ORIGINAL

NO. 2013-1255, 2013-1501

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NOS. 98292, 98584, 98585, 98586, 98587, 98588, 98589, 98590

STATE OF OHIO,

Appellant/Cross-Appellee

-vs-

FRANK ROGERS,

Appellee/Cross-Appellant

FIRST BRIEF OF APPELLANT/CROSS APPELLEE, STATE OF OHIO

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INTRODUCTION AND SUMMARY OF ARGUMENT

Consistent with the established principles of appellate review, a defendant who pleads guilty to multiple offenses and fails to raise an allied offenses issue at sentencing waives or forfeits the right to argue all but plain error on appeal. And since a plain error analysis is always predicated on there being an "obvious" error in failing to merge allied offenses, the claimed error must fail if the record contains no facts proving that a merger error occurred.

The Eighth District's *en banc* decision in *State v. Rogers*, 8th Dist. Cuyahoga Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, 98590, 2013-Ohio-3235, 994 N.E.2d 499, misinterprets the holding in *State v. Underwood,* 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, that "allied offenses of similar import must be merged at sentencing or the sentence is contrary to law." The State concedes that when allied offenses error is obvious on the record, an appellate court should find the error rises to the level of plain error. But there is no plain error when a defendant pleads guilty to an indictment, fails to offer any evidence at sentencing to show why the offenses are allied, and the appellate record contains no facts to show why multiple offenses should merge for sentencing.

Here, the Eighth District decided to reverse and remand Frank Rogers, Jr.'s, conviction not because an error occurred at sentencing, but because it could not tell if an error occurred. Instead of relying on the established application of the plain error rule, the lower court circumvented the rule by holding that plain error occurs simply because the trial court failed to affirmatively conduct a "facial" inquiry of the offenses at sentencing to determine whether the multiple offenses are allied. *Underwood* does not explicitly place a duty on a trial court to make this inquiry and that duty cannot be inferred from the allied offenses statute or prior case law. In creating this new duty for trail courts, the Eighth District relieves defense counsel of any duty to

protect their client's rights—it essentially finds that any issue of ineffective assistance of counsel resulting from counsel's failure to raise the merger issue at sentencing is superseded by a trial court's failure to raise the issue *sua sponte* and hold a hearing on the matter. The Eighth District's *en banc* holding is a misapplication of the plain error rule, a misreading of Supreme Court precedent, a clear departure from our traditional adversarial process and should be reversed.

Additionally, as the offense of receiving stolen property is an offense against the person whose property was stolen, when an indictment charges two counts of receiving the stolen property of two separate and distinct victims the offenses are not allied and do not merge for the purposes of sentencing. This part of the Eighth District's holding in the *en banc* decision of *Rogers* should be affirmed.

STATEMENT OF THE CASE AND RELEVANT FACTS

A Cuyahoga County grand jury indicted Frank Rogers, Jr., in eight different criminal cases over the course of two years. All eight cases were resolved through a negotiated plea agreement on January 24, 2012. The relevant cases for this appeal are labeled CR-11-545992 and CR-11-553806.

I. The Indictments and Relevant Counts of Conviction

In CR-11-545992, the "truck and tire case," a grand jury indicted Rogers on January 21, 2011 with two counts of failure to comply under R.C. 2921.331(B), one count of failure to comply under 2921.331(A), two counts of receiving stolen property under R.C. 2913.51(A), and possession of criminal tools under R.C. 2923.24(A). In CR-11-553806, "the multiple victim case," a grand jury indicted him on September 9, 2011 with two counts of receiving stolen property under R.C. 2913.51(A).

Rogers pleaded guilty to two counts of receiving stolen property and the one count of possession of criminal tools in the truck and tire case. The indictment language for count four stated:

> did receive, retain, or dispose of a 2006 Ford F 150 Pick Up Truck, the property of Mark Johnson knowing or having reasonable cause to believe that the property had been obtained through commission of a theft offense and property involved was a motor vehicle.

Count five's indictment language five stated:

> did receive, retain, or dispose of Tires & Rims, the property of Mark Johnson knowing or having reasonable cause to believe that the property had been obtained through commission of a theft offense and property involved was $500 or more and was less than $5,000.

The indictment language of count six stated:

> did possess or have under the person's control any substance, device, instrument, or article, to wit: a Tire Jack, and/or a Tow Chain, and/or Lug Nut Wrenches, with purpose to use it criminally.
>
> FURTHERMORE, the a Tire Jack, and/or a Tow Chain, and/or Lug Nut Wrenches, involved in the offense were intended to use in the commission of a felony, to wit: RC 2913.51 A (Receiving Stolen Property).

Additionally, Rogers pleaded guilty to two counts of receiving stolen property in the multiple victim case. The language of count one in that indictment read:

> did receive, retain, or dispose of jewelry and/or silverware and/or ceramic dolls and/or religious item, the property of Vilma Fontana knowing or having reasonable cause to believe that the property had been obtained through commission of a theft offense and property involved was $500 or more and was less than $5,000.

Count two stated:

> did receive, retain, or dispose of jewelry, the property of Rebecca Zuchowski knowing or having reasonable cause to believe that the

property had been obtained through commission of a theft offense and property involved was $500 or more and was less than $5,000.

II. Rogers's Plea Hearing

During Rogers's plea on January 24, 2012, the trial court conducted the appropriate Crim.R. 11 plea colloquy in which, Rogers acknowledged that a guilty plea means he admits to the facts in the indictments. (Tr. 12-23, 16). Further, the trial court explained the possible penalties for each offenses felony level. (Tr. 18-19). Rogers understood that he faced six to twelve months for the fifth degree felonies and six to eighteen months for the fourth degree felony. (Tr.18-21). After the colloquy, the trial court found Rogers to be aware of the maximum penalties and that he knowingly, intelligently, and voluntarily made his guilty pleas. (Tr. 23). Rogers requested a pre-sentencing investigation and the trial court so ordered. (Tr. 32-33).

III. Rogers's Sentencing Hearing

The trial court sentenced Rogers on February 28, 2012. The trial court stated that it reviewed the pre-sentencing investigation report. (Tr. 38). The two victims in CR-11-553806, Vilma Fontana and Rebecca Zuchowski, testified that their belongings were taken from their homes in Independence and Lakewood Police recovered their belongings when Rogers tried to fence the items at a pawn shop. (Tr. 46-56). Their different homes were burglarized on the same day. *Rogers II* at ¶ 20. Jewelry was stolen from the one home and religious items were stolen from the other. (Tr. 49, 54). Two different victims resided in each home. *Rogers II* at ¶ 20. Rogers was caught trying to pawn the stolen goods, but in *Rogers I* the Eighth District determined it was unclear from the record as two whether or not Rogers was caught with trying to pawn the stolen goods at the same time. *Id.* at ¶ 17. While the trial prosecutor at sentencing repeatedly clarified that Rogers was not charged with Burglary of either home, the first victim spoke of Roger's confession to burglarizing her home while her 98 year-old mother was still

inside. (Tr. 46, 50-51, 53). The discussion of the confession was not objected to by the defense counsel and is a part of the record.

No one placed any evidence or testimony on the record regarding Mark Johnson's stolen pickup truck, tires, and rims, or Rogers's possession of the tire jack, tow chain, and lug nut wrenches in CR-11-545992. The trial court then sentenced Rogers to an aggregate total of twenty-four months in CR-11-545992—twelve months for receiving the stolen pickup truck consecutive to the six months for receiving the stolen tires and rims, and consecutive to the six months for possessing the tire jack, tow chain, and lug nut wrenches. Additionally, the trial court sentenced him consecutively to six months for receiving the stolen property of Vilma Fontana and twelve months for receiving the stolen property of Rebecca Zuchowski for an aggregate period of incarceration of eighteen months in CR-11-553806. Further, the trial court imposed the sentences in all of the eight indicted cases to be served consecutively to one another (Tr. 73). During the sentencing, defense counsel did not raise any objection regarding the issue of allied offenses or assert any argument that the offenses in either of the two cases should be merged.

IV. *Rogers I*

Roger's appealed his convictions and sentence in *State v. Rogers*, 8th Dist. Cuyahoga Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, 98590, 2013-Ohio-1027, 990 N.E.2d 1085 ("*Rogers I*"). In his appeal, he raised for the first time the issue of allied offenses in both the truck and tires case and the multiple victim case. On March 21, 2013, the Eighth District Court of Appeals affirmed Rogers's convictions and sentence, holding at the outset that:

> We therefore find no basis for the suggestion that it is plain error for the [trial] court to fail to inquire into the possibility of whether offenses are allied for the purposes of sentencing. We continue to adhere to the basic proposition of appellate review that plain error can only exist if there is evidence making an error manifest on the

> record. We cannot envision a scenario where the absence of error on the record can ever suffice to show plain error.

Id. at ¶ 11. The Eighth District court went on to evaluate the individual counts regarding the issue of allied offenses for the above described cases. Concerning multiple victim case, the Eighth District ruled that:

> it is unclear from the transcript whether the two counts of receiving stolen property were committed with a state of mind to commit only one act. The indictment charged Rogers with committing those acts on the same day, but it did not charge that those acts occurred at the same time. It is possible from the record on appeal that he attempted to dispose of the stolen items separately, and that possibility alone is enough for us to find that he has failed to show an error that is so obvious that it rises to the level of plain error.

(Citations Omitted.) *Id.* at ¶ 17. Regarding the truck and tires case, the Eighth District held:

> There is nothing in the record to support Roger's argument that the tires and rims were from the stolen truck. Although the indictment identifies the truck that Rogers received, retained, or tried to dispose of, the count relating to the "Tires & Rims" made no connection to them being a part of the stolen truck. With the absence of any facts to support this assertion, we cannot find that the court committed plain error by failing to merge for sentencing Counts 4 and 5 of the indictment in CR-545992.

(Citations Omitted.) *Id.* at ¶ 19.

V. *Rogers II*

Sua sponte, the Eighth District designated the decision in *Rogers I* for *en banc* review on March 25, 2013. After some briefing by the parties, the Eighth District voted eleven to one in *State v. Rogers*, 8th Dist. Cuyahoga Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, 98590, 2013-Ohio-3235, 994 N.E.2d 499 ("*Rogers II*"), to affirm the trial court's imposition of separate sentences in the multiple victim case, but reversed and remanded the imposition of separate sentences in the truck and tires case on July 25, 2013.

In finding that the two counts of receiving stolen property in the multiple victim case were not allied, the Eighth District simply stated "[s]eparate victims alone established a separate animus for each offense." *Id.* at ¶ 22.

The Eighth District court reversed and remanded the sentences in the truck and tire case by finding that "we are unable to determine if these offenses were allied offenses of similar import. [...] There are simply no facts in the record to aid in our mandated de novo review of the issue." *Id.* at ¶ 25. According to the Eighth District:

> *Underwood* placed the duty squarely on the trial court judge to address the merger question. *Underwood,* 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923. Likewise, the merger statute imposes the same duty. R.C. 2941.25. Ultimately, it is the trial judge who imposes the sentence in a case. While the judge cannot be an advocate for either position, the trial court must address the potential allied-offense issue when the charges facially present a question of merger. A defendant's conviction on multiple counts, regardless of how achieved, does not affect the court's duty to merge allied offenses of similar import at sentencing.
>
> When a facial review of the charges and the elements of the crimes present a viable question of merger, the court must apply the *Johnson* test.
>
> ***
>
> We therefore hold that a trial court commits error where multiple charges facially present a question of merger under R.C. 2941.25 and the trial court fails to conduct an allied offenses of similar import analysis. We will discuss the effect of this error in more detail below.

Id. at ¶ 27-33.

In so doing, the Eighth District recognized that Rogers's trial counsel failed to raise the merger question in the trial court below, but that "a guilty plea alone does not constitute a valid waiver of the protections from possible double jeopardy under R.C. 2941.25." *Rogers II* at ¶ 35, 41. Instead, the Eighth District considered, "if the failure to assert double jeopardy at the trial

court level constituted a forfeiture of that right, the jeopardy claim may be reviewed for plain error." *Id.* at ¶ 36. But, "[d]efense counsel's failure to raise the merger issue does not relieve the trial court of its duty to determine the merger question when a facial question of merger presents itself. Ultimately it is the trial court that must apply the statutory requirements in R.C. 2941.25 and address the possible merger questions." *Id.* at ¶ 37. Reasoning, "[m]erger occurs just prior to the entry of conviction and is a function of sentencing that is the exclusive domain of the trial judge," the Eighth District found with "the absence of a stipulation or an agreement on which offenses are allied, a guilty plea does not negate the court's mandatory duty to merge allied offenses of similar import at sentencing." *Id.* at ¶ 38, 40, citing *Underwood* at ¶ 26.

Regarding review for plain error, the Eighth District when on to conclude:

> [Previous Eighth District opinions] accept the principle that it is plain error not to merge allied offenses, but rationalize that since there are no facts to find plain error, plain error does not exist. This is a self-fulfilling prophecy that defeats the constitutional protection outlined in *Underwood.* In our view, it is the absence of facts, or at least an inquiry into those facts, that makes the question ripe for review and creates plain error.
>
> The duty to merge implies a duty to inquire and determine whether multiple charges are allied offenses of similar import. Without the duty to inquire and determine, the duty to merge would be empty. An essential step in the merger process is applying the requirements of R.C. 2941.25, and hence the *Johnson* test, to the multiple charges. In our view, the failure to take this step where a facial review of the charges reveals it is necessary establishes prejudice and affects the outcome of the case. This is the fundamental distinction between our view and that of the dissent.
>
> ***
>
> [...] The plain error goes to the failure to address the required allied-offense analysis, not the plain error that exists when a record clearly demonstrates the offenses should have merged.

Id. at ¶ 54-59.

In the end, the Eighth District held *en banc*:

> (a) Where a facial question of allied offenses of similar import presents itself, a trial court judge has a duty to inquire and determine under R.C. 2941.25 whether those offenses should merge. A trial court commits plain error in failing to inquire and determine whether such offenses of similar import.
>
> (b) A defendant's failure to raise an allied offense of similar import issue in the trial court is not a bar to appellate review of the issue.
>
> (c) While facts establishing the conduct of the offender offered at the time of a plea may be used to establish that offenses are not allied, a guilty plea alone that does not include a stipulation or a finding that offenses are not allied offenses of similar import does not conclusively resolve the merger question. Thus, a guilty plea does not constitute a valid waiver of the protections from possible double jeopardy under R.C. 2941. 25.

Rogers II at ¶ 63.

VI. Certified Conflicts

On the same day the appellate court released its decision in *Rogers II*, the Eighth District *sua sponte* certified a conflict between its decision in *Rogers II* and *State v. Wallace*, 6th Dist. Wood No. WD-11-031, 2012-Ohio-2675, as it relates to the plain error and the issue of allied offenses. In *Wallace*, the Sixth District held:

> We have reviewed the record. In our view, even were we to consider appellant's argument on allied offenses as plain error, appellant's argument must fail. The record lacks evidence upon which to determine whether the same conduct resulted in both convictions. On this record, we are unable to determine whether the offenses were in fact committed by the same conduct.

Id. at ¶ 12. In its order, the Eighth District certified the following issues to this Court:

> (1) Whether a trial court commits plain error where multiple offenses present a facial question of allied offenses of similar import, yet the trial court fails to determine whether those offenses should merge under R.C. 2941.25 at sentencing;

> (2) Whether the failure of a defendant to raise an allied-offense issue or to object in the trial court can constitute an effective waiver or forfeiture of a defendant's constitutional rights against double jeopardy and a bar to appellate review of the issue when the record is silent on the defendant's conduct.

And, after some additional motion practice by the parties below, on September 6, 2013, the Eighth District certified a second conflict between its holding pertaining to separate victims and allied offenses in *Rogers II* and the Ninth District's opinion in *State v. Wilson*, 212 Ohio App.3d 171, 486 N.E. 2d 1242 (9th Dist. 1985). In *Wilson*, the appellate court found:

> In this case, the record reveals that on February 16, 1984, Wilson sold various items of jewelry to Dale Forster of C. E. Forster & Sons Jewelers. It was subsequently determined that the jewelry had been reported stolen in two separate burglaries. The state put on evidence to demonstrate that these items belonged to three different individuals. However, the state failed to prove that Wilson participated in these burglaries. The only evidence offered by the state which connected Wilson to the stolen property was the fact that he disposed of these stolen items in one transaction. As such, Wilson cannot be convicted and sentenced for three separate crimes of receiving stolen property. See, generally, *State v. Sanders* (1978), 59 Ohio App.2d 187, 392 N.E.2d 1297 [13 O. O. 3d 209].
>
> Accordingly, the trial court erred in not merging the three counts of receiving stolen property for purposes of sentencing. Thus, this assignment of error is well-taken.

Id. at 172. In its order, the Eighth District certified the following issue to this Court:

> Whether an offender who receives, retains, or disposes of the property of two or more other persons in a single transaction maybe convicted and sentenced for more than one count of receiving stolen property?

The State of Ohio filed its notice of certified conflict with this Court on August 7, 2013 for the Eighth District's order certifying a conflict on July 25, 2013 in Ohio Supreme Court case number 13-1255. As a result of the Eighth District's order certifying a conflict on September 6, 2013, Roger's filed his notice of certified conflict with this Court on September 20, 2013 in Ohio

Supreme Court case number 13-1501. On October 23, 2013, this Court determined conflicts existed and issued orders consolidating the two case numbers and ordering briefing under S.Ct. Prac.R. 16.05. The State of Ohio was designated Appellant/Cross-Appellee and Rogers was designated Appellee/Cross-Appellant. The State of Ohio's first brief now follows.

LAW AND ARGUMENT

The Eight District's *en banc* opinion in *State v. Rogers*, 8th Dist. Cuyahoga Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, 98590, 2013-Ohio-3235, 994 N.E.2d 499 ("*Rogers II*"), conflicts with other district courts of appeals on two distinct issues. In the first issue, the Eighth District incorrectly expands this Court's holding in *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, to mandate a trial court hold a "voir dire" hearing on allied offenses of similar import issues even where the record does not present such issues, however, the Eighth District does correctly determine that there is no issue as to allied offenses and the merger of sentences where an offender commits the same offense against multiple victims.

I. Where a Defendant Pleads Guilty to Multiple Offenses and does not Object to the Imposition of Separate Sentences, the Defendant Waives or Forfeits any Allied Offense Claims on Appeal. An Appellate Court cannot Presume that Plain Error Occurred Based on a Record that is Silent as to Allied Offense Analysis.

The Eighth District circumvented conventional plain error analysis by taking this Court's holding in *Underwood* out of context by relieving defendants of the responsibility to object at sentencing in order to preserve for appeal a claimed error by a trial court concerning the merger of sentences for allied offenses of similar import. It did so on the following premises: (1) an allied offense issue invokes the sentencing component of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and constitutional errors cannot be waived unless the waiver is knowing, intelligent, and voluntary; (2) the imposition of multiple sentences

for allied offenses of similar import is plain error; and (3) under R.C. 2941.25, the trial court must determine prior to sentencing whether the defendant committed the offenses with the same conduct.

From these premises the Eighth District concludes trial courts not only have a duty to merge allied offenses of similar import, but trial courts also has the obligation to *sua sponte* raise the issue of allied offenses at sentencing when the defendant fails to do so. This conclusion is invalid and conflicts with the Sixth District's holding in *State v. Wallace*, 6th Dist. Wood No. WD-11-031, 2012-Ohio-2675. As a result, this Court ordered the parties to brief the following issues:

> **(1) WHETHER A TRIAL COURT COMMITS PLAIN ERROR WHERE MULTIPLE OFFENSES PRESENT A FACIAL QUESTION OF ALLIED OFFENSES OF SIMILAR IMPORT, YET THE TRIAL COURT FAILS TO DETERMINE WHETHER THOSE OFFENSES SHOULD MERGE UNDER R.C. 2941.25 AT SENTENCING;**
>
> **(2) WHETHER THE FAILURE OF A DEFENDANT TO RAISE AN ALLIED-OFFENSE ISSUE OR TO OBJECT IN THE TRIAL COURT CAN CONSTITUTE AN EFFECTIVE WAIVER OR FORFEITURE OF A DEFENDANT'S CONSTITUTIONAL RIGHTS AGAINST DOUBLE JEOPARDY AND A BAR TO APPELLATE REVIEW OF THE ISSUE WHEN THE RECORD IS SILENT ON THE DEFENDANT'S CONDUCT.**

A. Allied Offenses of Similar Import

R.C.2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, prohibiting multiple punishments for the same offense. The statute states:

> (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.

R.C.2941.25(A) provides that there may be only one conviction for allied offenses of similar import. Because a defendant may be convicted of only one offense for such conduct, the defendant may be sentenced for only one offense. This Court previously held that allied offenses of similar import are to be merged at sentencing. *See State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 43; *State v. McGuire*, 80 Ohio St.3d 390, 399, 686 N.E.2d 1112 (1997). "Thus, a trial court is prohibited from imposing individual sentences for counts that constitute allied offenses of similar import. A defendant's plea to multiple counts does not affect the court's duty to merge those allied counts at sentencing. This duty is mandatory, not discretionary." *Underwood* at ¶ 26.

Further, this Court held in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E. 2d 1061, that R.C.2941.25 instructs trial courts to look at the defendant's conduct when evaluating whether offenses are allied. And, in *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, this Court ruled that appellate courts should apply a *de novo* standard of review in reviewing a trial court's R.C. 2941.25 merger determination.

B. A Plea of Guilty Waives an Allied Offenses Issue on Appeal if a Defendant Fails to Object at Sentencing.

During sentencing, Rogers's trial counsel failed to raise the merger question in the trial court below. Consequently, his knowing, intelligent, and voluntary pleas of guilt serve as the basis of waiving allied offenses challenges on appeal.

The merger of allied offenses of similar import, while required by R.C. 2941.25(A), is not of such fundamental importance that it may not be waived or forfeited by a defendant. *See,*

e.g., *State v. Comen*, 50 Ohio St.3d 206, 211, 553 N.E.2d 640 (1990) (declining to consider defendant's allied-offenses argument because he did not object in the trial court to the failure to merge the offenses). A constitutional right, as any other right, may be waived. *Stacy v. Van Coren*, 18 Ohio St.2d 188, 190, 248 N.E.2d 603 (1969), quoting *Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660, 88 L.Ed.2d 834 ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."). However, when a defendant is sentenced to allied offenses double jeopardy is implicated and there is a presumption against the waiver of constitutional rights. *Underwood,* at ¶ 32, citing *State v. Adams,* 43 Ohio St.3d 67, 69, 538 N.E.2d 1025 (1989). "'Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.'" *Adams* at 69, quoting *Brady v. United States,* 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). "A waiver of important constitutional rights cannot be presumed from a silent record [...]." *State v. Stone,* 43 Ohio St.2d 163, 167, 331 N.E.2d 411 (1975).

A guilty plea waives all appealable errors except for a challenge as to whether the defendant made a knowing, intelligent and voluntary acceptance of the plea. *State v. Spates* (1992), 64 Ohio St.3d 269, 272-273, 595 N.E.2d 351. Consequently, a plea of guilty waives all non-jurisdictional defects. *State v. Watson*, 8th Dist. Cuyahoga. No. 34664, 190868 (Apr. 8, 1976), citing *Ross v. Common Pleas Court of Auglaize County*, 30 Ohio St.2d 323, 324, 285 N.E.2d 25 (1972) ("[a] defendant who enters a voluntary plea of guilty while represented by competent counsel waives all non-jurisdictional defects in prior stages of the proceedings."); *see, also*, *State v. Hooper,* 7th Dist. Columbiana No. 03 CO 30, 2005-Ohio-7084, ¶ 7-17 (defendant

who enters guilty plea to two distinct offenses waives argument that offenses are, in reality, allied offenses of similar import).

Here, in the truck and tire case, Rogers was charged with two separate counts of receiving stolen property and one count for possession of criminal tools. Each receiving stolen property count specified different property in the language of the indictment—a pickup truck and tires and rims. The possession of criminal tools indictment language also specified different items that were likely used in the commission of a crime. Rogers pleaded guilty to those three separate offenses. This is unlike the facts underlying this Court's decision in *Underwood, supra.* In that case, the defendant entered a no contest plea to two counts of aggravated theft and two counts of theft; which on their face did not distinguish four separate offenses. The defendant's acts only covered the theft of $100,000 from the same victims and the theft of $500 from his employer. *Id.* at ¶ 2-4.

Because *Underwood* involved a no contest plea, this Court was not able to reach the issue of whether the defendant waived his double jeopardy rights and the issue of allied offenses on appeal with a knowingly, intelligently, and voluntarily made guilty plea. Here, Rogers pleaded guilty to three separate offenses in the truck and tire case. The trial court made Rogers aware of his potential maximum sentence for each crime he pleaded guilty to during the Crim.R. 11 plea colloquy. The trial court informed Rogers of the maximum sentences for the fourth and fifth degree felonies for receiving the stolen pickup truck and tires/rims and the possession of the tire jack, tow chain, and/or lug nut wrench. Accordingly, since he did not object at sentencing to the trial courts alleged failure to merge the offenses and he knew of his maximum potential sentences for those offenses he knowingly, intelligently, and voluntarily waived any challenge of double jeopardy or allied offenses on appeal.

C. Alternatively, a Defendant Forfeits all but Plain Error on Appeal Regarding the Issue of Allied Offenses when He Fails to Object at Sentencing.

The Eighth District concluded that Rogers's failure to raise the merger issue at sentencing did not constitute a waiver of his double jeopardy rights. In so doing, it appeared to confuse the concepts of "waiver" and "forfeiture." If failing to raise the issue of merger means Rogers did not waive his double jeopardy rights, then he forfeited the right to argue anything but plain error on appeal.

1. Allied Offense Issues are Forfeited on Appeal when a Defendant Fails to Object at Sentencing.

A "waiver" is the intentional relinquishment or abandonment of a right, while a "forfeiture" is the failure to preserve an objection. *State v. Payne,* 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 23. The waiver of a right is not subject to plain error review under Crim.R. 52(B), but a forfeiture of an objection is subject to plain error review under Crim.R. 52(B). *Id.* If Rogers did not intentionally relinquish his double jeopardy rights when he failed to object at sentencing that the trial court sentenced him separately on allied offenses of similar import, then he forfeited the right to complain of anything but plain error on appeal by not timely raising his objection. *Underwood* addressed this very point when this Court rejected the argument that a guilty plea to a jointly recommended sentence constituted a waiver of the right to raise an allied offense issue on appeal. *Underwood, supra,* at ¶ 32.

A defendant who pleads guilty and does not raise the issue of allied offenses at the time of sentencing forfeits all but plain error on appeal. In *Comen, supra,* this Court found an allied offenses argument forfeited on appeal because the defendant did not raise the issue in the trial court. Contained within the idea of issue forfeiture in the context of allied offenses is that a party who fails to object waives all but plain error. *See State v. Foust,* 105 Ohio St.3d 137, 2004-

Ohio-7006, 823 N.E. 2d 836, ¶ 139 (argument that state failed to prove separate animus for separate offenses was not raised at trial and defendant "thus waived all but plain error"). If Rogers did not waive his right to not be held twice in jeopardy for the same conduct, then by failing to raise the issue in the trial court he forfeited the right to object to this aspect of his sentence.

Comen should end any discussion concerning the application of the plain error rule in this case, but the Eighth District brushes that case to the side with the statement that it is "contradicted" by *Underwood.* *Rogers II* at ¶ 56. That statement is incorrect because *Underwood* is entirely consistent with *Comen.* This Court recognized Underwood's guilty plea did not waive error, but instead it concluded he simply forfeited all but plain error for purposes of appeal. *Underwood* at ¶ 31-32. With the state having conceded that Underwood's offenses were allied and should have merged for sentencing, this Court found that the trial court's failure to merge those sentences rose to the level of plain error. *Id.* at ¶ 8, 31.

Due to the concession of plain error in *Underwood,* this Court did not cite to *Comen* for the legal proposition that a failure to raise an allied offenses objection at sentencing forfeits all but plain error. With plain error established in *Underwood, Comen's* forfeiture of the right to argue allied offenses was immaterial.

2. The Eighth District Misapplied the Doctrine of Plain Error in *Rogers II.*

As the Eight District concedes in this case, "[t]here are simply no facts in the record to aid in our mandated de novo review" of the merger issue. *Rogers II* at ¶ 25. Without facts showing why offenses should merge, an appellate court cannot say that any sentencing error occurred, much less that an error occurred so "obvious" that it rose to the level of "plain" error.

The plain error doctrine set forth in Crim. R. 52(B) states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This rule is identical to Fed.R.Crim.P. 52(b) and Ohio courts resort to federal precedent when construing the state version of the rule. *See, e.g., State v. Wamsley,* 117 Ohio St. 3d 388, 2008-Ohio-1195, 884 N.E.2d 45, ¶ 18.

To prevail on a showing of plain error, a defendant must prove three things: (1) an error, (2) that is plain, and (3) that affects substantial rights. *See Jones v. United States,* 527 U. S. 373, 389, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999); *State v. Gross,* 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 45. A reviewing court will take notice of plain error only with the utmost caution, and only then to prevent a manifest miscarriage of justice. *State v. Long,* 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), syllabus.

An appellate court cannot find plain error on the mere possibility that error occurred. *See, e.g., State v. Sanders,* 92 Ohio St.3d 245, 264, 750 N.E.2d 90 (2001) (finding that "the possibility of jury confusion [...] does not reach the level of plain error."); *State v. Kelley,* 57 Ohio St.3d 127, 130, 566 N.E.2d 658 (1991) (criticizing the court of appeals for finding that "the possibility that appealable errors occurred at trial constituted plain error and negated appellee's plea of guilty to the lesser included offense for which he was ultimately sentenced.") It is an appellant's responsibility under App.R. 16(A)(7) to make an argument with citations to the parts of the record on which the appellant relies. However, the Eighth District's decision is a departure from the well-established principle of appellate review requiring an appellant show the error by reference to the record on appeal. *See* App.R. 12(A)(2); *State v. Stojetz,* 84 Ohio St.3d 452, 455, 705 N.E.2d 329 (1999). Thus, when appellate review requires the application of the plain error doctrine, it is inappropriate for the reviewing court to find plain error because of

insufficient facts in the record to determine whether error occurred at all in the trial court. If the reviewing court cannot determine whether an error exists because of an absence of facts in the record on appeal, logically there is no "obvious" plain error.

3. *State v. Comen* is Controlling, not *State v. Underwood* nor *State v. Johnson.*

When analyzing the issue of forfeiture and plain error as it relates to allied offenses of similar import it is best to view Rogers's case through the lens of *Comen, supra.* This Court did not mention *Comen* in either *Underwood, supra*, or *Johnson, supra.* But, this Court has not overruled *Comen* nor has it overruled the long line of precedent finding an allied offenses argument forfeited on appeal because it was not raised at the time of sentencing and the defendant failed to show the existence of plain error. *See, e.g., State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547, ¶ 54; *State v. Foust, supra*, ¶ 139; *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 96, overruled on other grounds by statute; *State ex rel. Celebrezze v. Gibbs*, 60 Ohio St.3d 69, 75, 573 N.E.2d 62 (1991).

Although the *Comen, Underwood*, and *Johnson* decisions seem to be at odds; they can be reconciled. In the *Comen* line of cases, this Court found an absence of plain error. While, in *Underwood* and *Johnson* there were either facts or a concession showing that plain error occurred at sentencing. Rogers's case is akin to *Comen* because of the lack of any facts on the issue of allied offenses makes it impossible to determine if plain error occurred during the sentencing hearing. While the indictment in the truck and tires case listed separate offenses as distinct counts with different property, the Eighth District found plain error because the trial court did not conduct a hearing on the record to perform its allied offenses of similar import and merger analysis.

In the truck and tire case, Rogers pleaded guilty to a bare bones indictment. By doing so, he admitted the facts alleged in the indictment. *See* Crim.R. 11(B)(1); *State v. Wilson,* 58 Ohio St.2d 52, 388 N.E.2d 745 (1979), paragraph one of the syllabus. He did not argue at sentencing that the receiving stolen property and possession of criminal tools offenses he pleaded guilty to were allied or that they should merge for sentencing. Thus, he forfeited the right to raise anything but plain error relating to the merger of his sentences. Under any plausible application of the plain error rule, Rogers failed to show an error, the existence of which an appellate court must recognize in order to prevent a miscarriage of justice. On that basis alone, a reviewing court should reject Rogers's argument that the trial court committed plain error by failing to merge for sentencing allied offenses of similar import.

The Eighth District cites *Underwood, supra,* for the proposition that it is error to fail to merge allied offenses and from this proposition concludes that a sentence must be reversed if the record on appeal does not contain enough information to prove that offenses are not allied. In its view, holding otherwise might result in a defendant being ordered to serve separate sentences for allied offenses, thus violating *Underwood.* Such a conclusion disregards *Comen, supra,* and misinterprets this Court's holding in *Underwood.* In both *Underwood* and *Johnson,* this Court's holdings were predicated on facts or concessions showing that the trial court erred by failing to merge offenses that actually were allied. *Underwood* was the result of a no contest plea and recommended sentence in which the state conceded that the defendant's offenses were allied offenses of similar import. *Underwood* at ¶ 8. And, *Johnson, supra,* involved a jury trial in which the evidence at trial convincingly showed that the subject offenses were allied. *Johnson* at ¶ 3, 53-57. In both cases, this Court was able to find a merger error that was obvious on the record.

The specific holding in *Underwood* that "offenses of similar import must be merged at sentencing or the sentence is contrary to law" is explained by the State's argument in that case. Midway through his trial, Underwood and the State reached a plea agreement in which Underwood would plead guilty to multiple offenses and the parties jointly recommended a sentence. *Underwood, supra,* at ¶ 4. Underwood did not raise the argument to the trial court that any offenses were allied and should have merged, but he did do so on direct appeal. *Id.* at ¶ 6. The state conceded that Underwood's sentences should have merged, but argued that he waived the right to appeal the merger issue by jointly agreeing to a sentence. *Id.* at ¶ 8. Accepting the state's concession regarding merger, this Court cited past precedent for the proposition that allied offenses are to be merged at sentencing and found that the trial court's failure to merge Underwood's sentences was plain error. *Id.* at ¶ 26.

With this Court's finding that the offenses in *Underwood* and *Johnson* were allied, its rulings in those cases that allied offenses must be merged for sentencing is entirely defendable because it was plainly established on the record that the offenses in each case were allied offenses of similar import. Therefore, it would violate double jeopardy to force the defendants in those cases to serve multiple punishments for a single act. Those errors were obvious in each case was and, indeed, plain error.

In the present case, the Eighth District admits it cannot determine whether Rogers's offenses were allied or not because Rogers pleaded guilty and failed to make a record at sentencing to demonstrate his claimed error on appeal. But, nothing in *Underwood* suggests that it applies to the mere possibility that an allied offenses error occurred. Applying *Comen, supra,* this Court should hold that a defendant's failure to preserve error at the time of sentencing

forfeited all but plain error and that under the established principles of plain error such a limited record on appeal makes it impossible for an appellate court to reverse and remand for plain error.

D. The Eighth District's Reversal and Remand Goes Beyond Plain Error and Actually Creates a New Form of Reversible Error.

The Eight District's final premise requiring a trial court to determine prior to sentencing whether or not any convicted offenses are any allied offenses of similar effort creates a vague and inappropriate standard that in reversing and remanding Rogers case for resentencing on allied offenses not only ignores the plain error doctrine but creates a new form of reversible error..

According to the Eighth District's *en banc* opinion, a trial court has an obligation to address a potential allied offenses issue if the convictions present a "facial" question of merger. *Rogers II* at ¶ 32. It is unclear what the Eighth District means with the use of the word "facial." As a legal term of art, "facial" means obvious or apparent "on its face." *Id.* at ¶ 104 (Stewart, J., dissenting). But application of this standard actually contradicts the Eighth District's conclusion.

