶44). In contrast to the past analysis under Rance and its progeny, "the court need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger." (see, Id. at ¶47).

In crafting the new test, the Johnson court provided an outline which is set forth in paragraphs 48 through 51.

In other words, "[i]f the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct. i.e., 'a single act, committed with a single state of mind.' If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." (see, Johnson, supra., at ¶¶49-50, quoting State of Ohio v. Brown, 119 Ohio St.3d 447 at ¶50). Pursuant to Johnson Appellant argues that it was improper for the trial court to convict and sentence him for offenses later determined to have been offenses of similar import and that should have been merged at the time of sentencing.

The trial court's conviction of Appellant to consecutive sentences on each of several allied offenses must be vacated. The case should be remanded to the trial court with instructions to merge the offenses as allied offenses of similar import. In the alternative, because at the time of sentencing, the judge did not have the benefit of Johnson to guide its analysis, the case should be remanded for development of the factual record so that the trial court can conduct an allied offense-merger analysis pursuant to Johnson and for proper sentencing thereafter (see, State of Ohio v. Damron, 2011-Ohio-2208, at ¶18; see, also, State of Ohio v. Miller, 2011-Ohio-1161 at ¶57; State of Ohio v. Winn, 121 Ohio St.3d 413, syllabus).

The Winn court elaborated that "[i]t is not difficult to see the presence of a weapon that has been shown or used, or whose possession has been made known to the victim during the commission of a theft offense, does not also forcibly restrain the liberty of another." (see, Id., at ¶21). While Winn was decided utilizing the Rance standard that has been rejected in Johnson, its reasoning remains sound because the Winn court noted that "[h]olding that kidnapping and aggravated robbery are allied offenses is also in keeping with thirty (30) years of precedent." (see, Id. at ¶2 (citations omitted)). As the Supreme Court recently noted, because "[t]he Johnson test reflects the approach followed by this Court prior to its decision in Rance, [...] \* \* \* the court's decisions prior to Rance have renewed relevance." (see, State of Ohio v. O'Neil, 2011-Ohio-2202 at ¶46). The Winn court cited the pre-Rance case of State of Ohio v. Logan, 60 Ohio St.2d 126 as being seminal case "considered authority for the proposition that Appellant's multiple separate offenses are offenses of similar import and should have merged at the time of sentencing to prevent the Appellant's rights to be free from Double Jeopardy being violated." (see, Winn, supra., at ¶22; see, also, State of Ohio v. Jenkins, 15 Ohio St.3d 164, 198 n. 29 (holding, another pre-Rance case citing Winn relying on the Logan proposition that "implicit within every Aggravated Robbery (and Robbery) is a kidnapping."

In discussing the "separate animus" analysis with respect to Appellant's case, the Court in Logan established the following guidelines in determining whether kidnapping and another offense of the same or similar kind are committed with a separate animus (see, Logan at the syllabus).

Here in attempting to commit Aggravated Robbery and Aggravated Burglary it may be that the building which was burglarized was also the same building wherein the Aggravated Robbery was committed. But, based upon Logan and Winn, ¶25, the crimes of Aggravated Robbery and Aggravated Burglary, defined in 2911.01 and 2911.11, as charged in the indictment, are allied offenses of similar import pursuant to Ohio Revised Code §2941.25. It was plain error for the trial court not to have merged the Aggravated Robbery and Aggravated Burglary charges into the Aggravated Robbery for sentencing.

The separate conviction and the separate sentence imposed on the Aggravated Robbery and Aggravated Burglary charges must be vacated because to hold otherwise would authorize, as outlined below, to allow the trial courts of Ohio to impose sentences which are beyond the statutory maximum sentence allowed by law. Alternatively, the case should be remanded so that the trial court can conduct an allied offense analysis hearing - merger analysis - pursuant to the Johnson Standard and for proper determination to be made and if necessary proper sentencing thereafter see, Damron, supra at ¶18; see, also, Miller, supra. at ¶¶57-59).

Appellant recognizes that recent authority from this Court when applying Johnson and holds that, under the particular facts of the case, Aggravated Robbery and Aggravated Burglary are allied offenses of similar import see, State of Ohio v. O'Neil, 2011-Ohio-2202 at ¶¶35-49; see, also, State of Ohio v. Frazier, 58 Ohio St.2d 253 and State of Ohio v. Slagle, 65 Ohio St.3d 597). The facts of this case distinguish the holding in those cases. And the outcome here should be no different.

