ORIGINAL

IN THE SUPREME COURT OF OHIO
2013 TERM

STATE OF OHIO,	:	Case No. **12-1741**
Plaintiff-Appellee,	:	On Appeal from the Franklin County
vs.	:	Court of Appeals, Tenth Appellate District
ARNALDO R. MIRANDA,	:	Court of Appeals
Defendant-Appellant.	:	Case No. 11AP-788

MERIT BRIEF OF DEFENDANT-APPELLANT ARNALDO R. MIRANDA

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STATEMENT OF FACTS

Drug task force investigators executed a search warrant for the Columbus residence of Jermaine Howell in December 2010. They found and seized approximately 1,200 pounds of marijuana. (Guilty Plea Tr. 8). Howell agreed to an interview and identified his supplier's contact person as "Reuben." Howell agreed to work with the task force to set him up. (*Id.* at 9). He provided the officers with an address on Carbondale Drive in Columbus where he would deliver money in payment of the marijuana. (*Id.* at 10).

The investigators set up surveillance of the Carbondale address. They attached a GPS tracking device to a pickup truck at the residence. On January 26, 2011, the tracking signals from the device led the task force officers to a warehouse on South 7th Street. After initiating surveillance of the warehouse, they observed a tractor-trailer deliver two or three crates. Shortly thereafter, a white van driven by Hector Martinez left the warehouse. (*Id.* at 10). The officers initiated a stop of the van and found marijuana inside. The officers obtained a search warrant for the warehouse and seized an additional quantity of marijuana. (*Id.* at 11).

Meanwhile, other members of the task force stopped Defendant Appellant Arnaldo "Reuben" Miranda ("Miranda") as he was leaving the Carbondale address with a woman. They were carrying two suitcases. A search of the suitcases resulted in the seizure of $960,000. The officers subsequently obtained a warrant to search a residence on Fishinger Road where Miranda had previously stored marijuana. On January 28, 2011, they found a quantity of "old" marijuana inside. The total drug seizure from the van, the two residences, and the warehouse was approximately 4,000 pounds. (*Id.* at 11-12).

On February 4, 2011, the Franklin County grand jury returned an indictment charging Miranda, his brother Luis, Martinez, and Howell in Count 1 with a first-degree felony of engaging

in a pattern of corrupt activity between October 1, 1010 and January 26, 2011. (R. 2: Indictment). The indictment also charged Miranda with multiple second-degree felony counts of possession of marijuana and trafficking in marijuana as follows:

Count No.	Date(s)	Offense
2	01/26/2011	Trafficking in Marijuana
3	01/26/2011	Possession of Marijuana
4	10/01/2010 to 01/28/2011	Trafficking in Marijuana
5	10/01/2010 to 01/28/2011	Possession of Marijuana
6	12/15/2010	Trafficking in Marijuana
7	12/15/2010	Possession of Marijuana

On June 20, 2011, Miranda pled guilty to the second-degree felony form of engaging in a pattern of corrupt activity as a stipulated lesser-included offense of Count 1. He also pled guilty to the trafficking in marijuana offense charged in Count 2. The State agreed to nolle prosequi the remaining counts. (R. 52-54: Plea Form).

On August 12, 2011, the court of common pleas sentenced Miranda to a mandatory eight-year prison term for the trafficking count and a six-year consecutive prison term for the corrupt activity count. (R. 69: Judgment of Conviction). Miranda filed a timely notice of appeal. (R. 80: Notice of Appeal).

Miranda's appeal raised a double jeopardy challenge to the trial court's imposition of separate convictions and sentences for the corrupt activity and trafficking counts. In the alternative, he argued the imposition of consecutive sentences was contrary to law and a violation of his constitutional right to due process. The Tenth District Court of Appeals overruled his

assignments of error and affirmed the judgment of the trial court. *State v. Miranda*, 10th Dist. No. 11AP-788, 2012-Ohio-3971.

Miranda filed a timely notice of appeal to this Court from the court of appeals' judgment. His memorandum in support of jurisdiction asserted three propositions of law. This Court accepted Miranda's appeal on Proposition of Law No. 1, which raises the question of whether Ohio courts are required to apply the standard announced in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061 when deciding whether the imposition of multiple convictions and sentences for the offense of engaging in a pattern of corrupt activity and one or more of its predicate felonies violates R.C. 2941.25 (the Allied Offenses Statute) and a defendant's rights under the Double Jeopardy Clauses of the federal and state constitutions.

ARGUMENT

Single Proposition of Law:

> **Ohio appellate courts are required to apply the new standard announced in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061 when deciding whether the imposition of multiple convictions and sentences for the offense of engaging in a pattern of corrupt activity and one or more of its predicate felonies violates R.C. 2941.25 (the Allied Offenses Statute) and a defendant's rights under the Double Jeopardy Clauses of Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.**

Miranda's first assignment of error in the court of appeals challenged the trial court's imposition of separate convictions and sentences for one count of engaging in a pattern of corrupt activity and the predicate felony count of trafficking in marijuana. He urged the appellate court to apply the new standard announced by this Court in the *Johnson* case for purposes of deciding whether the imposition of multiple convictions and sentences for a "RICO" violation and one of its predicate felonies violated R.C. 2941.25 and his rights under the Double Jeopardy Clauses of Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

The court of appeals declined to apply *Johnson.* Instead, it cited this Court's 1997 opinion in *State v. Schlosser,* 79 Ohio St.3d 329, 1998-Ohio-716, 681 N.E.2d 911 as dispositive authority for the proposition that a trial court may impose "cumulative punishment" for a corrupt activity count and one or more of its predicate felonies. *Miranda,* 2012-Ohio-3971, at ¶12. Miranda respectfully disagrees and asks this Court to declare that *Johnson* provides the controlling standard for resolving the appropriateness of entering separate convictions and imposing cumulative

punishment in all Ohio multiple-count prosecutions, including those brought under the Ohio RICO statute.

The Double Jeopardy Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." Article I, Section 10 of the Ohio Constitution contains virtually identical language.

The protections of the Double Jeopardy Clause are three-fold. It protects the accused against the following: 1) a second prosecution for the same offense after acquittal, 2) a second prosecution for the same offense after conviction, and 3) multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977). It is the last category of protections - the prohibition against multiple punishments - that is at issue in this appeal.

The multiple-punishment prohibition precludes "the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983). A court must presume "'in the absence of a clear indication of contrary legislative intent'" that the legislature "'ordinarily does not intend to punish the same offense under two different statutes.'" *Id.* 459 U.S. at 366, 103 S.Ct. at 678, quoting *Whalen v. United States*, 445 U.S. 684, 691-92, 100 S.Ct. 1432, 1437-38, 63 L.Ed.2d 715 (1980).