The two counts of receiving stolen property involved in CR-11-545992 are (1) a "stolen pickup truck" and (2) "tires and rims." The single count of possession of criminal tools involved "a tire jack and/or tow chain and/or lug nut wrenches." As the Eighth District concedes:

> [W]e are unable to determine if these offenses were allied offenses of similar import. It is unclear if the "tires and rims" are from the same "stolen pickup truck" or from another vehicle. Likewise, it is unclear how the tools involved were related to either of the receiving stolen property offenses. There are simply no facts in the record to aid in our mandated de novo review of the issue.

Id. at ¶ 25.

Logically, if an appellate court cannot determine if offenses are allied offenses of similar import because there are no facts in the record to suggest that they are, then the reviewing court

essentially concludes that there is no "facial" question of merger that required the trial court to inquire into regarding the allied offenses issue at sentencing. By the Eighth District's own reasoning in *Rogers II*, it should have affirmed Rogers's sentences. But, rather than apply its new "facial" approach, the Eighth District adopted a standard that goes beyond the plain error rule and presumes that all offenses are potentially allied and prior to sentencing a trial court must inquire into the possibility that sentences might be subject to merger, regardless of what facts are before the trial court.

The United States Supreme Court has been very clear in cautioning against the "unwarranted extension" of the plain error rule because it "would skew the Rule's 'careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.'" *United States v. Young,* 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), quoting *United States v. Frady,* 456 U.S. 152, 163, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). Indeed, the Supreme Court stated that it has no authority to create a "structural error exception" to the plain error rule, and that such an analysis is inappropriate in a plain error situation. *Johnson v. United States,* 520 U.S. 461, 466, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

While the Eighth District avoids stating its new rule as "*per se*" or "structural" error, it is indeed a new form of reversible error. The lower court explains its decision to place a duty on trial courts to inquire into the possibility that offenses might merge for sentencing by analogizing allied offenses issues to guilty pleas and claiming that a reviewing court would "automatically" find plain error if a trial court failed to advise a defendant of the right to subpoena witnesses under Crim.R. 11(C), regardless of whether the defendant claimed any prejudice. *Rogers II* at ¶ 58. The difference between plain error and *per se* reversible error is the demonstration of

prejudice. Plain error exists only when a defendant shows error affected his substantial rights (i.e., prejudice). As with the Eighth District's Crim.R.11 analogy, reversible error presumes prejudice. *See State v. Fisher,* 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, ¶ 9. By now stating that it would reverse a case even without a showing of prejudice, the Eighth District concedes it is employing a reversible error analysis. And, it does so without credence to the United States Supreme Court's admonition that a reversible error analysis is inappropriate in a plain error situation. *Johnson, supra.*

At least one other appellate district court has rejected a similar *per se* error claim in a post-*Underwood* allied offenses appeal from a guilty plea. *See State v. Wesseling,* 1st Dist. Hamilton No. C–110193, 2011-Ohio-5882, ¶ 6.

In *Wessling*, the First District concluded:

> The state urges us to determine that Wesseling has waived the allied-offense issue for purposes of this appeal because he failed to raise that issue at the trial-court level. In doing so, the state suggests that we distinguish the Ohio Supreme Court's decision in *State v. Underwood,* 124 Ohio St.3d 365, 2010–Ohio–1, 922 N.E.2d 923. In *Underwood,* the court concluded that when a trial court imposed sentences on multiple offenses that were subject to merger under R.C. 2941.25, a defendant could seek appellate review of that sentence, even though the defendant had pleaded no contest to the charges, his sentence was jointly recommended by the defendant and the state, and the defendant did not raise the allied-offense issue in the trial court. *Id.* at ¶ 26–¶ 32.
>
> Pursuant to *Johnson,* the conduct of the accused is critical in a court's allied-offense inquiry. Thus, the state argues, a defendant who entered a guilty plea after *Johnson,* waived a reading of the facts at the sentencing hearing, and did not raise the issue of allied offenses in the trial court, should not be able to argue for the first time on appeal that his offenses are allied offenses subject to merger.
>
> Although Wesseling pleaded guilty after *Johnson,* waived a reading of the facts, and failed to raise the allied-offense issue in the trial court, we need not depart from *Underwood* and create a

> per se rule prohibiting appellate review in these cases. Based upon the limited evidence in the record, however, we cannot conclude that the trial court committed plain error in sentencing Wesseling on both aggravated-burglary and felonious-assault charges. Crim.R. 52(B). Therefore, we overrule Wesseling's second assignment of error.

Id. at ¶ 14-16.

Yet, if the Eighth District is to employ a plain error analysis, its Crim.R.11(C) guilty plea analogy actually disproves its point. The only way an appellate court can know if a trial court failed to make the required Crim.R. 11(C) advisements would be if the error was shown on the transcript of the plea colloquy. When there is no transcript of a plea colloquy made available to a reviewing court, appellate courts have invoked established precedent to presume the regularity of the proceedings below and affirm. An appellant has the responsibility of providing the reviewing court with a record of the facts, testimony, and evidentiary matters that are necessary to support the appellant's assignments of error. App.R. 9; *Volodkevich v. Volodkevich,* 48 Ohio App. 3d 313, 314, 549 N.E.2d 1237 (9th Dist. 1989), citing *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384, 385 (1980); *Meinhard Commercial Corp. v. Spoke & Wheel, Inc.*, 52 Ohio App.2d 198, 201-202, 368 N.E.2d 1275 (8th Dist. 1977). In the absence of a complete record, an appellate court must presume regularity in the trial court's proceedings. *State v. Tillman*, 119 Ohio App.3d 449, 454, 695 N.E.2d 792 (9th Dist. 1997); *State v. Roberts*, 66 Ohio App.3d 654, 657, 585 N.E.2d 934, (9th Dist. 1991), citing *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). So by the Eighth District's own analysis not only did the appellate court fail to make a valid case for departing from established plain error precedent to create a new form of reversible error, but it cannot satisfy the plain error test that it employed without adequate facts on the record for its appellate review.

1. A Sentencing Court has no Affirmative Duty to Act under R.C. 2941.25 and *Sua Sponte* Raise an Issue of Allied Offenses of Similar Import.

The Eighth District insists that the trial judge has no duty to be an advocate for either the defendant or the State. *Rogers II* at ¶ 27. But, a careful review of the *en banc* opinion leaves no doubt that the Eighth District's decision effectively requires trial courts to advocate for a defendant. The Eight District says that defense counsel "should" raise potential merger issues, but that the trial court "must" raise the issue. *Id.* at ¶ 32, 38. The Eighth District even finds that issues of ineffective assistance of counsel are essentially superseded by the trial judge's "mandated duty to address merger." *Id.* at fn. 2.

It is well established that a trial court has no duty to act *sua sponte* to preserve the constitutional rights of a defendant who had failed to object to an error. *See, e.g., State v. Abdul Bari,* 8th Dist. Cuyahoga No. 90370, 2008-Ohio-3663, (court has no duty to sua sponte dismiss an indictment on speedy trial grounds absent objection); *Clark v. Newport News Shipbuilding & Dry Dock Co.,* 937 F.2d 934, 939 (4th Cir. 1991) ("Neither *Batson* nor its progeny suggests that it is the duty of the court to act sua sponte to prevent discriminatory exclusion of jurors. Rather, even in criminal cases, the objection is deemed waived if not timely raised.") The Eighth District violates this principle with its *en banc* decision in *Rogers II*

2. When the Record is Absent of Anything to Demonstrate the Existence of Plain Error for Allied offenses at Sentencing a Petition for Post-Conviction Relief is an Appropriate Avenue for Redress.

In criminal cases that terminate via a plea agreement, a trial court is rarely involved apart from taking the plea and sentencing the defendant. It is unclear why a sentencing court, with presumably less knowledge of the facts than defense counsel, should be required to raise the issue of allied offenses when defense counsel does not. It is a defense counsel's obligation to protect a defendant's rights not a trial court. A competent defense counsel that negotiated a

guilty plea is aware of the facts underlying those offenses to which a defendant pleaded guilty. It is defense counsel's obligation to advocate for the defendant at all stages of the proceeding. The Eighth District's *en banc* decision wrongly forces the trial courts to now act as a *de facto* defense counsel for a defendant.

The Eighth District finds the legal remedies a defendant has for the potential errors that trial counsel makes in failing to raise the issue of allied offenses to be inadequate. *See Rogers II* at fn. 2, ¶ 52. Of course, it would be difficult on direct appeal to make a viable ineffective assistance of counsel claim stemming from an alleged merger error in a guilty plea. As this case shows, the nature of a guilty plea proceeding is such that the facts necessary to prove an allied offense error may be missing. *See, e.g., State v. Coleman,* 85 Ohio St.3d 129, 134, 707 N.E.2d 476 (1999). But, there are other avenues available for defendants to raise an ineffective assistance of counsel claim.

Under R.C. 2953.21, a defendant can seek post-conviction relief for alleged errors of defense counsel occurring outside the record on appeal. The post-conviction relief statute is specifically designed for such issues of ineffective assistance of counsel because the petitioner is required to provide facts beyond the record on direct appeal. *State v. Cooperrider,* 4 Ohio St.3d 226, 228–229, 448 N.E.2d 452 (1983).

The Eighth District acknowledged the availability of post-conviction relief as a means of remedying counsel's failure to raise the issue of allied offenses at sentencing, but found that the "limited" nature of post-conviction makes it a less than satisfactory remedy. *Rogers II* at ¶ 52. However, it remains unclear what the Eighth District means when it says that post-conviction relief offers a "limited" remedy. The post-conviction statute, R.C. 2953.21(A), applies to constitutional claims of any kind, including ineffective assistance of counsel claims based on

alleged violations of the Sixth Amendment to the United States Constitution. In fact, it is the only means for raising ineffective assistance of counsel claims that rely on evidence outside the record on appeal. *See Coleman* at 134. ("Any allegations of ineffectiveness based on facts not appearing in the record should be reviewed through the postconviction remedies of R.C. 2953.21."). Moreover, federal courts restrict claims of ineffective assistance of counsel to post-conviction proceedings because the record can be more fully developed. *See Massaro v. United States,* 538 U.S. 500, 504–505, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003); *United States v. Spence,* 450 F.3d 691, 694 (7th Cir. 2006).

Based on the above there should be no difficulty applying the post-conviction relief statute to ineffective assistance of counsel claims involving issues of allied offenses of similar import in order to develop a record to determine whether or not sentences should be merged when the defense counsel at sentencing failed to do so.

3. A "Voir Dire Hearing" is Unworkable to Determine whether Offenses are Allied and if their Sentences Should Merge for Sentencing.

In the end, there is no compelling reason for The Eighth District's departure from well-established rules governing plain error. If the court can conclude as a matter of fact or by stipulation that offenses are allied, it must merge those offenses for sentencing as required by *Underwood.* But in guilty plea cases like this one, the absence of any facts showing why offenses are allied and should merge for sentencing belies a finding that plain error occurred.

The Eighth District's opinion criticizes application of the plain error rule as a "self-fulfilling prophecy that defeats the constitutional protection outlined in *Underwood.*" *Rogers* at ¶ 54. But all plain error analysis, regardless of the type of constitutional issue, leads to the same "self-fulfilling prophecy." Again, if the error is not obvious on the record, it is not by definition "plain."

In principle, nothing prohibits a trial court choosing to be proactive in sentencing and raise potential merger issues. This approach may be practical to build a record on appeal, but that kind of involvement by a trial court is not required by law and should not be mandated. Thus, a reviewing court has no authority to impose this kind of requirement it on trial courts.

The Eighth District's decision to reverse Rogers's case required a remand for a hearing, like the "voir dire hearing" suggested in *State v. Kent*, 68 Ohio App.2d 151, 428 N.E.2d 453 (8th Dist. 1980), overruled by *Comen, supra.* But, the Eighth District's opinion lacks guidance for the trial court on how to conduct such a hearing. A concern with applying *Kent* is that it fails to define the scope of the voir dire hearing a trial court is supposed to conduct to determine whether offenses are allied and should merge for sentencing. Given the lack of facts typically set forth in the indictment, the voir dire hearing would require additional fact finding by the trial court. However, how a trial court is to decide these facts is unclear and many questions of the hearing's scope and procedure are left unanswered by the Eighth District's *en banc* decision.

Appellate courts previously allowed allied offenses issues arising from trials to be determined solely on the arguments of counsel. *Rogers II* at ¶ 124 (Stewart, J., Dissenting). That procedure works because trials produce facts trial courts can use to determine whether individual crimes are allied offenses of similar import. Yet, with cases resolved by pleas there may be no facts showing whether offenses are allied. Some form of factual inquiry will be required at the sentencing hearing. If the arguments of counsel are not evidence, then it logically follows that the parties may have the right to offer evidence and call witnesses. Thus, it appears trial courts would have to conduct a mini or abbreviated trial to determine whether the multiple offenses were committed with a state of mind to commit only one act under *Rogers II* and *Kent*.

The requirement to hold such a trial or evidentiary hearing from a plea agreement seems to run contrary to having a plea of guilty obviate the need for trial.

But other questions still remain pertaining to the Eighth District's remand in the present matter. This Court has held that the defendant "bears the burden of establishing his entitlement to the protection, provided by R.C. 2941.25, against multiple punishments for a single act." *State v. Mughni,* 33 Ohio St.3d 65, 67, 514 N.E.2d 870 (1987). "What is the [Eighth District's] standard for finding that offenses are allied offenses of similar import: beyond a reasonable doubt, clear and convincing evidence, or a preponderance of the evidence? Does the defendant have the right to compel witnesses? Can a defendant testify at a voir dire hearing without waiving the Fifth Amendment right against self-incrimination? If new evidence surfaces at the voir dire hearing, does the state have the right to rescind the plea agreement and file additional charges? If requested, does the court have to make findings of fact?" *Rogers II* at ¶ 125 (Stewart, J., dissenting). Without an answer to those questions, a defendant has no guidance in establishing why two or more offenses should merge at sentencing and are not allied offense of similar import at the *Kent* voir dire hearing.

Of course, no reviewing court can or should try to predict all the possible consequences of the ruling in *Rogers II* requiring the trial court to conduct a hearing on allied offenses. But the Eighth District having created such a new rule, as pointed out by the dissenting opinion below, does a disservice to trial courts by failing to consider the practical consequences of this ruling. *Rogers* at ¶ 128 (Stewart, J., dissenting).

E. Rogers's Sentences in the Truck and Tires Case should be Affirmed.

When Rogers's made a knowing, intelligent, and voluntary guilty plea to receiving stolen property and possession of criminal tools in CR-11-545992 he waived any claims of allied

offense issues on appeal after his defense counsel failed to preserve his objection on the record at sentencing. In the alternative, Rogers forfeited all but plain error on appellate review regarding the trial court's alleged failure to merge his sentences. Since the record was devoid of anything to demonstrate the trial court erred in its determination to not merge the sentences, there was no plain error and Rogers's sentences for receiving the stolen pickup truck, tires and rims, and possession of criminal tools should be affirmed.

II. Offenses of Receiving Stolen Property Against Two Separate Victims do not Merge for the Purposes of Sentencing as the Offenses are not Allied Offenses of Similar Import.

The Eighth District's *en banc* opinion in *Rogers II* also concluded that two offenses of receiving the stolen property of two different victims are not allied offenses of similar import and therefore do not merge for sentencing. As this holding was in conflict with Ninth District's opinion in *State v. Wilson*, 212 Ohio App.3d 171, 486 N.E.2d 1242 (9th Dist. 1985), this Court ordered the parties to brief the following issue:

> **Whether an offender who receives, retains, or disposes of the property of two or more other persons in a single transaction maybe convicted and sentenced for more than one count of receiving stolen property?**

In CR-11-553806, Rogers pleaded guilty to two different counts of receiving stolen property charged against two different victims. "When an offense is defined in terms of conduct towards another, then there is a dissimilar import for each person affected by the conduct." *State v. Phillips*, 75 Ohio App.3d 785, 790, 600 N.E. 2d 825 (2nd Dist. 1991), citing *State v. Jones*, 18 Ohio St.3d 116, 118, 480 N.E.2d 408 (1985). Although Rogers may have had the single goal of selling the stolen items to a Lakewood pawnshop, Rogers committed two different acts of receiving stolen property against two different victims. These offenses were not allied and could be separately punished.

The two counts of receiving stolen property in the indictment revealed property taken from two distinct victims, from two separate houses, apparently taken during two different burglaries that occurred the same day. The same evidence was produced during the sentencing hearing when both victims testified to such and the trial court sentenced accordingly. Rogers argued on appeal that these acts were identical, so they should have been merged at sentencing.

But, even without facts to analyze Rogers's conduct, a reviewing court could determine from the indictment alone that these offenses were not subject to merger. A review of the elements of the receiving stolen property charges shows an offender must have "receive[d], retain[ed], or disposed of *property of another,* knowing or having reasonable cause to believe that it has been obtained through commission of a theft offense." (Emphasis added.) R.C. 2913.51.

Separate victims alone established a separate animus for each offense. Even if the defendant cannot distinguish one victim's goods from another's does not mean his conduct did not impact multiple victims. Each victim has a specific and identifiable right to redress against the conduct of the defendant. The defendant's conduct in receiving goods he knows to be stolen inherently implies that they may be from multiple owners or locations. "[M]ultiple sentences for a single act committed against multiple victims is permissible where the offense is defined in terms of conduct toward 'another as such offenses are of dissimilar import; the import being each person affected.'" *State v. Tapscott,* 7th Dist. Mahoning No. 11 MA 26, 2012-Ohio-4213, 978 N.E.2d 210, quoting *Jones, supra,* at, 118; *see, also, State v. Franklin,* 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 48. As such, the two counts of receiving stolen property in CR-11-553806 were not allied offenses of similar import and did not merge for the purposes of sentencing because to separate and distinct victims were affected by the offenses.

Alternatively, in this case, the record is replete with information, in addition to there being two separate victims in the indictment that demonstrates the two counts of receiving stolen property are not allied offenses of similar import. *Johnson, supra,* requires trial courts to look at the defendant's conduct when evaluating whether offenses are allied. Here, victim testimony and statements by the trial prosecutor in CR-11-553806 deduced the victims' belongings were taken from their homes in Independence, and Lakewood Police recovered their belongings when Rogers tried to fence the items at a pawn shop. Their different homes were burglarized on the same day. Jewelry was stolen from the one home and religious items were stolen from the other. The two different victims resided in each different home. Rogers was caught trying to pawn the stolen goods, but it was unclear from the record as whether or not Rogers was caught with trying to pawn the stolen goods at the same time. While the trial prosecutor at sentencing repeatedly clarified that Rogers was not charged with Burglary of either home, the first victim spoke of Roger's confession to burglarizing her home while her 98 year-old mother was still inside.

Under Evid.R. 101(C), the rules of evidence do not apply during sentencing. R.C. 2929.19(A) instead provides that at sentencing, "the prosecuting attorney [...] may present information relevant to the imposition of sentence in the case." This statute calls for the introduction of "information," not evidence. The information availed to the trial court at sentencing was more than enough to determine that the two counts of receiving stolen property in CR-11-553806 were not allied offenses of similar import and did not merge for the purposes of sentencing.

CONCLUSION

What the *Rogers* case demonstrates is that defense counsel—not the trial court and not the prosecuting attorney—has the ultimate duty to raise any potential allied offenses at the time of sentencing. If the issue is not raised at sentencing, the defendant knowingly, intelligently, and voluntarily waives his allied offense claims when he pleads guilty to the charged offenses because he is aware of his maximum potential sentences for the crime charged when making his plea. However, if this Court finds waiver inapplicable, then, in the alternative, a defendant forfeits all but plain error on appeal. Plain error cannot be established on the mere possibility that a sentencing error occurred, but rather on facts that prove an obvious error. If there are no facts to show that a plain error occurred, the defendant's recourse is in post-conviction proceedings. Rogers's sentences in CR-11-545992, the truck and tires case should be affirmed upon this Court's review.

Additionally, when a defendant is charged with two separate counts of receiving stolen property against two separate and distinct victims the offenses are not allied offenses of similar import and do not merge at sentencing. Therefore, Rogers's sentences in CR-11-553806 should be affirmed.

Respectfully submitted,

TIMOTHY J. McGINTY
CUYAHOGA COUNTY PROSECUTOR

BY:

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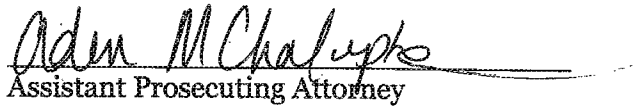
216.443.7800

SERVICE

A copy of the foregoing First Brief of Appellant/Cross-Appellee has been mailed this 3rd day of January, 2014, to Cullen Sweeney, 310 Lakeside Avenue, 2nd Floor, Cleveland, Ohio 44113.



Assistant Prosecuting Attorney

ORIGINAL

NO. 13-1255

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, 98590

STATE OF OHIO
Plaintiff-Appellant

-vs-

Frank Rogers, JR.
Defendant-Appellee

NOTICE OF CERTIFIED CONFLICT

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FILED
AUG 07 2013
CLERK OF COURT
SUPREME COURT OF OHIO

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AUG 07 2013
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Certified Conflict

The State of Ohio, gives notice of a certified conflict to the Ohio Supreme Court from the Eighth District Court of Appeals, Case Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, 98590 and journalized on July 25, 2013. The Eighth District has certified the following questions to this Court:

1. Whether a trial court commits plain error where multiple offenses present a facial question of allied offenses of similar import, yet the trial court fails to determine whether those offenses should merge under R.C. 2941.25 at sentencing;

2. Whether the failure of a defendant to raise an allied-offense issue or to object in the trial court can constitute an effective waiver or forfeiture of a defendant's rights against double jeopardy and bar to appellate review of the issue when the record is silent on the defendant's conduct.

The Eighth District has declared that its decision in *State v. Rogers*, 8th Dist. Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, 98590, 2013-Ohio-3235, is in conflict with the Sixth District's decision in *State v. Wallace*, 6th Dist. No. WD-11-031, 2012-Ohio-2675.

Under S.Ct.Prac.R. 8.01, a copy of the Eighth District's order certifying the conflict and copies of all decisions determined to be in conflict are attached in the accompanying appendix. Also, the State intends to submit for filing a notice of appeal

and accompanying memorandum in support of jurisdiction seeking discretionary review concurrently with this notice of certified conflict.

Respectfully Submitted,

TIMOTHY J. McGINTY
CUYAHOGA COUNTY PROSECUTOR

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CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Certified Conflict has been sent this 6th day of August, 2013 via U.S. Mail to: Cullen Sweeney, 310 Lakeside Avenue, Suite 200, Cleveland, Ohio 44113 and to the Ohio Public Defender, 250 East Broad Street, 14th Floor, Columbus, Ohio 43215. A copy of the Notice of Certified Conflict has also been sent via electronic mail to James Foley, Chief Counsel, Legal Division, Office of the Ohio Public Defender at Ken.Spiert@opd.ohio.gov.

Adam M Chaloupka
Assistant Prosecuting Attorney

Appendix

1) Order of the Eighth District Court of Appeals certifying a conflict in *State v. Frank Rogers*, 8th Dist. Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, 98590, issued July 25, 2013

2) *State v. Rogers*, 8th Dist. Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, 98590, 2013-Ohio-3235, 2013 WL 3878583

3) *State v. Wallace*, 6th Dist. No. WD-11-031, 2012-Ohio-2675, 2012 WL 2196290

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.	LOWER COURT NO.
98292	CP CR-552699
98584	CP CR-544682
98585	CP CR-545992
98586	CP CR-553547
98587	CP CR-553806
98588	CP CR-556821
98589	CP CR-555183
98590	CP CR-557079

COMMON PLEAS COURT

-vs-

FRANK ROGERS, JR.

Appellant

MOTION NO. 466385

Date 7/25/13

Journal Entry

Sua sponte, we hereby find that this court's en banc decision in *State v. Rogers* is in conflict with the decision of the Sixth District Court of Appeals in *State v. Wallace*, 6th Dist. No. WD-11-031, 2012-Ohio-2675. We certify the following issues to the Supreme Court of Ohio:

(1) Whether a trial court commits plain error where multiple offenses present a facial question of allied offenses of similar import, yet the trial court fails to determine whether those offenses should merge under R.C. 2941.25 at sentencing;

(2) Whether the failure of a defendant to raise an allied-offense issue or to object in the trial court can constitute an effective waiver or forfeiture of a defendant's constitutional rights against double jeopardy and a bar to appellate review of the issue when the record is silent on the defendant's conduct.

COPIES MAILED TO COUNSEL FOR ALL PARTIES.-COSTS TAXED

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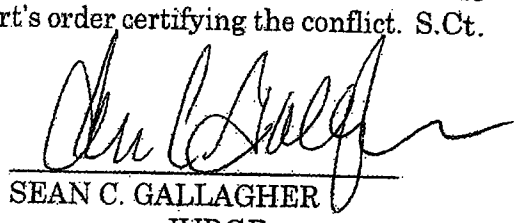
The parties are advised that in order to institute a certified-conflict case in the Supreme Court of Ohio, a party must file a notice of certified conflict in the Supreme Court within 30 days of this court's order certifying the conflict. S.Ct. Prac.R. 8.01.



SEAN C. GALLAGHER
JUDGE

PATRICIA ANN BLACKMON, J.,
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
EILEEN A. GALLAGHER, J.,
EILEEN T. GALLAGHER, J.,
LARRY A. JONES, SR., J.,
KATHLEEN ANN KEOUGH, J.,
MARY EILEEN KILBANE, J.,
TIM McCORMACK, J., and
KENNETH A. ROCCO, J., CONCUR

RECEIVED FOR FILING

JUL 25 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By _____ Deputy

MELODY J. STEWART, A.J., CONCURS THAT THE EN BANC DECISION IN THIS CASE IS IN CONFLICT WITH *WALLACE*, BUT DISSENTS AS TO THE MAJORITY'S DESCRIPTION OF THE ISSUES OF LAW.

[Cite as *State v. Rogers*, 2013-Ohio-3235.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, and 98590

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

FRANK ROGERS, JR.

DEFENDANT-APPELLANT

DECISION EN BANC
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Criminal Appeals from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-552699, CR-544682, CR-545992, CR-553547, CR-553806, CR-556821, CR-555183, and CR-557079

BEFORE: The En Banc Court

RELEASED AND JOURNALIZED: July 25, 2013

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SEAN C. GALLAGHER, J.:

{¶1} Defendant-appellant Frank Rogers, Jr., pleaded guilty to a series of charges in eight separate cases. He asserts on appeal that the trial court erred by failing to merge certain parts of the sentences in two of the cases, that the court failed to compute jail-time credit, and that the court failed to advise him of the consequences of violating postrelease control.

{¶2} Pursuant to App.R. 26 and Loc.App.R. 26, this court determined that a conflict existed between the original panel's decision in this case, released as *State v. Rogers*, 8th Dist. Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, and 98590, 2013-Ohio-1027, and previous decisions by this court involving a number of issues related to allied offenses of similar import.

{¶3} These issues include determining the duty of a trial court judge under R.C. 2941.25 where a facial question of allied offenses of similar import exists but the trial court fails to inquire; determining the effect of a defendant's failure to raise the allied offenses of similar import issue in the trial court and whether that failure constitutes a valid waiver or forfeiture of the defendant's constitutional right against double jeopardy; determining the effect of a prosecutor's failure to put facts on the record detailing a defendant's conduct in relation to possible allied offenses of similar import at the trial court level; determining the impact of a silent or inconclusive record from the trial court that fails to detail the offender's actual conduct involving allied offenses of similar import; determining the effect of a guilty plea to multiple charges on the allied offenses of similar

import analysis; and determining the effect of the absence of a stipulation to the allied offenses of similar import question.

{¶4} Accordingly, we sua sponte granted en banc consideration in this matter and convened an en banc conference in accordance with App.R. 26(A)(2), Loc.App.R. 26(D), and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672.

The Allied Offenses of Similar Import Claim in *Rogers*

{¶5} Rogers argues that his convictions in Cuyahoga C.P. No. CR-553806 on two counts of receiving stolen property were allied offenses of similar import and should have been merged at sentencing. Likewise, he asserts his convictions in Cuyahoga C.P. No. CR-545992 on two additional counts of receiving stolen property and one count of possession of criminal tools were also allied offenses of similar import and should have merged at sentencing.

Double Jeopardy

{¶6} At the outset, we revisit the significance of the allied offenses of similar import determination. The Fifth Amendment's Double Jeopardy Clause provides a criminal defendant with three protections: "'[It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977),

quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Ohio v. Johnson*, 467 U.S. 493, 498, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984).

{¶7} In multiple-punishment cases, "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

> Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended * * * to impose multiple punishments, imposition of such sentences does not violate the Constitution.

Albernaz v. United States, 450 U.S. 333, 344, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981).

Ohio and Allied Offenses of Similar Import

{¶8} Ohio's criminal statutes generally do not authorize multiple punishments for the same conduct. In 1974, the Ohio legislature enacted R.C. 2941.25. The legislation codified the protections of the Double Jeopardy Clauses of the Ohio and United States Constitutions, which prohibit multiple punishments for the same offense. *See State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923.

> R.C. 2941.25. 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.

{¶9} Historically, Ohio courts struggled interpreting the language in R.C. 2941.25. Likewise, determining the type of conduct by the offender that constituted either separate offenses or allied offenses of similar import was equally confusing. Starting in 1975, the Supreme Court of Ohio issued a series of decisions that over the years were met with mixed reviews on how best to address the constitutional protections against multiple punishments. *See generally State v. Ikner*, 44 Ohio St.2d 132, 339 N.E.2d 633 (1975), adopting *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *State v. Logan*, 60 Ohio St.2d 126, 128, 397 N.E.2d 1345 (1979); *State v. Blankenship*, 38 Ohio St.3d 116, 526 N.E.2d 816 (1988); *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699 (1999); *State v. Fears*, 86 Ohio St.3d 329, 715 N.E.2d 136 (1999); *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29; *State v. Yarborough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845; *State v. Cooper*, 104 Ohio St.3d 293, 2004-Ohio-6553, 819 N.E.2d 657; *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181; *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149; *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154; *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882; *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889.

{¶10} These cases were followed by a series of decisions that changed the

landscape of the merger analysis. *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923 (a trial court commits plain error when it fails to merge allied offenses of similar import); *State v. Johnson* 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061 (R.C. 2941.25 instructs courts to look at the defendant's conduct when evaluating whether his offenses are allied); and *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245 (an appellate court should apply a de novo standard of review in reviewing a trial court's R.C. 2941.25 merger determination).

The *Underwood*, *Johnson*, and *Williams* Decisions

{¶11} Prior to *Underwood*, many trial courts simply imposed concurrent sentences where the merger analysis was too confusing or unworkable. *Underwood* made it clear that allied offenses of similar import must be merged at sentencing or the sentence is deemed contrary to law. *Underwood* also made clear that even a defendant's plea to multiple counts does not affect the court's duty to merge allied counts at sentencing. The duty is mandatory, not discretionary. *Underwood* at ¶ 26. Significantly, *Underwood* determined that R.C. 2953.08(D) does not bar appellate review of a sentence involving merger even though it was jointly recommended by the parties and imposed by the court. *Id.* at ¶ 33.

{¶12} *Johnson* then reestablished the focus of the merger analysis on the plain language in the statute. "In determining whether offenses merge, we consider the defendant's conduct." *Johnson* at ¶ 44. "If 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.'" *Id.* at ¶ 49, quoting *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶ 50 (Lanzinger, J., dissenting). If both questions are answered affirmatively, then the offenses are allied offenses of similar import and will be merged. *Johnson* at ¶ 50.

{¶13} In *Johnson*, then Justice O'Connor,[1] in a separate concurring opinion, defined the term "allied offenses of similar import":

> In practice, allied offenses of similar import are simply multiple offenses that arise out of the same criminal conduct and are similar but not identical in the significance of the criminal wrongs committed and the resulting harm. R.C. 2941.25 permits a defendant to be charged with, and tried for, multiple offenses based on the same conduct but permits only one conviction based on conduct that results in similar criminal wrongs that have similar consequences.

Id. at ¶ 64 (O'Connor, J., concurring).

{¶14} Justice O'Connor further defined the distinction between the phrases "allied offenses" and "allied offenses of similar import." "[O]ffenses are 'allied' when their elements align to such a degree that commission of one offense would probably result in the commission of the other offense. Offenses are of 'similar import' when the underlying conduct involves similar criminal wrongs and similar resulting harm." *Id.* at ¶ 66-67.

{¶15} While many focus on the plurality decision in *Johnson* that abandoned the *Rance* test, we note that Justice O'Connor maintained in her concurring opinion in *Johnson* that *Rance* was overruled only "inasmuch as it requires a comparison of the

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[1] Justice Maureen O'Connor became Chief Justice on January 1, 2011.

elements of the offenses *solely* in the abstract." (Emphasis added.) *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶ 68. *See also Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699.

{¶16} The *Johnson* test did not completely eliminate consideration of the legal elements; it simply made the offender's conduct the lynchpin of that analysis. Thus, the court uses the elements of the offenses as guideposts to measure the defendant's conduct as it relates to the offenses in determining whether multiple offenses could have been committed by the same conduct. *State v. Hicks*, 8th Dist. No. 95169, 2011-Ohio-2780, ¶ 9. This is important in situations, as here, where the legal elements of the offenses present a facial question of merger. This initial comparison often establishes or eliminates the need for subsequent allied offenses of similar import analysis.

{¶17} The Supreme Court revisited the *Johnson* test and again described its workings in *Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245. The court again referenced considering the elements of the crimes in citing back to *Blankenship*, 38 Ohio St.3d at 117, 526 N.E.2d 816:

> This court established a two-part test for analyzing allied-offense issues in *State v. Blankenship*, 38 Ohio St.3d 116, 117, 526 N.E.2d 816 (1988).
>
> "In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses."

(Emphasis sic.)

Williams at ¶ 17, quoting *Blankenship* at 117.

{¶18} Significantly, the decision in *Williams* stressed how important the facts in the record were to the merger analysis on appeal:

> Appellate courts apply the law to the facts of individual cases to make a legal determination as to whether R.C. 2941.25 allows multiple convictions. * * * "[A] review of the evidence is more often than not vital to the resolution of a question of law. * * * " *O'Day v. Webb*, 29 Ohio St.2d 215, 219, 280 N.E.2d 896 (1972).
>
> As in cases involving review of motions to suppress, "the appellate court must * * * independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8.

Williams at ¶ 25-26. Further, "[a]n appellate court should apply a de novo standard of review in reviewing a trial court's R.C. 2941.25 merger determination." *Id.* at ¶ 28.

The *Rogers* Case

{¶19} The record before us reveals that no discussion took place in the trial court about merger of the counts in either of the underlying cases. While we can resolve the issue of merger in CR-553806 based on a facial review of the convictions, nothing in the documents that comprise the record in CR-545992 contains sufficient factual information that would permit an allied offenses of similar import analysis.

Receiving Stolen Property Convictions in CR-553806

{¶20} In CR-553806, the two counts of receiving stolen property in the indictment revealed property taken from two distinct victims from two

separate houses apparently taken during burglaries that occurred the same day. Rogers argued on appeal that these acts were identical, so they should have been merged at sentencing.

{¶21} Even without facts to analyze Rogers's conduct, we can determine from the face of these convictions that these offenses were not subject to merger. A review of the elements of the receiving stolen property charges shows an offender must have "receive[d], retain[ed], or disposed of *property of another*, knowing or having reasonable cause to believe that it has been obtained through commission of a theft offense." (Emphasis added.) R.C. 2913.51.