Here, the trial court did not discuss whether the crimes of Aggravated Robbery and Aggravated Burglary were allied offenses of similar import and should merge pursuant to Ohio Revised Code §2941.25. Moreover, the trial court did not have the benefit of the standards set forth in Johnson (see, Agee v. Russell, 92 Ohio St.3d 540, 751 N.E.2d 1043, 1047).

WHEREFORE, the Trial Court's sentence must be vacated and the matter remanded back to the Trial Court for the sole purpose of determining whether the multiple separate offenses should merge, and to develop a record as to whether the Aggravated Robbery and Aggravated Burglary offenses are allied offenses of similar import and should merge pursuant to Ohio Revised Code §2941.25 see, Damron, supra at ¶18; Miller, supra at ¶58 (because the trial court did not have the opportunity to address whether the convictions should merge, "a remand is necessary to establish the facts of his conduct and for the trial court to determine whether, under the new Johnson Standard, his crimes should merge."

Proposition of Law No. II: The Trial Court Erred in failing to merge the multiple separate offenses resulting in a sentence that is beyond the statutory maximum and contrary to law requiring a new De Novo Sentencing Hearing.....

It is well settled under Ohio law that "a sentence that is not in accordance with statutory mandated term is void." (see, State of Ohio v. Fischer, 128 Ohio St.3d 92, 942 N.E.2d 332, at ¶8, citing State of Ohio v. Simpkins, 117 Ohio St.3d 420, 684 N.E.2d 368 at ¶14; State of Ohio v. Beasley (1984), 14 Ohio St.3d 74, 75, 471 N.E.2d 774). In particular, a trial court cannot go beyond its statutory authority and impose a sentence that is greater than the maximum under the statute (see, State of Ohio v. Hairston, 2007 WL 3257331 (Ohio App. 11 Dist.), at ¶38 (holding that the trial court acted beyond its authority "when it imposed more than one sentence on the firearms specifications" related to an aggravated robbery where the statute required only one sentence." Furthermore, when a trial court goes beyond its authority by disregarding statutory maximums, "the erroneous sentence is void." Id. citing State of Ohio v. Payne, 114 Ohio St.3d 502, at ¶27; State of Ohio v. Jordan, 114 Ohio St.3d 21 at ¶23; see, also, City of Cincinnati v. Howard, 179 Ohio App.3d 60, 900 N.E.2d 689 holding that a sentence of \$150 fine and 30 hours of community service was void because the maximum penalty for the offense was only a \$150 fine). As such, "[a] void judgment has no legal force or effect and any party whose rights are affected may challenge its invalidity at any time and any place." (see, Hairston, supra at ¶36, citing Payne, supra at ¶33 Lenzinger, J., concurring)).

In the present case, the Defendant was convicted and sentenced for both Aggravated Burglary and Aggravated Robbery which pursuant to Ohio Revised Code §2941.25 requires that the offenses be merged prior to sentencing. Had the trial court merged the mentioned offenses prior to sentencing, the Appellant could have received a maximum sentence of ten years incarceration. Because Aggravated Robbery and Aggravated Burglary arose out of the same set of facts and circumstances, the failure of the trial court to hold a hearing to determine whether the multiple separate offenses should have or have not merged at the time of sentencing allowed the trial court to impose a sentence that is contrary to law. This Court has consistently held that a sentence imposed contrary to the mandatory language of the statute (O.R.C. §2941.25) is void and a new De Novo Sentencing Hearing must be held to prevent a manifest injustice.

While the Appellant is aware of this Court's decision in *Fischer* regarding the procedure for correcting error in sentencing dealing with [allied offenses], Defendant asserts that "[a] sentence that does not include the statutorily mandated term is void . . . [and] [t]he new sentencing hearing to which the offender is entitled is limited to the proper [merger analysis]."

This case is very similar to the holding in *Hairston and Howard*, *supra*, because the failure of the trial court to hold an allied offense, merger, hearing prior to sentencing, made the Appellant's sentence longer than the maximum penalty allowed by law. As such, the entire sentence is void, and the trial court did not have subject jurisdiction (*Id.*, at ¶¶2-3 (citing *Forne*, *supra*)).

Appellant's case is similar, but not exactly like, the trial court imposing a term of post release control upon a criminal defendant who is sentenced to a term of incarceration for an unclassified felony or for the offense of Aggravated Murder or Murder to which post release control does not apply.