In Ohio, R.C. 2941.25 "is a prophylactic statute that protects a criminal defendant's rights under the Double Jeopardy Clauses of the United States and Ohio Constitutions." *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶45. The statute provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied 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 them.

This statute represents an effort by the General Assembly to codify the "judicial doctrine sometimes referred to as 'merger'." *State v. Botta*, 27 Ohio St.2d 196, 201, 271 N.E.2d 776, 780 (1971). The merger doctrine is premised on "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." *Id.*

This Court first addressed the question of whether a predicate offense should merge into a compound offense in *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699. In that case, the defendant argued that the test adopted by the United States Supreme Court in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) foreclosed separate convictions and sentences for the offense of involuntary manslaughter and the predicate offense of aggravated robbery.

The *Rance* Court noted that under *Blockburger*, two offenses do not constitute the "same offense" for double jeopardy purposes if each offense requires proof of an element that the other does not. *Id.* 85 Ohio St.3d at 634, 710 N.E.2d at 702. It recognized that the typical compound offense, such as involuntary manslaughter, can be committed by means of several different predicate offenses. Quoting Justice Rehnquist's dissenting opinion in *Whalen,* the Court acknowledged that the question of whether any particular predicate offense should be merged

with a compound offense depends on whether the offenses are examined in the abstract or in light of the particular facts of the case:

> If one applies the test in the abstract by looking solely to the wording of [the statutes], *Blockburger* would always permit imposition of cumulative sentences * * *. If, on the other hand, one looks to the facts alleged in a particular indictment brought under [the statute], then Blockburger would bar cumulative punishments for violating [the compound offense] and the particular predicate offense charged in the indictment, since proof of the former would necessarily entail proof of the latter.

Id. 85 Ohio St.3d at 637, 710 N.E.2d at 703-704, quoting *Whalen*, 445 U.S. at 709-711, 100 S.Ct. at 1447-1448 (Rehnquist, J., dissenting).

The *Rance* Court adopted Justice Rehnquist's view that "that if it is necessary to compare criminal elements in order to resolve a case, those elements should be compared in the statutory abstract." *Id.* 85 Ohio St.3d at 637, 710 N.E.2d at 704. Because "aggravated robbery is only one of the many felonies that may support a charge of involuntary manslaughter[,]" it is possible to commit involuntary manslaughter without also committing aggravated robbery. Therefore, said the Court in *Rance*, the offenses are not allied offenses of similar import under R.C. 2941.25, even though the killing of the victim occurred as a proximate result of aggravated robbery. *Id.* 85 Ohio St.3d at 639, 710 N.E.2d at 705. The Court upheld Rance's convictions and consecutive sentences for both crimes.

In *Johnson,* this Court revisited the question of whether multiple convictions and sentences are permissible when a defendant is found guilty of a compound and a predicate offense. In overruling *Rance*, the Court expressly rejected its essential holding that the elements of the offenses must be compared in the abstract. The *Johnson* majority stated the sentencing judge should instead determine "whether it is possible to commit one offense and commit the other

with the same conduct, not whether it is possible to commit one without committing the other." 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶48 (internal citation omitted). If both crimes can be committed by the same conduct, the court must next determine whether the offenses were in fact committed by the same conduct. *Id.* at ¶49. "If the answer to both questions is yes, the offenses are allied offenses of similar import and must be merged." *Id.* at ¶50.

A. The Court of Appeals' Reliance on Language Taken Out-of-Context from This Court's Opinion in *Schlosser* as Eliminating the Need to Apply the Allied Offenses Statute in Corrupt Activity Prosecutions Was Misplaced.

The court of appeals, citing *Johnson*, acknowledged "[t]he primary indication of the General Assembly's intent is R.C. 2941.25." *Miranda*, 2012-Ohio-3971, at ¶8. However, citing its prior ruling in *State v. Thomas*, 10th Dist. No. 10AP-557, 2011-Ohio-1191, the appellate panel stated "other more specific legislative statements" may trump the Allied Offenses Statute for purposes of deciding whether the General Assembly intended cumulative punishment. *Id.* The Tenth District's opinion in *Thomas,* in turn, relied on this Court's post-*Rance*/pre-*Johnson* ruling in *State v. Childs*, 88 Ohio St.3d 558, 2000-Ohio-425, 728 N.E.2d 379 for this proposition.[1]

One of issues in *Childs* was whether the defendant could be separately convicted and sentenced for two counts of conspiracy to commit aggravated trafficking. This Court stated that R.C. 2941.25 is "the primary legislative statement on the multiplicity issue," but "is not the sole legislative declaration in Ohio on the multiplicity of indictments." *Id.* 88 Ohio St.3d at 561, 728 N.E.2d at 383. The Court added that "[d]epending upon the offense at issue, that section must be read in concert with other legislative statements on the issue." *Id.*

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[1]The Court's opinion was written by former Supreme Court Justice Deborah Cook, who also wrote the majority opinion in *Rance*.

The opinion in *Childs* cited Division (F) of R.C. 2923.01, the general conspiracy statute, as an example of "such a legislative statement." *Id.* Division (F) states that "[a] person who conspires to commit more than one offense is guilty of only one conspiracy, when the offenses are the object of the same agreement or continuous conspiratorial relationship." After analyzing the trial testimony and finding evidentiary support for "distinct conspiracies rather than subagreements toward a common overriding objective," the *Childs* Court held that the trial court could convict and sentence the defendant for the two conspiracy counts without running afoul of the Double Jeopardy Clause. *Id.* 88 Ohio St.3d at 562-63, 728 N.E.2d at 384-85.[2]

But unlike the scenario in *Childs*, the Tenth District in Miranda's appeal was unable to point to any "specific legislative statement" that the General Assembly intended to permit cumulative punishment for a corrupt activity conviction and one or more of its predicate felonies, Instead, the appellate panel relied on the following statement from this Court's opinion in *Schlosser,* 79 Ohio St.3d at 335, 681 N.E.2d at 916: "The intent of the [RICO] statute is to impose additional <u>liability</u> for the pattern of corrupt activity involving the criminal enterprise." *Miranda,* 2012-Ohio-3971, at ¶9 (emphasis supplied).