{¶22} Separate victims alone established a separate animus for each offense. Even if the defendant cannot distinguish one victim's goods from another's does not mean his conduct did not impact multiple victims. Each victim has a specific and identifiable right to redress against the conduct of the defendant. The defendant's conduct in receiving goods he knows to be stolen inherently implies that they may be from multiple owners or locations. "[M]ultiple sentences for a single act committed against multiple victims is permissible where the offense is defined in terms of conduct toward 'another as such offenses are of dissimilar import; the import being each person affected.'" *State v. Tapscott*, 7th Dist. No. 11 MA 26, 2012-Ohio-4213, quoting *State v. Jones*, 18 Ohio St.3d 116, 118, 480 N.E.2d 408 (1985). *See also State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 48; *State v. Phillips*, 8th Dist. No. 98487, 2013-Ohio-1443, ¶ 8-10.

{¶23} For this reason, we affirm the trial court's imposition of separate sentences in CR-553806.

Receiving Stolen Property and Possession of
Criminal Tools Convictions in CR-545992

{¶24} Central to our analysis of the convictions in CR-545992 and the primary focus of this en banc review is the effect of a trial court's failure to inquire or address an allied-offense question where it is clear from a facial review of the charges that the offenses may be allied, even when facts necessary to determine the conduct of the offender are missing.

{¶25} In this case, Rogers was convicted of two separate counts of receiving stolen property. One offense involved a "stolen pickup truck." The second offense involved "tires and rims." The possession of criminal tools offense involved "a tire jack and/or tow chain and/or lug nut wrenches." Although the receiving stolen property offenses involved the same victim and the possession of criminal tools offense occurred on the same date as the receiving stolen property offenses, we are unable to determine if these offenses were allied offenses of similar import. It is unclear if the "tires and rims" are from the same "stolen pickup truck" or from another vehicle. Likewise, it is unclear how the tools involved were related to either of the receiving stolen property offenses. There are simply no facts in the record to aid in our mandated de novo review of the issue.

{¶26} At the outset of our analysis, we note that not every case involving multiple convictions with a silent record will require an allied-offense determination by the trial court. Even where specific facts of the case are unknown, an appellate court can assess

whether a claim requires a return to the trial court. For example, cases that assert a claim that the allied-offense issue was not addressed in a silent record may nevertheless fail where the indictment shows the offenses were committed on separate dates or involved separate victims or involve statutes that would require completely separate conduct. Conversely, cases that involve offenses that facially present a question of intertwined conduct, such as kidnapping and rape, or aggravated robbery and kidnapping, or gross sexual imposition and rape, create an allied-offense challenge that can result in the finding of error for failing to address the merger issue.

The Role of the Trial Judge

{¶27} *Underwood* placed the duty squarely on the trial court judge to address the merger question. *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923. Likewise, the merger statute imposes the same duty. R.C. 2941.25. Ultimately, it is the trial judge who imposes the sentence in a case. While the judge cannot be an advocate for either position, the trial court must address the potential allied-offense issue when the charges facially present a question of merger. A defendant's conviction on multiple counts, regardless of how achieved, does not affect the court's duty to merge allied offenses of similar import at sentencing.

{¶28} When a facial review of the charges and the elements of the crimes present a viable question of merger, the court must apply the *Johnson* test.

{¶29} Under the first prong, the court determines "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." *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶ 48, citing *Blankenship*, 38 Ohio St.3d at 119, 526 N.E.2d 816 (Whiteside, J., concurring). ("It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses can be committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses.")

{¶30} If the court's answer in the first prong is yes, then the second prong requires the trial court to determine if, in fact, the offenses were actually committed by the same conduct, i.e., "'a single act, committed with a single state of mind.'" *Johnson* at ¶ 49, quoting *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶ 50 (Lanzinger, J., dissenting). If the answer to both questions in both prongs is yes, then the offenses are allied offenses of similar import and they must be merged. *Johnson* at ¶ 50.

{¶31} "Conversely, if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." *Id.* at ¶ 51.

{¶32} Where the charges present a facial question of merger, the court must perform the analysis. As stated in *State v. Baker*, 8th Dist. No. 97139, 2012-Ohio-1833, ¶ 19:

> In short, there is no magic cleansing that occurs through the process of case resolution that satisfies the constitutional prohibition against imposing individual sentences for counts that constitute allied offenses. Merger must be addressed and resolved, or it remains outstanding. As

noted in *Underwood* [124 Ohio St.3d 365, 2012-Ohio-1, 922 N.E.2d 923, at ¶ 20], "[a] trial court does not have the discretion to exercise its jurisdiction in a manner that ignores mandatory statutory provisions." *Id.* Thus, the constitutional and Ohio statutory prohibition against multiple punishments for the same conduct must always be addressed in the absence of a stipulation to a separate animus or separate acts.

{¶33} We therefore hold that a trial court commits error where multiple charges facially present a question of merger under R.C. 2941.25 and the trial court fails to conduct an allied offenses of similar import analysis. We will discuss the effect of this error in more detail below.

{¶34} The distinction between our view and the dissent is we believe plain error exists in the failure to address a statutory mandate. The plain error occurs at that point and need not be premised on the illusive question of whether the multiple offenses would actually merge.

Defense Counsel and the Failure to Raise Merger

{¶35} Rogers's trial counsel failed to raise the merger question in the trial court below. However, because double jeopardy is implicated, there is a presumption against waiver of constitutional rights. *Underwood,* 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, at ¶ 32, citing *State v. Adams*, 43 Ohio St.3d 67, 69, 538 N.E.2d 1025 (1989). "'Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.'" *Adams* at 69, quoting *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). "A waiver of important constitutional rights cannot

be presumed from a silent record * * *." *State v. Stone*, 43 Ohio St.2d 163, 167, 331 N.E.2d 411 (1975).

{¶36} Furthermore, even if the failure to assert double jeopardy at the trial court level constituted a forfeiture of that right, the jeopardy claim may be reviewed for plain error. *See United States v. Ehle*, 640 F.3d 689, 694 (6th Cir.2011). Despite the dissent's analysis of the facts in both *Underwood* and *Johnson*, those admitted errors were not deemed "waived" or "forfeited" or reduced to an ineffective assistance of counsel claim on appeal.

{¶37} Defense counsel's failure to raise the merger issue does not relieve the trial court of its duty to determine the merger question when a facial question of merger presents itself. Ultimately it is the trial court that must apply the statutory requirements in R.C. 2941.25 and address the possible merger questions.[2]

{¶38} While defense counsel should raise potential merger questions, it is important to note that a defendant and his counsel have no role in the charging process, and the defendant has no burden to prove offenses merge in the guilt phase. Merger is not an affirmative defense under R.C. 2901.05(D)(1)(a) and (b). Merger occurs just prior to the entry of conviction and is a function of sentencing that is the exclusive domain of the trial judge.

---

[2] Even if defense counsel's failure to raise a merger issue amounts to an ineffective assistance of counsel claim, as referenced by the dissent, this does not relieve the trial judge of his or her statutorily mandated duty to address merger.

{¶39} Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. Thus, *Underwood* makes clear that a defendant may appeal his sentence even though it was jointly recommended by the parties and imposed by the court. *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923. As will be discussed later, when the issue of merger is facially apparent, the failure of the trial court to address the merger issue amounts to plain error. Therefore, a defendant's failure to raise an allied offenses of similar import issue in the trial court is not a bar to appellate review of the issue.

Effect of Guilty Plea

{¶40} In *Underwood*, the Supreme Court of Ohio held that the issue of allied offenses under R.C. 2941.25 may be appealed even if the defendant entered separate pleas to multiple offenses and received a jointly recommended sentence. *Id.* at ¶ 26. In this case, there was no discussion about Rogers's specific conduct at the time of the plea. Likewise, there was no stipulation or understanding of how the receiving stolen property counts or the possession of criminal tools count related to each other. In the absence of a stipulation or an agreement on which offenses are allied, a guilty plea does not negate the court's mandatory duty to merge allied offenses of similar import at sentencing. *Underwood* at ¶ 26.

{¶41} While facts establishing the conduct of the offender offered at the time of a plea may be used to establish that offenses are not allied, a guilty plea alone that does not include a stipulation or a finding that offenses are not allied offenses of similar import

does not conclusively resolve the merger question. Thus, a guilty plea alone does not constitute a valid waiver of the protections from possible double jeopardy under R.C. 2941.25.

The Role of Prosecutors

{¶42} The statute places no burden of proof on prosecutors to establish that offenses do not merge. Again, the determination of merger is in the hands of the trial judge based on the charges and the facts before the court.

{¶43} We are well aware that there are offenders who deserve separate convictions and punishments for certain conduct. Rather than ignoring the question, prosecutors should relish the opportunity to make the case for why certain offenders deserve convictions or punishments based on their conduct.

{¶44} Prosecutors are free to charge in any manner they see fit. They can charge as many counts as they conceivably feel cover the gamut of a defendant's conduct. With that, there are many opportunities to address the allied-offense issue along the path of case resolution. Prosecutors can put facts into the individual indictment counts distinguishing conduct; they can indicate in the response to a bill of particulars what offenses are not allied; at the time of a plea, they can indicate which offenses are not allied and why they are not allied by stating a factual basis for the plea, even if one is not required under Crim.R. 11; they can file a sentencing memorandum outlining the merger issues; they can also appear at sentencing and point out why offenses are not allied; they can also enter into a stipulation on what offenses are committed with separate conduct or a distinct animus.

Thus, at any point in the process, prosecutors can put facts on the record that would support a determination that certain offenses are not allied.

{¶45} This does not have to involve long or complicated hearings or witnesses. Historically, merger of offenses has always been viewed as a part of the sentencing process. Thus, "the sentencing process is less exacting than the process of establishing guilt." *State v. Bowser*, 186 Ohio App.3d 162, 2010-Ohio-951, 926 N.E.2d 714, ¶ 14 (2d Dist.), citing *Nichols v. United States*, 511 U.S. 738, 747, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994). Therefore, this process can easily be satisfied by a brief recitation of facts or circumstances by the prosecutor to aid the trial court in its determination. Nothing more should be required.[3]

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[3] In one of the more insightful decisions on this issue released more than 30 years ago, former Judge Alvin Krenzler noted:

> When there is a probability that the allied offense issue may arise in a case, the prosecutor and defense counsel would be well advised to squarely confront the issue in any plea bargaining that takes place. By resolving this question at the plea bargaining stage and incorporating the resolution of the allied offense issue in the plea bargain to be placed on the record, the prosecutor and defense counsel will act to avoid later problems in the validity of the plea bargain, in the entering of the plea, in the acceptance of the plea, in the judgment of conviction, and any appeal of the case.

State v. Kent, 68 Ohio App.2d 151, 155, 428 N.E.2d 453 (8th Dist.1980), fn.1.

The Application of Plain Error

{¶46} If the facts necessary to determine whether offenses are allied offenses of similar import are not in the record and the trial court does not inquire, then plain error exists when the issue is raised on appeal. *See State v. Barrett*, 8th Dist. No. 97614, 2012-Ohio-3948, 974 N.E.2d 185, (S. Gallagher, J., dissenting.)

{¶47} Pursuant to the terms of Crim.R. 52(B), plain errors or defects that affect substantial rights may be grounds for reversal even though they were not brought to the attention of the trial court. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶48} Plain error requires:

> (1) "there must be an error, i.e., a deviation from a legal rule," (2) "the error must be plain," which means that it "must be an 'obvious' defect in the trial proceedings," and (3) "the error must have affected 'substantial rights,'" which means that "the trial court's error must have affected the outcome of the trial.

State v. Gross, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 45, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

{¶49} We find that in failing to address a merger issue, there is a deviation from a legal rule. Thus, as here, when a trial court fails to determine whether offenses are allied offenses of similar import, the first prong of the plain error test is satisfied. The legislative requirement under R.C. 2941.25 to determine allied offenses is also mandated

by the Supreme Court of Ohio in *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923. "R.C. 2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, which prohibits multiple punishments for the same offense." *Id.* at ¶ 23. "[W]hen a sentence fails to include a mandatory provision, it may be appealed because such a sentence is 'contrary to law' and is also not 'authorized by law.'" *Id.* at ¶ 21.

{¶50} The second prong requires that the error must be "plain" or "obvious." Where it is clear from a facial review of the convictions that the allied offenses of similar import analysis should have been conducted but was not, the error is plain and obvious. Here the trial court should have realized from the face of the charges in CR-545992 that a merger analysis of the receiving stolen property and possession of criminal tools offenses was necessary. When the legislature statutorily mandates a procedural duty under R.C. 2941.25 to protect an established constitutional right, a violation of that duty constitutes error.

{¶51} Lastly, the third prong of plain error requires that the error must have affected the "substantial rights" of the accused. Clearly, the prospect of being subjected to multiple punishments for offenses that may be allied affects a defendant's substantial rights. In our view, the unresolved nature of double jeopardy so undermines the integrity of the proceedings that it constitutes plain error and satisfies this prong.

{¶52} To find otherwise would undermine the *Underwood* decision and the legislative mandate of R.C. 2941.25. Further, a defendant would be left with the limited

remedy of an ineffective assistance of counsel claim on appeal. That claim, like the allied offenses of similar import claim, would contain no more facts in support of it than the initial allied offenses of similar import claim. In the end, a postconviction relief petition would be all that remained as a remedy after the case is over. The unresolved nature of the double jeopardy issue affects the outcome of the case and prejudices the offender.

Distinguishing Forms of Plain Error

{¶53} We are cognizant that other panels of this court have declined to find plain error when the record does not contain facts from which an allied-offense error might be determined. They take issue with the approach that finds plain error when it is uncertain if the outcome of the case would have been otherwise. This view is outlined in *State v. Snuffer*, 8th Dist. Nos. 96480, 96481, 96482, and 96483, 2011-Ohio-6430, ¶ 9; *State v. Lindsey*, 8th Dist. No. 96601, 2012-Ohio-804, ¶ 13; *State v. Barrett*, 8th Dist. No. 97614, 2012-Ohio-3948, 974 N.E.2d 185; and in the original panel decision in this case released as *State v. Rogers*, 8th Dist. Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, and 98590, 2013-Ohio-1027.

{¶54} These cases accept the principle that it is plain error not to merge allied offenses, but rationalize that since there are no facts to find plain error, plain error does not exist. This is a self-fulfilling prophecy that defeats the constitutional protection outlined in *Underwood*. In our view, it is the absence of facts, or at least an inquiry into those facts, that makes the question ripe for review and creates plain error.

{¶55} The duty to merge implies a duty to inquire and determine whether multiple charges are allied offenses of similar import. Without the duty to inquire and determine, the duty to merge would be empty. An essential step in the merger process is applying the requirements of R.C. 2941.25, and hence the *Johnson* test, to the multiple charges. In our view, the failure to take this step where a facial review of the charges reveals it is necessary establishes prejudice and affects the outcome of the case. This is the fundamental distinction between our view and that of the dissent.

{¶56} In *State v. Corrao*, 8th Dist. No. 95167, 2011-Ohio-2517, ¶ 10, this court extended *Underwood* and held that "the trial court's failure to make the necessary inquiry [into the allied-offense issue post-*Johnson*] constitutes plain error necessitating a remand." There is historical support for this proposition. In *State v. Kent*, 68 Ohio App.2d 151, 428 N.E.2d 453 (8th Dist.1980), this court held that the trial court has "an affirmative duty to make inquiry as to whether the allied offense statute would be applicable" prior to sentencing the defendant. *Id.* at 156; *see also State v. Latson*, 133 Ohio App.3d 475, 728 N.E.2d 465 (8th Dist.1999). *Kent* was implicitly overruled by *State v. Comen*, 50 Ohio St.3d 206, 211, 553 N.E.2d 640 (1990), which overruled the defendant's challenge on an allied-offense issue for not being raised at the trial court level during the plea and sentencing hearings. Of course, *Comen* itself has since been contradicted by *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, at ¶ 29. *See Baker*, 8th Dist. No. 97139, 2012-Ohio-1833.

{¶57} Most traditional plain error deals with issues involving the guilt phase. *See State v. Davis*, 127 Ohio St.3d 268, 2010-Ohio-5706, 939 N.E.2d 147. Unlike plain error claims in the guilt phase, procedural plain error in sentencing does not affect the determination of guilt or innocence. The effect of finding plain error in the sentencing phase is minimal on the overall case and requires a return to the trial court solely to determine if any of the convictions merge. *See State v. Biondo*, 11th Dist. No. 2012-P-0043, 2013-Ohio-876. We also note that as trial courts become more aware of their duty to inquire and address merger questions, this problem will largely disappear. Even when trial courts fail to address the issue, there are often facts in the record that allow for resolution of the issue by de novo review on appeal. Thus, very few of these cases will result in a return to the trial court.

{¶58} If a trial court failed to advise a defendant under Crim.R. 11 of the right to subpoena witnesses, we would automatically find plain error. We would not contemplate or hedge our finding on whether the record is silent on the question of whether the defendant would have actually subpoenaed witnesses. It is enough that the advisement was not made to demonstrate the plain error.

{¶59} The failure to address the allied-offense issue, in our view, is no different. The plain error goes to the failure to address the required allied-offense analysis, not the plain error that exists when a record clearly demonstrates the offenses should have merged.

Other Issues

{¶60} Rogers also raised issues regarding jail-time credit and postrelease control.

{¶61} Rogers argued that the court erred by failing to compute his jail-time credit as mandated by R.C. 2967.191 and that trial counsel was ineffective for failing to request an accurate calculation of the jail-time credit. This assignment of error is moot because the court granted Rogers's pro se motion for jail-time credit on April 16, 2012.

{¶62} Lastly, Rogers complains that the court erred by failing to advise him of the consequences of violating postrelease control. This assignment is overruled because the court did apprise Rogers during sentencing of the consequences of violating postrelease control. *See* tr. 69-70.

Conclusion

{¶63} We therefore hold the following:

(a) Where a facial question of allied offenses of similar import presents itself, a trial court judge has a duty to inquire and determine under R.C. 2941.25 whether those offenses should merge. A trial court commits plain error in failing to inquire and determine whether such offenses are allied offenses of similar import.

(b) A defendant's failure to raise an allied offenses of similar import issue in the trial court is not a bar to appellate review of the issue.

(c) While facts establishing the conduct of the offender offered at the time of a plea may be used to establish that offenses are not allied, a guilty plea alone that does not include a stipulation or a finding that offenses are not allied offenses of similar import

does not conclusively resolve the merger question. Thus, a guilty plea does not constitute a valid waiver of the protections from possible double jeopardy under R.C. 2941.25.

{¶64} We overrule the prior decisions of this court to the extent they are in conflict with this decision. *See, e.g.*, *Snuffer*, 8th Dist. Nos. 96480, 96481, 96482, and 96483, 2011-Ohio-6430; *Lindsey*, 8th Dist. No. 96601, 2012-Ohio-804; *Barrett*, 8th Dist. No. 97614, 2012-Ohio-3948. In this case, we sustain the first assignment of error to the extent a remand is necessary to establish the underlying facts of Rogers's conduct in CR-545992 and for the trial court to determine whether the subject crimes should merge for sentencing purposes.

{¶65} By separate entry, we certify a conflict between this decision and the Sixth District's decision in *State v. Wallace*, 6th Dist. No. WD-11-031, 2012-Ohio-2675.[4]

{¶66} Judgment affirmed in part, reversed in part, and cause remanded.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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[4] The parties are advised that in order to institute a certified-conflict case in the Supreme Court of Ohio, a party must file a notice of certified conflict in the Supreme Court within 30 days of this court's order certifying the conflict. S.Ct.Prac.R. 4.1.

SEAN C. GALLAGHER, JUDGE

PATRICIA ANN BLACKMON, J.,
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
EILEEN A. GALLAGHER, J.,
EILEEN T. GALLAGHER, J.,
MARY EILEEN KILBANE, J.,
KATHLEEN ANN KEOUGH, J.,
LARRY A. JONES, SR., J.,
TIM McCORMACK, J., and
KENNETH A. ROCCO, J., CONCUR

KENNETH A. ROCCO, J., CONCURS WITH SEPARATE OPINION in which Patricia Ann Blackmon, Mary J. Boyle, Eileen A. Gallagher, Eileen T. Gallagher, Sean C. Gallagher, Larry A. Jones, Sr., Kathleen Ann Keough, Mary Eileen Kilbane, and Tim McCormack, JJ., CONCUR

LARRY A. JONES, SR., J., CONCURS WITH SEPARATE OPINION in which Patricia Ann Blackmon, Mary J. Boyle, Eileen A. Gallagher, Eileen T. Gallagher, Sean C. Gallagher, Kathleen Ann Keough, Mary Eileen Kilbane, Tim McCormack, and Kenneth A. Rocco, JJ., CONCUR

MELODY J. STEWART, A.J., DISSENTS WITH SEPARATE OPINION

KENNETH A. ROCCO, J., CONCURRING WITH MAJORITY OPINION:

{¶67} While I concur with the reasoning of the majority opinion, I write separately to express my concern that the dissenting opinion may become the law in this state. Should that occur, the trial judge will be relegated to a passive role at a time when his or her role rightfully is paramount. Moreover, I do not share the dissenting opinion's trust that a postconviction petition will afford relief to a defendant who is unaware when he or

she enters into a plea agreement of the nuances existing between the legal concepts of "forfeiture" and "waiver"; arguably, that issue "could have been raised" in a direct appeal.

{¶68} In addition, I wish to point out that because an analysis *with a solution to the dilemma presented in this case* was proposed in *State v. Kent*, 68 Ohio App.2d 151, 428 N.E.2d 453 (8th Dist.1980), that case deserves more than what the majority opinion affords it.

{¶69} Crim.R. 11(C) vests the trial court with the responsibility to ensure that a defendant is not unknowingly, involuntarily, or unintelligently surrendering his constitutional rights at a plea hearing. Obviously, the right conferred under the Double Jeopardy Clause qualifies as one.

{¶70} Thus, although the rule does not specifically require it, prior to making a finding of guilt, the trial court should make an inquiry concerning the facts underlying the defendant's change of plea. This court may not "have the authority to impose" such an action on the trial court, as the dissenting opinion notes, but the rule certainly encompasses it and provides the trial court with the jurisdiction to do so.

{¶71} As stated in *Kent*, 68 Ohio App.2d 151, 428 N.E.2d 453, after the defendant enters his change of plea to all of the offenses, and the trial court has otherwise complied with its duties under Crim.R. 11(C), a determination can then be made with respect to any potential allied-offense issue. The *Kent* court noted:

> This can occur in one of several situations.
>
> First, if either the prosecutor, the defense counsel, or a defendant advises the court that the defendant is pleading guilty to multiple offenses

and that in entering the plea consideration was given to the allied offense statute, the court can then accept the guilty plea and enter a judgment of conviction for all of the offenses to which the party has pled guilty. [Footnote omitted.]

In the event that a statement similar to that given above is not made, but a defendant affirmatively raises the issue of allied offenses and indicates that he is entering a plea of guilty to multiple offenses that are allied offenses of similar import and that a judgment of conviction can only be entered for one, the court will proceed to *accept the guilty plea to all of the offenses*. The court will then conduct a voir dire hearing to determine whether they are allied offenses of similar import with a single animus *which would require a judgment of conviction for only one offense*. If, after conducting such a hearing on the record, the cou[r]t determines that the offenses are allied offenses of similar import with a single animus, a judgment of conviction for only one offense may be entered. If the court, after conducting a hearing on the record, determines that there were multiple offenses of dissimilar import or offenses committed separately or with a separate animus as to each, the court will then enter a judgment of conviction for each of the offenses. R.C. 2941.25(A) and (B).

* * * If nothing is said by either the prosecutor or the defendant in regard to allied offenses and the court has accepted the guilty plea to all of the offenses, *the court has an affirmative duty to make inquiry as to whether the allied offense statute would be applicable. Under these circumstances, the court would explain that in Ohio there is an allied offense statute [that protects the constitutional right against double jeopardy], and thus, depending upon the evidence, a judgment of conviction may only be entered for one offense; and a hearing would be held to determine if there are such allied offenses.*

We recognize that Crim.R. 11 does not contain a requirement that the court conduct such a hearing after accepting the guilty plea. Nevertheless, the allied offense statute is mandatory in that when there are allied offenses of similar import, there can only be one judgment of conviction.

Therefore, two significant alternatives present themselves. First, the trial court could accept the guilty plea to the multiple offenses of similar import, make no further inquiry, and sentence the defendant for each offense. Then, if an appeal is taken, a defendant who has pled guilty to multiple offenses of similar import may raise the issue that there were allied offenses of similar import with a single animus and that the judgment of conviction for the multiple offenses should not have been entered. He would argue that he did not make a knowing, intelligent and voluntary plea because he was not advised of the allied offense statute.

On the other hand, a trial court could conduct an allied offense hearing on the record for multiple offenses of similar import. After that, the trial judge would determine whether sentence could be imposed for only one offense, or if the offenses were allied offenses, impose separate sentences as to each one shown to have an animus separate from the others. This process would have an additional advantage: it would provide the record necessary for an appellate court to review the determination below.

We believe the better practice would be for the court to conduct the allied offense hearing when a defendant has pled guilty to multiple offenses of similar import. In this way, the defendant's rights are protected and the defendant is then precluded from successfully raising the allied offense issue on appeal. Thus, in the interests of judicial economy and protection of the rights of the defendant, it is the better practice to have the trial court conduct the allied offense hearing after accepting a guilty plea to offenses which may be construed to be allied offenses of similar import.

Further, in the event that the trial court erred in its determination of allied offenses, the entire guilty plea is not vacated. It is only the judgment of conviction relating to the allied offenses.

(Emphasis added.)

{¶72} The foregoing procedure makes eminent sense. In advising the defendant during the colloquy at the plea hearing of this additional constitutional right, putting the prosecutor to his proof, requiring defense counsel to advocate for his client, and making a final determination of whether there exists a factual basis prior to making a finding of guilt, the trial court is not acting as an advocate for anything but the law itself. This is the judge's sole responsibility, after all.

{¶73} Despite the implicit directive Crim.R. 11(C) contains, the merger issue has been declared in some instances as one that can "only occur at sentencing." *See State v. Snuffer*, 8th Dist. Nos. 96480, 96481, 96482, and 96483, 2011-Ohio-6430, ¶ 10. Therefore, the trial court may, in addition, require the parties to submit sentencing memoranda on the issue prior to conducting the sentencing hearing. The prosecutor at the

same time could be advised to be prepared to elect, should the trial court make the determination that merger must occur. This would serve several beneficial purposes.

{¶74} It would lend further support for the trial court's determinations with respect to guilt, merger, and, incidentally, proportionality. It would provide more material for purposes of appellate review. It would also address the concerns set forth by the dissenting opinion. *See also State v. Barrett*, 8th Dist. No. 97614, 2012-Ohio-3948, ¶ 24-25 (which set forth the belief that the trial judge should not be placed in the position of "advocating" for the defendant but acknowledged that, at the plea hearing, "the court has an affirmative duty to advise a defendant of the consequences of waiving constitutional rights").

{¶75} Finally, it would also have the advantage of cutting short the process currently in use, i.e., several appeals, as the issue comes from the trial court to this court, is reviewed with or without an adequate record, and is remanded for the trial court to make another decision for this court to review again. Adding the necessity for the filing of a petition for postconviction relief as a method of redressing the issue merely compounds the problem. Judicial economy is clearly lacking in this area, and it is this court's duty to provide some *guidance* to the trial courts. The procedure outlined in *Kent*, 68 Ohio App.2d 151, 428 N.E.2d 453, serves both ends.

{¶76} The vexing problem this case presents easily could be solved by the Ohio Supreme Court. That court could either embrace the procedure proposed in *Kent*, or

amend Crim.R. 11(C) to require the trial judge, prior to accepting the change of plea, to make an inquiry into the underlying facts.

LARRY A. JONES, SR., J., CONCURRING WITH MAJORITY OPINION:

{¶77} I concur in judgment with the reasoning of both the majority opinion and Judge Rocco's concurring opinion, but write separately to provide simple and straightforward instructions for the trial court.

{¶78} As highlighted by the majority, it is a fundamental principle that an offender can be punished only once for a crime; otherwise, the offender's constitutional right to be protected from double jeopardy has been violated.

{¶79} When an offender is convicted of more than one offense, R.C. 2941.25 obligates the trial court to determine whether the offenses are allied. This obligation is the same whether the conviction is the result of a plea of guilty, a plea of no contest, or a verdict after a trial.

{¶80} Therefore, if an offender is convicted of more than one offense and the parties do not expressly agree, i.e. stipulate, that the offenses *are not* allied offenses of similar import, the trial court must make the inquiry and this inquiry must take place on the record before the offender is sentenced (but this inquiry may take place at the sentencing hearing).

{¶81} The trial court is obligated to do an allied-offenses analysis, on the record each time there is a conviction of more than one offense. While, in some cases, it may seem tedious, in the long run it will save the state's and court's resources by streamlining

multiple appeals and, most importantly, ensure the constitutional rights of the defendant against double jeopardy.

MELODY J. STEWART, A.J., DISSENTING:

{¶82} I believe that the majority's decision misinterprets the holding in *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, that "allied offenses of similar import must be merged at sentencing or the sentence is contrary to law." I agree that it is plain error for the court to sentence an offender to serve multiple terms of imprisonment for allied offenses of similar import — when an allied offenses error is obvious on the record, we must find the error rises to the level of plain error. The question presented en banc is what to do when a defendant pleads guilty to an indictment, fails to offer any evidence at sentencing to show why the offenses are allied, and the appellate record contains no facts to show why multiple offenses should merge for sentencing.

{¶83} Consistent with established principles of appellate review, I would find that the defendant who pleads guilty to multiple offenses and fails to raise an allied offenses issue at sentencing forfeits the right to argue all but plain error on appeal. And since a plain error analysis is always predicated on there being an "obvious" error in failing to merge allied offenses, the claimed error must fail if the record contains no facts proving that a merger error occurred.

{¶84} The majority of this court decides differently, reversing and remanding a conviction not because an error occurred, but because it cannot tell if an error occurred.

Rather than rely on the established application of the plain error rule, the majority circumvents the rule by holding that plain error occurs simply because the court failed to conduct a "facial" inquiry of the offenses at sentencing to determine whether multiple offenses are allied. *Underwood* does not explicitly place a duty on the court to make this inquiry nor can that duty be inferred. What is more, in creating this new duty for the court (and the prosecuting attorney), the majority relieves defense counsel of any duty to protect a client's rights — it essentially finds that any issue of ineffective assistance of counsel resulting from counsel's failure to raise the merger issue at sentencing is superseded by the court's per se error in failing to raise the issue sua sponte.

{¶85} This holding is a misapplication of the plain error rule, a misreading of Supreme Court precedent, and a clear departure from our traditional adversary process. I respectfully dissent.

I

{¶86} The plain error doctrine set forth in Crim.R. 52(B) states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This rule is identical to Fed.R.Crim.P. 52(b) and Ohio courts have resorted to federal precedent when construing the state version of the rule. *See, e.g., State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, 884 N.E.2d 45, ¶ 18.

{¶87} To prevail on a showing of plain error, a defendant must prove three things: (1) an error, (2) that is plain, and (3) that affects substantial rights. *See Jones v. United States*, 527 U.S. 373, 389, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999); *State v. Gross*, 97 Ohio

St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 45. A reviewing court will take notice of plain error only with the utmost caution, and only then to prevent a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), syllabus.

{¶88} As the majority concedes, "[t]here are simply no facts in the record to aid in our mandated de novo review" of the merger issue. *Ante* at ¶ 25. Without facts showing why offenses should merge, this court cannot say that any sentencing error occurred, much less that an error occurred that was so "obvious" that it rose to the level of "plain" error. It is the appellant's responsibility under App.R. 16(A)(7) to make an argument with citations to the parts of the record on which the appellant relies.

{¶89} Rogers pleaded guilty to a bare bones indictment. By doing so, he admitted the facts alleged in the indictment. *See* Crim.R. 11(B)(1); *State v. Wilson*, 58 Ohio St.2d 52, 388 N.E.2d 745 (1979), paragraph one of the syllabus. He did not argue at sentencing that the offenses he pleaded guilty to were allied and should merge for sentencing, so he forfeited the right to raise anything but plain error relating to merger of sentences. Under any plausible application of the plain error rule, Rogers has failed to show an error, the existence of which we must recognize in order to prevent a miscarriage of justice. On this basis alone, we should reject Rogers's argument that the court committed plain error by failing to merge for sentencing allied offenses of similar import. *See State v. Snuffer*, 8th Dist. Nos. 96480, 96481, 96482, and 96483, 2011-Ohio-6430; *State v. Lindsey*, 8th Dist. No. 96601, 2012-Ohio-804; *State v. Barrett*, 8th Dist. No. 97614, 2012-Ohio-3948; *State v. Rogers*, 8th Dist. Nos. 97093 and 97094, 2012-Ohio-2496.

II

{¶90} The majority circumvents a conventional plain error analysis by taking the *Underwood* holding out of context and relieving the defendant of the onus of objecting and otherwise preserving any claimed error. It does so on the following premises: (1) allied offenses issues invoke the sentencing component of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and constitutional errors cannot be waived unless the waiver is knowing or intelligent; (2) the "imposition of multiple sentences for allied offenses of similar import is plain error"; and (3) under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. From these premises the majority concludes that the trial judge not only has a duty to merge allied offenses of similar import, but that the trial judge also has the obligation to raise the issue of allied offenses at sentencing even if the defendant fails to do so. This conclusion is not valid.

A

1

{¶91} Although the majority correctly concludes that Rogers's failure to raise the merger issue at sentencing did not constitute a waiver of his double jeopardy rights, *ante* at ¶ 35, it reaches that conclusion for the wrong reasons because it confuses the concepts of "waiver" and "forfeiture." By failing to raise the issue of merger, Rogers did not waive his double jeopardy rights, but he did forfeit the right to argue anything but plain error on appeal. This distinction is important: nuanced or not.

{¶92} A "waiver" is the intentional relinquishment or abandonment of a right, while a "forfeiture" is the failure to preserve an objection. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 23. The waiver of a right is not subject to plain error review under Crim.R. 52(B), but a forfeiture of an objection is subject to plain error review under Crim.R. 52(B). *Id.* Rogers did not intentionally relinquish his double jeopardy rights when he failed to object at sentencing that he was separately sentenced on allied offenses of similar import — he merely forfeited the right to complain of anything but plain error on appeal by not timely raising it. In fact, *Underwood* addressed this very point, rejecting the argument that a guilty plea to a jointly recommended sentence constituted a waiver of the right to raise an allied offense issue on appeal. *Underwood, supra,* at ¶ 32.

2

{¶93} There really is no doubt that a defendant who pleads guilty and does not raise the issue of allied offenses at the time of sentencing forfeits all but plain error on appeal. In *State v. Comen*, 50 Ohio St.3d 206, 211, 553 N.E.2d 640 (1990), the Supreme Court found an allied offenses argument forfeited on appeal because the defendant did not raise the issue in the trial court. Implicit in the idea of issue forfeiture in the context of allied offenses is that a party who fails to object waives all but plain error. *See State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 139 (argument that state failed to prove separate animus for separate offenses was not raised at trial and defendant "thus waived all but plain error"). Rogers did not waive his right to not be held twice in

jeopardy for the same conduct, but by failing to raise the issue in the trial court, he did forfeit the right to object to this aspect of his sentence.

{¶94} *Comen* should end any discussion concerning the application of the plain error rule in this case, yet the majority gives short shrift to that case with the statement that it is "contradicted" by *Underwood*. *Ante* at ¶ 56. This comment is not correct because *Underwood* is entirely consistent with *Comen* — the Supreme Court recognized that Underwood's guilty plea did not waive error; it simply forfeited all but plain error for purposes of appeal. With the state having conceded that Underwood's offenses were allied and should have merged for sentencing, *Underwood* at ¶ 8, the Supreme Court found that the court's failure to merge those sentences rose to the level of plain error.

{¶95} Given the concession of plain error in *Underwood*, the Supreme Court had no reason to cite *Comen* for the legal proposition that a failure to raise an allied offenses objection at sentencing forfeits all but plain error. With plain error established, Comen's forfeiture of the right to argue allied offenses was immaterial.