The Seventh District recently decided a case under similar factual circumstances in *State of Ohio v. Young*, 2011 WL 2149280, 2011-Ohio-2646. In *Young*, the Defendant was convicted of Aggravated Murder, an unclassified felony, and was sentenced to life without the possibility of parole. The trial court advised the Defendant that when he was released from prison he would be subject to a period of post release control for up to five years (*Id.*, at ¶67). The Seventh District found the inclusion of post release control where it does not apply was erroneous and required a *de novo* sentencing hearing, even under the plain error analysis (see, *Id.*, at ¶¶68-71). In doing so, the court stated, "[a] void sentence must be vacated, placing the parties in the same position they would have been in had there been no sentence." *Id.*, at 70 (quoting *State of Ohio v. Crockett*, 2009-Ohio-2894, at ¶9 (citing *State of Ohio v. Simpkins*, 2008-Ohio-1197, at ¶22)). As such, the court held that the trial court was required to "conduct a new sentencing hearing." (see, *Id.*).

Also in *Crockett*, *supra*., the Defendant was convicted of Aggravated Murder, an unclassified felony. (*Id.*, at ¶3). During the sentencing, the

trial court imposed a term of post-release control on the defendant (I. at ¶6). As a result, defendant appealed, and the state conceded that the trial court erred in imposing post-release control on the defendant because he was sentenced to an unclassified felony. *Id.* The Seventh District Court agreed and held "the trial court was not authorized to impose post-release control as part of Crockett's sentence. When a trial court imposes a sentence that is unauthorized by law, the sentence is unlawful." (*Id.* at ¶9 citing *Simpkins* at ¶21). Furthermore, "[a]n unlawful act is not merely considered erroneous and voidable, but it is wholly unauthorized and void." *Id.* (emphasis in original). "A void sentence must be vacated, placing the parties in the same position they would have been in had there been no sentence." (*Id.* citing *Simpkins*, at ¶22). As such, the Seventh District ordered the trial court to conduct a new sentencing hearing. *Id.*

A similar situation arose in *State of Ohio v. Long*, 2010 WL 5140785 (Ohio App. 1 Dist.), 2011-Ohio-6115. In *Long*, the Defendant was convicted in 2004 of murder, an unclassified felony, and sentence to prison for a term of fifteen years to life. *Id.* at ¶2. In the judgment of conviction, the trial court stated, "as part of the sentence in this case, the defendant is subject to post release control supervision of R.C. 2967.28." *Id.* In April of 2010, the Defendant filed a "Motion to Vacate and Correct a Void Sentence," which was denied by the trial court. *Id.* at ¶3. The defendant appealed the trial court's decision on the ground that the trial court acted beyond its statutory authority in imposing post release control. *Id.* The First District agreed and stated "R.C. 2967.28 did not authorize the trial court to include in defendant's murder sentence the requirement that he be subject, upon release from prison, to post release control, *Id.* at ¶4. The court further stated that "when a sentencing court has imposed post release control without statutory authority to do so, and the matter has come to the attention of the trial court or a reviewing court, the sentence is void and must be vacated, and the defendant must be resentenced." *Id.* at ¶5. As such, the trial court held that the trial court erred failing to vacate the defendant's sentence and hold a resentencing hearing. *Id.* at ¶6.

Finally, in *State of Ohio v. Wright*, 2009 WL 3837615 Ohio App. 9 Dist.), 2009-Ohio-6081, the Ninth District considered the imposition of post-release control to an individual sentenced to an unclassified felony an error so serious that the court decided the issue without it being raised by the defendant. *Id.* at ¶4. In *Wright*, the court held that because "a sentence that does not conform to statutory mandates requiring the imposition of post release control is a nullity and void." *Id.* at ¶7 (citing *Simpkins*, 2008-Ohio-1197, at ¶22), the court could not decide the merits of the defendant's appeal and the defendant was to be resentenced (see, *State of Ohio v. Wright*, 2009-Ohio-6081, at ¶7).

#### CONCLUSION

The failure of the trial court to hold a hearing to determine whether the multiple separate offenses of which the Appellant was Indicted, Convicted, and Sentenced for were allied offenses of similar import and which should have merged prior to sentencing renders the trial court to have committed a prejudicial error in that the trial court imposed a sentence that is not only contrary to state law, but contrary to the dictates of both the United States and Ohio Constitutions. Trial Courts are statutorily mandated to comply with the laws of the land. The trial court is or should be aware of the mandatory duty to hold an allied offense hearing prior to sentencing a criminal defendant convicted of multiple separate offenses, to determine which offenses, if any are offenses of similar import pursuant to Ohio Revised Code §2941.23 and which should merge. If the mandatory language of the statute is not followed during or as a part of the sentencing hearing, the sentence imposed by the trial court is possibly a sentence that is beyond the statutory maximum sentence allowed by law and as such, as illustrated herein above, a nullity and void and requires a Remand back to the trial court for a new hearing to determine whether or not the multiple separate offenses should have merged at the time of sentencing. If the offenses should have merged, would require then that the trial court hold a new De Novo Sentencing hearing with the Appellant present.