The Tenth District's reliance on *Schlosser* as authority for dispensing with the need to apply R.C. 2941.25 in corrupt activity prosecutions was misplaced. The precise issue decided by *Schlosser*

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[2]Interestingly, the Court in *Childs* was also presented with the question of whether the defendant could be convicted and sentenced for a separate count of conspiracy to engage in a pattern of corrupt activity under R.C. 2923.32. The State insisted that multiple punishments were permissible, and that "to hold otherwise would thwart RICO's purpose to enhance penalties where criminal enterprises are involved." *Id.* 88 Ohio St.3d at 564, 728 N.E.2d at 385. The *Childs* Court found it unnecessary to decide this issue because the RICO conspiracy conviction was inconsistent with the State's theory that the two trafficking conspiracy counts involved separate agreements each directed to a short-term goal. For this reason, the Court affirmed the court of appeals' reversal of the RICO conspiracy conviction due to insufficient evidence. *Id.* 88 Ohio St.3d at 564, 728 N.E.2d at 385-86.

was whether a culpable mental state is required for a violation of R.C. 2923.32(A)(1). *Id.* 79 Ohio St.3d at 331, 681 N.E.2d at 913 ("the issue certified to this court by the Court of Appeals for Montgomery County is, 'Is any culpable mental state required for a violation of R.C. 2923.32(A)(1) and, if so, what culpable mental state is required?'")

The quoted statement from *Schlosser* was framed in terms of "liability," not punishment. It was made in the context of resolving the certified question regarding culpable mental state. The decision in *Schlosser* had absolutely nothing to do with the Double Jeopardy Clause or the Allied Offenses Statute.

Moreover, at the time *Schlosser* was decided, Division (D) of R.C. 2923.32 provided that "[c]riminal penalties under this section are not mutually exclusive, unless otherwise provided, and do not preclude the application of any other criminal or civil remedy under this or any other section of the Revised Code." But in 2007, the General Assembly removed Division (D) in its entirety. *See* H.B. 241, Section 1, 151 Ohio Laws, Part V, 9092, 9133 (eff. 7/1/2007).

The deletion is significant. It is a settled rule of statutory construction that an amendment to a section of the Revised Code "is presumed to have been made to effect some purpose." *Canton Malleable Iron Co. v. Porterfield*, 30 Ohio St.2d 163, 175, 283 N.E.2d 434, 441 (1972). This rule applies with equal force to amendments that excise language from a statute. *State v. Didion*, 173 Ohio App.3d 130, 2007-Ohio-4494,877 N.E.2d 725, ¶29.

In *Didion*, for example, the defendant argued that the trial court lacked statutory authority to order him to pay restitution to the medical insurers of the victims of his vehicular assault offenses. He pointed out that prior to his offense date, the General Assembly amended R.C. 2929.18 (the financial sanctions statute) by deleting language which authorized restitution awards to third parties.

The court of appeals acknowledged that "one could argue" the amended version of the statute gives "trial courts broad discretion in ordering financial sanctions and that the courts' discretion includes ordering restitution to third parties." *Id.* at ¶28. It nevertheless rejected this broad interpretation of the statute because "[t]he General Assembly removed the third-party language from the statute for a reason in 2004, and it has never put the language back. * * * R.C. 2929.18(A)(1) used to allow restitution to third parties, but it no longer does. Therefore, we hold that R.C. 2929.18(A)(1) authorizes trial courts to order the payment of restitution to crime victims but not to third parties." *Id.* ¶29.

By eliminating the language in Division (D) from the RICO statute, the General Assembly recognized the unfairness of excepting corrupt activity prosecutions from the limitations of R.C. 2941.25. In the appellate proceedings below, Miranda argued that the amendment reflected an intent on the part of the legislature to require the merger of a corrupt activities conviction with one or more of its predicate offenses if such merger is consistent with the Allied Offenses Statute.[3]

In rejecting Miranda's argument, the Tenth District noted that the removal of Division (D) was part of a bill that created a new Revised Code Chapter governing criminal and civil asset forfeitures. *Id.* ¶11. The appellate panel pointed out that the second sentence of Division (D)

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[3]The court of appeals opinion states that "[a]ppellant argues that [the] 2006 amendment to R.C. 2923.32 demonstrates that the General Assembly no longer intended to allow cumulative punishment in corrupt activity cases." *Miranda*, 2012-Ohio-3971, at ¶10. This is not an entirely accurate characterization of Miranda's argument below. Miranda's appellate brief noted that in the 1993 ruling in *State v. Burge*, 88 Ohio App.3d 91, 94, 623 N.E.2d 146, 148 (1993), the Tenth District "interpreted Division (D) as carving out an exception shielding convictions under the corrupt activities statute from the reach of the Allied Offenses Statute. By striking this language, the General Assembly recognized the unfairness of a blanket exception and expressed its intent to permit the merger of a corrupt activities conviction with a predicate offense *if consistent with the [Allied Offenses] statute*." *See* Brief of Defendant-Appellant, p. 12 (emphasis supplied).

included language relating to criminal forfeitures under the RICO statute. *Id.* The panel members stated they could "find no evidence that the General Assembly intended to permit merger of corrupt activity convictions with predicate offenses by deleting the first sentence of the former division (D) of R.C. 2923.32." *Id.* But this line of reasoning fails to account for the fact that the first sentence of Division (D) had nothing to do with forfeitures. The General Assembly removed it for a reason, and "it has never put the language back." *Didion, supra.*

In the alternative, the court of appeals reasoned that the *Schlosser* decision did not rely on Division (D). The panel emphasized that this Court looked to the similarity of the Ohio RICO statute with its federal counterpart, and "the clear statements that the federal law allow[s] cumulative punishment." *Id.* ¶12.

But it again bears emphasizing that the *Schlosser* decision addressed only the question of whether the Ohio statute requires a culpable mental state. The "clear statements" regarding the federal statute do not having any bearing on whether Ohio courts are required to apply the Ohio Allied Offenses Statute when deciding whether it is constitutionally permissible for the sentencing court to impose multiple punishments for an Ohio RICO violation and one or more predicate felonies.

In the final analysis , the General Assembly's reasons for removing Division (D) from the RICO statute are almost beside the point. The fact remains that the language was deleted, and that there are no other "specific legislative statements" removing multiple-count corrupt activities prosecutions from the ambit of the Allied Offenses statute. Therefore, this Court should rule that Ohio appellate courts are required to apply R.C. 2941.25 and the new standard announced in *State v. Johnson* when deciding whether to merge multiple convictions for the offense of engaging in a pattern of corrupt activity and one or more of its predicate felonies.

B. It Is Possible to Commit the Crime of Engaging in a Pattern of Corrupt Activity Involving Trafficking in Marijuana and the Predicate Crime of Trafficking in Marijuana by the Same Conduct.

As a matter of simple logic, application of the *Johnson* standard will ordinarily result in the merging of an underlying or "predicate" offense with the "compound" offense. Indeed, *Johnson* involved precisely such a fact pattern. The defendant was found guilty of the felony-murder subsection of the aggravated murder statute based on the predicate felony of child endangering as well as a separate substantive count of child endangering.