{¶96} In fact, the rule that a defendant who fails to raise the issue of allied offenses at sentencing forfeits the right to argue that issue on appeal is so well established that it is axiomatic. For example, in *State v. Antenori*, 8th Dist. No. 90580, 2008-Ohio-5987, we held, consistent with the principles announced in *Comen*, that by voluntarily entering guilty pleas to two separate offenses, a "defendant waive[s] any argument that the same constituted allied offenses of similar import." *Id.* at ¶ 6.

{¶97} And in *State v. Wulff*, 8th Dist. No. 94087, 2011-Ohio-700, we distinguished *Antenori* from *Underwood* by noting that *Underwood* involved a jointly recommended sentence as opposed to the guilty plea entered into in *Antenori*. *Id.* at ¶ 25. *Wulff* thus concluded that a defendant who voluntarily enters guilty pleas and allows himself to be sentenced at the court's discretion forfeited any argument that his offenses constituted allied offenses of similar import. *Id.* at ¶ 26.

{¶98} Any argument the majority makes that *Underwood* somehow undercut the principles announced in *Comen* should have been dispensed with in *State v. Clementson*, 8th Dist. No. 94230, 2011-Ohio-1798, where the author of the present en banc decision not only agreed with the *Antenori–Wulff* analysis, but explained his agreement by citing with approval the passage from *Antenori* explaining why *Underwood* was distinguishable. *Id.* at ¶ 11. *Clementson* thus denied an application to reopen an appeal on grounds that appellate counsel was ineffective for failing to raise an assignment of error relating to the court's failure to merge allied offenses of similar import for sentencing because that issue arose in the context of a guilty plea and was essentially unreviewable on direct appeal. *Id.* at ¶ 13.

B

{¶99} The majority cites *Underwood* for the proposition that it is error to fail to merge allied offenses and from this proposition concludes that a sentence must be reversed if the record on appeal does not contain enough information to prove that offenses are not allied. In its view, holding otherwise might result in the defendant actually being ordered

to serve separate sentences for allied offenses, and that would violate *Underwood*. This conclusion disregards *Comen* and miscomprehends *Underwood's* holding. It is important to understand that in both *Underwood* and *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Supreme Court's holdings were predicated on facts or concessions showing that the trial judge had erred by failing to merge offenses that actually were allied: *Underwood* was the result of a no contest plea and recommended sentence in which the state conceded that Underwood's offenses were allied offenses of similar import; *Johnson* involved a jury trial in which the evidence at trial convincingly showed that the subject offenses were allied. In both cases, the Supreme Court was able to find a merger error that was obvious on the record.

{¶100} The specific holding in *Underwood* that "offenses of similar import must be merged at sentencing or the sentence is contrary to law" is explained by the state's argument in that case. Midway through his trial, Underwood and the state reached a plea agreement in which Underwood would plead guilty to multiple offenses and the parties jointly recommended a sentence. *Underwood, supra,* at ¶ 4. Underwood did not raise the argument to the trial court that any offenses were allied and should have merged, but he did do so on direct appeal. *Id.* at ¶ 6. The state conceded that Underwood's sentences should have merged, but argued that he waived the right to appeal the merger issue by jointly agreeing to a sentence. *Id.* at ¶ 8. Accepting the state's concession regarding merger, the Supreme Court cited past precedent for the proposition that allied offenses are

to be merged at sentencing and found that the trial court's failure to merge Underwood's sentences was plain error. *Id.* at ¶ 26.

{¶101} With the Supreme Court's finding that the offenses in *Underwood* and *Johnson* were allied, its directive that allied offenses must be merged for sentencing is entirely defensible — it was plainly established that the offenses in each case were allied offenses of similar import, so it would violate double jeopardy to force the defendants in those cases to serve multiple punishments for a single act. The obvious error in each case was, indeed, plain error.

{¶102} In this case, the majority admittedly has no idea whether Rogers's offenses were allied because Rogers pleaded guilty and failed to make a record to demonstrate his claimed error. Nothing in *Underwood* suggests that it applies to the *mere possibility* that an allied offenses error occurred. Applying *Comen*, we should hold that Rogers's failure to preserve error at the time of sentencing forfeited all but plain error and that the limited record on appeal makes it impossible for us to find such an error.

C

{¶103} The majority's final premise — that the court has the responsibility to determine prior to sentencing whether there are any allied offenses issues — imposes a vague standard that the majority actually disregards and creates a new form of structural error.

1

{¶104} In the majority's view, the trial judge has the obligation to address a potential allied offenses issue if the convictions present a "facial" question of merger. *Ante* at ¶ 32. It is unclear what is meant by the use of that word. As a legal term of art, "facial" means obvious or apparent "on its face." But application of this standard actually contradicts the majority's conclusion.

{¶105} The two counts of receiving stolen property involved (1) a "stolen pickup truck" and (2) "tires and rims." The single count of possession of criminal tools involved "a tire jack and/or tow chain and/or lug nut wrenches." As the majority concedes:

> [W]e are unable to determine if these offenses were allied offenses of similar import. It is unclear if the "tires and rims" are from the same "stolen pickup truck" or from another vehicle. Likewise, it is unclear how the tools involved were related to either of the receiving stolen property offenses. There are simply no facts in the record to aid in our mandated de novo review of the issue.

Ante at ¶ 25.

{¶106} If this court is unable to determine whether the offenses are allied offenses of similar import because there are no facts to suggest that they are, it has necessarily concluded that there is no "facial" question of merger that obligated the trial judge to inquire into the allied offenses issue. The analysis is at an end. By its own reasoning, the majority's analysis necessarily affirms Rogers's sentences.

{¶107} Rather than apply this new "facial" approach, the majority now adopts a standard that goes beyond the plain error rule and presumes that all offenses are potentially allied and the trial judge must, prior to sentencing, inquire into the possibility that

sentences might be subject to merger, regardless of what facts are before the trial judge — in essence elevating plain error to a form of structural error.

{¶108} It is only in the rarest of cases that an error is held to be structural, thus requiring an automatic reversal. *Washington v. Recuenco*, 548 U.S. 212, 218, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). The United States Supreme Court has been very clear in cautioning against the "unwarranted extension" of the plain error rule because it "would skew the Rule's 'careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.'" *United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), quoting *United States v. Frady*, 456 U.S. 152, 163, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). Indeed, the Supreme Court has stated that it has no authority to create a "structural error exception" to the plain error rule, and that a structural error analysis is inappropriate in a plain error situation. *Johnson v. United States*, 520 U.S. 461, 466, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

{¶109} Although the majority carefully avoids characterizing its new rule as "per se" or "structural" error, the intent is clear. The majority explains its decision to place a duty on the court to inquire into the possibility that offenses might merge for sentencing by analogizing allied offenses issues to guilty pleas and claiming that we would "automatically" find plain error if the court failed to advise a defendant of the right to subpoena witnesses under Crim.R. 11(C), regardless of whether the defendant claimed any prejudice. *Ante* at ¶ 58. The difference between plain error and structural error is the

demonstration of prejudice: plain error exists only when the defendant shows that error affected substantial rights (i.e., prejudice); structural error presumes prejudice. *See State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, ¶ 9. By now stating that it would reverse a case even without a showing of prejudice, this court implicitly concedes that it is employing a structural error analysis. It does so with no regard to the Supreme Court's admonition that a structural error analysis is inappropriate in a plain error situation. *Johnson, supra.* At least one other appellate district court has rejected a similar per se error claim in a post-*Underwood* allied offenses appeal from a guilty plea. *See State v. Wessling*, 1st Dist. No. C-110193, 2011-Ohio-5882, ¶ 6.

{¶110} In any event, if the majority insists that it is employing a plain error analysis, the Crim.R. 11(C) guilty plea analogy it uses actually disproves its point. The only way an appellate court would know if a trial judge failed to make the required Crim.R. 11(C) advisements would be if the error was shown on the transcript of the plea colloquy. When there is no transcript of a plea colloquy made available to us, we have invoked established precedent to presume the regularity of the proceedings below and affirm. *See, e.g., State v. Smith*, 8th Dist. No. 94063, 2010-Ohio-3512, ¶ 11-12; *State v. Simmons*, 8th Dist. No. 94982, 2010-Ohio-6188, ¶ 19. So the majority not only fails to make a convincing case for departing from established plain error precedent to create a new form of structural error, it cannot satisfy the plain error test that it says it employs.

{¶111} Although the majority insists that the trial judge has no duty to be an advocate for either the defendant or the state, *ante* at ¶ 27, there is no doubt that its decision effectively requires the court to be more of an advocate for the defendant than defense counsel. It says that defense counsel "should" raise potential merger issues, *ante* at ¶ 38, but that the court "must" raise the issue. *Ante* at ¶ 32. The majority even finds that issues of ineffective assistance of counsel are essentially superseded by the trial judge's "mandated duty to address merger." *Ante* at fn. 2.

{¶112} It is well established that the court has no duty to act sua sponte to preserve the constitutional rights of a defendant who had failed to object to an error. *See, e.g., State v. Abdul Bari*, 8th Dist. No. 90370, 2008-Ohio-3663 (court has no duty to sua sponte dismiss an indictment on speedy trial grounds absent objection); *Clark v. Newport News Shipbuilding & Dry Dock Co.*, 937 F.2d 934, 939 (4th Cir.1991) ("Neither *Batson* nor its progeny suggests that it is the duty of the court to act sua sponte to prevent discriminatory exclusion of jurors. Rather, even in criminal cases, the objection is deemed waived if not timely raised.").

{¶113} In criminal cases that terminate by plea agreement, the court usually has no involvement apart from taking the plea and sentencing the defendant. It is unclear why the sentencing judge, who would presumably have less knowledge of the facts than defense counsel, should have the obligation to raise the issue of allied offenses when defense counsel has not done so. Obviously, it is defense counsel's obligation to protect a

defendant's rights. Competent defense counsel who negotiates a guilty plea will be aware of the facts underlying those offenses to which a defendant pleads guilty. At all events, it is defense counsel's obligation to advocate for the defendant. This court's decision essentially forces the trial judge to act as a de facto second chair for the defendant.

3

{¶114} It is disappointing that this court finds inadequate the legal remedies a defendant has for the potential errors that trial counsel makes in failing to raise the issue of allied offenses. To be sure, it would be difficult on direct appeal to make a viable ineffective assistance of counsel claim stemming from an alleged merger error in a guilty plea. As this case shows, the nature of guilty plea proceedings are such that the facts necessary to prove the error would be missing. *See, e.g., State v. Coleman*, 85 Ohio St.3d 129, 134, 707 N.E.2d 476 (1999). But there are other avenues for raising error.

{¶115} Under R.C. 2953.21, a defendant can seek postconviction relief for the alleged errors of defense counsel that occur outside the record on appeal. Indeed, the postconviction relief statute is specifically designed for such issues of ineffective assistance of counsel because the petitioner is required to provide facts beyond the record on direct appeal. *State v. Cooperrider*, 4 Ohio St.3d 226, 228-229, 448 N.E.2d 452 (1983).

{¶116} The majority acknowledges the availability of postconviction relief as a means of remedying defense counsel's failure to raise the issue of allied offenses at sentencing, but apparently finds that the "limited" nature of postconviction makes it a less

than satisfactory remedy. *Ante* at ¶ 52. It is unclear what it means when it says that postconviction relief offers a "limited" remedy. The postconviction statute, R.C. 2953.21(A), applies to constitutional claims of any kind, including ineffective assistance of counsel claims based on alleged violations of the Sixth Amendment to the United States Constitution. In fact, it is the only vehicle for raising ineffective assistance of counsel claims that rely on evidence outside the record on appeal. *See Coleman*, at 134. ("Any allegations of ineffectiveness based on facts not appearing in the record should be reviewed through the postconviction remedies of R.C. 2953.21."). The federal courts usually restrict claims of ineffective assistance, on whatever theory, to postconviction proceedings because the record can be more fully developed. *See Massaro v. United States*, 538 U.S. 500, 504-505, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003); *United States v. Spence*, 450 F.3d 691, 694 (7th Cir.2006).

{¶117} Presumably, the majority has no difficulty applying the postconviction relief statute to other forms of constitutional error apart from ineffective assistance of counsel claims. That being so, there is no reason why the postconviction remedies for those kinds of errors are any less limited than the postconviction remedies provided for ineffective assistance of counsel errors, particularly when the Supreme Court has specifically endorsed the postconviction relief statute for use in cases where the record is insufficient to prove a claim of error on direct appeal.

III

{¶118} In the end, there is no compelling reason for this court's departure from well-established rules governing plain error. If the court can conclude as a matter of fact or a stipulation that offenses are allied, it must merge those offenses for sentencing as required by *Underwood*. But in guilty plea cases like this one, the absence of any facts showing why offenses are allied and should merge for sentencing means that plain error cannot be shown.

{¶119} The majority opinion criticizes application of the plain error rule as a "self-fulfilling prophecy that defeats the constitutional protection outlined in *Underwood*." *Ante* at ¶ 54. But all plain error analysis, regardless of the type of constitutional issue, leads to the same "self-fulfilling prophecy" — if the error is not demonstrated on the record, it is not by definition "plain."

{¶120} I agree in principle with the concurring opinion that a trial judge can choose to be more proactive in sentencing and raise potential merger issues in accordance with *State v. Kent*, 68 Ohio App.2d 151, 428 N.E.2d 453 (8th Dist.1980). This could even entail the trial judge refusing to accept a guilty plea unless the parties have agreed in advance on all issues of allied offenses as part of the plea agreement. To be sure, this proactive approach would indeed be the better practice. But that kind of involvement is not required by law and we have no authority to impose it on trial judges.

{¶121} This court's decision to reverse this case requires a remand for a hearing, like that suggested in *Kent*. And it does so without guidance for the trial courts.

{¶122} A concern with applying *Kent* is that it fails to define the scope of the "voir dire hearing" that a trial judge is supposed to conduct to determine whether offenses are allied and should merge for sentencing. Given the lack of facts typically set forth in the indictment, the voir dire hearing would necessarily require additional fact finding. But the manner in which the court is to decide these facts is unclear and many questions of procedure are left unanswered.

{¶123} To illustrate how these questions might arise, suppose a case where the defendant pleads guilty to an indictment charging a rape and kidnapping that occurs on the same day to the same victim. The court accepts the plea, the defendant makes no request that the sentences merge, so the offenses are not merged for sentencing. On appeal, and consistent with this court's new approach that plain error is demonstrated because there is the possibility that the offense might have merged had the issue been raised, the sentence is reversed. On remand, the defendant argues that the two offenses are allied and must merge because they were committed with a state of mind to commit only one act. The state disagrees and theorizes that the defendant's acts were committed separately and should not merge for sentencing. With no agreement of the parties, the court decides to hold a voir dire hearing to resolve the issue. What is the scope of this hearing?

{¶124} As a court, we have previously allowed allied offenses issues arising from trials to be determined solely on the arguments of counsel. That procedure is defensible because a trial produces facts from which the court can determine whether individual crimes were allied offenses of similar import. But with remands of guilty plea cases like

this one, there are no facts showing whether offenses are allied. Some form of factual inquiry will be required. If we accept that the arguments of counsel do not constitute evidence, it follows that the parties have the right to offer evidence and call witnesses. That being the case, it appears that the court would have to at least conduct a mini or abbreviated trial. This sort of trial or hearing would be required because the allied offenses issue is one in which the court must determine whether the multiple offenses were committed with a state of mind to commit only one act. I can imagine no other way to determine this other than to hear evidence of the underlying crimes. The irony of having to hold such a trial or evidentiary hearing from a plea agreement is obvious.

{¶125} There are other questions left unanswered by a remand. The Supreme Court has held that the defendant "bears the burden of establishing his entitlement to the protection, provided by R.C. 2941.25, against multiple punishments for a single act." *State v. Mughni*, 33 Ohio St.3d 65, 67, 514 N.E.2d 870 (1987). What is the court's standard for finding that offenses are allied offenses of similar import: beyond a reasonable doubt, clear and convincing evidence, or a preponderance of the evidence? Does the defendant have the right to compel witnesses? Can the defendant testify at a voir dire hearing without waiving the Fifth Amendment right against self-incrimination? If new evidence surfaces at the voir dire hearing, does the state have the right to rescind the plea agreement and file additional charges? If requested, does the court have to make findings of fact?

{¶126} There is always the possibility that the parties on remand could stipulate facts beyond those stated in the indictment, but it is unclear why defense counsel would do so. The defendant who has pleaded guilty and been sentenced has nothing to lose and everything to gain by forcing a hearing on allied offenses. In cases like this where there are no facts on the record to show whether offenses are allied, defense counsel is working with a clean slate. Advice to stipulate facts under these circumstances could be a questionable defense strategy and would almost certainly open the door to an ineffective assistance of counsel claim should the court find that merger is warranted.

{¶127} One of the reasons given by one of the concurring opinions in this case is to express concern that this "dissenting opinion may become the law of this state." *Ante* at ¶ 67. With all due respect to the author, this opinion expresses what is already the law of the state (or the state of the law) — at least with regard to plain error jurisprudence. And the unanswered questions about the scope of the proposed voir dire hearing to be conducted on remand should cause this court to pause before abandoning our well-established plain error doctrine and creating a new, expansive rule requiring a remand in all guilty plea cases in which allied offenses could conceivably be, but are not plainly, at issue.

{¶128} Of course, no appellate court can or should try to predict all the possible consequences of a ruling. But having adopted a new rule, this court does a disservice to the trial court by failing to consider the practical consequences of this ruling.

{¶129} What this case demonstrates is that the defense — not the court and not the prosecuting attorney — has the ultimate duty to raise any potential allied offenses at the time of sentencing. If the issue is not raised before sentencing, the defendant forfeits all but plain error on appeal. Plain error cannot be established on the mere possibility that a sentencing error occurred, but rather on facts that prove an obvious error. If there are no facts to show that a plain error occurred, the defendant's recourse is in postconviction proceedings.

[Cite as *State v. Wallace*, 2012-Ohio-2675.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio	Court of Appeals No. WD-11-031
Appellee	Trial Court No. 2011CR0023
v.	
Mark Wallace	**DECISION AND JUDGMENT**
Appellant	Decided: June 15, 2012

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Gwen Howe-Gebers, Assistant Prosecuting Attorney, for appellee.

Brian D. Smith, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Mark Wallace appeals a May 3, 2011 judgment of the Wood County Court of Common Pleas. Under the judgment, appellant stands convicted of (1) theft, a violation of R.C. 2913.02(A)(1) and a felony of the fourth degree, (2) receiving stolen property, a violation of R.C. 2913.51(A) and a felony of the fifth degree, and (3)

engaging in a pattern of corrupt activity, a violation of R.C. 2923.32(A)(1) and a felony of the third degree. The convictions are a result of guilty pleas entered under a plea agreement.

{¶ 2} The court also imposed sentence, sentencing Wallace to serve a one-year term of imprisonment on the conviction for theft, a one-year term on the conviction for receiving stolen property, and a five-year term on the conviction of engaging in corrupt activity. The court ordered that the sentences be served concurrently with each other for a total aggregate term of imprisonment of five years. The trial court also ordered appellant to pay restitution in the amount of $9,548.01.

{¶ 3} On appeal, appellant challenges the trial court judgment on three grounds: (1) that the theft and receiving stolen property convictions and sentences are for allied offenses of similar import under R.C. 2941.25(A) that are to be merged into a single conviction and sentence, (2) that the conviction for theft is barred by double jeopardy because of a prior criminal prosecution against him, and (3) that appellant received ineffective assistance of counsel. Appellant raises these arguments under three assignments of error:

{¶ 4} Assignment of Error No. 1: The Defendant-Appellant's conviction for both theft and receiving stolen property is contrary to law and should be reversed.

{¶ 5} Assignment of Error No. 2: The Defendant-Appellant's conviction for theft is a violation of his Constitutional right against double jeopardy.

{¶ 6} Assignment of Error No. 3: The Defendant-Appellant received ineffective assistance of counsel.

Claimed Allied Offenses

{¶ 7} Under Assignment of Error No. 1, appellant argues that applying the standard set by the Ohio Supreme Court in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, his theft and receiving stolen property convictions are for allied offenses within the meaning of R.C. 2941.25 and that the two convictions were to be merged at sentencing. In *Johnson*, the court identified a two-step analysis to determine allied offenses under R.C. 2941.25(A):

> In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is 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. * * *.
>
> If 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." [*State v.*] *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N. E.2d 149, at ¶ 50 (Lanzinger, J., dissenting.). *Id.*, at ¶ 48-49; see *State v. Harris*, 6th Dist. No. L-10-1171, 2011-Ohio-4863, ¶ 18.

{¶ 8} At the plea hearing, the state made a statement of facts that it contends would be established by the evidence at trial. With respect to the theft count, the state

3.

claimed that the evidence at trial would establish "that on or about March 1st, 2010, and continuing through October 14th, 2010, in Wood County, the defendant, Mark Wallace, did with purpose to deprive Hobby Lobby, the owners of property or services, to wit; art and crafts supplies knowingly obtained or exerted control over said property without the consent of Hobby Lobby valued at $5,000 or more but less than $100,000."

{¶ 9} With respect to the receiving stolen property count, the state contended that the evidence would establish that "on or about April 1st, 2010 and continuing through October 14th, 2010, the defendant in Wood County did knowingly receive, retain or dispose of property of another, knowing or having reasonable cause to believe said property was obtained through the commission of a theft offense, valued at less than $5,000."

{¶ 10} The parties agree that the first step under the *Johnson* analysis has been met; that is, they agree that it is possible to commit both the stolen property offense and the theft offense by the same conduct. Appellant asserts that the second step has also been met, arguing that both offenses were committed by appellant's theft of merchandise from Hobby Lobby alone, either personally or as an accomplice.

{¶ 11} The state argues first that the court should decline to consider the allied offenses argument presented by appellant. Appellant failed to raise the issue in the trial court and the state argues that this court should refuse to consider the issue as plain error on appeal. On the merits, the state argues that the two offenses were not in fact committed by the same conduct. The state contends that the evidence at trial would have

demonstrated that the receiving stolen property conviction was based upon instances where appellant received stolen property but had not been involved in the actual theft, either personally or as an accomplice.

{¶ 12} We have reviewed the record. In our view, even were we to consider appellant's argument on allied offenses as plain error, appellant's argument must fail. The record lacks evidence upon which to determine whether the same conduct resulted in both convictions. On this record, we are unable to determine whether the offenses were in fact committed by the same conduct.

{¶ 13} Accordingly, we find appellant's Assignment of Error No. 1 is not well-taken.

Claimed Bar by Double Jeopardy Due to Prior Prosecution for Theft Offense

{¶ 14} Appellant argues under Assignment of Error No. 2 that his conviction for theft violates state and federal constitutional prohibitions against double jeopardy because he was prosecuted twice for the same theft offense. Appellant basis this argument on a prior prosecution in Perrysburg Municipal Court and attaches documents from that criminal proceeding to his appellate brief as evidence in support of his appeal. The documents, however, were not offered in evidence in the trial court. In fact, the trial court record does not include any documents or record from the municipal court case.

{¶ 15} We cannot consider the municipal court records that were attached to appellant's brief in this appeal. "A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal

on the basis of the new matter." *State v. Ishmail,* 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. The nature of the appellate process itself precludes consideration of such evidence: "Since a reviewing court can only reverse the judgment of a trial court if it finds error in the proceedings of such court, it follows that a reviewing court should be limited to what transpired in the trial court as reflected by the record made of the proceedings." *Id.* at 405-406.

{¶ 16} As with Assignment of Error No. 1, we conclude that even were we to consider the double jeopardy claim under Assignment of Error No. 2 as plain error, evidence in the record is lacking to support the claim. Accordingly, Assignment of Error No. 2 is not well-taken.

Ineffective Assistance of Counsel

{¶ 17} Under Assignment of Error No. 3, appellant argues that he was denied effective assistance of trial counsel. Appellant argues that his trial counsel was deficient on multiple grounds. First, appellant contends that counsel failed to present and preserve the double jeopardy defense arising from the prior municipal court proceedings (appellant's argument under Assignment of Error No. 2).

{¶ 18} Appellant's argument in this regard requires consideration of contended facts outside of the record in this appeal. Appellant argues that he was convicted of attempted theft under a no contest plea in Perrysburg Municipal Court in a prior criminal prosecution. According to appellant, the charge was based upon an incident at a Hobby Lobby store in Perrysburg that occurred within the dates of the thefts from Hobby Lobby

in Wood County that constitute the basis of the theft conviction in this case. Appellant argues that trial counsel was deficient in failing to object to the theft conviction on the basis of double jeopardy due to the prior municipal court conviction.

{¶ 19} Appellant also argues that trial counsel was deficient in failing to argue in the trial court objections to the theft and receiving stolen property convictions on the basis that they are allied offenses of similar import as argued under Assignment of Error No. 1.

{¶ 20} Finally, appellant also argues that trial counsel was defective because he failed to conduct a thorough investigation of the charges against appellant in this case and as a result failed to fully advise appellant as to applicable law and legal issues raised considered under Assignments of Error Nos. 1 and 2 before he pled guilty to the offenses. Appellant argues that this deficiency made his guilty pleas less knowing and voluntary. Appellant contends that had he known he could not be convicted and sentenced on some of the charges in this case (as argued under Assignments of Error Nos. 1 and 2), he "might" have proceeded to trial.

{¶ 21} To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Proof of prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *State v. Bradley,* 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus.

{¶ 22} In the context of convictions based upon guilty pleas, the prejudice element generally requires a showing "that there is a reasonable probability that, but the counsel's errors * * * [the defendant] * * * would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart* 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *State v. Xie,* 62 Ohio St.3d 521,524, 584 N.E.2d 715 (1992). A different showing of prejudice applies where the ineffective assistance of counsel claim is based upon a claimed failure of trial counsel to communicate a plea offer before it lapsed. *Missouri v. Frye,* __U.S.__, 132 S.Ct. 1399, 1409-1410, 182 L.Ed.2d 379 (2012).

{¶ 23} A claim of ineffective assistance of counsel that requires consideration of evidence outside the record of trial court proceedings cannot be considered on direct appeal. *State v. Hartman,* 93 Ohio St.3d 274, 299, 754 N.E.2d 1150 (2001); *State v. Carter,* 89 Ohio St.3d 593, 606, 734 N.E.2d 345 (2000).

{¶ 24} Our review of appellant's arguments under Assignments of Error Nos. 1 and 2, demonstrates that proof of those claimed errors requires consideration of evidence outside the record of the trial court proceedings. Accordingly the ineffective assistance of counsel arguments based upon the failure of counsel to present and pursue those

claims in the trial court are also not the type of ineffective assistance of counsel claims that can be considered on direct appeal.

{¶ 25} The final ineffective assistance of counsel argument concerns claimed deficiency of legal representation in plea negotiations. Where it is claimed that counsel was ineffective for failing to conduct a proper investigation of the charges against a defendant and to render appropriate legal advice on whether to accept a plea bargain and plead guilty to an offense, the prejudice requirement recognized in *Hill v. Lockhart* applies and requires a showing that but for trial counsel's errors, the defendant would not have pled guilty. *Missouri v. Frye*, 132 S.Ct. at 1409-1410; *Hill v. Lockhart* at 59-60.

{¶ 26} Here appellant has not claimed that he would not have pled guilty had counsel conducted a proper pretrial investigation of the charges against him and had given appropriate legal advice on available defenses to the charges. Accordingly, under *Hill v. Lockhart* analysis appellant's third claim of ineffective assistance of counsel fails for lack of prejudice.

{¶ 27} Accordingly as two of appellant's claims of ineffective assistance of counsel fail due to the necessity to consider evidence outside of the record and the third fails on the merits due to a lack of prejudice, we find appellant's Assignment of Error No. 3 is not well-taken.

{¶ 28} We conclude that justice has been afforded the party complaining and that appellant has not been denied a fair trial. We affirm the judgment of the Wood County

Court of Common Pleas and order appellant to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

Thomas J. Osowik, J.
CONCUR.

JUDGE

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.

10.

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, 98590
Appellee	:	
-vs-	:	
FRANK ROGERS JR.	:	
Appellant	:	

13-1501

NOTICE OF CERTIFIED CONFLICT

ROBERT L. TOBIK
Cuyahoga County Public Defender
BY: CULLEN SWEENEY (COUNSEL OF RECORD)
#0077187
Assistant Public Defender
310 Lakeside Avenue
Suite 200
Cleveland, OH 44113
(216) 443-7583
(216) 443-3632 FAX

COUNSEL FOR APPELLANT FRANK ROGERS JR.

TIMOTHY J. MCGINTY
Cuyahoga County Prosecutor
The Justice Center – 9th Floor
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7800

COUNSEL FOR APPELLEE, THE STATE OF OHIO

RECEIVED
SEP 20 2013
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
SEP 20 2013
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Certified Conflict

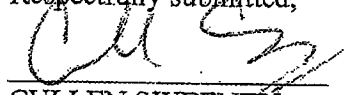
Appellant Frank Rogers Jr. hereby gives notice of a certified conflict to the Ohio Supreme Court from the Eighth District Court of Appeals, Case Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, 98590 and journalized on September 6, 2013. The Eighth District has certified the following question to this Court.

> Whether an offender who receives, retains, or disposes of the property of two or more persons in a single transaction may be convicted and sentenced for more than one court of receiving stolen property?

The Eighth District has declared that its en banc decision in State v. Rogers, 8th Dist. Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, 98590, is in conflict with the decision of the Ninth District Court of Appeals in State v. Wilson, 21 Ohio App. 3d 171, 486 N.E. 2d 1242 (9th Dist. 1985).

Under S.Ct. Prac. 8.01, a copy of the Eighth District's order certifying the conflict and copies of all decisions determined to be in conflict are attached in the accompanying appendix.

Respectfully submitted,



CULLEN SWEENEY
Assistant Public Defender

CERTIFICATE OF SERVICE

A copy of the foregoing Certified Conflict was hand-delivered upon Timothy J. McGinty, Cuyahoga County Prosecutor and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 13 day of September, 2013.

CULLEN SWEENEY
Assistant Public Defender

APPENDIX

1. Journal entries appointing appellate counsel to represent Frank Rogers.

2. Order of the Eighth District Court of Appeals certifying a conflict in *State v. Rogers*, 8th Dist. Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, 98590, issued September 6, 2013.

3. *State v. Rogers*, 8th Dist. Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, 98590, 2013-Ohio-3235, 2013 WL 3878583.

4. *State v. Wilson*, 21 Ohio App. 3d 171, 486 N.E.2d 1242 (9th Dist. 1985).

73175208

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

FRANK M ROGERS
Defendant

Case No: CR-11-557079-A

Judge: PAMELA A BARKER

INDICT: 2925.11 DRUG POSSESSION /FORS
2923.24 POSSESSING CRIMINAL TOOLS /FORS

JOURNAL ENTRY

COURT APPOINTS RUTH FISCHBEIN-COHEN AS APPELLATE COUNSEL.

04/03/2012
CPKBA 04/03/2012 12:00:02

Pamela A. Barker
Judge Signature 04/04/2012

HEAR
04/03/2012

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04/04/2012 09:43:39
By: CLSJO
GERALD E. FUERST, CLERK

73175205

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

FRANK M ROGERS
Defendant

Case No: CR-11-556821-B

Judge: PAMELA A BARKER

INDICT: 2911.12 BURGLARY

JOURNAL ENTRY

COURT APPOINTS RUTH FISCHBEIN-COHEN AS APPELLATE COUNSEL.

04/03/2012
CPKBA 04/03/2012 12:00:01

Pamela A. Barker
Judge Signature 04/04/2012

HEAR
04/03/2012

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04/04/2012 09:43:30
By: CLSJO
GERALD E. FUERST, CLERK

73175202

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

FRANK M ROGERS
Defendant

Case No: CR-11-555183-A

Judge: PAMELA A BARKER

INDICT:2913.51 RECEIVING STOLEN PROPERTY

JOURNAL ENTRY

COURT APPOINTS RUTH FISCHBEIN-COHEN AS APPELLATE COUNSEL.

04/03/2012
CPKBA 04/03/2012 12:00:01

Pamela A. Barker
Judge Signature 04/04/2012

HEAR
04/03/2012

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04/04/2012 09:43:23
By: CLSJO
GERALD E. FUERST, CLERK

73175199

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

FRANK M ROGERS
Defendant

Case No: CR-11-553806-A

Judge: PAMELA A BARKER

INDICT: 2913.51 RECEIVING STOLEN PROPERTY
2913.51 RECEIVING STOLEN PROPERTY

JOURNAL ENTRY

COURT APPOINTS RUTH FISCHBEIN-COHEN AS APPELLATE COUNSEL.

04/03/2012
CPKBA 04/03/2012 12:00:01

Pamela A. Barker
Judge Signature 04/04/2012

HEAR
04/03/2012

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By: CLSJO
GERALD E. FUERST, CLERK

73175196

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

FRANK ROGERS
Defendant

Case No: CR-11-553547-A

Judge: PAMELA A BARKER

INDICT:2913.51 RECEIVING STOLEN PROPERTY

JOURNAL ENTRY

COURT APPOINTS RUTH FISCHBEIN-COHEN AS APPELLATE COUNSEL.

04/03/2012
CPKBA 04/03/2012 12:00:00

Pamela A. Barker
Judge Signature 04/04/2012

HEAR
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04/04/2012 09:43:11
By: CLSJO
GERALD E. FUERST, CLERK

73175187

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

FRANK M ROGERS JR
Defendant

Case No: CR-11-552699-A

Judge: PAMELA A BARKER

INDICT: 2913.51 RECEIVING STOLEN PROPERTY

JOURNAL ENTRY

COURT APPOINTS RUTH FISCHBEIN-COHEN AS APPELLATE COUNSEL.

04/03/2012
CPKBA 04/03/2012 12:00:00

Pamela A. Barker
Judge Signature 04/04/2012

HEAR
04/03/2012

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By: CLSJO
GERALD E. FUERST, CLERK

73175193

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

FRANK M ROGERS
Defendant

Case No: CR-11-545992-A

Judge: PAMELA A BARKER

INDICT: 2921.331 FAILURE TO COMPLY WITH ORDER,SIGNAL OF POLICE OFFICER
2921.331 FAILURE TO COMPLY WITH ORDER,SIGNAL OF POLICE OFFICER
2921.331 FAILURE TO COMPLY WITH ORDER,SIGNAL OF POLICE OFFICER
ADDITIONAL COUNTS...

JOURNAL ENTRY

COURT APPOINTS RUTH FISCHBEIN-COHEN AS APPELLATE COUNSEL.

04/03/2012
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Pamela A. Barker
Judge Signature 04/04/2012

HEAR
04/03/2012

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04/04/2012 09:43:04
By: CLSJO
GERALD E. FUERST, CLERK

73175190

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

FRANK ROGERS,JR
Defendant

Case No: CR-10-544682-A

Judge: PAMELA A BARKER

INDICT: 2911.13 BREAKING AND ENTERING
2913.02 GRAND THEFT
2911.13 BREAKING AND ENTERING
ADDITIONAL COUNTS...

JOURNAL ENTRY

COURT APPOINTS RUTH FISCHBEIN-COHEN AS APPELLATE COUNSEL.

04/03/2012
CPKBA 04/03/2012 12:00:00

Pamela A. Barker
Judge Signature 04/04/2012

HEAR
04/03/2012

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By: CLSJO
GERALD E. FUERST, CLERK

Court of Appeals of Ohio, Eighth District
County of Cuyahoga
Andrea Rocco, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.	LOWER COURT NO.
98292	CP CR-552699
98584	CP CR-544682
98585	CP CR-545992
98586	CP CR-553547
98587	CP CR-553806
98588	CP CR-556821
98589	CP CR-555183
98590	CP CR-557079

COMMON PLEAS COURT

-vs-

FRANK ROGERS, JR.