Defendant states that he was improperly sentenced because the trial court failed to conduct the proper allied offense analysis hearing prior

to imposition of a valid sentence upon him. The trial court went beyond its statutory authority in imposing a greater than maximum sentence. As such, Defendant's sentence is void because the trial court lacked subject matter jurisdiction to impose such a sentence in this case, and the Defendant is therefore entitled to a de novo sentencing hearing.

WHEREFORE, and for the foregoing reasons, it is requested that this Court SUSTAIN each Proposition set out herein above and Remand this Matter back to the Trial Court forthwith.

Respectfully submitted,

  
\_\_\_\_\_  
Darrell L. Dukas, A582-416  
Appellant proprois persona

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon the Portage County Prosecuting Attorney, Victor V. Vigiucchi, located at 241 Chestnut Street, Ravenna, Ohio 44266 by Regular U.S. Mail, postage prepaid this 7<sup>th</sup> day of August, 2012.

  
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Appellant proprois persona

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**A P P E N D I X**

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IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY, OHIO

FILED  
COURT OF APPEALS

JUN 29 2012

LINDA K FANKHAUSER, CLERK  
PORTAGE COUNTY, OHIO

STATE OF OHIO, : OPINION  
Plaintiff-Appellee, :  
- vs - : CASE NOS. 2011-P-0098  
DARRELL L. DUKES, : and 2011-P-0099  
Defendant-Appellant. :

Criminal Appeals from the Court of Common Pleas, Case Nos. 2009 CR 00405 and 2009 CR 00491.

Judgment: Affirmed.

*Victor V. Viglucci*, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

*Darrell L. Dukes*, pro se, PID: A582418, Mansfield Correctional Institution, P.O. Box 788, Mansfield, OH 44901 (Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Darrell L. Dukes, pro se, appeals the judgments of the Portage County Court of Common Pleas denying his pro se motions for resentencing. For the following reasons, the judgment is affirmed.

{¶2} In July 2009, a three-count indictment was filed against appellant, charging him with two counts of trafficking in cocaine and one count of possessing criminal tools. In August 2009, another three-count indictment was filed against

appellant, charging him with complicity to murder, aggravated burglary, and aggravated robbery.

{¶3} In March 2010, appellant negotiated guilty pleas as to both respective indictments. On the second indictment, appellant pled guilty to aggravated burglary, a first-degree felony in violation of R.C. 2911.11(A)(1)(B), and aggravated robbery, a first-degree felony in violation of R.C. 2911.01(A)(3). The state entered a nolle prosequi on the remaining count of complicity to murder. Appellant was sentenced to seven years in prison for the aggravated burglary and a consecutive term of eight years for the aggravated robbery, for a total of 15 years in prison. On the first indictment, appellant pled guilty to all counts: trafficking in cocaine (both counts), fourth-degree felonies in violation of R.C. 2925.03(A)(C)(4)(c), and possession of criminal tools, a fifth-degree felony in violation of R.C. 2923.24(A)(C). The trial court sentenced appellant to three consecutive one-year terms for these offenses, which were ordered to be served concurrent with his 15-year sentence.

{¶4} In October 2011, appellant filed two motions "to alter, amend or vacate" his sentences, arguing the court erred in its March 2010 sentencing and seeking a de novo resentencing hearing. In his motions, appellant argued that many of his offenses were allied offenses of similar import and should have merged. The trial court denied both motions.

{¶5} Appellant now appeals. This court, sua sponte, consolidated appellant's cases for the purpose of this appeal. Appellant asserts two assignments of error:

{¶6} [1.] The Trial Court erred when it denied Appellant's motion for re-sentencing when it found Appellant to have had a separate animus for each of his offenses.

{¶7} [2.] The Trial Court erred improperly sentencing [sic] Appellant to separate sentences for offenses which should have been merged as allied offenses of similar import pursuant to Ohio Revised Code §2941.25(A).