After overruling *Rance* and announcing the new two-pronged standard for applying R.C. 2941.25, this Court had little difficulty finding the defendant's conviction for child endangering merged with his conviction for aggravated murder. It explained that "Johnson's beating of [the child victim] constituted child abuse under [the child endangering statute]. That child abuse formed the predicate offense for the felony murder under [the aggravated murder statute]. The conduct that qualified as child abuse resulted in [the victim's] death, thereby qualifying as the commission of felony murder." 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶57.

Ohio's RICO statute requires the prosecution to prove the accused conducted or participated in the affairs of an enterprise through a pattern of "two or more incidents of corrupt activity." R.C. 2923.31(E); R.C. 2923.32(A)(1). These "incidents" will typically consist of one or more qualifying felony offenses enumerated in R.C. 2923.31(I)(2). When a defendant is charged with a RICO count, it is common practice for prosecutors to also indict him for additional counts separately charging the predicate felonies upon which the pattern of corrupt activity is based. The new standard in *Johnson* should, in most if not all instances, foreclose "shotgun convictions" for the compound "RICO" count and one or more of its predicate offenses.

C. Miranda Engaged in a Pattern of Corrupt Activity and Trafficked in Marijuana Through the Same Conduct.

Application of the *Johnson* standard to Miranda's case is relatively straight-forward. As to the first prong of *Johnson*, it is possible to commit the offense of engaging in a pattern of corrupt activity and the predicate offense of trafficking in marijuana through the same conduct. As to the second prong, the indictment expressly incorporated the Count 2 trafficking in marijuana offense as a predicate offense of the RICO offense charged in Count 1. The structuring of the indictment in this manner establishes as a matter of law that both offenses were committed by the same conduct. In addition, the State's statement of facts during Miranda's guilty plea hearing confirmed the corrupt activity count was based entirely on the marijuana trafficking activity.

D. The Trial Court Committed Plain Error When it Entered Separate Convictions and Sentenced Miranda to Consecutive Prison Terms for Engaging in a Pattern of Corrupt Activity and Trafficking in Marijuana.

The Ohio Felony Sentencing Act grants a defendant an appeal as of right from a sentence that is contrary to law. R.C. 2953.08(A)(4). A sentence is authorized by law only if it comports with all mandatory sentencing provisions. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶23. Although Miranda did not raise an objection, this Court has held that a trial court commits plain error when it imposes multiple sentences for allied offenses of similar import. *Id.* at ¶31.

Because Miranda's convictions merge under the *Johnson* standard, the imposition of multiple sentences in his case was plain error. This error violated his substantial rights under the Allied Offenses Statute and the Double Jeopardy Clauses of the federal and state constitutions. It also resulted in an excessive punishment for his crime and a manifest miscarriage of justice. For these reasons, Miranda asks the Court to sustain his single proposition of law.

CONCLUSION

Miranda admitted his involvement in a marijuana operation and was prepared to accept the fact that his crime warranted a relatively stiff, mandatory prison term. However, he was unfairly subjected to multiple punishments for two charges that constitute the same offense under the standard announced in *Johnson*. His aggregate prison term of fourteen years is grossly excessive punishment for his conduct under the circumstances. Wherefore, Miranda prays that this Court will reverse the judgment of the court of appeals and remand his case to the court of common pleas with instructions requiring the prosecution to elect one count upon which he should be convicted and sentenced.

Respectfully submitted,

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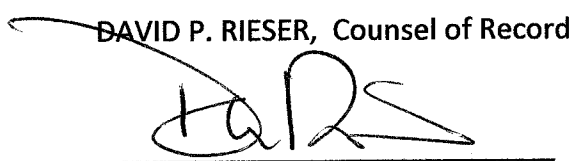

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APPELLANT ARNALDO R. MIRANDA

CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Defendant-Appellant Arnaldo R. Miranda was served upon Ron O'Brien (0017245), Prosecuting Attorney, Franklin County, Ohio, and Seth Gilbert, Attorney for Plaintiff-Appellee State of Ohio, 373 South High Street, 13th Floor, Columbus, Ohio 43215-4554 by hand-delivery this 6th day of May, 2013.

DAVID P. RIESER (0025247)
ATTORNEY FOR DEFENDANT-
APPELLANT ARNALDO R. MIRANDA

IN THE SUPREME COURT OF OHIO
2012 TERM

12-1741

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
vs.	:	
ARNALDO R. MIRANDA,	:	Court of Appeals Case No. 11AP-788
Defendant-Appellant.	:	

NOTICE OF APPEAL OF DEFENDANT-APPELLANT ARNALDO R. MIRANDA

OFFICE OF THE PUBLIC ATTORNEY
2012 OCT 15 PM 4:16
FRANKLIN COUNTY OHIO

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SUPREME COURT OF OHIO

and

SETH GILBERT (0072929) (COUNSEL OF RECORD)
Assistant Prosecuting Attorney

COUNSEL FOR PLAINTIFF-APPELLEE

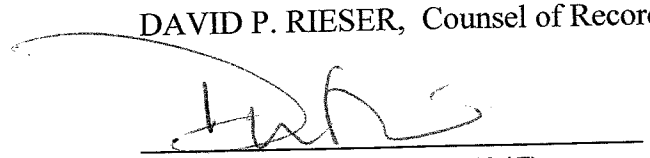
NOTICE OF APPEAL OF DEFENDANT-APPELLANT ARNALDO R. MIRANDA

Defendant-Appellant Arnaldo R. Miranda hereby gives notice of his appeal to the Supreme Court of Ohio from the Judgment Entry of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. 11AP-788 on August 30, 2012.

This case raises a substantial constitutional question, involves a felony, and is one of public or great general interest.

Respectfully submitted,

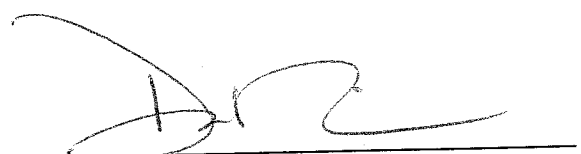
DAVID P. RIESER, Counsel of Record



DAVID P. RIESER (0025247)
ATTORNEY FOR DEFENDANT-
APPELLANT ARNALDO R. MIRANDA

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal of Defendant-Appellant Arnaldo R. Miranda was served upon Ron O'Brien (0017245), Prosecuting Attorney, Franklin County, Ohio, and Seth Gilbert, Attorney for Plaintiff-Appellee State of Ohio, 373 South High Street, 13th Floor, Columbus, Ohio 43215-4554 by regular U.S. Mail this 15th day of October, 2012.