Appellant

MOTION NO. 467168

Date 09/06/2013

Journal Entry

Appellant's motion to certify conflict is granted. We find that this court's en banc decision in *State v. Rogers* is in conflict with the decision of the Ninth District Court of Appeals in *State v. Wilson*, 21 Ohio App.3d 171, 486 N.E.2d 1242 (9th Dist.1985). We certify the following issue to the Supreme Court of Ohio:

> Whether an offender who receives, retains, or disposes of the property of two or more other persons in a single transaction may be convicted and sentenced for more than one count of receiving stolen property?

MELODY J. STEWART, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA ANN BLACKMON, J.,
MARY J. BOYLE, J.,

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SEP X 6 2013
CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By _____ Deputy

COPIES MAILED TO COUNSEL FOR
ALL PARTIES-COSTS TAXED

FRANK D. CELEBREZZE, JR., J.,
EILEEN T. GALLAGHER, J.,
LARRY A. JONES, SR., J.,
TIM McCORMACK, J., and
KENNETH A. ROCCO, J.

Dissenting:

EILEEN A. GALLAGHER, J.,
KATHLEEN ANN KEOUGH, J., and
MARY EILEEN KILBANE, J.
SEAN C. GALLAGHER, J., DISSENTS (WITH SEPARATE OPINION)

SEAN C. GALLAGHER, J., DISSENTING:

I respectfully dissent from the majority decision to certify a conflict in this matter. I would not grant that request because the cases in question predate *Johnson* and are from the 1970s and mid 1980s, long before any of the current analysis of merger was considered. If the parties want to consider a case for possible conflict, they should look to *State v. Thomas,* 10th Dist. Franklin No. 10AP-557, 2011-Ohio-1191.

In any event, I would reject the analysis in *Thomas* and maintain the principle that separate victims ***always*** means the offenses have a dissimilar import. A review of *Rogers* makes the separate victim/separate conviction principle clear:

> Separate victims alone established a separate animus for each offense. Even if the defendant cannot distinguish one victim's goods from another's does not mean his conduct did not impact multiple victims. Each victim has a specific and identifiable right to redress against the conduct of the defendant. The defendant's conduct in

> receiving goods he knows to be stolen inherently implies that they may be from multiple owners or locations. "[M]ultiple sentences for a single act committed against multiple victims is permissible where the offense is defined in terms of conduct toward 'another as such offenses are of dissimilar import; the import being each person affected.'"

State v. Tapscott, 7th Dist. No. 11 MA 26, 2012-Ohio-4213, quoting *State v. Jones*, 18 Ohio St.3d 116, 118, 480 N.E.2d 408 (1985).

If a prosecutor charges only one count of receiving stolen property where the "goods" in question come from multiple victims, then the prosecutor has effectively conceded, through the charging process, that the conduct merges. Where, however, the prosecutor distinguishes victims through separate counts, each of those victims (if guilt is admitted or established) is impacted by the offender's conduct, and those offenses are of dissimilar import, the dissimilar import being each person affected by the offender's conduct. I reject the grafting of "mens rea" concepts from the guilt phase onto sentencing procedures. The fact that a defendant does not "know" precisely who owned something, or that there were multiple victims in a receiving stolen property scenario, does not impact the analysis that leads to establishing that the crimes have a dissimilar import. Further, a close read of the receiving stolen property statute specifically notes "property of another." Because an offender's conduct impacts separate victims, his offenses are, in effect, dissimilar and subject to separate punishments.

[Cite as *State v. Rogers*, 2013-Ohio-3235.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, and 98590

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

FRANK ROGERS, JR.

DEFENDANT-APPELLANT

DECISION EN BANC
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Criminal Appeals from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-552699, CR-544682, CR-545992, CR-553547, CR-553806, CR-556821, CR-555183, and CR-557079

BEFORE: The En Banc Court

RELEASED AND JOURNALIZED: July 25, 2013

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SEAN C. GALLAGHER, J.:

{¶1} Defendant-appellant Frank Rogers, Jr., pleaded guilty to a series of charges in eight separate cases. He asserts on appeal that the trial court erred by failing to merge certain parts of the sentences in two of the cases, that the court failed to compute jail-time credit, and that the court failed to advise him of the consequences of violating postrelease control.

{¶2} Pursuant to App.R. 26 and Loc.App.R. 26, this court determined that a conflict existed between the original panel's decision in this case, released as *State v. Rogers*, 8th Dist. Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, and 98590, 2013-Ohio-1027, and previous decisions by this court involving a number of issues related to allied offenses of similar import.

{¶3} These issues include determining the duty of a trial court judge under R.C. 2941.25 where a facial question of allied offenses of similar import exists but the trial court fails to inquire; determining the effect of a defendant's failure to raise the allied offenses of similar import issue in the trial court and whether that failure constitutes a valid waiver or forfeiture of the defendant's constitutional right against double jeopardy; determining the effect of a prosecutor's failure to put facts on the record detailing a defendant's conduct in relation to possible allied offenses of similar import at the trial court level; determining the impact of a silent or inconclusive record from the trial court that fails to detail the offender's actual conduct involving allied offenses of similar import; determining the effect of a guilty plea to multiple charges on the allied offenses of similar

import analysis; and determining the effect of the absence of a stipulation to the allied offenses of similar import question.

{¶4} Accordingly, we sua sponte granted en banc consideration in this matter and convened an en banc conference in accordance with App.R. 26(A)(2), Loc.App.R. 26(D), and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672.

The Allied Offenses of Similar Import Claim in *Rogers*

{¶5} Rogers argues that his convictions in Cuyahoga C.P. No. CR-553806 on two counts of receiving stolen property were allied offenses of similar import and should have been merged at sentencing. Likewise, he asserts his convictions in Cuyahoga C.P. No. CR-545992 on two additional counts of receiving stolen property and one count of possession of criminal tools were also allied offenses of similar import and should have merged at sentencing.

Double Jeopardy

{¶6} At the outset, we revisit the significance of the allied offenses of similar import determination. The Fifth Amendment's Double Jeopardy Clause provides a criminal defendant with three protections: "'[It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977),

quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Ohio v. Johnson*, 467 U.S. 493, 498, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984).

{¶7} In multiple-punishment cases, "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

> Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended * * * to impose multiple punishments, imposition of such sentences does not violate the Constitution.

Albernaz v. United States, 450 U.S. 333, 344, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981).

Ohio and Allied Offenses of Similar Import

{¶8} Ohio's criminal statutes generally do not authorize multiple punishments for the same conduct. In 1974, the Ohio legislature enacted R.C. 2941.25. The legislation codified the protections of the Double Jeopardy Clauses of the Ohio and United States Constitutions, which prohibit multiple punishments for the same offense. *See State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923.

> R.C. 2941.25. 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.

{¶9} Historically, Ohio courts struggled interpreting the language in R.C. 2941.25. Likewise, determining the type of conduct by the offender that constituted either separate offenses or allied offenses of similar import was equally confusing. Starting in 1975, the Supreme Court of Ohio issued a series of decisions that over the years were met with mixed reviews on how best to address the constitutional protections against multiple punishments. *See generally State v. Ikner*, 44 Ohio St.2d 132, 339 N.E.2d 633 (1975), adopting *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *State v. Logan*, 60 Ohio St.2d 126, 128, 397 N.E.2d 1345 (1979); *State v. Blankenship*, 38 Ohio St.3d 116, 526 N.E.2d 816 (1988); *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699 (1999); *State v. Fears*, 86 Ohio St.3d 329, 715 N.E.2d 136 (1999); *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29; *State v. Yarborough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845; *State v. Cooper*, 104 Ohio St.3d 293, 2004-Ohio-6553, 819 N.E.2d 657; *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181; *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149; *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154; *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882; *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889.

{¶10} These cases were followed by a series of decisions that changed the

landscape of the merger analysis. *Underwood,* 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923 (a trial court commits plain error when it fails to merge allied offenses of similar import); *State v. Johnson* 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061 (R.C. 2941.25 instructs courts to look at the defendant's conduct when evaluating whether his offenses are allied); and *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245 (an appellate court should apply a de novo standard of review in reviewing a trial court's R.C. 2941.25 merger determination).

The *Underwood, Johnson,* and *Williams* Decisions

{¶11} Prior to *Underwood*, many trial courts simply imposed concurrent sentences where the merger analysis was too confusing or unworkable. *Underwood* made it clear that allied offenses of similar import must be merged at sentencing or the sentence is deemed contrary to law. *Underwood* also made clear that even a defendant's plea to multiple counts does not affect the court's duty to merge allied counts at sentencing. The duty is mandatory, not discretionary. *Underwood* at ¶ 26. Significantly, *Underwood* determined that R.C. 2953.08(D) does not bar appellate review of a sentence involving merger even though it was jointly recommended by the parties and imposed by the court. *Id.* at ¶ 33.

{¶12} *Johnson* then reestablished the focus of the merger analysis on the plain language in the statute. "In determining whether offenses merge, we consider the defendant's conduct." *Johnson* at ¶ 44. "If 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.'" *Id.* at ¶ 49, quoting *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶ 50 (Lanzinger, J., dissenting). If both questions are answered affirmatively, then the offenses are allied offenses of similar import and will be merged. *Johnson* at ¶ 50.

{¶13} In *Johnson*, then Justice O'Connor,[1] in a separate concurring opinion, defined the term "allied offenses of similar import":

> In practice, allied offenses of similar import are simply multiple offenses that arise out of the same criminal conduct and are similar but not identical in the significance of the criminal wrongs committed and the resulting harm. R.C. 2941.25 permits a defendant to be charged with, and tried for, multiple offenses based on the same conduct but permits only one conviction based on conduct that results in similar criminal wrongs that have similar consequences.

Id. at ¶ 64 (O'Connor, J., concurring).

{¶14} Justice O'Connor further defined the distinction between the phrases "allied offenses" and "allied offenses of similar import." "[O]ffenses are 'allied' when their elements align to such a degree that commission of one offense would probably result in the commission of the other offense. Offenses are of 'similar import' when the underlying conduct involves similar criminal wrongs and similar resulting harm." *Id.* at ¶ 66-67.

{¶15} While many focus on the plurality decision in *Johnson* that abandoned the *Rance* test, we note that Justice O'Connor maintained in her concurring opinion in *Johnson* that *Rance* was overruled only "inasmuch as it requires a comparison of the

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[1] Justice Maureen O'Connor became Chief Justice on January 1, 2011.

elements of the offenses *solely* in the abstract." (Emphasis added.) *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶ 68. *See also Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699.

{¶16} The *Johnson* test did not completely eliminate consideration of the legal elements; it simply made the offender's conduct the lynchpin of that analysis. Thus, the court uses the elements of the offenses as guideposts to measure the defendant's conduct as it relates to the offenses in determining whether multiple offenses could have been committed by the same conduct. *State v. Hicks*, 8th Dist. No. 95169, 2011-Ohio-2780, ¶ 9. This is important in situations, as here, where the legal elements of the offenses present a facial question of merger. This initial comparison often establishes or eliminates the need for subsequent allied offenses of similar import analysis.

{¶17} The Supreme Court revisited the *Johnson* test and again described its workings in *Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245. The court again referenced considering the elements of the crimes in citing back to *Blankenship*, 38 Ohio St.3d at 117, 526 N.E.2d 816:

> This court established a two-part test for analyzing allied-offense issues in *State v. Blankenship*, 38 Ohio St.3d 116, 117, 526 N.E.2d 816 (1988).
>
> "In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses."

(Emphasis sic.)

Williams at ¶ 17, quoting *Blankenship* at 117.

{¶18} Significantly, the decision in *Williams* stressed how important the facts in the record were to the merger analysis on appeal:

> Appellate courts apply the law to the facts of individual cases to make a legal determination as to whether R.C. 2941.25 allows multiple convictions. * * * "[A] review of the evidence is more often than not vital to the resolution of a question of law. * * * " *O'Day v. Webb*, 29 Ohio St.2d 215, 219, 280 N.E.2d 896 (1972).
>
> As in cases involving review of motions to suppress, "the appellate court must * * * independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8.

Williams at ¶ 25-26. Further, "[a]n appellate court should apply a de novo standard of review in reviewing a trial court's R.C. 2941.25 merger determination." *Id.* at ¶ 28.

The *Rogers* Case

{¶19} The record before us reveals that no discussion took place in the trial court about merger of the counts in either of the underlying cases. While we can resolve the issue of merger in CR-553806 based on a facial review of the convictions, nothing in the documents that comprise the record in CR-545992 contains sufficient factual information that would permit an allied offenses of similar import analysis.

Receiving Stolen Property Convictions in CR-553806

{¶20} In CR-553806, the two counts of receiving stolen property in the indictment revealed property taken from two distinct victims from two

separate houses apparently taken during burglaries that occurred the same day. Rogers argued on appeal that these acts were identical, so they should have been merged at sentencing.

{¶21} Even without facts to analyze Rogers's conduct, we can determine from the face of these convictions that these offenses were not subject to merger. A review of the elements of the receiving stolen property charges shows an offender must have "receive[d], retain[ed], or disposed of *property of another*, knowing or having reasonable cause to believe that it has been obtained through commission of a theft offense." (Emphasis added.) R.C. 2913.51.

{¶22} Separate victims alone established a separate animus for each offense. Even if the defendant cannot distinguish one victim's goods from another's does not mean his conduct did not impact multiple victims. Each victim has a specific and identifiable right to redress against the conduct of the defendant. The defendant's conduct in receiving goods he knows to be stolen inherently implies that they may be from multiple owners or locations. "[M]ultiple sentences for a single act committed against multiple victims is permissible where the offense is defined in terms of conduct toward 'another as such offenses are of dissimilar import; the import being each person affected.'" *State v. Tapscott*, 7th Dist. No. 11 MA 26, 2012-Ohio-4213, quoting *State v. Jones*, 18 Ohio St.3d 116, 118, 480 N.E.2d 408 (1985). *See also State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 48; *State v. Phillips*, 8th Dist. No. 98487, 2013-Ohio-1443, ¶ 8-10.

{¶23} For this reason, we affirm the trial court's imposition of separate sentences in CR-553806.

Receiving Stolen Property and Possession of
Criminal Tools Convictions in CR-545992

{¶24} Central to our analysis of the convictions in CR-545992 and the primary focus of this en banc review is the effect of a trial court's failure to inquire or address an allied-offense question where it is clear from a facial review of the charges that the offenses may be allied, even when facts necessary to determine the conduct of the offender are missing.

{¶25} In this case, Rogers was convicted of two separate counts of receiving stolen property. One offense involved a "stolen pickup truck." The second offense involved "tires and rims." The possession of criminal tools offense involved "a tire jack and/or tow chain and/or lug nut wrenches." Although the receiving stolen property offenses involved the same victim and the possession of criminal tools offense occurred on the same date as the receiving stolen property offenses, we are unable to determine if these offenses were allied offenses of similar import. It is unclear if the "tires and rims" are from the same "stolen pickup truck" or from another vehicle. Likewise, it is unclear how the tools involved were related to either of the receiving stolen property offenses. There are simply no facts in the record to aid in our mandated de novo review of the issue.

{¶26} At the outset of our analysis, we note that not every case involving multiple convictions with a silent record will require an allied-offense determination by the trial court. Even where specific facts of the case are unknown, an appellate court can assess

whether a claim requires a return to the trial court. For example, cases that assert a claim that the allied-offense issue was not addressed in a silent record may nevertheless fail where the indictment shows the offenses were committed on separate dates or involved separate victims or involve statutes that would require completely separate conduct. Conversely, cases that involve offenses that facially present a question of intertwined conduct, such as kidnapping and rape, or aggravated robbery and kidnapping, or gross sexual imposition and rape, create an allied-offense challenge that can result in the finding of error for failing to address the merger issue.

The Role of the Trial Judge

{¶27} *Underwood* placed the duty squarely on the trial court judge to address the merger question. *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923. Likewise, the merger statute imposes the same duty. R.C. 2941.25. Ultimately, it is the trial judge who imposes the sentence in a case. While the judge cannot be an advocate for either position, the trial court must address the potential allied-offense issue when the charges facially present a question of merger. A defendant's conviction on multiple counts, regardless of how achieved, does not affect the court's duty to merge allied offenses of similar import at sentencing.

{¶28} When a facial review of the charges and the elements of the crimes present a viable question of merger, the court must apply the *Johnson* test.

{¶29} Under the first prong, the court determines "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." *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶ 48, citing *Blankenship*, 38 Ohio St.3d at 119, 526 N.E.2d 816 (Whiteside, J., concurring). ("It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses can be committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses.")

{¶30} If the court's answer in the first prong is yes, then the second prong requires the trial court to determine if, in fact, the offenses were actually committed by the same conduct, i.e., "'a single act, committed with a single state of mind.'" *Johnson* at ¶ 49, quoting *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶ 50 (Lanzinger, J., dissenting). If the answer to both questions in both prongs is yes, then the offenses are allied offenses of similar import and they must be merged. *Johnson* at ¶ 50.

{¶31} "Conversely, if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." *Id.* at ¶ 51.

{¶32} Where the charges present a facial question of merger, the court must perform the analysis. As stated in *State v. Baker*, 8th Dist. No. 97139, 2012-Ohio-1833, ¶ 19:

> In short, there is no magic cleansing that occurs through the process of case resolution that satisfies the constitutional prohibition against imposing individual sentences for counts that constitute allied offenses. Merger must be addressed and resolved, or it remains outstanding. As

> noted in *Underwood* [124 Ohio St.3d 365, 2012-Ohio-1, 922 N.E.2d 923, at ¶ 20], "[a] trial court does not have the discretion to exercise its jurisdiction in a manner that ignores mandatory statutory provisions." *Id.* Thus, the constitutional and Ohio statutory prohibition against multiple punishments for the same conduct must always be addressed in the absence of a stipulation to a separate animus or separate acts.

{¶33} We therefore hold that a trial court commits error where multiple charges facially present a question of merger under R.C. 2941.25 and the trial court fails to conduct an allied offenses of similar import analysis. We will discuss the effect of this error in more detail below.

{¶34} The distinction between our view and the dissent is we believe plain error exists in the failure to address a statutory mandate. The plain error occurs at that point and need not be premised on the illusive question of whether the multiple offenses would actually merge.

Defense Counsel and the Failure to Raise Merger

{¶35} Rogers's trial counsel failed to raise the merger question in the trial court below. However, because double jeopardy is implicated, there is a presumption against waiver of constitutional rights. *Underwood,* 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, at ¶ 32, citing *State v. Adams*, 43 Ohio St.3d 67, 69, 538 N.E.2d 1025 (1989). "'Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.'" *Adams* at 69, quoting *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). "A waiver of important constitutional rights cannot

be presumed from a silent record * * *." *State v. Stone*, 43 Ohio St.2d 163, 167, 331 N.E.2d 411 (1975).

{¶36} Furthermore, even if the failure to assert double jeopardy at the trial court level constituted a forfeiture of that right, the jeopardy claim may be reviewed for plain error. *See United States v. Ehle*, 640 F.3d 689, 694 (6th Cir.2011). Despite the dissent's analysis of the facts in both *Underwood* and *Johnson*, those admitted errors were not deemed "waived" or "forfeited" or reduced to an ineffective assistance of counsel claim on appeal.

{¶37} Defense counsel's failure to raise the merger issue does not relieve the trial court of its duty to determine the merger question when a facial question of merger presents itself. Ultimately it is the trial court that must apply the statutory requirements in R.C. 2941.25 and address the possible merger questions.[2]

{¶38} While defense counsel should raise potential merger questions, it is important to note that a defendant and his counsel have no role in the charging process, and the defendant has no burden to prove offenses merge in the guilt phase. Merger is not an affirmative defense under R.C. 2901.05(D)(1)(a) and (b). Merger occurs just prior to the entry of conviction and is a function of sentencing that is the exclusive domain of the trial judge.

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[2] Even if defense counsel's failure to raise a merger issue amounts to an ineffective assistance of counsel claim, as referenced by the dissent, this does not relieve the trial judge of his or her statutorily mandated duty to address merger.

{¶39} Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. Thus, *Underwood* makes clear that a defendant may appeal his sentence even though it was jointly recommended by the parties and imposed by the court. *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923. As will be discussed later, when the issue of merger is facially apparent, the failure of the trial court to address the merger issue amounts to plain error. Therefore, a defendant's failure to raise an allied offenses of similar import issue in the trial court is not a bar to appellate review of the issue.

Effect of Guilty Plea

{¶40} In *Underwood*, the Supreme Court of Ohio held that the issue of allied offenses under R.C. 2941.25 may be appealed even if the defendant entered separate pleas to multiple offenses and received a jointly recommended sentence. *Id.* at ¶ 26. In this case, there was no discussion about Rogers's specific conduct at the time of the plea. Likewise, there was no stipulation or understanding of how the receiving stolen property counts or the possession of criminal tools count related to each other. In the absence of a stipulation or an agreement on which offenses are allied, a guilty plea does not negate the court's mandatory duty to merge allied offenses of similar import at sentencing. *Underwood* at ¶ 26.

{¶41} While facts establishing the conduct of the offender offered at the time of a plea may be used to establish that offenses are not allied, a guilty plea alone that does not include a stipulation or a finding that offenses are not allied offenses of similar import

does not conclusively resolve the merger question. Thus, a guilty plea alone does not constitute a valid waiver of the protections from possible double jeopardy under R.C. 2941.25.

The Role of Prosecutors

{¶42} The statute places no burden of proof on prosecutors to establish that offenses do not merge. Again, the determination of merger is in the hands of the trial judge based on the charges and the facts before the court.

{¶43} We are well aware that there are offenders who deserve separate convictions and punishments for certain conduct. Rather than ignoring the question, prosecutors should relish the opportunity to make the case for why certain offenders deserve convictions or punishments based on their conduct.

{¶44} Prosecutors are free to charge in any manner they see fit. They can charge as many counts as they conceivably feel cover the gamut of a defendant's conduct. With that, there are many opportunities to address the allied-offense issue along the path of case resolution. Prosecutors can put facts into the individual indictment counts distinguishing conduct; they can indicate in the response to a bill of particulars what offenses are not allied; at the time of a plea, they can indicate which offenses are not allied and why they are not allied by stating a factual basis for the plea, even if one is not required under Crim.R. 11; they can file a sentencing memorandum outlining the merger issues; they can also appear at sentencing and point out why offenses are not allied; they can also enter into a stipulation on what offenses are committed with separate conduct or a distinct animus.

Thus, at any point in the process, prosecutors can put facts on the record that would support a determination that certain offenses are not allied.

{¶45} This does not have to involve long or complicated hearings or witnesses. Historically, merger of offenses has always been viewed as a part of the sentencing process. Thus, "the sentencing process is less exacting than the process of establishing guilt." *State v. Bowser*, 186 Ohio App.3d 162, 2010-Ohio-951, 926 N.E.2d 714, ¶ 14 (2d Dist.), citing *Nichols v. United States*, 511 U.S. 738, 747, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994). Therefore, this process can easily be satisfied by a brief recitation of facts or circumstances by the prosecutor to aid the trial court in its determination. Nothing more should be required.[3]

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[3] In one of the more insightful decisions on this issue released more than 30 years ago, former Judge Alvin Krenzler noted:

> When there is a probability that the allied offense issue may arise in a case, the prosecutor and defense counsel would be well advised to squarely confront the issue in any plea bargaining that takes place. By resolving this question at the plea bargaining stage and incorporating the resolution of the allied offense issue in the plea bargain to be placed on the record, the prosecutor and defense counsel will act to avoid later problems in the validity of the plea bargain, in the entering of the plea, in the acceptance of the plea, in the judgment of conviction, and any appeal of the case.

State v. Kent, 68 Ohio App.2d 151, 155, 428 N.E.2d 453 (8th Dist.1980), fn.1.

The Application of Plain Error

{¶46} If the facts necessary to determine whether offenses are allied offenses of similar import are not in the record and the trial court does not inquire, then plain error exists when the issue is raised on appeal. *See State v. Barrett*, 8th Dist. No. 97614, 2012-Ohio-3948, 974 N.E.2d 185, (S. Gallagher, J., dissenting.)

{¶47} Pursuant to the terms of Crim.R. 52(B), plain errors or defects that affect substantial rights may be grounds for reversal even though they were not brought to the attention of the trial court. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶48} Plain error requires:

> (1) "there must be an error, i.e., a deviation from a legal rule," (2) "the error must be plain," which means that it "must be an 'obvious' defect in the trial proceedings," and (3) "the error must have affected 'substantial rights,'" which means that "the trial court's error must have affected the outcome of the trial.

State v. Gross, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 45, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

{¶49} We find that in failing to address a merger issue, there is a deviation from a legal rule. Thus, as here, when a trial court fails to determine whether offenses are allied offenses of similar import, the first prong of the plain error test is satisfied. The legislative requirement under R.C. 2941.25 to determine allied offenses is also mandated

by the Supreme Court of Ohio in *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923. "R.C. 2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, which prohibits multiple punishments for the same offense." *Id.* at ¶ 23. "[W]hen a sentence fails to include a mandatory provision, it may be appealed because such a sentence is 'contrary to law' and is also not 'authorized by law.'" *Id.* at ¶ 21.

{¶50} The second prong requires that the error must be "plain" or "obvious." Where it is clear from a facial review of the convictions that the allied offenses of similar import analysis should have been conducted but was not, the error is plain and obvious. Here the trial court should have realized from the face of the charges in CR-545992 that a merger analysis of the receiving stolen property and possession of criminal tools offenses was necessary. When the legislature statutorily mandates a procedural duty under R.C. 2941.25 to protect an established constitutional right, a violation of that duty constitutes error.

{¶51} Lastly, the third prong of plain error requires that the error must have affected the "substantial rights" of the accused. Clearly, the prospect of being subjected to multiple punishments for offenses that may be allied affects a defendant's substantial rights. In our view, the unresolved nature of double jeopardy so undermines the integrity of the proceedings that it constitutes plain error and satisfies this prong.

{¶52} To find otherwise would undermine the *Underwood* decision and the legislative mandate of R.C. 2941.25. Further, a defendant would be left with the limited

remedy of an ineffective assistance of counsel claim on appeal. That claim, like the allied offenses of similar import claim, would contain no more facts in support of it than the initial allied offenses of similar import claim. In the end, a postconviction relief petition would be all that remained as a remedy after the case is over. The unresolved nature of the double jeopardy issue affects the outcome of the case and prejudices the offender.

Distinguishing Forms of Plain Error

{¶53} We are cognizant that other panels of this court have declined to find plain error when the record does not contain facts from which an allied-offense error might be determined. They take issue with the approach that finds plain error when it is uncertain if the outcome of the case would have been otherwise. This view is outlined in *State v. Snuffer*, 8th Dist. Nos. 96480, 96481, 96482, and 96483, 2011-Ohio-6430, ¶ 9; *State v. Lindsey*, 8th Dist. No. 96601, 2012-Ohio-804, ¶ 13; *State v. Barrett*, 8th Dist. No. 97614, 2012-Ohio-3948, 974 N.E.2d 185; and in the original panel decision in this case released as *State v. Rogers*, 8th Dist. Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, and 98590, 2013-Ohio-1027.

{¶54} These cases accept the principle that it is plain error not to merge allied offenses, but rationalize that since there are no facts to find plain error, plain error does not exist. This is a self-fulfilling prophecy that defeats the constitutional protection outlined in *Underwood*. In our view, it is the absence of facts, or at least an inquiry into those facts, that makes the question ripe for review and creates plain error.

{¶55} The duty to merge implies a duty to inquire and determine whether multiple charges are allied offenses of similar import. Without the duty to inquire and determine, the duty to merge would be empty. An essential step in the merger process is applying the requirements of R.C. 2941.25, and hence the *Johnson* test, to the multiple charges. In our view, the failure to take this step where a facial review of the charges reveals it is necessary establishes prejudice and affects the outcome of the case. This is the fundamental distinction between our view and that of the dissent.

{¶56} In *State v. Corrao*, 8th Dist. No. 95167, 2011-Ohio-2517, ¶ 10, this court extended *Underwood* and held that "the trial court's failure to make the necessary inquiry [into the allied-offense issue post-*Johnson*] constitutes plain error necessitating a remand." There is historical support for this proposition. In *State v. Kent*, 68 Ohio App.2d 151, 428 N.E.2d 453 (8th Dist.1980), this court held that the trial court has "an affirmative duty to make inquiry as to whether the allied offense statute would be applicable" prior to sentencing the defendant. *Id.* at 156; *see also State v. Latson*, 133 Ohio App.3d 475, 728 N.E.2d 465 (8th Dist.1999). *Kent* was implicitly overruled by *State v. Comen*, 50 Ohio St.3d 206, 211, 553 N.E.2d 640 (1990), which overruled the defendant's challenge on an allied-offense issue for not being raised at the trial court level during the plea and sentencing hearings. Of course, *Comen* itself has since been contradicted by *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, at ¶ 29. *See Baker*, 8th Dist. No. 97139, 2012-Ohio-1833.

{¶57} Most traditional plain error deals with issues involving the guilt phase. *See State v. Davis*, 127 Ohio St.3d 268, 2010-Ohio-5706, 939 N.E.2d 147. Unlike plain error claims in the guilt phase, procedural plain error in sentencing does not affect the determination of guilt or innocence. The effect of finding plain error in the sentencing phase is minimal on the overall case and requires a return to the trial court solely to determine if any of the convictions merge. *See State v. Biondo*, 11th Dist. No. 2012-P-0043, 2013-Ohio-876. We also note that as trial courts become more aware of their duty to inquire and address merger questions, this problem will largely disappear. Even when trial courts fail to address the issue, there are often facts in the record that allow for resolution of the issue by de novo review on appeal. Thus, very few of these cases will result in a return to the trial court.

{¶58} If a trial court failed to advise a defendant under Crim.R. 11 of the right to subpoena witnesses, we would automatically find plain error. We would not contemplate or hedge our finding on whether the record is silent on the question of whether the defendant would have actually subpoenaed witnesses. It is enough that the advisement was not made to demonstrate the plain error.

{¶59} The failure to address the allied-offense issue, in our view, is no different. The plain error goes to the failure to address the required allied-offense analysis, not the plain error that exists when a record clearly demonstrates the offenses should have merged.

Other Issues

{¶60} Rogers also raised issues regarding jail-time credit and postrelease control.

{¶61} Rogers argued that the court erred by failing to compute his jail-time credit as mandated by R.C. 2967.191 and that trial counsel was ineffective for failing to request an accurate calculation of the jail-time credit. This assignment of error is moot because the court granted Rogers's pro se motion for jail-time credit on April 16, 2012.

{¶62} Lastly, Rogers complains that the court erred by failing to advise him of the consequences of violating postrelease control. This assignment is overruled because the court did apprise Rogers during sentencing of the consequences of violating postrelease control. *See* tr. 69-70.

Conclusion

{¶63} We therefore hold the following:

(a) Where a facial question of allied offenses of similar import presents itself, a trial court judge has a duty to inquire and determine under R.C. 2941.25 whether those offenses should merge. A trial court commits plain error in failing to inquire and determine whether such offenses are allied offenses of similar import.

(b) A defendant's failure to raise an allied offenses of similar import issue in the trial court is not a bar to appellate review of the issue.

(c) While facts establishing the conduct of the offender offered at the time of a plea may be used to establish that offenses are not allied, a guilty plea alone that does not include a stipulation or a finding that offenses are not allied offenses of similar import

does not conclusively resolve the merger question. Thus, a guilty plea does not constitute a valid waiver of the protections from possible double jeopardy under R.C. 2941.25.

{¶64} We overrule the prior decisions of this court to the extent they are in conflict with this decision. *See, e.g.*, *Snuffer*, 8th Dist. Nos. 96480, 96481, 96482, and 96483, 2011-Ohio-6430; *Lindsey*, 8th Dist. No. 96601, 2012-Ohio-804; *Barrett*, 8th Dist. No. 97614, 2012-Ohio-3948. In this case, we sustain the first assignment of error to the extent a remand is necessary to establish the underlying facts of Rogers's conduct in CR-545992 and for the trial court to determine whether the subject crimes should merge for sentencing purposes.

{¶65} By separate entry, we certify a conflict between this decision and the Sixth District's decision in *State v. Wallace,* 6th Dist. No. WD-11-031, 2012-Ohio-2675.[4]

{¶66} Judgment affirmed in part, reversed in part, and cause remanded.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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[4] The parties are advised that in order to institute a certified-conflict case in the Supreme Court of Ohio, a party must file a notice of certified conflict in the Supreme Court within 30 days of this court's order certifying the conflict. S.Ct.Prac.R. 4.1.

SEAN C. GALLAGHER, JUDGE

PATRICIA ANN BLACKMON, J.,
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
EILEEN A. GALLAGHER, J.,
EILEEN T. GALLAGHER, J.,
MARY EILEEN KILBANE, J.,
KATHLEEN ANN KEOUGH, J.,
LARRY A. JONES, SR., J.,
TIM McCORMACK, J., and
KENNETH A. ROCCO, J., CONCUR

KENNETH A. ROCCO, J., CONCURS WITH SEPARATE OPINION in which Patricia Ann Blackmon, Mary J. Boyle, Eileen A. Gallagher, Eileen T. Gallagher, Sean C. Gallagher, Larry A. Jones, Sr., Kathleen Ann Keough, Mary Eileen Kilbane, and Tim McCormack, JJ., CONCUR

LARRY A. JONES, SR., J., CONCURS WITH SEPARATE OPINION in which Patricia Ann Blackmon, Mary J. Boyle, Eileen A. Gallagher, Eileen T. Gallagher, Sean C. Gallagher, Kathleen Ann Keough, Mary Eileen Kilbane, Tim McCormack, and Kenneth A. Rocco, JJ., CONCUR

MELODY J. STEWART, A.J., DISSENTS WITH SEPARATE OPINION

KENNETH A. ROCCO, J., CONCURRING WITH MAJORITY OPINION:

{¶67} While I concur with the reasoning of the majority opinion, I write separately to express my concern that the dissenting opinion may become the law in this state. Should that occur, the trial judge will be relegated to a passive role at a time when his or her role rightfully is paramount. Moreover, I do not share the dissenting opinion's trust that a postconviction petition will afford relief to a defendant who is unaware when he or

she enters into a plea agreement of the nuances existing between the legal concepts of "forfeiture" and "waiver"; arguably, that issue "could have been raised" in a direct appeal.

{¶68} In addition, I wish to point out that because an analysis *with a solution to the dilemma presented in this case* was proposed in *State v. Kent*, 68 Ohio App.2d 151, 428 N.E.2d 453 (8th Dist.1980), that case deserves more than what the majority opinion affords it.

{¶69} Crim.R. 11(C) vests the trial court with the responsibility to ensure that a defendant is not unknowingly, involuntarily, or unintelligently surrendering his constitutional rights at a plea hearing. Obviously, the right conferred under the Double Jeopardy Clause qualifies as one.

{¶70} Thus, although the rule does not specifically require it, prior to making a finding of guilt, the trial court should make an inquiry concerning the facts underlying the defendant's change of plea. This court may not "have the authority to impose" such an action on the trial court, as the dissenting opinion notes, but the rule certainly encompasses it and provides the trial court with the jurisdiction to do so.

{¶71} As stated in *Kent*, 68 Ohio App.2d 151, 428 N.E.2d 453, after the defendant enters his change of plea to all of the offenses, and the trial court has otherwise complied with its duties under Crim.R. 11(C), a determination can then be made with respect to any potential allied-offense issue. The *Kent* court noted:

> This can occur in one of several situations.
>
> First, if either the prosecutor, the defense counsel, or a defendant advises the court that the defendant is pleading guilty to multiple offenses

and that in entering the plea consideration was given to the allied offense statute, the court can then accept the guilty plea and enter a judgment of conviction for all of the offenses to which the party has pled guilty. [Footnote omitted.]