{¶8} It is well founded that any issues that could have been raised by a defendant on direct appeal are res judicata and not subject to appellate review. *State v. Lintz*, 11th Dist. No. 2010-L-067, 2011-Ohio-6511, ¶36, citing *State v. Perry*, 10 Ohio St.2d 175 (1967). Here, appellant argues that his sentences are void and therefore *not* precluded from review by principles of res judicata. While appellant correctly notes that the doctrine of res judicata does not preclude review of a void sentence, the doctrine still applies to "other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, paragraph three of the syllabus. The Ohio Supreme Court in *Fischer* recognized that sentences considered void are typically those in which the trial court lacked subject-matter jurisdiction. *Id.* at ¶7. In the normal course, sentencing errors are not jurisdictional as to render a judgment void. *Id.* The *Fischer* Court merely defined the failure to impose post-release control in accordance with the statutorily-mandated terms as a narrow and limited exception to that rule. *Id.* at ¶12.

{¶9} This court has declined to expand the holding in *Fischer* and has continually held that the failure to merge sentences does not render a judgment void,

but *voidable*; therefore, "such challenges, if not raised on direct appeal, are barred by the doctrine of res judicata." *State v. Cioffi*, 11th Dist. Nos. 2011-T-0072 & 2011-T-0073, 2012-Ohio-299, ¶14, citing *State v. Britta*, 11th Dist. No. 2011-L-041, 2011-Ohio-6069, ¶17-18. See also *State v. Hobbs*, 11th Dist. No. 2010-L-064, 2011-Ohio-1298, ¶43 and *State v. Freeman*, 11th Dist. No. 2010-T-0069, 2011-Ohio-2457, ¶16. Thus, when an appellant does not raise the issue of allied offenses of similar import in a timely direct appeal, the challenge is barred by the doctrine of res judicata. *Cioffi, supra*, ¶14, citing *State v. Dodson*, 12th Dist No. CA2011-02-034, 2011-Ohio-6347, ¶9. See also *State v. Poole*, 8th Dist. No. 94759, 2011-Ohio-716, ¶13 ("the time to challenge a conviction based on allied offenses is through a direct appeal—not a resentencing hearing"); and *State v. Goldsmith*, 8th Dist. No. 95073, 2011-Ohio-840, ¶11 ("[b]ecause [appellant] failed to raise on direct appeal from his conviction the issue concerning whether the offenses challenged herein are allied offenses of similar import subject to merger, we find that the issue is barred by the doctrine of res judicata").

{¶10} Appellant is attempting to use the denials of his motions for sentencing relief to raise issues that could and should have been raised on a direct appeal. Appellant claims the court erred in its March 4, 2010 entry by failing to merge certain offenses. Appellant had the opportunity to timely file a direct appeal from this entry. He failed to do so. Instead, appellant waited approximately 19 months to challenge his sentences by filing a motion for sentencing relief with the trial court. Appellant cannot now collaterally attack his original sentences by the denial of his present motions.

{¶11} Further, even if this issue could be considered, appellant's argument would still fail. Appellant contends that many of his offenses should have merged for

the purposes of sentencing, pursuant to *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6313. However, appellant was sentenced before *Johnson* was decided. As the Second Appellate District recently explained, an appellant seeking to challenge his pre-*Johnson* sentencing on the grounds of merger cannot rely on *Johnson* “because “[a] new judicial ruling may be applied only to cases that are pending on the announcement date. \* \* \* The new judicial ruling may not be applied retroactively to a conviction that has become final, i.e. where the accused has exhausted all of his appellate remedies.” *State v. Parson*, 2d Dist. No. 24641, 2012-Ohio-730, ¶11, quoting *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, ¶6.

{¶12} Consequently, the judgments of the Portage County Court of Common Pleas are affirmed.

THOMAS R. WRIGHT, J., concurs,

DIANE V. GRENDALL, J., concurs in judgment only.

STATE OF OHIO )  
 )SS.  
COUNTY OF PORTAGE )

IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

STATE OF OHIO,

JUDGMENT ENTRY

Plaintiff-Appellee,

CASE NOS. 2011-P-0098  
and 2011-P-0099

- vs -

DARRELL L. DUKES,

Defendant-Appellant.

For the reasons stated in the opinion of this court, appellant's assignments of error are without merit. It is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is affirmed.

Costs to be taxed against appellant.

  
PRESIDING JUDGE TIMOTHY P. CANNON

THOMAS R. WRIGHT, J., concurs,

DIANE V. GRENDALL, J., concurs in judgment only.