DAVID P. RIESER (0025247)
ATTORNEY FOR DEFENDANT-
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FRANKLIN COUNTY, OHIO

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CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 11AP-788
v.	:	(C.P.C. No. 11CR-02-688)
Arnaldo R. Miranda,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on August 30, 2012, appellant's two assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

DORRIAN, SADLER & FRENCH, JJ.

BY_____
Judge Julia L. Dorrian

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FRANKLIN COUNTY, OHIO
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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 11AP-788
	:	(C.P.C. No. 11CR-02-688)
v.		
Arnaldo R. Miranda,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 30, 2012

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

David P. Rieser, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Defendant-appellant, Arnaldo R. Miranda ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas imposing prison sentences pursuant to appellant's guilty plea. Because we conclude that the trial court did not err by sentencing appellant to separate consecutive sentences on the two charges to which he pled guilty, we affirm.

{¶ 2} In January 2011, appellant and several other men were arrested in connection with their involvement in a marijuana trafficking enterprise. After his arrest, appellant confessed to the police that he was the "money person" for the enterprise. Appellant was indicted on one count of engaging in a pattern of corrupt activity, a first-degree felony in violation of R.C. 2923.32; three counts of trafficking in marijuana,

second-degree felonies in violation of R.C. 2925.03; and three counts of possession of marijuana, second-degree felonies in violation of R.C. 2925.11. Appellant ultimately pled guilty to two counts: a second-degree felony charge of engaging in a pattern of corrupt activity and a second-degree felony charge of trafficking in marijuana. Following the guilty plea, the trial court sentenced appellant to six years' imprisonment on the charge of engaging in a pattern of corrupt activity and eight years' imprisonment on the charge of trafficking in marijuana, with the sentences to be served consecutively. The court also imposed a fine of $15,000 on each count, required appellant to pay court costs, and notified appellant of a mandatory three-year term of post-release control.

{¶ 3} Appellant appeals from the trial court's judgment imposing the prison sentences, assigning two errors for this court's review:

> Assignment of Error No. 1: The imposition of separate convictions and sentences for the offense of engaging in a pattern of corrupt activity and the predicate offense of trafficking in marijuana violated R.C. 2941.25 (the allied offenses statute) and Defendant-Appellant's rights under the Double Jeopardy Clauses of [the] Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.
>
> Assignment of Error No. 2: The methodology employed by the trial court to justify the imposition of consecutive sentences for the offense of engaging in a pattern of corrupt activity and the predicate offense of trafficking in marijuana was contrary to R.C. 2929.11 and R.C. 2929.12, and also violated Defendant-Appellant's right to due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution. Defendant-Appellant requests the Court to grant him leave to appeal his consecutive sentences pursuant to R.C. 2953.08(C).

{¶ 4} Appellant argues that the sentences imposed by the trial court are contrary to law. Under R.C. 2953.08(A)(4), a criminal defendant who is convicted of or pleads guilty to a felony may appeal a sentence on the grounds that it is contrary to law. In *State v. Allen*, 10th Dist. No. 10AP-487, 2011-Ohio-1757, this court explained the standard of review in felony sentencing decisions:

> In *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶ 19, this court held that, pursuant to R.C. 2953.08(G),

> we review whether clear and convincing evidence establishes that a felony sentence is contrary to law. A sentence is contrary to law when the trial court failed to apply the appropriate statutory guidelines. *Burton* at ¶ 19.
>
> After *Burton,* however, in a plurality opinion, the Supreme Court of Ohio established a two-step procedure for reviewing a felony sentence. *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912. The first step is to "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Kalish* at ¶ 4. The second step requires that the trial court's decision also be reviewed under an abuse of discretion standard. *Id.* An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.
>
> As a plurality opinion, *Kalish* has limited precedential value. *State v. Franklin,* 182 Ohio App.3d 410, 2009-Ohio-2664, ¶ 8. Additionally, since *Kalish,* this court has continued to rely on *Burton* and only applied the contrary-to-law standard of review. *Franklin* at ¶ 8, citing *State v. Burkes,* 10th Dist. No. 08AP-830, 2009-Ohio-2276; *State v. O'Keefe,* 10th Dist. No. 08AP-724, 2009-Ohio-1563; *State v. Hayes,* 10th Dist. No. 08AP-233, 2009-Ohio-1100.

Id. at ¶ 19-21.

{¶ 5} In this case, however, appellant raised no objections during the sentencing hearing. Therefore, he has waived all but plain error. *See State v. Worth,* 10th Dist. No. 10AP-1125, 2012-Ohio-666, ¶ 84. Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." To find plain error, we must find that there was an error, that the error was plain, constituting an obvious defect in the trial proceedings, and that the error affected the appellant's substantial rights. *State v. Carter,* 10th Dist. No. 03AP-778, 2005-Ohio-291, ¶ 22. Moreover, notice of plain error is taken only in exceptional circumstances to prevent a manifest miscarriage of justice. *State v. Sneed,* 63 Ohio St.3d 3, 10 (1992).

{¶ 6} In his first assignment of error, appellant claims that the trial court erred by imposing separate sentences for each of the counts to which he pled guilty. Appellant argues that the trial court was required to merge the convictions for the purposes of sentencing pursuant to R.C. 2941.25, Ohio's allied offenses statute. As noted above, appellant did not object to the lack of merger at the sentencing hearing; therefore, the plain-error standard applies. *See State v. Davic*, 10th Dist. No. 11AP-555, 2012-Ohio-952, ¶ 13. "Plain error exists when a trial court was required to, but did not, merge a defendant's offenses because the defendant suffers prejudice by having more convictions than authorized by law." *Id.*

{¶ 7} Appellant argues that his convictions for engaging in a pattern of corrupt activity and trafficking in marijuana must be merged pursuant to the allied offenses statute because they were committed by the same conduct. Ohio's allied offenses statute provides that "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." R.C. 2941.25(A). By contrast, "[w]here 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." R.C. 2941.25(B).

{¶ 8} However, as we have previously noted, "[a] person may be punished for multiple offenses arising from a single criminal act so long as the General Assembly intended cumulative punishment." *State v. Thomas*, 10th Dist. No. 10AP-557, 2011-Ohio-1191, ¶ 19, citing *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 25. The primary indication of the General Assembly's intent is R.C. 2941.25, but other more specific legislative statements may also be considered depending on the offenses involved. *Id.*

{¶ 9} Appellant pled guilty to engaging in a pattern of corrupt activity, in violation of R.C. 2923.32, also known as Ohio's Racketeer Influenced and Corrupt Organizations ("RICO") statute. The Supreme Court of Ohio has previously held that "[t]he RICO statute was designed to impose *cumulative* liability for [a] criminal enterprise."