In the event that a statement similar to that given above is not made, but a defendant affirmatively raises the issue of allied offenses and indicates that he is entering a plea of guilty to multiple offenses that are allied offenses of similar import and that a judgment of conviction can only be entered for one, the court will proceed to *accept the guilty plea to all of the offenses.* The court will then conduct a voir dire hearing to determine whether they are allied offenses of similar import with a single animus *which would require a judgment of conviction for only one offense.* If, after conducting such a hearing on the record, the cou[r]t determines that the offenses are allied offenses of similar import with a single animus, a judgment of conviction for only one offense may be entered. If the court, after conducting a hearing on the record, determines that there were multiple offenses of dissimilar import or offenses committed separately or with a separate animus as to each, the court will then enter a judgment of conviction for each of the offenses. R.C. 2941.25(A) and (B).

* * * If nothing is said by either the prosecutor or the defendant in regard to allied offenses and the court has accepted the guilty plea to all of the offenses, *the court has an affirmative duty to make inquiry as to whether the allied offense statute would be applicable. Under these circumstances, the court would explain that in Ohio there is an allied offense statute [that protects the constitutional right against double jeopardy], and thus, depending upon the evidence, a judgment of conviction may only be entered for one offense; and a hearing would be held to determine if there are such allied offenses.*

We recognize that Crim.R. 11 does not contain a requirement that the court conduct such a hearing after accepting the guilty plea. Nevertheless, the allied offense statute is mandatory in that when there are allied offenses of similar import, there can only be one judgment of conviction.

Therefore, two significant alternatives present themselves. First, the trial court could accept the guilty plea to the multiple offenses of similar import, make no further inquiry, and sentence the defendant for each offense. Then, if an appeal is taken, a defendant who has pled guilty to multiple offenses of similar import may raise the issue that there were allied offenses of similar import with a single animus and that the judgment of conviction for the multiple offenses should not have been entered. He would argue that he did not make a knowing, intelligent and voluntary plea because he was not advised of the allied offense statute.

On the other hand, a trial court could conduct an allied offense hearing on the record for multiple offenses of similar import. After that, the trial judge would determine whether sentence could be imposed for only one offense, or if the offenses were allied offenses, impose separate sentences as to each one shown to have an animus separate from the others. This process would have an additional advantage: it would provide the record necessary for an appellate court to review the determination below.

We believe the better practice would be for the court to conduct the allied offense hearing when a defendant has pled guilty to multiple offenses of similar import. In this way, the defendant's rights are protected and the defendant is then precluded from successfully raising the allied offense issue on appeal. Thus, in the interests of judicial economy and protection of the rights of the defendant, it is the better practice to have the trial court conduct the allied offense hearing after accepting a guilty plea to offenses which may be construed to be allied offenses of similar import.

Further, in the event that the trial court erred in its determination of allied offenses, the entire guilty plea is not vacated. It is only the judgment of conviction relating to the allied offenses.

(Emphasis added.)

{¶72} The foregoing procedure makes eminent sense. In advising the defendant during the colloquy at the plea hearing of this additional constitutional right, putting the prosecutor to his proof, requiring defense counsel to advocate for his client, and making a final determination of whether there exists a factual basis prior to making a finding of guilt, the trial court is not acting as an advocate for anything but the law itself. This is the judge's sole responsibility, after all.

{¶73} Despite the implicit directive Crim.R. 11(C) contains, the merger issue has been declared in some instances as one that can "only occur at sentencing." *See State v. Snuffer*, 8th Dist. Nos. 96480, 96481, 96482, and 96483, 2011-Ohio-6430, ¶ 10. Therefore, the trial court may, in addition, require the parties to submit sentencing memoranda on the issue prior to conducting the sentencing hearing. The prosecutor at the

same time could be advised to be prepared to elect, should the trial court make the determination that merger must occur. This would serve several beneficial purposes.

{¶74} It would lend further support for the trial court's determinations with respect to guilt, merger, and, incidentally, proportionality. It would provide more material for purposes of appellate review. It would also address the concerns set forth by the dissenting opinion. *See also State v. Barrett*, 8th Dist. No. 97614, 2012-Ohio-3948, ¶ 24-25 (which set forth the belief that the trial judge should not be placed in the position of "advocating" for the defendant but acknowledged that, at the plea hearing, "the court has an affirmative duty to advise a defendant of the consequences of waiving constitutional rights").

{¶75} Finally, it would also have the advantage of cutting short the process currently in use, i.e., several appeals, as the issue comes from the trial court to this court, is reviewed with or without an adequate record, and is remanded for the trial court to make another decision for this court to review again. Adding the necessity for the filing of a petition for postconviction relief as a method of redressing the issue merely compounds the problem. Judicial economy is clearly lacking in this area, and it is this court's duty to provide some *guidance* to the trial courts. The procedure outlined in *Kent*, 68 Ohio App.2d 151, 428 N.E.2d 453, serves both ends.

{¶76} The vexing problem this case presents easily could be solved by the Ohio Supreme Court. That court could either embrace the procedure proposed in *Kent*, or

amend Crim.R. 11(C) to require the trial judge, prior to accepting the change of plea, to make an inquiry into the underlying facts.

LARRY A. JONES, SR., J., CONCURRING WITH MAJORITY OPINION:

{¶77} I concur in judgment with the reasoning of both the majority opinion and Judge Rocco's concurring opinion, but write separately to provide simple and straightforward instructions for the trial court.

{¶78} As highlighted by the majority, it is a fundamental principle that an offender can be punished only once for a crime; otherwise, the offender's constitutional right to be protected from double jeopardy has been violated.

{¶79} When an offender is convicted of more than one offense, R.C. 2941.25 obligates the trial court to determine whether the offenses are allied. This obligation is the same whether the conviction is the result of a plea of guilty, a plea of no contest, or a verdict after a trial.

{¶80} Therefore, if an offender is convicted of more than one offense and the parties do not expressly agree, i.e. stipulate, that the offenses *are not* allied offenses of similar import, the trial court must make the inquiry and this inquiry must take place on the record before the offender is sentenced (but this inquiry may take place at the sentencing hearing).

{¶81} The trial court is obligated to do an allied-offenses analysis, on the record each time there is a conviction of more than one offense. While, in some cases, it may seem tedious, in the long run it will save the state's and court's resources by streamlining

multiple appeals and, most importantly, ensure the constitutional rights of the defendant against double jeopardy.

MELODY J. STEWART, A.J., DISSENTING:

{¶82} I believe that the majority's decision misinterprets the holding in *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, that "allied offenses of similar import must be merged at sentencing or the sentence is contrary to law." I agree that it is plain error for the court to sentence an offender to serve multiple terms of imprisonment for allied offenses of similar import — when an allied offenses error is obvious on the record, we must find the error rises to the level of plain error. The question presented en banc is what to do when a defendant pleads guilty to an indictment, fails to offer any evidence at sentencing to show why the offenses are allied, and the appellate record contains no facts to show why multiple offenses should merge for sentencing.

{¶83} Consistent with established principles of appellate review, I would find that the defendant who pleads guilty to multiple offenses and fails to raise an allied offenses issue at sentencing forfeits the right to argue all but plain error on appeal. And since a plain error analysis is always predicated on there being an "obvious" error in failing to merge allied offenses, the claimed error must fail if the record contains no facts proving that a merger error occurred.

{¶84} The majority of this court decides differently, reversing and remanding a conviction not because an error occurred, but because it cannot tell if an error occurred.

Rather than rely on the established application of the plain error rule, the majority circumvents the rule by holding that plain error occurs simply because the court failed to conduct a "facial" inquiry of the offenses at sentencing to determine whether multiple offenses are allied. *Underwood* does not explicitly place a duty on the court to make this inquiry nor can that duty be inferred. What is more, in creating this new duty for the court (and the prosecuting attorney), the majority relieves defense counsel of any duty to protect a client's rights — it essentially finds that any issue of ineffective assistance of counsel resulting from counsel's failure to raise the merger issue at sentencing is superseded by the court's per se error in failing to raise the issue sua sponte.

{¶85} This holding is a misapplication of the plain error rule, a misreading of Supreme Court precedent, and a clear departure from our traditional adversary process. I respectfully dissent.

I

{¶86} The plain error doctrine set forth in Crim.R. 52(B) states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This rule is identical to Fed.R.Crim.P. 52(b) and Ohio courts have resorted to federal precedent when construing the state version of the rule. *See, e.g., State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, 884 N.E.2d 45, ¶ 18.

{¶87} To prevail on a showing of plain error, a defendant must prove three things: (1) an error, (2) that is plain, and (3) that affects substantial rights. *See Jones v. United States*, 527 U.S. 373, 389, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999); *State v. Gross*, 97 Ohio

St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 45. A reviewing court will take notice of plain error only with the utmost caution, and only then to prevent a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), syllabus.

{¶88} As the majority concedes, "[t]here are simply no facts in the record to aid in our mandated de novo review" of the merger issue. *Ante* at ¶ 25. Without facts showing why offenses should merge, this court cannot say that any sentencing error occurred, much less that an error occurred that was so "obvious" that it rose to the level of "plain" error. It is the appellant's responsibility under App.R. 16(A)(7) to make an argument with citations to the parts of the record on which the appellant relies.

{¶89} Rogers pleaded guilty to a bare bones indictment. By doing so, he admitted the facts alleged in the indictment. *See* Crim.R. 11(B)(1); *State v. Wilson*, 58 Ohio St.2d 52, 388 N.E.2d 745 (1979), paragraph one of the syllabus. He did not argue at sentencing that the offenses he pleaded guilty to were allied and should merge for sentencing, so he forfeited the right to raise anything but plain error relating to merger of sentences. Under any plausible application of the plain error rule, Rogers has failed to show an error, the existence of which we must recognize in order to prevent a miscarriage of justice. On this basis alone, we should reject Rogers's argument that the court committed plain error by failing to merge for sentencing allied offenses of similar import. *See State v. Snuffer*, 8th Dist. Nos. 96480, 96481, 96482, and 96483, 2011-Ohio-6430; *State v. Lindsey*, 8th Dist. No. 96601, 2012-Ohio-804; *State v. Barrett*, 8th Dist. No. 97614, 2012-Ohio-3948; *State v. Rogers*, 8th Dist. Nos. 97093 and 97094, 2012-Ohio-2496.

II

{¶90} The majority circumvents a conventional plain error analysis by taking the *Underwood* holding out of context and relieving the defendant of the onus of objecting and otherwise preserving any claimed error. It does so on the following premises: (1) allied offenses issues invoke the sentencing component of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and constitutional errors cannot be waived unless the waiver is knowing or intelligent; (2) the "imposition of multiple sentences for allied offenses of similar import is plain error"; and (3) under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. From these premises the majority concludes that the trial judge not only has a duty to merge allied offenses of similar import, but that the trial judge also has the obligation to raise the issue of allied offenses at sentencing even if the defendant fails to do so. This conclusion is not valid.

A

1

{¶91} Although the majority correctly concludes that Rogers's failure to raise the merger issue at sentencing did not constitute a waiver of his double jeopardy rights, *ante* at ¶ 35, it reaches that conclusion for the wrong reasons because it confuses the concepts of "waiver" and "forfeiture." By failing to raise the issue of merger, Rogers did not waive his double jeopardy rights, but he did forfeit the right to argue anything but plain error on appeal. This distinction is important: nuanced or not.

{¶92} A "waiver" is the intentional relinquishment or abandonment of a right, while a "forfeiture" is the failure to preserve an objection. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 23. The waiver of a right is not subject to plain error review under Crim.R. 52(B), but a forfeiture of an objection is subject to plain error review under Crim.R. 52(B). *Id.* Rogers did not intentionally relinquish his double jeopardy rights when he failed to object at sentencing that he was separately sentenced on allied offenses of similar import — he merely forfeited the right to complain of anything but plain error on appeal by not timely raising it. In fact, *Underwood* addressed this very point, rejecting the argument that a guilty plea to a jointly recommended sentence constituted a waiver of the right to raise an allied offense issue on appeal. *Underwood, supra,* at ¶ 32.

2

{¶93} There really is no doubt that a defendant who pleads guilty and does not raise the issue of allied offenses at the time of sentencing forfeits all but plain error on appeal. In *State v. Comen*, 50 Ohio St.3d 206, 211, 553 N.E.2d 640 (1990), the Supreme Court found an allied offenses argument forfeited on appeal because the defendant did not raise the issue in the trial court. Implicit in the idea of issue forfeiture in the context of allied offenses is that a party who fails to object waives all but plain error. *See State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 139 (argument that state failed to prove separate animus for separate offenses was not raised at trial and defendant "thus waived all but plain error"). Rogers did not waive his right to not be held twice in

jeopardy for the same conduct, but by failing to raise the issue in the trial court, he did forfeit the right to object to this aspect of his sentence.

{¶94} *Comen* should end any discussion concerning the application of the plain error rule in this case, yet the majority gives short shrift to that case with the statement that it is "contradicted" by *Underwood*. *Ante* at ¶ 56. This comment is not correct because *Underwood* is entirely consistent with *Comen* — the Supreme Court recognized that Underwood's guilty plea did not waive error; it simply forfeited all but plain error for purposes of appeal. With the state having conceded that Underwood's offenses were allied and should have merged for sentencing, *Underwood* at ¶ 8, the Supreme Court found that the court's failure to merge those sentences rose to the level of plain error.

{¶95} Given the concession of plain error in *Underwood*, the Supreme Court had no reason to cite *Comen* for the legal proposition that a failure to raise an allied offenses objection at sentencing forfeits all but plain error. With plain error established, Comen's forfeiture of the right to argue allied offenses was immaterial.

{¶96} In fact, the rule that a defendant who fails to raise the issue of allied offenses at sentencing forfeits the right to argue that issue on appeal is so well established that it is axiomatic. For example, in *State v. Antenori*, 8th Dist. No. 90580, 2008-Ohio-5987, we held, consistent with the principles announced in *Comen*, that by voluntarily entering guilty pleas to two separate offenses, a "defendant waive[s] any argument that the same constituted allied offenses of similar import." *Id.* at ¶ 6.

{¶97} And in *State v. Wulff*, 8th Dist. No. 94087, 2011-Ohio-700, we distinguished *Antenori* from *Underwood* by noting that *Underwood* involved a jointly recommended sentence as opposed to the guilty plea entered into in *Antenori*. *Id.* at ¶ 25. *Wulff* thus concluded that a defendant who voluntarily enters guilty pleas and allows himself to be sentenced at the court's discretion forfeited any argument that his offenses constituted allied offenses of similar import. *Id.* at ¶ 26.

{¶98} Any argument the majority makes that *Underwood* somehow undercut the principles announced in *Comen* should have been dispensed with in *State v. Clementson*, 8th Dist. No. 94230, 2011-Ohio-1798, where the author of the present en banc decision not only agreed with the *Antenori–Wulff* analysis, but explained his agreement by citing with approval the passage from *Antenori* explaining why *Underwood* was distinguishable. *Id.* at ¶ 11. *Clementson* thus denied an application to reopen an appeal on grounds that appellate counsel was ineffective for failing to raise an assignment of error relating to the court's failure to merge allied offenses of similar import for sentencing because that issue arose in the context of a guilty plea and was essentially unreviewable on direct appeal. *Id.* at ¶ 13.

B

{¶99} The majority cites *Underwood* for the proposition that it is error to fail to merge allied offenses and from this proposition concludes that a sentence must be reversed if the record on appeal does not contain enough information to prove that offenses are not allied. In its view, holding otherwise might result in the defendant actually being ordered

to serve separate sentences for allied offenses, and that would violate *Underwood*. This conclusion disregards *Comen* and miscomprehends *Underwood's* holding. It is important to understand that in both *Underwood* and *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Supreme Court's holdings were predicated on facts or concessions showing that the trial judge had erred by failing to merge offenses that actually were allied: *Underwood* was the result of a no contest plea and recommended sentence in which the state conceded that Underwood's offenses were allied offenses of similar import; *Johnson* involved a jury trial in which the evidence at trial convincingly showed that the subject offenses were allied. In both cases, the Supreme Court was able to find a merger error that was obvious on the record.

{¶100} The specific holding in *Underwood* that "offenses of similar import must be merged at sentencing or the sentence is contrary to law" is explained by the state's argument in that case. Midway through his trial, Underwood and the state reached a plea agreement in which Underwood would plead guilty to multiple offenses and the parties jointly recommended a sentence. *Underwood, supra,* at ¶ 4. Underwood did not raise the argument to the trial court that any offenses were allied and should have merged, but he did do so on direct appeal. *Id.* at ¶ 6. The state conceded that Underwood's sentences should have merged, but argued that he waived the right to appeal the merger issue by jointly agreeing to a sentence. *Id.* at ¶ 8. Accepting the state's concession regarding merger, the Supreme Court cited past precedent for the proposition that allied offenses are

to be merged at sentencing and found that the trial court's failure to merge Underwood's sentences was plain error. *Id.* at ¶ 26.

{¶101} With the Supreme Court's finding that the offenses in *Underwood* and *Johnson* were allied, its directive that allied offenses must be merged for sentencing is entirely defensible — it was plainly established that the offenses in each case were allied offenses of similar import, so it would violate double jeopardy to force the defendants in those cases to serve multiple punishments for a single act. The obvious error in each case was, indeed, plain error.

{¶102} In this case, the majority admittedly has no idea whether Rogers's offenses were allied because Rogers pleaded guilty and failed to make a record to demonstrate his claimed error. Nothing in *Underwood* suggests that it applies to the *mere possibility* that an allied offenses error occurred. Applying *Comen*, we should hold that Rogers's failure to preserve error at the time of sentencing forfeited all but plain error and that the limited record on appeal makes it impossible for us to find such an error.

C

{¶103} The majority's final premise — that the court has the responsibility to determine prior to sentencing whether there are any allied offenses issues — imposes a vague standard that the majority actually disregards and creates a new form of structural error.

1

{¶104} In the majority's view, the trial judge has the obligation to address a potential allied offenses issue if the convictions present a "facial" question of merger. *Ante* at ¶ 32. It is unclear what is meant by the use of that word. As a legal term of art, "facial" means obvious or apparent "on its face." But application of this standard actually contradicts the majority's conclusion.

{¶105} The two counts of receiving stolen property involved (1) a "stolen pickup truck" and (2) "tires and rims." The single count of possession of criminal tools involved "a tire jack and/or tow chain and/or lug nut wrenches." As the majority concedes:

> [W]e are unable to determine if these offenses were allied offenses of similar import. It is unclear if the "tires and rims" are from the same "stolen pickup truck" or from another vehicle. Likewise, it is unclear how the tools involved were related to either of the receiving stolen property offenses. There are simply no facts in the record to aid in our mandated de novo review of the issue.

Ante at ¶ 25.

{¶106} If this court is unable to determine whether the offenses are allied offenses of similar import because there are no facts to suggest that they are, it has necessarily concluded that there is no "facial" question of merger that obligated the trial judge to inquire into the allied offenses issue. The analysis is at an end. By its own reasoning, the majority's analysis necessarily affirms Rogers's sentences.

{¶107} Rather than apply this new "facial" approach, the majority now adopts a standard that goes beyond the plain error rule and presumes that all offenses are potentially allied and the trial judge must, prior to sentencing, inquire into the possibility that

sentences might be subject to merger, regardless of what facts are before the trial judge — in essence elevating plain error to a form of structural error.

{¶108} It is only in the rarest of cases that an error is held to be structural, thus requiring an automatic reversal. *Washington v. Recuenco*, 548 U.S. 212, 218, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). The United States Supreme Court has been very clear in cautioning against the "unwarranted extension" of the plain error rule because it "would skew the Rule's 'careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.'" *United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), quoting *United States v. Frady*, 456 U.S. 152, 163, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). Indeed, the Supreme Court has stated that it has no authority to create a "structural error exception" to the plain error rule, and that a structural error analysis is inappropriate in a plain error situation. *Johnson v. United States*, 520 U.S. 461, 466, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

{¶109} Although the majority carefully avoids characterizing its new rule as "per se" or "structural" error, the intent is clear. The majority explains its decision to place a duty on the court to inquire into the possibility that offenses might merge for sentencing by analogizing allied offenses issues to guilty pleas and claiming that we would "automatically" find plain error if the court failed to advise a defendant of the right to subpoena witnesses under Crim.R. 11(C), regardless of whether the defendant claimed any prejudice. *Ante* at ¶ 58. The difference between plain error and structural error is the

demonstration of prejudice: plain error exists only when the defendant shows that error affected substantial rights (i.e., prejudice); structural error presumes prejudice. *See State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, ¶ 9. By now stating that it would reverse a case even without a showing of prejudice, this court implicitly concedes that it is employing a structural error analysis. It does so with no regard to the Supreme Court's admonition that a structural error analysis is inappropriate in a plain error situation. *Johnson, supra.* At least one other appellate district court has rejected a similar per se error claim in a post-*Underwood* allied offenses appeal from a guilty plea. *See State v. Wessling*, 1st Dist. No. C-110193, 2011-Ohio-5882, ¶ 6.

{¶110} In any event, if the majority insists that it is employing a plain error analysis, the Crim.R. 11(C) guilty plea analogy it uses actually disproves its point. The only way an appellate court would know if a trial judge failed to make the required Crim.R. 11(C) advisements would be if the error was shown on the transcript of the plea colloquy. When there is no transcript of a plea colloquy made available to us, we have invoked established precedent to presume the regularity of the proceedings below and affirm. *See, e.g., State v. Smith,* 8th Dist. No. 94063, 2010-Ohio-3512, ¶ 11-12; *State v. Simmons*, 8th Dist. No. 94982, 2010-Ohio-6188, ¶ 19. So the majority not only fails to make a convincing case for departing from established plain error precedent to create a new form of structural error, it cannot satisfy the plain error test that it says it employs.

{¶111} Although the majority insists that the trial judge has no duty to be an advocate for either the defendant or the state, *ante* at ¶ 27, there is no doubt that its decision effectively requires the court to be more of an advocate for the defendant than defense counsel. It says that defense counsel "should" raise potential merger issues, *ante* at ¶ 38, but that the court "must" raise the issue. *Ante* at ¶ 32. The majority even finds that issues of ineffective assistance of counsel are essentially superseded by the trial judge's "mandated duty to address merger." *Ante* at fn. 2.

{¶112} It is well established that the court has no duty to act sua sponte to preserve the constitutional rights of a defendant who had failed to object to an error. *See, e.g., State v. Abdul Bari*, 8th Dist. No. 90370, 2008-Ohio-3663 (court has no duty to sua sponte dismiss an indictment on speedy trial grounds absent objection); *Clark v. Newport News Shipbuilding & Dry Dock Co.*, 937 F.2d 934, 939 (4th Cir.1991) ("Neither *Batson* nor its progeny suggests that it is the duty of the court to act sua sponte to prevent discriminatory exclusion of jurors. Rather, even in criminal cases, the objection is deemed waived if not timely raised.").

{¶113} In criminal cases that terminate by plea agreement, the court usually has no involvement apart from taking the plea and sentencing the defendant. It is unclear why the sentencing judge, who would presumably have less knowledge of the facts than defense counsel, should have the obligation to raise the issue of allied offenses when defense counsel has not done so. Obviously, it is defense counsel's obligation to protect a

defendant's rights. Competent defense counsel who negotiates a guilty plea will be aware of the facts underlying those offenses to which a defendant pleads guilty. At all events, it is defense counsel's obligation to advocate for the defendant. This court's decision essentially forces the trial judge to act as a de facto second chair for the defendant.

3

{¶114} It is disappointing that this court finds inadequate the legal remedies a defendant has for the potential errors that trial counsel makes in failing to raise the issue of allied offenses. To be sure, it would be difficult on direct appeal to make a viable ineffective assistance of counsel claim stemming from an alleged merger error in a guilty plea. As this case shows, the nature of guilty plea proceedings are such that the facts necessary to prove the error would be missing. *See, e.g., State v. Coleman*, 85 Ohio St.3d 129, 134, 707 N.E.2d 476 (1999). But there are other avenues for raising error.

{¶115} Under R.C. 2953.21, a defendant can seek postconviction relief for the alleged errors of defense counsel that occur outside the record on appeal. Indeed, the postconviction relief statute is specifically designed for such issues of ineffective assistance of counsel because the petitioner is required to provide facts beyond the record on direct appeal. *State v. Cooperrider*, 4 Ohio St.3d 226, 228-229, 448 N.E.2d 452 (1983).

{¶116} The majority acknowledges the availability of postconviction relief as a means of remedying defense counsel's failure to raise the issue of allied offenses at sentencing, but apparently finds that the "limited" nature of postconviction makes it a less

than satisfactory remedy. *Ante* at ¶ 52. It is unclear what it means when it says that postconviction relief offers a "limited" remedy. The postconviction statute, R.C. 2953.21(A), applies to constitutional claims of any kind, including ineffective assistance of counsel claims based on alleged violations of the Sixth Amendment to the United States Constitution. In fact, it is the only vehicle for raising ineffective assistance of counsel claims that rely on evidence outside the record on appeal. *See Coleman*, at 134. ("Any allegations of ineffectiveness based on facts not appearing in the record should be reviewed through the postconviction remedies of R.C. 2953.21."). The federal courts usually restrict claims of ineffective assistance, on whatever theory, to postconviction proceedings because the record can be more fully developed. *See Massaro v. United States*, 538 U.S. 500, 504-505, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003); *United States v. Spence*, 450 F.3d 691, 694 (7th Cir.2006).

{¶117} Presumably, the majority has no difficulty applying the postconviction relief statute to other forms of constitutional error apart from ineffective assistance of counsel claims. That being so, there is no reason why the postconviction remedies for those kinds of errors are any less limited than the postconviction remedies provided for ineffective assistance of counsel errors, particularly when the Supreme Court has specifically endorsed the postconviction relief statute for use in cases where the record is insufficient to prove a claim of error on direct appeal.

III

{¶118} In the end, there is no compelling reason for this court's departure from well-established rules governing plain error. If the court can conclude as a matter of fact or a stipulation that offenses are allied, it must merge those offenses for sentencing as required by *Underwood*. But in guilty plea cases like this one, the absence of any facts showing why offenses are allied and should merge for sentencing means that plain error cannot be shown.

{¶119} The majority opinion criticizes application of the plain error rule as a "self-fulfilling prophecy that defeats the constitutional protection outlined in *Underwood*." *Ante* at ¶ 54. But all plain error analysis, regardless of the type of constitutional issue, leads to the same "self-fulfilling prophecy" — if the error is not demonstrated on the record, it is not by definition "plain."

{¶120} I agree in principle with the concurring opinion that a trial judge can choose to be more proactive in sentencing and raise potential merger issues in accordance with *State v. Kent*, 68 Ohio App.2d 151, 428 N.E.2d 453 (8th Dist.1980). This could even entail the trial judge refusing to accept a guilty plea unless the parties have agreed in advance on all issues of allied offenses as part of the plea agreement. To be sure, this proactive approach would indeed be the better practice. But that kind of involvement is not required by law and we have no authority to impose it on trial judges.

{¶121} This court's decision to reverse this case requires a remand for a hearing, like that suggested in *Kent*. And it does so without guidance for the trial courts.

{¶122} A concern with applying *Kent* is that it fails to define the scope of the "voir dire hearing" that a trial judge is supposed to conduct to determine whether offenses are allied and should merge for sentencing. Given the lack of facts typically set forth in the indictment, the voir dire hearing would necessarily require additional fact finding. But the manner in which the court is to decide these facts is unclear and many questions of procedure are left unanswered.

{¶123} To illustrate how these questions might arise, suppose a case where the defendant pleads guilty to an indictment charging a rape and kidnapping that occurs on the same day to the same victim. The court accepts the plea, the defendant makes no request that the sentences merge, so the offenses are not merged for sentencing. On appeal, and consistent with this court's new approach that plain error is demonstrated because there is the possibility that the offense might have merged had the issue been raised, the sentence is reversed. On remand, the defendant argues that the two offenses are allied and must merge because they were committed with a state of mind to commit only one act. The state disagrees and theorizes that the defendant's acts were committed separately and should not merge for sentencing. With no agreement of the parties, the court decides to hold a voir dire hearing to resolve the issue. What is the scope of this hearing?

{¶124} As a court, we have previously allowed allied offenses issues arising from trials to be determined solely on the arguments of counsel. That procedure is defensible because a trial produces facts from which the court can determine whether individual crimes were allied offenses of similar import. But with remands of guilty plea cases like

this one, there are no facts showing whether offenses are allied. Some form of factual inquiry will be required. If we accept that the arguments of counsel do not constitute evidence, it follows that the parties have the right to offer evidence and call witnesses. That being the case, it appears that the court would have to at least conduct a mini or abbreviated trial. This sort of trial or hearing would be required because the allied offenses issue is one in which the court must determine whether the multiple offenses were committed with a state of mind to commit only one act. I can imagine no other way to determine this other than to hear evidence of the underlying crimes. The irony of having to hold such a trial or evidentiary hearing from a plea agreement is obvious.

{¶125} There are other questions left unanswered by a remand. The Supreme Court has held that the defendant "bears the burden of establishing his entitlement to the protection, provided by R.C. 2941.25, against multiple punishments for a single act." *State v. Mughni*, 33 Ohio St.3d 65, 67, 514 N.E.2d 870 (1987). What is the court's standard for finding that offenses are allied offenses of similar import: beyond a reasonable doubt, clear and convincing evidence, or a preponderance of the evidence? Does the defendant have the right to compel witnesses? Can the defendant testify at a voir dire hearing without waiving the Fifth Amendment right against self-incrimination? If new evidence surfaces at the voir dire hearing, does the state have the right to rescind the plea agreement and file additional charges? If requested, does the court have to make findings of fact?

{¶126} There is always the possibility that the parties on remand could stipulate facts beyond those stated in the indictment, but it is unclear why defense counsel would do so. The defendant who has pleaded guilty and been sentenced has nothing to lose and everything to gain by forcing a hearing on allied offenses. In cases like this where there are no facts on the record to show whether offenses are allied, defense counsel is working with a clean slate. Advice to stipulate facts under these circumstances could be a questionable defense strategy and would almost certainly open the door to an ineffective assistance of counsel claim should the court find that merger is warranted.

{¶127} One of the reasons given by one of the concurring opinions in this case is to express concern that this "dissenting opinion may become the law of this state." *Ante* at ¶ 67. With all due respect to the author, this opinion expresses what is already the law of the state (or the state of the law) — at least with regard to plain error jurisprudence. And the unanswered questions about the scope of the proposed voir dire hearing to be conducted on remand should cause this court to pause before abandoning our well-established plain error doctrine and creating a new, expansive rule requiring a remand in all guilty plea cases in which allied offenses could conceivably be, but are not plainly, at issue.

{¶128} Of course, no appellate court can or should try to predict all the possible consequences of a ruling. But having adopted a new rule, this court does a disservice to the trial court by failing to consider the practical consequences of this ruling.

{¶129} What this case demonstrates is that the defense — not the court and not the prosecuting attorney — has the ultimate duty to raise any potential allied offenses at the time of sentencing. If the issue is not raised before sentencing, the defendant forfeits all but plain error on appeal. Plain error cannot be established on the mere possibility that a sentencing error occurred, but rather on facts that prove an obvious error. If there are no facts to show that a plain error occurred, the defendant's recourse is in postconviction proceedings.

21 Ohio App.3d 171
Court of Appeals of Ohio,
Ninth District, Summit County.

The STATE of Ohio, Appellee,
v.
WILSON, Appellant.

No. 11736. | Feb. 13, 1985.

Defendant was convicted in the Court of Common Pleas, Summit County, on three counts of receiving stolen property, and he appealed. The Court of Appeals, George, J., held that: (1) defendant could not be sentenced on three counts of receiving stolen property when only evidence connecting him to property was fact that he disposed of three items in one transaction, but (2) defendant's unexplained possession of stolen property could give rise to permissive inference that defendant was guilty of theft offense.

Sentence reversed; remanded for resentencing.

West Headnotes (4)

[1] **Criminal Law**
Merger of Offenses

When defendant is charged on multiple counts of receiving stolen property, court shall merge counts to a single count when shown that defendant received, retained or disposed all items at one time in single transaction or occurrence. R.C. § 2913.57.

14 Cases that cite this headnote

[2] **Sentencing and Punishment**
Larceny, Embezzlement, and Receiving Stolen Property

Counts of receiving stolen property were required to be merged into one for purposes of sentencing, even though state introduced evidence to demonstrate that items were owned by three different individuals and stolen in two separate burglaries, where only evidence offered by state which connected defendant to property was fact that he disposed of the items in one transaction. R.C. § 2913.51.

14 Cases that cite this headnote

[3] **Larceny**
Presumptions Arising from Possession in General

Defendant's unexplained possession of stolen property may give rise to permissive inference that defendant is guilty of a theft offense. R.C. § 2913.51.

21 Cases that cite this headnote

[4] **Receiving Stolen Goods**
Knowledge of Theft and Intent

Evidence was sufficient to support conviction of receiving stolen property, since jury could properly infer defendant had knowledge that property was stolen, in light of defendant's unexplained possession of property, especially when property included two rings which carried two sets of initials, none of which were defendant's. R.C. § 2913.51.

18 Cases that cite this headnote

**1243 *Syllabus by the Court*

*171 1. When a defendant is charged on multiple counts of receiving stolen property under R.C. 2913.51, the trial court shall merge the counts into a single count when it is shown that the defendant received, retained or disposed of all the items of property at one time in a single transaction or occurrence.

2. A defendant's unexplained possession of stolen property may give rise to the permissive inference that the defendant is guilty of a theft offense.

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Opinion

GEORGE, Judge.

The defendant-appellant, Paul Wilson, appeals his conviction on three counts of receiving stolen property. This court affirms in part and reverses in part.

Wilson was arrested on February 17, 1984, in connection with a series of burglaries in the University of Akron area. He was indicted on nineteen counts of aggravated burglary, and twenty counts of receiving stolen property.

On May 4, 1984, Wilson filed a motion to suppress the evidence seized at his apartment. A hearing was held on May 15, 1984, and one of the state's witnesses was unable to attend. The trial court deferred its ruling on this motion and ruled that the state could proceed to trial on those counts which did not pertain to the evidence seized at Wilson's apartment.

A trial by jury commenced May 17, 1984, concerning three counts of receiving stolen property, in violation of R.C. 2913.51, plus the specification under R.C. 2941.143; and three counts of aggravated burglary, in violation of R.C. 2911.11(A)(3), plus the specification under R.C. 2941.142. Wilson was found guilty only on the three counts of receiving *172 stolen property, plus the specifications.

****1244 Assignment of Error 1**

[1] [2] "The trial court erred in denying defendant's motion to consolidate the three counts of stolen property into one count since the evidence showed that: (A) defendant engaged in one act of disposition; (B) that there was no evidence as to when, how or in what manner defendant acquired possession of the stolen property."

Wilson argues that the three counts of receiving stolen property should have been merged into a single count. This issue was considered by this court in *State v. Austin* (Feb. 16, 1984), Summit App. No. 11298, unreported. In that case, this court ruled that a defendant's conviction on two separate counts of receiving stolen property under R.C. 2913.51 should have been merged, stating at 3-4:

" * * * If [the defendant] received, retained or disposed of all the items of property at one time in a single transaction or occurance [*sic*], both counts are allied offenses of similar import and should have been merged for sentencing purposes. * * *."

In this case, the record reveals that on February 16, 1984, Wilson sold various items of jewelry to Dale Forster of C.E. Forster & Sons Jewelers. It was subsequently determined that the jewelry had been reported stolen in two separate burglaries. The state put on evidence to demonstrate that these items belonged to three different individuals. However, the state failed to prove that Wilson participated in these burglaries. The only evidence offered by the state which connected Wilson to the stolen property was the fact that he disposed of these stolen items in one transaction. As such, Wilson cannot be convicted and sentenced for three separate crimes of receiving stolen property. See, generally, *State v. Sanders* (1978), 59 Ohio App.2d 187, 392 N.E.2d 1297 [13 O.O.3d 209].