(Emphasis added.) *State v. Schlosser*, 79 Ohio St.3d 329, 335 (1997). Finding that Ohio's RICO statute was based on the federal RICO statute, the Supreme Court noted that Congress declared the intention of the federal law to be to " 'provid[e] enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.' " *Id.* at 332, quoting Organized Crime Control Act of 1970, Statement of Findings and Purpose, 84 Stat. 922, reprinted in 1970 U.S. Code Cong. & Adm. News at 1073. Thus, merger of a conviction for engaging in a pattern of corrupt activity and a predicate offense is not required because the intent of Ohio's RICO statute "is to impose additional liability for the *pattern* of corrupt activity involving the criminal enterprise." (Emphasis sic.) *Id.* at 335.

{¶ 10} Appellant argues that a 2006 amendment to R.C. 2923.32 demonstrates that the General Assembly no longer intended to allow cumulative punishment in corrupt activity cases. Appellant cites to this court's decision in *State v. Burge*, 88 Ohio App.3d 91 (10th Dist.1993), in which we referred to division (D) of R.C. 2923.32 in concluding that a defendant could be convicted and sentenced on both a corrupt activity charge and on the predicate offense. *Id.* at 94. The first sentence of division (D) of R.C. 2923.32 provided that " '[c]riminal penalties under this section are not mutually exclusive, unless otherwise provided, and do not preclude the application of any other criminal or civil remedy under this or any other section of the Revised Code.' " *Burge* at 94, quoting R.C. 2923.32(D). In 2006, the General Assembly enacted Sub.H.B. No. 241, which deleted division (D) from R.C. 2923.32. Sub.H.B. No. 241, 151 Ohio Laws, Part V, 9092, 9133. Appellant argues that, by deleting this provision, the General Assembly expressed its intent to allow the merger of a corrupt activity conviction with a predicate offense where such merger would otherwise be consistent with the allied offenses statute.

{¶ 11} We acknowledge that "[t]he General Assembly's amendment to a section of the Revised Code is presumed to have been made to effect some purpose." *Canton Malleable Iron Co. v. Porterfield*, 30 Ohio St.2d 163, 175 (1972). However, further examination of Sub.H.B. No. 241 indicates that the deletion of division (D) of R.C. 2923.32 was not intended to permit merger of a corrupt activity conviction with a predicate offense. Sub.H.B. No. 241 created a new chapter of the Revised Code, Chapter 2981, governing criminal and civil asset forfeitures. Sub.H.B. No. 241, 151 Ohio Laws,

Part V, 9092, 9217-43. In addition to creating new forfeiture provisions, the legislation deleted certain forfeiture provisions located in other parts of the Revised Code. The second sentence of former R.C. 2923.32(D) related to criminal forfeiture, providing that "[a] disposition of criminal forfeiture ordered pursuant to division (B)(3) of this section in relation to a child who was adjudicated delinquent by reason of a violation of this section does not preclude the application of any other order of disposition under Chapter 2152. of the Revised Code or any other civil remedy under this or any other section of the Revised Code." R.C. 2923.32(D), repealed in Sub.H.B. No. 241, 151 Ohio Laws, Part V, 9092, 9133. In addition to deleting division (D) of R.C. 2923.32, Sub.H.B. No. 241 also deleted divisions (B)(4)-(6), (C), and (E)-(F) of the statute, each of which also addressed forfeiture. Sub.H.B. No. 241, 151 Ohio Laws, Part V, 9092, 9131-34. Thus, the deletion of division (D) of the statute appears to have been part of the general revisions related to the creation of Chapter 2981. We find no evidence that the General Assembly intended to permit merger of corrupt activity convictions with predicate offenses by deleting the first sentence of the former division (D) of R.C. 2923.32.

{¶ 12} In *Schlosser*, the Supreme Court of Ohio did not rely on division (D) of R.C. 2923.32 in holding that the statute permitted cumulative punishment. Rather, as noted above, the court looked to the law's similarity to federal law and the clear statements that the federal law allowed cumulative punishment. *Schlosser* at 332-35. Further, since the deletion of division (D), two courts of appeals have concluded that R.C. 2923.32 permits cumulative punishment and does not require merger of a corrupt activity conviction with a predicate offense. *See State v. Dodson*, 12th Dist. No. CA2010-08-191, 2011-Ohio-6222, ¶ 68; *State v. Moulton*, 8th Dist. No. 93726, 2010-Ohio-4484, ¶ 35-38. Consistent with these decisions and the reasoning set forth above, we conclude that the General Assembly intended to permit separate punishments for engaging in a pattern of corrupt activity and the underlying predicate crimes. Thus, even assuming for the purpose of analysis that appellant is correct that he committed the crimes of engaging in a pattern of corrupt activity and trafficking in marijuana through the same conduct, the trial court did not err by imposing separate sentences for the two convictions.

{¶ 13} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶ 14} In appellant's second assignment of error, he asserts that the trial court erred in the "methodology" used to impose consecutive sentences on appellant for the two convictions. Appellant concedes that the eight-year prison term for trafficking in marijuana was mandated by statute. However, appellant argues that the trial court erred by imposing a consecutive six-year prison term for engaging in a pattern of corrupt activity. Appellant argues that, in imposing a consecutive sentence, the trial court improperly relied on the prosecutor's statement that the marijuana trafficking enterprise involved Mexican drug cartels.

{¶ 15} Under Ohio law, "[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." R.C. 2929.11(A). In imposing a sentence, the court has discretion to determine the most effective way to comply with these purposes; in the exercise of this discretion, the court must consider factors relating to the seriousness of the defendant's conduct, the likelihood of recidivism, and other relevant factors. R.C. 2929.12(A). The offender, the prosecutor, and the victim or victim's representative may present information relevant to the imposition of sentence. R.C. 2929.19(A).

{¶ 16} At the sentencing hearing, the prosecutor asserted that "[g]iven the size of this organization, this is, clearly, coming from Mexico, involving Mexican cartels, because of the amount of money involved as well as the information that the state has gotten from the investigation." (Sentencing Hearing Tr. at 14.) When the court pronounced appellant's six-year sentence on the charge of engaging in a pattern of corrupt activity, it referred to the involvement of Mexican cartels in the trafficking enterprise. Appellant asserts that the trial judge acted contrary to law in relying on the assertion that Mexican cartels were involved in the enterprise because there was no evidence in the record to support the assertion.