Accordingly, the trial court erred in not merging the three counts of receiving stolen property for purposes of sentencing. Thus, this assignment of error is well-taken.

Assignment of Error 2

[3] [4] "The trial court erred in not directing a verdict of acquittal when the evidence was insufficient as a matter of law to support a finding of guilty beyond a reasonable doubt as to the receiving stolen property charges."

Wilson argues that the evidence failed to prove that he is guilty of receiving stolen property because the state failed to demonstrate how he obtained that property. However, the state proved that Wilson was in possession of the stolen property. In *State v. Coker* (1984), 15 Ohio App.3d 97, 472 N.E.2d 747, this court at 99 stated that a defendant's unexplained possession of stolen property may give rise to the permissive inference that the defendant is guilty of a theft offense. Likewise in this case the jury could properly infer that Wilson had knowledge that the property was stolen. Especially where two rings carried two sets of initials, none of which were Wilson's.

Accordingly, this assignment of error is overruled. The judgment of the trial court in sentencing Wilson is reversed. The cause is remanded for resentencing.

Judgment accordingly.

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BAIRD, P.J., and QUILLIN, J., concur.

Parallel Citations

486 N.E.2d 1242, 21 O.B.R. 182

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[Cite as *State v. Rogers*, 2013-Ohio-3235.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 98292, 98584, 98585, 98586,
98587, 98588, 98589, and 98590

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

FRANK ROGERS, JR.

DEFENDANT-APPELLANT

DECISION EN BANC
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Criminal Appeals from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-552699, CR-544682, CR-545992, CR-553547,
CR-553806, CR-556821, CR-555183, and CR-557079

BEFORE: The En Banc Court

RELEASED AND JOURNALIZED: July 25, 2013

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SEAN C. GALLAGHER, J.:

{¶1} Defendant-appellant Frank Rogers, Jr., pleaded guilty to a series of charges in eight separate cases. He asserts on appeal that the trial court erred by failing to merge certain parts of the sentences in two of the cases, that the court failed to compute jail-time credit, and that the court failed to advise him of the consequences of violating postrelease control.

{¶2} Pursuant to App.R. 26 and Loc.App.R. 26, this court determined that a conflict existed between the original panel's decision in this case, released as *State v. Rogers*, 8th Dist. Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, and 98590, 2013-Ohio-1027, and previous decisions by this court involving a number of issues related to allied offenses of similar import.

{¶3} These issues include determining the duty of a trial court judge under R.C. 2941.25 where a facial question of allied offenses of similar import exists but the trial court fails to inquire; determining the effect of a defendant's failure to raise the allied offenses of similar import issue in the trial court and whether that failure constitutes a valid waiver or forfeiture of the defendant's constitutional right against double jeopardy; determining the effect of a prosecutor's failure to put facts on the record detailing a defendant's conduct in relation to possible allied offenses of similar import at the trial court level; determining the impact of a silent or inconclusive record from the trial court that fails to detail the offender's actual conduct involving allied offenses of similar import; determining the effect of a guilty plea to multiple charges on the allied offenses of similar

import analysis; and determining the effect of the absence of a stipulation to the allied offenses of similar import question.

{¶4} Accordingly, we sua sponte granted en banc consideration in this matter and convened an en banc conference in accordance with App.R. 26(A)(2), Loc.App.R. 26(D), and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672.

The Allied Offenses of Similar Import Claim in *Rogers*

{¶5} Rogers argues that his convictions in Cuyahoga C.P. No. CR-553806 on two counts of receiving stolen property were allied offenses of similar import and should have been merged at sentencing. Likewise, he asserts his convictions in Cuyahoga C.P. No. CR-545992 on two additional counts of receiving stolen property and one count of possession of criminal tools were also allied offenses of similar import and should have merged at sentencing.

Double Jeopardy

{¶6} At the outset, we revisit the significance of the allied offenses of similar import determination. The Fifth Amendment's Double Jeopardy Clause provides a criminal defendant with three protections: "'[It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977),

quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Ohio v. Johnson*, 467 U.S. 493, 498, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984).

{¶7} In multiple-punishment cases, "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

> Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended * * * to impose multiple punishments, imposition of such sentences does not violate the Constitution.

Albernaz v. United States, 450 U.S. 333, 344, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981).

Ohio and Allied Offenses of Similar Import

{¶8} Ohio's criminal statutes generally do not authorize multiple punishments for the same conduct. In 1974, the Ohio legislature enacted R.C. 2941.25. The legislation codified the protections of the Double Jeopardy Clauses of the Ohio and United States Constitutions, which prohibit multiple punishments for the same offense. *See State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923.

> R.C. 2941.25. 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.

{¶9} Historically, Ohio courts struggled interpreting the language in R.C. 2941.25. Likewise, determining the type of conduct by the offender that constituted either separate offenses or allied offenses of similar import was equally confusing. Starting in 1975, the Supreme Court of Ohio issued a series of decisions that over the years were met with mixed reviews on how best to address the constitutional protections against multiple punishments. *See generally State v. Ikner*, 44 Ohio St.2d 132, 339 N.E.2d 633 (1975), adopting *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *State v. Logan*, 60 Ohio St.2d 126, 128, 397 N.E.2d 1345 (1979); *State v. Blankenship*, 38 Ohio St.3d 116, 526 N.E.2d 816 (1988); *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699 (1999); *State v. Fears*, 86 Ohio St.3d 329, 715 N.E.2d 136 (1999); *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29; *State v. Yarborough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845; *State v. Cooper*, 104 Ohio St.3d 293, 2004-Ohio-6553, 819 N.E.2d 657; *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181; *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149; *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154; *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882; *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889.

{¶10} These cases were followed by a series of decisions that changed the

landscape of the merger analysis. *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923 (a trial court commits plain error when it fails to merge allied offenses of similar import); *State v. Johnson* 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061 (R.C. 2941.25 instructs courts to look at the defendant's conduct when evaluating whether his offenses are allied); and *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245 (an appellate court should apply a de novo standard of review in reviewing a trial court's R.C. 2941.25 merger determination).

The *Underwood*, *Johnson,* and *Williams* Decisions

{¶11} Prior to *Underwood*, many trial courts simply imposed concurrent sentences where the merger analysis was too confusing or unworkable. *Underwood* made it clear that allied offenses of similar import must be merged at sentencing or the sentence is deemed contrary to law. *Underwood* also made clear that even a defendant's plea to multiple counts does not affect the court's duty to merge allied counts at sentencing. The duty is mandatory, not discretionary. *Underwood* at ¶ 26. Significantly, *Underwood* determined that R.C. 2953.08(D) does not bar appellate review of a sentence involving merger even though it was jointly recommended by the parties and imposed by the court. *Id.* at ¶ 33.

{¶12} *Johnson* then reestablished the focus of the merger analysis on the plain language in the statute. "In determining whether offenses merge, we consider the defendant's conduct." *Johnson* at ¶ 44. "If 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.'" *Id.* at ¶ 49, quoting *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶ 50 (Lanzinger, J., dissenting). If both questions are answered affirmatively, then the offenses are allied offenses of similar import and will be merged. *Johnson* at ¶ 50.

{¶13} In *Johnson*, then Justice O'Connor,[1] in a separate concurring opinion, defined the term "allied offenses of similar import":

> In practice, allied offenses of similar import are simply multiple offenses that arise out of the same criminal conduct and are similar but not identical in the significance of the criminal wrongs committed and the resulting harm. R.C. 2941.25 permits a defendant to be charged with, and tried for, multiple offenses based on the same conduct but permits only one conviction based on conduct that results in similar criminal wrongs that have similar consequences.

Id. at ¶ 64 (O'Connor, J., concurring).

{¶14} Justice O'Connor further defined the distinction between the phrases "allied offenses" and "allied offenses of similar import." "[O]ffenses are 'allied' when their elements align to such a degree that commission of one offense would probably result in the commission of the other offense. Offenses are of 'similar import' when the underlying conduct involves similar criminal wrongs and similar resulting harm." *Id.* at ¶ 66-67.

{¶15} While many focus on the plurality decision in *Johnson* that abandoned the *Rance* test, we note that Justice O'Connor maintained in her concurring opinion in *Johnson* that *Rance* was overruled only "inasmuch as it requires a comparison of the

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[1] Justice Maureen O'Connor became Chief Justice on January 1, 2011.

elements of the offenses *solely* in the abstract." (Emphasis added.) *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶ 68. *See also Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699.

{¶16} The *Johnson* test did not completely eliminate consideration of the legal elements; it simply made the offender's conduct the lynchpin of that analysis. Thus, the court uses the elements of the offenses as guideposts to measure the defendant's conduct as it relates to the offenses in determining whether multiple offenses could have been committed by the same conduct. *State v. Hicks*, 8th Dist. No. 95169, 2011-Ohio-2780, ¶ 9. This is important in situations, as here, where the legal elements of the offenses present a facial question of merger. This initial comparison often establishes or eliminates the need for subsequent allied offenses of similar import analysis.

{¶17} The Supreme Court revisited the *Johnson* test and again described its workings in *Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245. The court again referenced considering the elements of the crimes in citing back to *Blankenship*, 38 Ohio St.3d at 117, 526 N.E.2d 816:

> This court established a two-part test for analyzing allied-offense issues in *State v. Blankenship*, 38 Ohio St.3d 116, 117, 526 N.E.2d 816 (1988).
>
> "In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses."

(Emphasis sic.)

Williams at ¶ 17, quoting *Blankenship* at 117.

{¶18} Significantly, the decision in *Williams* stressed how important the facts in the record were to the merger analysis on appeal:

> Appellate courts apply the law to the facts of individual cases to make a legal determination as to whether R.C. 2941.25 allows multiple convictions. * * * "[A] review of the evidence is more often than not vital to the resolution of a question of law. * * * " *O'Day v. Webb*, 29 Ohio St.2d 215, 219, 280 N.E.2d 896 (1972).
>
> As in cases involving review of motions to suppress, "the appellate court must * * * independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8.

Williams at ¶ 25-26. Further, "[a]n appellate court should apply a de novo standard of review in reviewing a trial court's R.C. 2941.25 merger determination." *Id.* at ¶ 28.

The *Rogers* Case

{¶19} The record before us reveals that no discussion took place in the trial court about merger of the counts in either of the underlying cases. While we can resolve the issue of merger in CR-553806 based on a facial review of the convictions, nothing in the documents that comprise the record in CR-545992 contains sufficient factual information that would permit an allied offenses of similar import analysis.

Receiving Stolen Property Convictions in CR-553806

{¶20} In CR-553806, the two counts of receiving stolen property in the indictment revealed property taken from two distinct victims from two

separate houses apparently taken during burglaries that occurred the same day. Rogers argued on appeal that these acts were identical, so they should have been merged at sentencing.

{¶21} Even without facts to analyze Rogers's conduct, we can determine from the face of these convictions that these offenses were not subject to merger. A review of the elements of the receiving stolen property charges shows an offender must have "receive[d], retain[ed], or disposed of *property of another*, knowing or having reasonable cause to believe that it has been obtained through commission of a theft offense." (Emphasis added.) R.C. 2913.51.

{¶22} Separate victims alone established a separate animus for each offense. Even if the defendant cannot distinguish one victim's goods from another's does not mean his conduct did not impact multiple victims. Each victim has a specific and identifiable right to redress against the conduct of the defendant. The defendant's conduct in receiving goods he knows to be stolen inherently implies that they may be from multiple owners or locations. "[M]ultiple sentences for a single act committed against multiple victims is permissible where the offense is defined in terms of conduct toward 'another as such offenses are of dissimilar import; the import being each person affected.'" *State v. Tapscott*, 7th Dist. No. 11 MA 26, 2012-Ohio-4213, quoting *State v. Jones*, 18 Ohio St.3d 116, 118, 480 N.E.2d 408 (1985). *See also State v. Franklin,* 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 48; *State v. Phillips,* 8th Dist. No. 98487, 2013-Ohio-1443, ¶ 8-10.

{¶23} For this reason, we affirm the trial court's imposition of separate sentences in CR-553806.

Receiving Stolen Property and Possession of
Criminal Tools Convictions in CR-545992

{¶24} Central to our analysis of the convictions in CR-545992 and the primary focus of this en banc review is the effect of a trial court's failure to inquire or address an allied-offense question where it is clear from a facial review of the charges that the offenses may be allied, even when facts necessary to determine the conduct of the offender are missing.

{¶25} In this case, Rogers was convicted of two separate counts of receiving stolen property. One offense involved a "stolen pickup truck." The second offense involved "tires and rims." The possession of criminal tools offense involved "a tire jack and/or tow chain and/or lug nut wrenches." Although the receiving stolen property offenses involved the same victim and the possession of criminal tools offense occurred on the same date as the receiving stolen property offenses, we are unable to determine if these offenses were allied offenses of similar import. It is unclear if the "tires and rims" are from the same "stolen pickup truck" or from another vehicle. Likewise, it is unclear how the tools involved were related to either of the receiving stolen property offenses. There are simply no facts in the record to aid in our mandated de novo review of the issue.

{¶26} At the outset of our analysis, we note that not every case involving multiple convictions with a silent record will require an allied-offense determination by the trial court. Even where specific facts of the case are unknown, an appellate court can assess

whether a claim requires a return to the trial court. For example, cases that assert a claim that the allied-offense issue was not addressed in a silent record may nevertheless fail where the indictment shows the offenses were committed on separate dates or involved separate victims or involve statutes that would require completely separate conduct. Conversely, cases that involve offenses that facially present a question of intertwined conduct, such as kidnapping and rape, or aggravated robbery and kidnapping, or gross sexual imposition and rape, create an allied-offense challenge that can result in the finding of error for failing to address the merger issue.

The Role of the Trial Judge

{¶27} *Underwood* placed the duty squarely on the trial court judge to address the merger question. *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923. Likewise, the merger statute imposes the same duty. R.C. 2941.25. Ultimately, it is the trial judge who imposes the sentence in a case. While the judge cannot be an advocate for either position, the trial court must address the potential allied-offense issue when the charges facially present a question of merger. A defendant's conviction on multiple counts, regardless of how achieved, does not affect the court's duty to merge allied offenses of similar import at sentencing.

{¶28} When a facial review of the charges and the elements of the crimes present a viable question of merger, the court must apply the *Johnson* test.

{¶29} Under the first prong, the court determines "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." *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶ 48, citing *Blankenship*, 38 Ohio St.3d at 119, 526 N.E.2d 816 (Whiteside, J., concurring). ("It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses can be committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses.")

{¶30} If the court's answer in the first prong is yes, then the second prong requires the trial court to determine if, in fact, the offenses were actually committed by the same conduct, i.e., "'a single act, committed with a single state of mind.'" *Johnson* at ¶ 49, quoting *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶ 50 (Lanzinger, J., dissenting). If the answer to both questions in both prongs is yes, then the offenses are allied offenses of similar import and they must be merged. *Johnson* at ¶ 50.

{¶31} "Conversely, if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." *Id.* at ¶ 51.

{¶32} Where the charges present a facial question of merger, the court must perform the analysis. As stated in *State v. Baker*, 8th Dist. No. 97139, 2012-Ohio-1833, ¶ 19:

> In short, there is no magic cleansing that occurs through the process of case resolution that satisfies the constitutional prohibition against imposing individual sentences for counts that constitute allied offenses. Merger must be addressed and resolved, or it remains outstanding. As

> noted in *Underwood* [124 Ohio St.3d 365, 2012-Ohio-1, 922 N.E.2d 923, at ¶ 20], "[a] trial court does not have the discretion to exercise its jurisdiction in a manner that ignores mandatory statutory provisions." *Id.* Thus, the constitutional and Ohio statutory prohibition against multiple punishments for the same conduct must always be addressed in the absence of a stipulation to a separate animus or separate acts.

{¶33} We therefore hold that a trial court commits error where multiple charges facially present a question of merger under R.C. 2941.25 and the trial court fails to conduct an allied offenses of similar import analysis. We will discuss the effect of this error in more detail below.

{¶34} The distinction between our view and the dissent is we believe plain error exists in the failure to address a statutory mandate. The plain error occurs at that point and need not be premised on the illusive question of whether the multiple offenses would actually merge.

Defense Counsel and the Failure to Raise Merger

{¶35} Rogers's trial counsel failed to raise the merger question in the trial court below. However, because double jeopardy is implicated, there is a presumption against waiver of constitutional rights. *Underwood,* 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, at ¶ 32, citing *State v. Adams*, 43 Ohio St.3d 67, 69, 538 N.E.2d 1025 (1989). "'Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.'" *Adams* at 69, quoting *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). "A waiver of important constitutional rights cannot

be presumed from a silent record * * *." *State v. Stone*, 43 Ohio St.2d 163, 167, 331 N.E.2d 411 (1975).

{¶36} Furthermore, even if the failure to assert double jeopardy at the trial court level constituted a forfeiture of that right, the jeopardy claim may be reviewed for plain error. *See United States v. Ehle*, 640 F.3d 689, 694 (6th Cir.2011). Despite the dissent's analysis of the facts in both *Underwood* and *Johnson*, those admitted errors were not deemed "waived" or "forfeited" or reduced to an ineffective assistance of counsel claim on appeal.

{¶37} Defense counsel's failure to raise the merger issue does not relieve the trial court of its duty to determine the merger question when a facial question of merger presents itself. Ultimately it is the trial court that must apply the statutory requirements in R.C. 2941.25 and address the possible merger questions.[2]

{¶38} While defense counsel should raise potential merger questions, it is important to note that a defendant and his counsel have no role in the charging process, and the defendant has no burden to prove offenses merge in the guilt phase. Merger is not an affirmative defense under R.C. 2901.05(D)(1)(a) and (b). Merger occurs just prior to the entry of conviction and is a function of sentencing that is the exclusive domain of the trial judge.

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[2] Even if defense counsel's failure to raise a merger issue amounts to an ineffective assistance of counsel claim, as referenced by the dissent, this does not relieve the trial judge of his or her statutorily mandated duty to address merger.

{¶39} Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. Thus, *Underwood* makes clear that a defendant may appeal his sentence even though it was jointly recommended by the parties and imposed by the court. *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923. As will be discussed later, when the issue of merger is facially apparent, the failure of the trial court to address the merger issue amounts to plain error. Therefore, a defendant's failure to raise an allied offenses of similar import issue in the trial court is not a bar to appellate review of the issue.

Effect of Guilty Plea

{¶40} In *Underwood*, the Supreme Court of Ohio held that the issue of allied offenses under R.C. 2941.25 may be appealed even if the defendant entered separate pleas to multiple offenses and received a jointly recommended sentence. *Id.* at ¶ 26. In this case, there was no discussion about Rogers's specific conduct at the time of the plea. Likewise, there was no stipulation or understanding of how the receiving stolen property counts or the possession of criminal tools count related to each other. In the absence of a stipulation or an agreement on which offenses are allied, a guilty plea does not negate the court's mandatory duty to merge allied offenses of similar import at sentencing. *Underwood* at ¶ 26.

{¶41} While facts establishing the conduct of the offender offered at the time of a plea may be used to establish that offenses are not allied, a guilty plea alone that does not include a stipulation or a finding that offenses are not allied offenses of similar import

does not conclusively resolve the merger question. Thus, a guilty plea alone does not constitute a valid waiver of the protections from possible double jeopardy under R.C. 2941.25.

The Role of Prosecutors

{¶42} The statute places no burden of proof on prosecutors to establish that offenses do not merge. Again, the determination of merger is in the hands of the trial judge based on the charges and the facts before the court.

{¶43} We are well aware that there are offenders who deserve separate convictions and punishments for certain conduct. Rather than ignoring the question, prosecutors should relish the opportunity to make the case for why certain offenders deserve convictions or punishments based on their conduct.

{¶44} Prosecutors are free to charge in any manner they see fit. They can charge as many counts as they conceivably feel cover the gamut of a defendant's conduct. With that, there are many opportunities to address the allied-offense issue along the path of case resolution. Prosecutors can put facts into the individual indictment counts distinguishing conduct; they can indicate in the response to a bill of particulars what offenses are not allied; at the time of a plea, they can indicate which offenses are not allied and why they are not allied by stating a factual basis for the plea, even if one is not required under Crim.R. 11; they can file a sentencing memorandum outlining the merger issues; they can also appear at sentencing and point out why offenses are not allied; they can also enter into a stipulation on what offenses are committed with separate conduct or a distinct animus.

Thus, at any point in the process, prosecutors can put facts on the record that would support a determination that certain offenses are not allied.

{¶45} This does not have to involve long or complicated hearings or witnesses. Historically, merger of offenses has always been viewed as a part of the sentencing process. Thus, "the sentencing process is less exacting than the process of establishing guilt." *State v. Bowser*, 186 Ohio App.3d 162, 2010-Ohio-951, 926 N.E.2d 714, ¶ 14 (2d Dist.), citing *Nichols v. United States*, 511 U.S. 738, 747, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994). Therefore, this process can easily be satisfied by a brief recitation of facts or circumstances by the prosecutor to aid the trial court in its determination. Nothing more should be required.[3]

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[3] In one of the more insightful decisions on this issue released more than 30 years ago, former Judge Alvin Krenzler noted:

> When there is a probability that the allied offense issue may arise in a case, the prosecutor and defense counsel would be well advised to squarely confront the issue in any plea bargaining that takes place. By resolving this question at the plea bargaining stage and incorporating the resolution of the allied offense issue in the plea bargain to be placed on the record, the prosecutor and defense counsel will act to avoid later problems in the validity of the plea bargain, in the entering of the plea, in the acceptance of the plea, in the judgment of conviction, and any appeal of the case.

State v. Kent, 68 Ohio App.2d 151, 155, 428 N.E.2d 453 (8th Dist.1980), fn.1.

The Application of Plain Error

{¶46} If the facts necessary to determine whether offenses are allied offenses of similar import are not in the record and the trial court does not inquire, then plain error exists when the issue is raised on appeal. *See State v. Barrett*, 8th Dist. No. 97614, 2012-Ohio-3948, 974 N.E.2d 185, (S. Gallagher, J., dissenting.)

{¶47} Pursuant to the terms of Crim.R. 52(B), plain errors or defects that affect substantial rights may be grounds for reversal even though they were not brought to the attention of the trial court. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶48} Plain error requires:

> (1) "there must be an error, i.e., a deviation from a legal rule," (2) "the error must be plain," which means that it "must be an 'obvious' defect in the trial proceedings," and (3) "the error must have affected 'substantial rights,'" which means that "the trial court's error must have affected the outcome of the trial.

State v. Gross, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 45, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

{¶49} We find that in failing to address a merger issue, there is a deviation from a legal rule. Thus, as here, when a trial court fails to determine whether offenses are allied offenses of similar import, the first prong of the plain error test is satisfied. The legislative requirement under R.C. 2941.25 to determine allied offenses is also mandated

by the Supreme Court of Ohio in *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923. "R.C. 2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, which prohibits multiple punishments for the same offense." *Id.* at ¶ 23. "[W]hen a sentence fails to include a mandatory provision, it may be appealed because such a sentence is 'contrary to law' and is also not 'authorized by law.'" *Id.* at ¶ 21.

{¶50} The second prong requires that the error must be "plain" or "obvious." Where it is clear from a facial review of the convictions that the allied offenses of similar import analysis should have been conducted but was not, the error is plain and obvious. Here the trial court should have realized from the face of the charges in CR-545992 that a merger analysis of the receiving stolen property and possession of criminal tools offenses was necessary. When the legislature statutorily mandates a procedural duty under R.C. 2941.25 to protect an established constitutional right, a violation of that duty constitutes error.

{¶51} Lastly, the third prong of plain error requires that the error must have affected the "substantial rights" of the accused. Clearly, the prospect of being subjected to multiple punishments for offenses that may be allied affects a defendant's substantial rights. In our view, the unresolved nature of double jeopardy so undermines the integrity of the proceedings that it constitutes plain error and satisfies this prong.

{¶52} To find otherwise would undermine the *Underwood* decision and the legislative mandate of R.C. 2941.25. Further, a defendant would be left with the limited

remedy of an ineffective assistance of counsel claim on appeal. That claim, like the allied offenses of similar import claim, would contain no more facts in support of it than the initial allied offenses of similar import claim. In the end, a postconviction relief petition would be all that remained as a remedy after the case is over. The unresolved nature of the double jeopardy issue affects the outcome of the case and prejudices the offender.

Distinguishing Forms of Plain Error

{¶53} We are cognizant that other panels of this court have declined to find plain error when the record does not contain facts from which an allied-offense error might be determined. They take issue with the approach that finds plain error when it is uncertain if the outcome of the case would have been otherwise. This view is outlined in *State v. Snuffer*, 8th Dist. Nos. 96480, 96481, 96482, and 96483, 2011-Ohio-6430, ¶ 9; *State v. Lindsey*, 8th Dist. No. 96601, 2012-Ohio-804, ¶ 13; *State v. Barrett*, 8th Dist. No. 97614, 2012-Ohio-3948, 974 N.E.2d 185; and in the original panel decision in this case released as *State v. Rogers*, 8th Dist. Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, and 98590, 2013-Ohio-1027.

{¶54} These cases accept the principle that it is plain error not to merge allied offenses, but rationalize that since there are no facts to find plain error, plain error does not exist. This is a self-fulfilling prophecy that defeats the constitutional protection outlined in *Underwood*. In our view, it is the absence of facts, or at least an inquiry into those facts, that makes the question ripe for review and creates plain error.

{¶55} The duty to merge implies a duty to inquire and determine whether multiple charges are allied offenses of similar import. Without the duty to inquire and determine, the duty to merge would be empty. An essential step in the merger process is applying the requirements of R.C. 2941.25, and hence the *Johnson* test, to the multiple charges. In our view, the failure to take this step where a facial review of the charges reveals it is necessary establishes prejudice and affects the outcome of the case. This is the fundamental distinction between our view and that of the dissent.

{¶56} In *State v. Corrao*, 8th Dist. No. 95167, 2011-Ohio-2517, ¶ 10, this court extended *Underwood* and held that "the trial court's failure to make the necessary inquiry [into the allied-offense issue post-*Johnson*] constitutes plain error necessitating a remand." There is historical support for this proposition. In *State v. Kent*, 68 Ohio App.2d 151, 428 N.E.2d 453 (8th Dist.1980), this court held that the trial court has "an affirmative duty to make inquiry as to whether the allied offense statute would be applicable" prior to sentencing the defendant. *Id.* at 156; *see also State v. Latson*, 133 Ohio App.3d 475, 728 N.E.2d 465 (8th Dist.1999). *Kent* was implicitly overruled by *State v. Comen*, 50 Ohio St.3d 206, 211, 553 N.E.2d 640 (1990), which overruled the defendant's challenge on an allied-offense issue for not being raised at the trial court level during the plea and sentencing hearings. Of course, *Comen* itself has since been contradicted by *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, at ¶ 29. *See Baker*, 8th Dist. No. 97139, 2012-Ohio-1833.

{¶57} Most traditional plain error deals with issues involving the guilt phase. *See State v. Davis*, 127 Ohio St.3d 268, 2010-Ohio-5706, 939 N.E.2d 147. Unlike plain error claims in the guilt phase, procedural plain error in sentencing does not affect the determination of guilt or innocence. The effect of finding plain error in the sentencing phase is minimal on the overall case and requires a return to the trial court solely to determine if any of the convictions merge. *See State v. Biondo*, 11th Dist. No. 2012-P-0043, 2013-Ohio-876. We also note that as trial courts become more aware of their duty to inquire and address merger questions, this problem will largely disappear. Even when trial courts fail to address the issue, there are often facts in the record that allow for resolution of the issue by de novo review on appeal. Thus, very few of these cases will result in a return to the trial court.

{¶58} If a trial court failed to advise a defendant under Crim.R. 11 of the right to subpoena witnesses, we would automatically find plain error. We would not contemplate or hedge our finding on whether the record is silent on the question of whether the defendant would have actually subpoenaed witnesses. It is enough that the advisement was not made to demonstrate the plain error.

{¶59} The failure to address the allied-offense issue, in our view, is no different. The plain error goes to the failure to address the required allied-offense analysis, not the plain error that exists when a record clearly demonstrates the offenses should have merged.

Other Issues

{¶60} Rogers also raised issues regarding jail-time credit and postrelease control.

{¶61} Rogers argued that the court erred by failing to compute his jail-time credit as mandated by R.C. 2967.191 and that trial counsel was ineffective for failing to request an accurate calculation of the jail-time credit. This assignment of error is moot because the court granted Rogers's pro se motion for jail-time credit on April 16, 2012.

{¶62} Lastly, Rogers complains that the court erred by failing to advise him of the consequences of violating postrelease control. This assignment is overruled because the court did apprise Rogers during sentencing of the consequences of violating postrelease control. *See* tr. 69-70.

Conclusion

{¶63} We therefore hold the following:

(a) Where a facial question of allied offenses of similar import presents itself, a trial court judge has a duty to inquire and determine under R.C. 2941.25 whether those offenses should merge. A trial court commits plain error in failing to inquire and determine whether such offenses are allied offenses of similar import.

(b) A defendant's failure to raise an allied offenses of similar import issue in the trial court is not a bar to appellate review of the issue.

(c) While facts establishing the conduct of the offender offered at the time of a plea may be used to establish that offenses are not allied, a guilty plea alone that does not include a stipulation or a finding that offenses are not allied offenses of similar import

does not conclusively resolve the merger question. Thus, a guilty plea does not constitute a valid waiver of the protections from possible double jeopardy under R.C. 2941.25.

{¶64} We overrule the prior decisions of this court to the extent they are in conflict with this decision. *See, e.g.*, *Snuffer*, 8th Dist. Nos. 96480, 96481, 96482, and 96483, 2011-Ohio-6430; *Lindsey*, 8th Dist. No. 96601, 2012-Ohio-804; *Barrett*, 8th Dist. No. 97614, 2012-Ohio-3948. In this case, we sustain the first assignment of error to the extent a remand is necessary to establish the underlying facts of Rogers's conduct in CR-545992 and for the trial court to determine whether the subject crimes should merge for sentencing purposes.

{¶65} By separate entry, we certify a conflict between this decision and the Sixth District's decision in *State v. Wallace,* 6th Dist. No. WD-11-031, 2012-Ohio-2675.[4]

{¶66} Judgment affirmed in part, reversed in part, and cause remanded.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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[4] The parties are advised that in order to institute a certified-conflict case in the Supreme Court of Ohio, a party must file a notice of certified conflict in the Supreme Court within 30 days of this court's order certifying the conflict. S.Ct.Prac.R. 4.1.

SEAN C. GALLAGHER, JUDGE

PATRICIA ANN BLACKMON, J.,
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
EILEEN A. GALLAGHER, J.,
EILEEN T. GALLAGHER, J.,
MARY EILEEN KILBANE, J.,
KATHLEEN ANN KEOUGH, J.,
LARRY A. JONES, SR., J.,
TIM McCORMACK, J., and
KENNETH A. ROCCO, J., CONCUR

KENNETH A. ROCCO, J., CONCURS WITH SEPARATE OPINION in which Patricia Ann Blackmon, Mary J. Boyle, Eileen A. Gallagher, Eileen T. Gallagher, Sean C. Gallagher, Larry A. Jones, Sr., Kathleen Ann Keough, Mary Eileen Kilbane, and Tim McCormack, JJ., CONCUR

LARRY A. JONES, SR., J., CONCURS WITH SEPARATE OPINION in which Patricia Ann Blackmon, Mary J. Boyle, Eileen A. Gallagher, Eileen T. Gallagher, Sean C. Gallagher, Kathleen Ann Keough, Mary Eileen Kilbane, Tim McCormack, and Kenneth A. Rocco, JJ., CONCUR

MELODY J. STEWART, A.J., DISSENTS WITH SEPARATE OPINION

KENNETH A. ROCCO, J., CONCURRING WITH MAJORITY OPINION:

{¶67} While I concur with the reasoning of the majority opinion, I write separately to express my concern that the dissenting opinion may become the law in this state. Should that occur, the trial judge will be relegated to a passive role at a time when his or her role rightfully is paramount. Moreover, I do not share the dissenting opinion's trust that a postconviction petition will afford relief to a defendant who is unaware when he or

she enters into a plea agreement of the nuances existing between the legal concepts of "forfeiture" and "waiver"; arguably, that issue "could have been raised" in a direct appeal.

{¶68} In addition, I wish to point out that because an analysis *with a solution to the dilemma presented in this case* was proposed in *State v. Kent*, 68 Ohio App.2d 151, 428 N.E.2d 453 (8th Dist.1980), that case deserves more than what the majority opinion affords it.

{¶69} Crim.R. 11(C) vests the trial court with the responsibility to ensure that a defendant is not unknowingly, involuntarily, or unintelligently surrendering his constitutional rights at a plea hearing. Obviously, the right conferred under the Double Jeopardy Clause qualifies as one.

{¶70} Thus, although the rule does not specifically require it, prior to making a finding of guilt, the trial court should make an inquiry concerning the facts underlying the defendant's change of plea. This court may not "have the authority to impose" such an action on the trial court, as the dissenting opinion notes, but the rule certainly encompasses it and provides the trial court with the jurisdiction to do so.

{¶71} As stated in *Kent*, 68 Ohio App.2d 151, 428 N.E.2d 453, after the defendant enters his change of plea to all of the offenses, and the trial court has otherwise complied with its duties under Crim.R. 11(C), a determination can then be made with respect to any potential allied-offense issue. The *Kent* court noted:

> This can occur in one of several situations.
>
> First, if either the prosecutor, the defense counsel, or a defendant advises the court that the defendant is pleading guilty to multiple offenses

> and that in entering the plea consideration was given to the allied offense statute, the court can then accept the guilty plea and enter a judgment of conviction for all of the offenses to which the party has pled guilty. [Footnote omitted.]
>
> In the event that a statement similar to that given above is not made, but a defendant affirmatively raises the issue of allied offenses and indicates that he is entering a plea of guilty to multiple offenses that are allied offenses of similar import and that a judgment of conviction can only be entered for one, the court will proceed to *accept the guilty plea to all of the offenses*. The court will then conduct a voir dire hearing to determine whether they are allied offenses of similar import with a single animus *which would require a judgment of conviction for only one offense*. If, after conducting such a hearing on the record, the cou[r]t determines that the offenses are allied offenses of similar import with a single animus, a judgment of conviction for only one offense may be entered. If the court, after conducting a hearing on the record, determines that there were multiple offenses of dissimilar import or offenses committed separately or with a separate animus as to each, the court will then enter a judgment of conviction for each of the offenses. R.C. 2941.25(A) and (B).

* * * If nothing is said by either the prosecutor or the defendant in regard to allied offenses and the court has accepted the guilty plea to all of the offenses, *the court has an affirmative duty to make inquiry as to whether the allied offense statute would be applicable. Under these circumstances, the court would explain that in Ohio there is an allied offense statute [that protects the constitutional right against double jeopardy], and thus, depending upon the evidence, a judgment of conviction may only be entered for one offense; and a hearing would be held to determine if there are such allied offenses.*

We recognize that Crim.R. 11 does not contain a requirement that the court conduct such a hearing after accepting the guilty plea. Nevertheless, the allied offense statute is mandatory in that when there are allied offenses of similar import, there can only be one judgment of conviction.

Therefore, two significant alternatives present themselves. First, the trial court could accept the guilty plea to the multiple offenses of similar import, make no further inquiry, and sentence the defendant for each offense. Then, if an appeal is taken, a defendant who has pled guilty to multiple offenses of similar import may raise the issue that there were allied offenses of similar import with a single animus and that the judgment of conviction for the multiple offenses should not have been entered. He would argue that he did not make a knowing, intelligent and voluntary plea because he was not advised of the allied offense statute.