{¶ 17} The Ohio Rules of Evidence do not apply to sentencing hearings. Evid.R. 101(C)(3); *State v. Guzman*, 10th Dist. No. 02AP-1440, 2003-Ohio-4822, ¶ 25. We have previously held that "a trial court may even consider information during the sentencing hearing that may have been inadmissible at trial." *Id.* Moreover, R.C. 2929.19(A)

explicitly provides that, at a sentencing hearing, the offender, the prosecutor, and the victim may present *information* relevant to sentencing. The statute does not use the term "evidence" when referring to the matters that may be presented for the trial court's consideration. Therefore, the trial court was not precluded from considering the prosecutor's statement regarding the involvement of Mexican cartels.

{¶ 18} Appellant did not object to the prosecutor's statement during the sentencing hearing. Moreover, we note that appellant's own counsel alluded to the possible involvement of Mexican cartels before the prosecutor made any such assertion:

> [Appellant] was found with a million dollars in cash. It's not his money. That money gets shipped back. It goes back to Arizona. From there, I don't know where it goes. Maybe it goes to Mexico. I guess we can only surmise.

(Sentencing Hearing Tr. at 6.)

{¶ 19} Finally, the transcript indicates that, contrary to appellant's assertion, the trial court did not refer to the involvement of Mexican cartels in the marijuana trafficking enterprise as the basis for imposing consecutive sentences. Rather, the trial court made this reference in explaining the length of the sentence imposed. The court acknowledged that appellant accepted responsibility for his role by pleading guilty but explained that the scope and scale of the marijuana trafficking enterprise reduced the mitigating effect of that factor:

> This was a huge operation, commercially, that brought a lot of illegal drugs into our community, and the involvement with the Mexican cartels is probably inviting the most dangerous folks on the face of the planet, or just about, next to the Taliban, to have dealings with Columbus, and I can't give any more than two years less than the maximum for accepting responsibility on this thing.

(Sentencing Hearing Tr. at 24.)

{¶ 20} Under these circumstances, we conclude that the trial court did not commit plain error in imposing consecutive sentences on appellant.

{¶ 21} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶ 22} For the foregoing reasons, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and FRENCH, JJ., concur.

57816 - S98

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,	:	TERMINATION NO. 13 BY: SL
Plaintiff,	:	
vs.	:	CASE NO. 11CR-02-688
ARNALDO R. MIRANDA	:	JUDGE FRYE
Defendant.	:	

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FRANKLIN CO. OHIO
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CLERK OF COURTS

JUDGMENT ENTRY
(Prison Imposed)

On June 20, 2011, the State was represented by Assistant Prosecuting Attorneys Dan Stanley and Michael Jakubow and Defendant was represented by David Rieser, Esq. Defendant, after being advised of his rights pursuant to Crim. R. 11, entered a plea of **guilty** to the stipulated lesser included offense of **Count One** of the indictment, to-wit: **ENGAGING IN A PATTERN OF CORRUPT ACTIVITY**, in violation of Section 2923.32 of the Ohio Revised Code, being a **felony** of the **2nd degree**, and **Count Two** of the indictment, to-wit: **TRAFFICKING IN MARIJUANA**, in violation of Section 2925.03, a **felony** of the **2nd degree.**

Upon recommendation of the prosecuting attorney and for good cause shown, the Court hereby enters a **NOLLE PROSEQUI** as to **Counts Three, Four, Five, Six, and Seven** of the indictment.

The Court found the Defendant guilty of the charge to which the plea was entered and ordered and received a pre-sentence investigation. The Assistant Prosecuting Attorney and the Defendant's attorney did not recommend a sentence.

On August 12, 2011, the sentencing hearing was held pursuant to R.C. 2929.19. The Court considered the sentencing memorandum submitted by defense counsel, afforded counsel an opportunity to speak on behalf of the Defendant and addressed the Defendant personally affording him an opportunity to make a statement on his own behalf in the form of mitigation and to present information regarding the existence or non-existence of the factors the Court has considered and weighed. The court also considered photographs and other matters as reflected on the record in open court.

The Court has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the Court has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14. The Court further finds that a maximum prison term is mandatory pursuant to R.C. 2929.13(F) for Count Two.

The Court hereby imposes the following sentence: **SIX (6) YEARS IMPRISONMENT ON COUNT ONE PLUS EIGHT (8) YEARS ON COUNT TWO (FOR A TOTAL OF 14 YEARS) TO BE SERVED** at the **OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS. COUNTS ONE AND TWO SHALL RUN CONSECUTIVE WITH EACH OTHER. DEFENDANT'S BUREAU OF MOTOR VEHICLES LICENSE SHALL BE SUSPENDED FOR A PERIOD OF SIX (6) MONTHS WITHOUT WORK PRIVILEGES, EFFECTIVE AUGUST 12, 2011.**

After imposing sentence, the Court stated its reasons as required by RC. 2929.19 and consistent with *State v. Foster*, 2006-Ohio-856. The Court finds that prison is consistent with the purposes and principles of sentencing. The Court also notified Defendant of the applicable period of **3 years mandatory post-release control** pursuant to R.C. 2929.19(B)(3)(c), (d) and (e).

The Court considered Defendant's present and future ability to pay a fine and financial sanction and does, pursuant to R.C. 2929.18, hereby render judgment for the following fine and/or financial sanctions: **DEFENDANT SHALL PAY COURT COSTS IN AN AMOUNT TO BE DETERMINED. DEFENDANT SHALL PAY A FINE IN THE AMOUNT OF $15,000 ON EACH COUNT, (total fine of $30,000.)**

The Court recommends to the Department of Rehabilitation and Correction that defendant be permitted to serve his sentence in the same institution as his brother, Luis A. Miranda, who was sentenced on July 25, 2011 in Case No. 11CR-02-687.

The Court finds that Defendant has **(-199 -) days** of jail credit on this case and hereby certifies the time to the Ohio Department of Rehabilitation and Correction. Defendant is to receive jail time credit on this case for all additional jail time served while awaiting transportation to ODRC.

IT IS SO ORDERED.

RICHARD A. FRYE, JUDGE

Copies to:
All Counsel

Case No. 11CR-02-688

Ohio Constitution Article I. Bill of Rights

§ 10. Trial for crimes; witness

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code **§ 2923.31. Corrupt activity definitions**

As used in sections 2923.31 to 2923.36 of the Revised Code:

* * *

(E) "Pattern of corrupt activity" means two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event.

At least one of the incidents forming the pattern shall occur on or after January 1, 1986. Unless any incident was an aggravated murder or murder, the last of the incidents forming the pattern shall occur within six years after the commission of any prior incident forming the pattern, excluding any period of imprisonment served by any person engaging in the corrupt activity.

For the purposes of the criminal penalties that may be imposed pursuant to section 2923.32 of the Revised Code, at least one of the incidents forming the pattern shall constitute a felony under the laws of this state in existence at the time it was committed or, if committed in violation of the laws of the United States or of any other state, shall constitute a felony under the law of the United States or the other state and would be a criminal offense under the law of this state if committed in this state.

* * *

(I) "Corrupt activity" means engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in any of the following:

* * * ;

(2)

Conduct constituting any of the following:

* * * .

(c)

Any violation of section 2907.21, 2907.22, 2907.31, 2913.02, 2913.11, 2913.21, 2913.31, 2913.32, 2913.34, 2913.42, 2913.47, 2913.51, 2915.03, 2925.03, 2925.04, 2925.05, or 2925.37 of the Revised Code, any violation of section 2925.11 of the Revised Code that is a felony of the first, second, third, or fourth degree and that occurs on or after July 1, 1996, any violation of section 2915.02 of the Revised Code that occurred prior to July 1, 1996, any violation of section 2915.02 of the Revised Code that occurs on or after July 1, 1996, and that, had it occurred prior to that date, would have been a violation of section 3769.11

of the Revised Code as it existed prior to that date, any violation of section 2915.06 of the Revised Code as it existed prior to July 1, 1996, or any violation of division (B) of section 2915.05 of the Revised Code as it exists on and after July 1, 1996, when the proceeds of the violation, the payments made in the violation, the amount of a claim for payment or for any other benefit that is false or deceptive and that is involved in the violation, or the value of the contraband or other property illegally possessed, sold, or purchased in the violation exceeds one thousand dollars, or any combination of violations described in division (I)(2)(c) of this section when the total proceeds of the combination of violations, payments made in the combination of violations, amount of the claims for payment or for other benefits that is false or deceptive and that is involved in the combination of violations, or value of the contraband or other property illegally possessed, sold, or purchased in the combination of violations exceeds one thousand dollars;

* * *

Ohio Revised Code § 2923.32. Engaging in pattern of corrupt activity

(A) (1) No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt.

(2) No person, through a pattern of corrupt activity or the collection of an unlawful debt, shall acquire or maintain, directly or indirectly, any interest in, or control of, any enterprise or real property.

(3) No person, who knowingly has received any proceeds derived, directly or indirectly, from a pattern of corrupt activity or the collection of any unlawful debt, shall use or invest, directly or indirectly, any part of those proceeds, or any proceeds derived from the use or investment of any of those proceeds, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

A purchase of securities on the open market with intent to make an investment, without intent to control or participate in the control of the issuer, and without intent to assist another to do so is not a violation of this division, if the securities of the issuer held after the purchase by the purchaser, the members of the purchaser's immediate family, and the purchaser's or the immediate family members' accomplices in any pattern of corrupt activity or the collection of an unlawful debt do not aggregate one per cent of the outstanding securities of any one class of the issuer and do not confer, in law or in fact, the power to elect one or more directors of the issuer.

(B) (1) Whoever violates this section is guilty of engaging in a pattern of corrupt activity. Except as otherwise provided in this division, engaging in corrupt activity is a felony of the second degree. Except as otherwise provided in this division, if at least one of the incidents of corrupt activity is a felony of the first, second, or third degree, aggravated murder, or murder, if at least one of the incidents was a felony under the law of this state that was committed prior to July 1, 1996, and that would constitute a felony of the first, second, or third degree, aggravated murder, or murder if committed on or after July 1, 1996, or if at least one of the incidents of corrupt activity is a felony under the law of the United States or of another state that, if committed in this state on or after July 1, 1996, would constitute a felony of the first, second, or third degree, aggravated murder, or murder under the law of this state, engaging in a pattern of corrupt activity is a felony of the first degree. If the offender also is convicted of or pleads guilty to a specification as described in section 2941.1422 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, engaging in a pattern of corrupt activity is a felony of the first degree, and the court shall sentence the offender to a mandatory prison term as provided in division (B)(7) of section 2929.14 of the Revised Code and shall order the

offender to make restitution as provided in division (B)(8) of section 2929.18 of the Revised Code. Notwithstanding any other provision of law, a person may be convicted of violating the provisions of this section as well as of a conspiracy to violate one or more of those provisions under section 2923.01 of the Revised Code.

(2) Notwithstanding the financial sanctions authorized by section 2929.18 of the Revised Code, the court may do all of the following with respect to any person who derives pecuniary value or causes property damage, personal injury other than pain and suffering, or other loss through or by the violation of this section:

(a) In lieu of the fine authorized by that section, impose a fine not exceeding the greater of three times the gross value gained or three times the gross loss caused and order the clerk of the court to pay the fine into the state treasury to the credit of the corrupt activity investigation and prosecution fund, which is hereby created;

(b) In addition to the fine described in division (B)(2)(a) of this section and the financial sanctions authorized by section 2929.18 of the Revised Code, order the person to pay court costs;

(c) In addition to the fine described in division (B)(2)(a) of this section and the financial sanctions authorized by section 2929.18 of the Revised Code, order the person to pay to the state, municipal, or county law enforcement agencies that handled the investigation and prosecution the costs of investigation and prosecution that are reasonably incurred.

The court shall hold a hearing to determine the amount of fine, court costs, and other costs to be imposed under this division.

(3) In addition to any other penalty or disposition authorized or required by law, the court shall order any person who is convicted of or pleads guilty to a violation of this section or who is adjudicated delinquent by reason of a violation of this section to criminally forfeit to the state under Chapter 2981. of the Revised Code any personal or real property in which the person has an interest and that was used in the course of or intended for use in the course of a violation of this section, or that was derived from or realized through conduct in violation of this section, including any property constituting an interest in, means of control over, or influence over the enterprise involved in the violation and any property constituting proceeds derived from the violation, including all of the following:

(a) Any position, office, appointment, tenure, commission, or employment contract of any kind acquired or maintained by the person in violation of this section, through which the person, in violation of this section, conducted or participated in the conduct of an enterprise, or that afforded the person a source of influence or control over an enterprise that the person exercised in violation of this section;

(b) Any compensation, right, or benefit derived from a position, office, appointment, tenure, commission, or employment contract described in division (B)(3)(a) of this section that accrued to the person in violation of this section during the period of the pattern of corrupt activity;

(c) Any interest in, security of, claim against, or property or contractual right affording the person a source of influence or control over the affairs of an enterprise that the person exercised in violation of this section;

(d) Any amount payable or paid under any contract for goods or services that was awarded or performed in violation of this section.

Ohio Revised Code § 2941.25. Allied offenses of similar import - multiple counts

(A) Where the same conduct by defendant can be construed to constitute two or more allied 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 them.

Ohio Revised Code § 2953.08. Appeal as a matter of right - grounds

(A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

* * *

(4) The sentence is contrary to law.