> *On the other hand, a trial court could conduct an allied offense hearing on the record for multiple offenses of similar import. After that, the trial judge would determine whether sentence could be imposed for only one offense, or if the offenses were allied offenses, impose separate sentences as to each one shown to have an animus separate from the others. This process would have an additional advantage: it would provide the record necessary for an appellate court to review the determination below.*
>
> *We believe the better practice would be for the court to conduct the allied offense hearing when a defendant has pled guilty to multiple offenses of similar import. In this way, the defendant's rights are protected and the defendant is then precluded from successfully raising the allied offense issue on appeal. Thus, in the interests of judicial economy and protection of the rights of the defendant, it is the better practice to have the trial court conduct the allied offense hearing after accepting a guilty plea to offenses which may be construed to be allied offenses of similar import.*
>
> Further, in the event that the trial court erred in its determination of allied offenses, the entire guilty plea is not vacated. It is only the judgment of conviction relating to the allied offenses.

(Emphasis added.)

{¶72} The foregoing procedure makes eminent sense. In advising the defendant during the colloquy at the plea hearing of this additional constitutional right, putting the prosecutor to his proof, requiring defense counsel to advocate for his client, and making a final determination of whether there exists a factual basis prior to making a finding of guilt, the trial court is not acting as an advocate for anything but the law itself. This is the judge's sole responsibility, after all.

{¶73} Despite the implicit directive Crim.R. 11(C) contains, the merger issue has been declared in some instances as one that can "only occur at sentencing." *See State v. Snuffer*, 8th Dist. Nos. 96480, 96481, 96482, and 96483, 2011-Ohio-6430, ¶ 10. Therefore, the trial court may, in addition, require the parties to submit sentencing memoranda on the issue prior to conducting the sentencing hearing. The prosecutor at the

same time could be advised to be prepared to elect, should the trial court make the determination that merger must occur. This would serve several beneficial purposes.

{¶74} It would lend further support for the trial court's determinations with respect to guilt, merger, and, incidentally, proportionality. It would provide more material for purposes of appellate review. It would also address the concerns set forth by the dissenting opinion. *See also State v. Barrett*, 8th Dist. No. 97614, 2012-Ohio-3948, ¶ 24-25 (which set forth the belief that the trial judge should not be placed in the position of "advocating" for the defendant but acknowledged that, at the plea hearing, "the court has an affirmative duty to advise a defendant of the consequences of waiving constitutional rights").

{¶75} Finally, it would also have the advantage of cutting short the process currently in use, i.e., several appeals, as the issue comes from the trial court to this court, is reviewed with or without an adequate record, and is remanded for the trial court to make another decision for this court to review again. Adding the necessity for the filing of a petition for postconviction relief as a method of redressing the issue merely compounds the problem. Judicial economy is clearly lacking in this area, and it is this court's duty to provide some *guidance* to the trial courts. The procedure outlined in *Kent*, 68 Ohio App.2d 151, 428 N.E.2d 453, serves both ends.

{¶76} The vexing problem this case presents easily could be solved by the Ohio Supreme Court. That court could either embrace the procedure proposed in *Kent*, or

amend Crim.R. 11(C) to require the trial judge, prior to accepting the change of plea, to make an inquiry into the underlying facts.

LARRY A. JONES, SR., J., CONCURRING WITH MAJORITY OPINION:

{¶77} I concur in judgment with the reasoning of both the majority opinion and Judge Rocco's concurring opinion, but write separately to provide simple and straightforward instructions for the trial court.

{¶78} As highlighted by the majority, it is a fundamental principle that an offender can be punished only once for a crime; otherwise, the offender's constitutional right to be protected from double jeopardy has been violated.

{¶79} When an offender is convicted of more than one offense, R.C. 2941.25 obligates the trial court to determine whether the offenses are allied. This obligation is the same whether the conviction is the result of a plea of guilty, a plea of no contest, or a verdict after a trial.

{¶80} Therefore, if an offender is convicted of more than one offense and the parties do not expressly agree, i.e. stipulate, that the offenses *are not* allied offenses of similar import, the trial court must make the inquiry and this inquiry must take place on the record before the offender is sentenced (but this inquiry may take place at the sentencing hearing).

{¶81} The trial court is obligated to do an allied-offenses analysis, on the record each time there is a conviction of more than one offense. While, in some cases, it may seem tedious, in the long run it will save the state's and court's resources by streamlining

multiple appeals and, most importantly, ensure the constitutional rights of the defendant against double jeopardy.

MELODY J. STEWART, A.J., DISSENTING:

{¶82} I believe that the majority's decision misinterprets the holding in *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, that "allied offenses of similar import must be merged at sentencing or the sentence is contrary to law." I agree that it is plain error for the court to sentence an offender to serve multiple terms of imprisonment for allied offenses of similar import — when an allied offenses error is obvious on the record, we must find the error rises to the level of plain error. The question presented en banc is what to do when a defendant pleads guilty to an indictment, fails to offer any evidence at sentencing to show why the offenses are allied, and the appellate record contains no facts to show why multiple offenses should merge for sentencing.

{¶83} Consistent with established principles of appellate review, I would find that the defendant who pleads guilty to multiple offenses and fails to raise an allied offenses issue at sentencing forfeits the right to argue all but plain error on appeal. And since a plain error analysis is always predicated on there being an "obvious" error in failing to merge allied offenses, the claimed error must fail if the record contains no facts proving that a merger error occurred.

{¶84} The majority of this court decides differently, reversing and remanding a conviction not because an error occurred, but because it cannot tell if an error occurred.

Rather than rely on the established application of the plain error rule, the majority circumvents the rule by holding that plain error occurs simply because the court failed to conduct a "facial" inquiry of the offenses at sentencing to determine whether multiple offenses are allied. *Underwood* does not explicitly place a duty on the court to make this inquiry nor can that duty be inferred. What is more, in creating this new duty for the court (and the prosecuting attorney), the majority relieves defense counsel of any duty to protect a client's rights — it essentially finds that any issue of ineffective assistance of counsel resulting from counsel's failure to raise the merger issue at sentencing is superseded by the court's per se error in failing to raise the issue sua sponte.

{¶85} This holding is a misapplication of the plain error rule, a misreading of Supreme Court precedent, and a clear departure from our traditional adversary process. I respectfully dissent.

I

{¶86} The plain error doctrine set forth in Crim.R. 52(B) states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This rule is identical to Fed.R.Crim.P. 52(b) and Ohio courts have resorted to federal precedent when construing the state version of the rule. *See, e.g., State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, 884 N.E.2d 45, ¶ 18.

{¶87} To prevail on a showing of plain error, a defendant must prove three things: (1) an error, (2) that is plain, and (3) that affects substantial rights. *See Jones v. United States*, 527 U.S. 373, 389, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999); *State v. Gross*, 97 Ohio

St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 45. A reviewing court will take notice of plain error only with the utmost caution, and only then to prevent a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), syllabus.

{¶88} As the majority concedes, "[t]here are simply no facts in the record to aid in our mandated de novo review" of the merger issue. *Ante* at ¶ 25. Without facts showing why offenses should merge, this court cannot say that any sentencing error occurred, much less that an error occurred that was so "obvious" that it rose to the level of "plain" error. It is the appellant's responsibility under App.R. 16(A)(7) to make an argument with citations to the parts of the record on which the appellant relies.

{¶89} Rogers pleaded guilty to a bare bones indictment. By doing so, he admitted the facts alleged in the indictment. *See* Crim.R. 11(B)(1); *State v. Wilson*, 58 Ohio St.2d 52, 388 N.E.2d 745 (1979), paragraph one of the syllabus. He did not argue at sentencing that the offenses he pleaded guilty to were allied and should merge for sentencing, so he forfeited the right to raise anything but plain error relating to merger of sentences. Under any plausible application of the plain error rule, Rogers has failed to show an error, the existence of which we must recognize in order to prevent a miscarriage of justice. On this basis alone, we should reject Rogers's argument that the court committed plain error by failing to merge for sentencing allied offenses of similar import. *See State v. Snuffer*, 8th Dist. Nos. 96480, 96481, 96482, and 96483, 2011-Ohio-6430; *State v. Lindsey*, 8th Dist. No. 96601, 2012-Ohio-804; *State v. Barrett*, 8th Dist. No. 97614, 2012-Ohio-3948; *State v. Rogers*, 8th Dist. Nos. 97093 and 97094, 2012-Ohio-2496.

II

{¶90} The majority circumvents a conventional plain error analysis by taking the *Underwood* holding out of context and relieving the defendant of the onus of objecting and otherwise preserving any claimed error. It does so on the following premises: (1) allied offenses issues invoke the sentencing component of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and constitutional errors cannot be waived unless the waiver is knowing or intelligent; (2) the "imposition of multiple sentences for allied offenses of similar import is plain error"; and (3) under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. From these premises the majority concludes that the trial judge not only has a duty to merge allied offenses of similar import, but that the trial judge also has the obligation to raise the issue of allied offenses at sentencing even if the defendant fails to do so. This conclusion is not valid.

A

1

{¶91} Although the majority correctly concludes that Rogers's failure to raise the merger issue at sentencing did not constitute a waiver of his double jeopardy rights, *ante* at ¶ 35, it reaches that conclusion for the wrong reasons because it confuses the concepts of "waiver" and "forfeiture." By failing to raise the issue of merger, Rogers did not waive his double jeopardy rights, but he did forfeit the right to argue anything but plain error on appeal. This distinction is important: nuanced or not.

{¶92} A "waiver" is the intentional relinquishment or abandonment of a right, while a "forfeiture" is the failure to preserve an objection. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 23. The waiver of a right is not subject to plain error review under Crim.R. 52(B), but a forfeiture of an objection is subject to plain error review under Crim.R. 52(B). *Id.* Rogers did not intentionally relinquish his double jeopardy rights when he failed to object at sentencing that he was separately sentenced on allied offenses of similar import — he merely forfeited the right to complain of anything but plain error on appeal by not timely raising it. In fact, *Underwood* addressed this very point, rejecting the argument that a guilty plea to a jointly recommended sentence constituted a waiver of the right to raise an allied offense issue on appeal. *Underwood, supra,* at ¶ 32.

2

{¶93} There really is no doubt that a defendant who pleads guilty and does not raise the issue of allied offenses at the time of sentencing forfeits all but plain error on appeal. In *State v. Comen*, 50 Ohio St.3d 206, 211, 553 N.E.2d 640 (1990), the Supreme Court found an allied offenses argument forfeited on appeal because the defendant did not raise the issue in the trial court. Implicit in the idea of issue forfeiture in the context of allied offenses is that a party who fails to object waives all but plain error. *See State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 139 (argument that state failed to prove separate animus for separate offenses was not raised at trial and defendant "thus waived all but plain error"). Rogers did not waive his right to not be held twice in

jeopardy for the same conduct, but by failing to raise the issue in the trial court, he did forfeit the right to object to this aspect of his sentence.

{¶94} *Comen* should end any discussion concerning the application of the plain error rule in this case, yet the majority gives short shrift to that case with the statement that it is "contradicted" by *Underwood*. *Ante* at ¶ 56. This comment is not correct because *Underwood* is entirely consistent with *Comen* — the Supreme Court recognized that Underwood's guilty plea did not waive error; it simply forfeited all but plain error for purposes of appeal. With the state having conceded that Underwood's offenses were allied and should have merged for sentencing, *Underwood* at ¶ 8, the Supreme Court found that the court's failure to merge those sentences rose to the level of plain error.

{¶95} Given the concession of plain error in *Underwood,* the Supreme Court had no reason to cite *Comen* for the legal proposition that a failure to raise an allied offenses objection at sentencing forfeits all but plain error. With plain error established, Comen's forfeiture of the right to argue allied offenses was immaterial.

{¶96} In fact, the rule that a defendant who fails to raise the issue of allied offenses at sentencing forfeits the right to argue that issue on appeal is so well established that it is axiomatic. For example, in *State v. Antenori*, 8th Dist. No. 90580, 2008-Ohio-5987, we held, consistent with the principles announced in *Comen,* that by voluntarily entering guilty pleas to two separate offenses, a "defendant waive[s] any argument that the same constituted allied offenses of similar import." *Id.* at ¶ 6.

{¶97} And in *State v. Wulff*, 8th Dist. No. 94087, 2011-Ohio-700, we distinguished *Antenori* from *Underwood* by noting that *Underwood* involved a jointly recommended sentence as opposed to the guilty plea entered into in *Antenori*. *Id.* at ¶ 25. *Wulff* thus concluded that a defendant who voluntarily enters guilty pleas and allows himself to be sentenced at the court's discretion forfeited any argument that his offenses constituted allied offenses of similar import. *Id.* at ¶ 26.

{¶98} Any argument the majority makes that *Underwood* somehow undercut the principles announced in *Comen* should have been dispensed with in *State v. Clementson*, 8th Dist. No. 94230, 2011-Ohio-1798, where the author of the present en banc decision not only agreed with the *Antenori–Wulff* analysis, but explained his agreement by citing with approval the passage from *Antenori* explaining why *Underwood* was distinguishable. *Id.* at ¶ 11. *Clementson* thus denied an application to reopen an appeal on grounds that appellate counsel was ineffective for failing to raise an assignment of error relating to the court's failure to merge allied offenses of similar import for sentencing because that issue arose in the context of a guilty plea and was essentially unreviewable on direct appeal. *Id.* at ¶ 13.

B

{¶99} The majority cites *Underwood* for the proposition that it is error to fail to merge allied offenses and from this proposition concludes that a sentence must be reversed if the record on appeal does not contain enough information to prove that offenses are not allied. In its view, holding otherwise might result in the defendant actually being ordered

to serve separate sentences for allied offenses, and that would violate *Underwood*. This conclusion disregards *Comen* and miscomprehends *Underwood's* holding. It is important to understand that in both *Underwood* and *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Supreme Court's holdings were predicated on facts or concessions showing that the trial judge had erred by failing to merge offenses that actually were allied: *Underwood* was the result of a no contest plea and recommended sentence in which the state conceded that Underwood's offenses were allied offenses of similar import; *Johnson* involved a jury trial in which the evidence at trial convincingly showed that the subject offenses were allied. In both cases, the Supreme Court was able to find a merger error that was obvious on the record.

{¶100} The specific holding in *Underwood* that "offenses of similar import must be merged at sentencing or the sentence is contrary to law" is explained by the state's argument in that case. Midway through his trial, Underwood and the state reached a plea agreement in which Underwood would plead guilty to multiple offenses and the parties jointly recommended a sentence. *Underwood, supra,* at ¶ 4. Underwood did not raise the argument to the trial court that any offenses were allied and should have merged, but he did do so on direct appeal. *Id.* at ¶ 6. The state conceded that Underwood's sentences should have merged, but argued that he waived the right to appeal the merger issue by jointly agreeing to a sentence. *Id.* at ¶ 8. Accepting the state's concession regarding merger, the Supreme Court cited past precedent for the proposition that allied offenses are

to be merged at sentencing and found that the trial court's failure to merge Underwood's sentences was plain error. *Id.* at ¶ 26.

{¶101} With the Supreme Court's finding that the offenses in *Underwood* and *Johnson* were allied, its directive that allied offenses must be merged for sentencing is entirely defensible — it was plainly established that the offenses in each case were allied offenses of similar import, so it would violate double jeopardy to force the defendants in those cases to serve multiple punishments for a single act. The obvious error in each case was, indeed, plain error.

{¶102} In this case, the majority admittedly has no idea whether Rogers's offenses were allied because Rogers pleaded guilty and failed to make a record to demonstrate his claimed error. Nothing in *Underwood* suggests that it applies to the *mere possibility* that an allied offenses error occurred. Applying *Comen*, we should hold that Rogers's failure to preserve error at the time of sentencing forfeited all but plain error and that the limited record on appeal makes it impossible for us to find such an error.

C

{¶103} The majority's final premise — that the court has the responsibility to determine prior to sentencing whether there are any allied offenses issues — imposes a vague standard that the majority actually disregards and creates a new form of structural error.

1

{¶104} In the majority's view, the trial judge has the obligation to address a potential allied offenses issue if the convictions present a "facial" question of merger. *Ante* at ¶ 32. It is unclear what is meant by the use of that word. As a legal term of art, "facial" means obvious or apparent "on its face." But application of this standard actually contradicts the majority's conclusion.

{¶105} The two counts of receiving stolen property involved (1) a "stolen pickup truck" and (2) "tires and rims." The single count of possession of criminal tools involved "a tire jack and/or tow chain and/or lug nut wrenches." As the majority concedes:

> [W]e are unable to determine if these offenses were allied offenses of similar import. It is unclear if the "tires and rims" are from the same "stolen pickup truck" or from another vehicle. Likewise, it is unclear how the tools involved were related to either of the receiving stolen property offenses. There are simply no facts in the record to aid in our mandated de novo review of the issue.

Ante at ¶ 25.

{¶106} If this court is unable to determine whether the offenses are allied offenses of similar import because there are no facts to suggest that they are, it has necessarily concluded that there is no "facial" question of merger that obligated the trial judge to inquire into the allied offenses issue. The analysis is at an end. By its own reasoning, the majority's analysis necessarily affirms Rogers's sentences.

{¶107} Rather than apply this new "facial" approach, the majority now adopts a standard that goes beyond the plain error rule and presumes that all offenses are potentially allied and the trial judge must, prior to sentencing, inquire into the possibility that

sentences might be subject to merger, regardless of what facts are before the trial judge — in essence elevating plain error to a form of structural error.

{¶108} It is only in the rarest of cases that an error is held to be structural, thus requiring an automatic reversal. *Washington v. Recuenco*, 548 U.S. 212, 218, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). The United States Supreme Court has been very clear in cautioning against the "unwarranted extension" of the plain error rule because it "would skew the Rule's 'careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.'" *United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), quoting *United States v. Frady*, 456 U.S. 152, 163, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). Indeed, the Supreme Court has stated that it has no authority to create a "structural error exception" to the plain error rule, and that a structural error analysis is inappropriate in a plain error situation. *Johnson v. United States*, 520 U.S. 461, 466, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

{¶109} Although the majority carefully avoids characterizing its new rule as "per se" or "structural" error, the intent is clear. The majority explains its decision to place a duty on the court to inquire into the possibility that offenses might merge for sentencing by analogizing allied offenses issues to guilty pleas and claiming that we would "automatically" find plain error if the court failed to advise a defendant of the right to subpoena witnesses under Crim.R. 11(C), regardless of whether the defendant claimed any prejudice. *Ante* at ¶ 58. The difference between plain error and structural error is the

demonstration of prejudice: plain error exists only when the defendant shows that error affected substantial rights (i.e., prejudice); structural error presumes prejudice. *See State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, ¶ 9. By now stating that it would reverse a case even without a showing of prejudice, this court implicitly concedes that it is employing a structural error analysis. It does so with no regard to the Supreme Court's admonition that a structural error analysis is inappropriate in a plain error situation. *Johnson, supra.* At least one other appellate district court has rejected a similar per se error claim in a post-*Underwood* allied offenses appeal from a guilty plea. *See State v. Wessling*, 1st Dist. No. C-110193, 2011-Ohio-5882, ¶ 6.

{¶110} In any event, if the majority insists that it is employing a plain error analysis, the Crim.R. 11(C) guilty plea analogy it uses actually disproves its point. The only way an appellate court would know if a trial judge failed to make the required Crim.R. 11(C) advisements would be if the error was shown on the transcript of the plea colloquy. When there is no transcript of a plea colloquy made available to us, we have invoked established precedent to presume the regularity of the proceedings below and affirm. *See, e.g., State v. Smith*, 8th Dist. No. 94063, 2010-Ohio-3512, ¶ 11-12; *State v. Simmons*, 8th Dist. No. 94982, 2010-Ohio-6188, ¶ 19. So the majority not only fails to make a convincing case for departing from established plain error precedent to create a new form of structural error, it cannot satisfy the plain error test that it says it employs.

{¶111} Although the majority insists that the trial judge has no duty to be an advocate for either the defendant or the state, *ante* at ¶ 27, there is no doubt that its decision effectively requires the court to be more of an advocate for the defendant than defense counsel. It says that defense counsel "should" raise potential merger issues, *ante* at ¶ 38, but that the court "must" raise the issue. *Ante* at ¶ 32. The majority even finds that issues of ineffective assistance of counsel are essentially superseded by the trial judge's "mandated duty to address merger." *Ante* at fn. 2.

{¶112} It is well established that the court has no duty to act sua sponte to preserve the constitutional rights of a defendant who had failed to object to an error. *See, e.g., State v. Abdul Bari*, 8th Dist. No. 90370, 2008-Ohio-3663 (court has no duty to sua sponte dismiss an indictment on speedy trial grounds absent objection); *Clark v. Newport News Shipbuilding & Dry Dock Co.*, 937 F.2d 934, 939 (4th Cir.1991) ("Neither *Batson* nor its progeny suggests that it is the duty of the court to act sua sponte to prevent discriminatory exclusion of jurors. Rather, even in criminal cases, the objection is deemed waived if not timely raised.").

{¶113} In criminal cases that terminate by plea agreement, the court usually has no involvement apart from taking the plea and sentencing the defendant. It is unclear why the sentencing judge, who would presumably have less knowledge of the facts than defense counsel, should have the obligation to raise the issue of allied offenses when defense counsel has not done so. Obviously, it is defense counsel's obligation to protect a

defendant's rights. Competent defense counsel who negotiates a guilty plea will be aware of the facts underlying those offenses to which a defendant pleads guilty. At all events, it is defense counsel's obligation to advocate for the defendant. This court's decision essentially forces the trial judge to act as a de facto second chair for the defendant.

3

{¶114} It is disappointing that this court finds inadequate the legal remedies a defendant has for the potential errors that trial counsel makes in failing to raise the issue of allied offenses. To be sure, it would be difficult on direct appeal to make a viable ineffective assistance of counsel claim stemming from an alleged merger error in a guilty plea. As this case shows, the nature of guilty plea proceedings are such that the facts necessary to prove the error would be missing. *See, e.g.*, *State v. Coleman*, 85 Ohio St.3d 129, 134, 707 N.E.2d 476 (1999). But there are other avenues for raising error.

{¶115} Under R.C. 2953.21, a defendant can seek postconviction relief for the alleged errors of defense counsel that occur outside the record on appeal. Indeed, the postconviction relief statute is specifically designed for such issues of ineffective assistance of counsel because the petitioner is required to provide facts beyond the record on direct appeal. *State v. Cooperrider*, 4 Ohio St.3d 226, 228-229, 448 N.E.2d 452 (1983).

{¶116} The majority acknowledges the availability of postconviction relief as a means of remedying defense counsel's failure to raise the issue of allied offenses at sentencing, but apparently finds that the "limited" nature of postconviction makes it a less

than satisfactory remedy. *Ante* at ¶ 52. It is unclear what it means when it says that postconviction relief offers a "limited" remedy. The postconviction statute, R.C. 2953.21(A), applies to constitutional claims of any kind, including ineffective assistance of counsel claims based on alleged violations of the Sixth Amendment to the United States Constitution. In fact, it is the only vehicle for raising ineffective assistance of counsel claims that rely on evidence outside the record on appeal. *See Coleman*, at 134. ("Any allegations of ineffectiveness based on facts not appearing in the record should be reviewed through the postconviction remedies of R.C. 2953.21."). The federal courts usually restrict claims of ineffective assistance, on whatever theory, to postconviction proceedings because the record can be more fully developed. *See Massaro v. United States*, 538 U.S. 500, 504-505, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003); *United States v. Spence*, 450 F.3d 691, 694 (7th Cir.2006).

{¶117} Presumably, the majority has no difficulty applying the postconviction relief statute to other forms of constitutional error apart from ineffective assistance of counsel claims. That being so, there is no reason why the postconviction remedies for those kinds of errors are any less limited than the postconviction remedies provided for ineffective assistance of counsel errors, particularly when the Supreme Court has specifically endorsed the postconviction relief statute for use in cases where the record is insufficient to prove a claim of error on direct appeal.

III

{¶118} In the end, there is no compelling reason for this court's departure from well-established rules governing plain error. If the court can conclude as a matter of fact or a stipulation that offenses are allied, it must merge those offenses for sentencing as required by *Underwood*. But in guilty plea cases like this one, the absence of any facts showing why offenses are allied and should merge for sentencing means that plain error cannot be shown.

{¶119} The majority opinion criticizes application of the plain error rule as a "self-fulfilling prophecy that defeats the constitutional protection outlined in *Underwood*." *Ante* at ¶ 54. But all plain error analysis, regardless of the type of constitutional issue, leads to the same "self-fulfilling prophecy" — if the error is not demonstrated on the record, it is not by definition "plain."

{¶120} I agree in principle with the concurring opinion that a trial judge can choose to be more proactive in sentencing and raise potential merger issues in accordance with *State v. Kent*, 68 Ohio App.2d 151, 428 N.E.2d 453 (8th Dist.1980). This could even entail the trial judge refusing to accept a guilty plea unless the parties have agreed in advance on all issues of allied offenses as part of the plea agreement. To be sure, this proactive approach would indeed be the better practice. But that kind of involvement is not required by law and we have no authority to impose it on trial judges.

{¶121} This court's decision to reverse this case requires a remand for a hearing, like that suggested in *Kent*. And it does so without guidance for the trial courts.

{¶122} A concern with applying *Kent* is that it fails to define the scope of the "voir dire hearing" that a trial judge is supposed to conduct to determine whether offenses are allied and should merge for sentencing. Given the lack of facts typically set forth in the indictment, the voir dire hearing would necessarily require additional fact finding. But the manner in which the court is to decide these facts is unclear and many questions of procedure are left unanswered.

{¶123} To illustrate how these questions might arise, suppose a case where the defendant pleads guilty to an indictment charging a rape and kidnapping that occurs on the same day to the same victim. The court accepts the plea, the defendant makes no request that the sentences merge, so the offenses are not merged for sentencing. On appeal, and consistent with this court's new approach that plain error is demonstrated because there is the possibility that the offense might have merged had the issue been raised, the sentence is reversed. On remand, the defendant argues that the two offenses are allied and must merge because they were committed with a state of mind to commit only one act. The state disagrees and theorizes that the defendant's acts were committed separately and should not merge for sentencing. With no agreement of the parties, the court decides to hold a voir dire hearing to resolve the issue. What is the scope of this hearing?

{¶124} As a court, we have previously allowed allied offenses issues arising from trials to be determined solely on the arguments of counsel. That procedure is defensible because a trial produces facts from which the court can determine whether individual crimes were allied offenses of similar import. But with remands of guilty plea cases like

this one, there are no facts showing whether offenses are allied. Some form of factual inquiry will be required. If we accept that the arguments of counsel do not constitute evidence, it follows that the parties have the right to offer evidence and call witnesses. That being the case, it appears that the court would have to at least conduct a mini or abbreviated trial. This sort of trial or hearing would be required because the allied offenses issue is one in which the court must determine whether the multiple offenses were committed with a state of mind to commit only one act. I can imagine no other way to determine this other than to hear evidence of the underlying crimes. The irony of having to hold such a trial or evidentiary hearing from a plea agreement is obvious.

{¶125} There are other questions left unanswered by a remand. The Supreme Court has held that the defendant "bears the burden of establishing his entitlement to the protection, provided by R.C. 2941.25, against multiple punishments for a single act." *State v. Mughni*, 33 Ohio St.3d 65, 67, 514 N.E.2d 870 (1987). What is the court's standard for finding that offenses are allied offenses of similar import: beyond a reasonable doubt, clear and convincing evidence, or a preponderance of the evidence? Does the defendant have the right to compel witnesses? Can the defendant testify at a voir dire hearing without waiving the Fifth Amendment right against self-incrimination? If new evidence surfaces at the voir dire hearing, does the state have the right to rescind the plea agreement and file additional charges? If requested, does the court have to make findings of fact?

{¶126} There is always the possibility that the parties on remand could stipulate facts beyond those stated in the indictment, but it is unclear why defense counsel would do so. The defendant who has pleaded guilty and been sentenced has nothing to lose and everything to gain by forcing a hearing on allied offenses. In cases like this where there are no facts on the record to show whether offenses are allied, defense counsel is working with a clean slate. Advice to stipulate facts under these circumstances could be a questionable defense strategy and would almost certainly open the door to an ineffective assistance of counsel claim should the court find that merger is warranted.

{¶127} One of the reasons given by one of the concurring opinions in this case is to express concern that this "dissenting opinion may become the law of this state." *Ante* at ¶ 67. With all due respect to the author, this opinion expresses what is already the law of the state (or the state of the law) — at least with regard to plain error jurisprudence. And the unanswered questions about the scope of the proposed voir dire hearing to be conducted on remand should cause this court to pause before abandoning our well-established plain error doctrine and creating a new, expansive rule requiring a remand in all guilty plea cases in which allied offenses could conceivably be, but are not plainly, at issue.

{¶128} Of course, no appellate court can or should try to predict all the possible consequences of a ruling. But having adopted a new rule, this court does a disservice to the trial court by failing to consider the practical consequences of this ruling.

{¶129} What this case demonstrates is that the defense — not the court and not the prosecuting attorney — has the ultimate duty to raise any potential allied offenses at the time of sentencing. If the issue is not raised before sentencing, the defendant forfeits all but plain error on appeal. Plain error cannot be established on the mere possibility that a sentencing error occurred, but rather on facts that prove an obvious error. If there are no facts to show that a plain error occurred, the defendant's recourse is in postconviction proceedings.

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.	LOWER COURT NO.
98292	CP CR-552699
98584	CP CR-544682
98585	CP CR-545992
98586	CP CR-553547
98587	CP CR-553806
98588	CP CR-556821
98589	CP CR-555183
98590	CP CR-557079

COMMON PLEAS COURT

-vs-

FRANK ROGERS, JR.

Appellant

MOTION NO. 466385

Date 7/25/13

Journal Entry

Sua sponte, we hereby find that this court's en banc decision in *State v. Rogers* is in conflict with the decision of the Sixth District Court of Appeals in *State v. Wallace*, 6th Dist. No. WD-11-031, 2012-Ohio-2675. We certify the following issues to the Supreme Court of Ohio:

> (1) Whether a trial court commits plain error where multiple offenses present a facial question of allied offenses of similar import, yet the trial court fails to determine whether those offenses should merge under R.C. 2941.25 at sentencing;
>
> (2) Whether the failure of a defendant to raise an allied-offense issue or to object in the trial court can constitute an effective waiver or forfeiture of a defendant's constitutional rights against double jeopardy and a bar to appellate review of the issue when the record is silent on the defendant's conduct.

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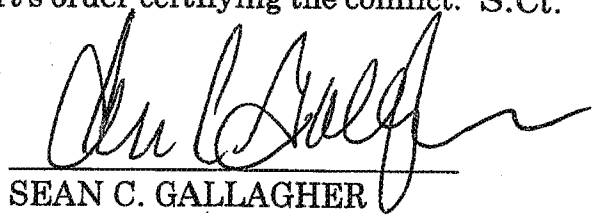
The parties are advised that in order to institute a certified-conflict case in the Supreme Court of Ohio, a party must file a notice of certified conflict in the Supreme Court within 30 days of this court's order certifying the conflict. S.Ct. Prac.R. 8.01.



SEAN C. GALLAGHER
JUDGE

PATRICIA ANN BLACKMON, J.,
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
EILEEN A. GALLAGHER, J.,
EILEEN T. GALLAGHER, J.,
LARRY A. JONES, SR., J.,
KATHLEEN ANN KEOUGH, J.,
MARY EILEEN KILBANE, J.,
TIM McCORMACK, J., and
KENNETH A. ROCCO, J., CONCUR

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JUL 25 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By _____ Deputy

MELODY J. STEWART, A.J., CONCURS THAT THE EN BANC DECISION IN THIS CASE IS IN CONFLICT WITH *WALLACE*, BUT DISSENTS AS TO THE MAJORITY'S DESCRIPTION OF THE ISSUES OF LAW.

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.	LOWER COURT NO.
98292	CP CR-552699
98584	CP CR-544682
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98588	CP CR-556821
98589	CP CR-555183
98590	CP CR-557079

COMMON PLEAS COURT

-vs-

FRANK ROGERS, JR.

Appellant

MOTION NO. 467168

Date 09/06/13

Journal Entry

Motion by Appellant to certify a conflict is granted. See separate order of this same date.

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CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By _____ Deputy

MELODY J. STEWART
Administrative Judge

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.	LOWER COURT NO.
98292	CP CR-552699
98584	CP CR-544682
98585	CP CR-545992
98586	CP CR-553547
98587	CP CR-553808
98588	CP CR-556821
98589	CP CR-555183
98590	CP CR-557079

COMMON PLEAS COURT

-vs-

FRANK ROGERS, JR.

Appellant

MOTION NO. 467168

Date 09/06/2013

Journal Entry

Appellant's motion to certify conflict is granted. We find that this court's en banc decision in *State v. Rogers* is in conflict with the decision of the Ninth District Court of Appeals in *State v. Wilson*, 21 Ohio App.3d 171, 486 N.E.2d 1242 (9th Dist.1985). We certify the following issue to the Supreme Court of Ohio:

> Whether an offender who receives, retains, or disposes of the property of two or more other persons in a single transaction may be convicted and sentenced for more than one count of receiving stolen property?

MELODY J. STEWART, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA ANN BLACKMON, J.,
MARY J. BOYLE, J.,

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OF THE COURT OF APPEALS
By _____ Deputy

FRANK D. CELEBREZZE, JR., J.,
EILEEN T. GALLAGHER, J.,
LARRY A. JONES, SR., J.,
TIM McCORMACK, J., and
KENNETH A. ROCCO, J.

Dissenting:

EILEEN A. GALLAGHER, J.,
KATHLEEN ANN KEOUGH, J., and
MARY EILEEN KILBANE, J.
SEAN C. GALLAGHER, J., DISSENTS (WITH SEPARATE OPINION)

SEAN C. GALLAGHER, J., DISSENTING:

I respectfully dissent from the majority decision to certify a conflict in this matter. I would not grant that request because the cases in question predate *Johnson* and are from the 1970s and mid 1980s, long before any of the current analysis of merger was considered. If the parties want to consider a case for possible conflict, they should look to *State v. Thomas,* 10th Dist. Franklin No. 10AP-557, 2011-Ohio-1191.

In any event, I would reject the analysis in *Thomas* and maintain the principle that separate victims ***always*** means the offenses have a dissimilar import. A review of *Rogers* makes the separate victim/separate conviction principle clear:

> Separate victims alone established a separate animus for each offense. Even if the defendant cannot distinguish one victim's goods from another's does not mean his conduct did not impact multiple victims. Each victim has a specific and identifiable right to redress against the conduct of the defendant. The defendant's conduct in

> receiving goods he knows to be stolen inherently implies that they may be from multiple owners or locations. "[M]ultiple sentences for a single act committed against multiple victims is permissible where the offense is defined in terms of conduct toward another as such offenses are of dissimilar import; the import being each person affected.'"

State v. Tapscott, 7th Dist. No. 11 MA 26, 2012-Ohio-4213, quoting *State v. Jones*, 18 Ohio St.3d 116, 118, 480 N.E.2d 408 (1985).

If a prosecutor charges only one count of receiving stolen property where the "goods" in question come from multiple victims, then the prosecutor has effectively conceded, through the charging process, that the conduct merges. Where, however, the prosecutor distinguishes victims through separate counts, each of those victims (if guilt is admitted or established) is impacted by the offender's conduct, and those offenses are of dissimilar import, the dissimilar import being each person affected by the offender's conduct. I reject the grafting of "mens rea" concepts from the guilt phase onto sentencing procedures. The fact that a defendant does not "know" precisely who owned something, or that there were multiple victims in a receiving stolen property scenario, does not impact the analysis that leads to establishing that the crimes have a dissimilar import. Further, a close read of the receiving stolen property statute specifically notes "property of another." Because an offender's conduct impacts separate victims, his offenses are, in effect, dissimilar and subject to separate punishments.

Article [V]

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 offence 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.

Section 10

1: No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

2: No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

3: No State shall, without the Consent of Congress, lay anyDuty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

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.

Effective Date: 01-01-1974