

IN THE SUPREME COURT OF OHIO
SCT: 2013-1501

13-1255

STATE OF OHIO :
Appellant/Cross Appellee :
-vs- :
FRANK ROGERS JR. :
Appellee/Cross-Appellant :

MERIT BRIEF IN RESPONSE

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 APPELLEE/ CROSS-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 APPELLANT/CROSS-APPELLEE, THE STATE OF OHIO

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case is not about plain error. Rather it is about the sentencing authority of a trial court as circumscribed by the plain language of the allied offense statute, R.C. 2941.25 and this Court's prior decisions in *State v. Underwood* (2010), 124 Ohio St. 3d 365 and *State v. Johnson* (2010), 128 Ohio St. 3d 153. As this Court previously held:

When the plea agreement is silent on the issue of allied offenses of similar import, however, the trial court *is obligated* under R.C. 2941.25 to determine whether the offenses are allied, and if they are, to convict the defendant of only one offense.

Underwood (2010), 124 Ohio St. 3d at 371 (emphasis added). The Eighth District's decision in this case is a simple application of *Underwood*. Because the trial court neglected its obligation to make an allied offense determination "when the charges facially present a question of merger," *State v. Rogers*, 8th Dist. Nos. 98292, 98584-90, 2013-Ohio-1027 ("*Rogers II*"), the individual sentences must be vacated.

As explained by this Court in *Johnson*, an allied offense analysis is a two-step process. The first step involves largely a question of law—is it "possible to commit one offense *and* commit the other with the same conduct." *Johnson*, 128 Ohio St. 3d at 162. If the answer to that question is yes, then the two offenses are "allied" and, absent additional findings by the trial court, the defendant may only be convicted of one. R.C. 2941.25(A). This is the starting point for any sentencing of allied offenses. If the trial court never goes any further, it is constrained as a matter of law to impose a single sentence.

The second step of the analysis involves a consideration of the particular facts of the case and, if certain findings are made, the trial court is empowered to impose individual sentences upon each allied offense. Specifically, the trial court may impose

individual sentences on allied offenses if it finds that the offenses were “committed separately or with a separate animus as to each.” R.C. 2941.25(B); *see also Johnson*, 128 Ohio St. 3d at 163 (explaining that individual sentences can be imposed on allied offenses if there were “not committed with the same conduct, i.e. ‘a single act, committed with a single state of mind.’”)

Applying this analysis to the instant case, this Court begins by determining whether it is *possible*, with the same conduct, to:

1. Commit the offenses of receiving stolen property belong to the same individual and possession criminal tools to receive that property (CR 545992);¹
2. Commit the offenses of receiving stolen property belong to multiple individuals (CR 553806).

Frank Rogers maintains, as discussed below, that it is possible to commit these offenses with the same conduct. Then the offenses are “allied” and the starting point for sentencing in each case is a single sentence.

This Court must consider the implications of a trial court imposing multiple sentences on allied offenses *without* making any findings that the offenses were committed with separate conduct. Rogers maintains that the Eighth District correctly held that a trial court cannot impose separate sentences upon allied offenses without making such findings. Accordingly, the cases must be remanded to the trial court for a new sentencing hearing.

¹ The State does not disagree that it is possible that Rogers committed all three offenses in CR 545992 with the same conduct.

The State's entire premise in this case is erroneous. It assumes that a trial court always has the authority to impose individual sentences on every count *unless the defendant specifically objects*. This Court's decision in *Underwood* makes clear that is not the case. In *Underwood*, this Court held that R.C. 2941.25 provides a limitation on the sentencing authority of the trial court *and* that this limitation is not dependent upon the issue being raised by the parties. Indeed, even when the parties agree to a sentence that violates R.C. 2941.25, the trial court is prohibited from imposing that agreed sentence. *Underwood*, 124 Ohio St. 3d at 370. When, on the face of the indictment, two offenses could possibly have been committed at the same time, then those two offenses are, as a matter of law, allied offenses that must be merged *unless a finding is made that they were committed separately or with separate animus*.

While the State claims that the Eighth District decided to reverse Rogers' sentence "because it could not tell if an error occurred," (State's Br. at 1), that is not the case. An error did plainly occur in this case. The trial court committed error when it failed to comply with its "obligat[ion] under R.C. 2941.25 to determine whether the offenses were allied."

Underwood, 124 Ohio St. 3d at 371. The error was:

- not holding the hearing,
- not addressing the issue, and
- imposing separate sentences on each count without making a determination that the offenses were committed separately or with a separate animus.

Despite the State's claim that "*Underwood* does not explicitly place a duty on a trial court" to make an allied offense determination, (State's Br. at 1), *Underwood* does exactly that. *Id.* ("When the plea agreement is silent on the issue of allied offenses of similar import,

however, the trial court is obligated under R.C. 2941.25 to determine whether the offenses are allied. . .”)

Although the State laments that the Eighth District’s approach is unworkable in the context of plea agreements, the opposite is exactly true. The allied offense issue is easily addressed in cases involving plea agreements. As explained by this Court in *Underwood*, nothing “precludes the state and a defendant from stipulating in the plea agreement that the offenses were committed with separate animus, thus subjecting the defendant to more than one conviction and sentence.” 124 Ohio St. 3d at 371. Or, alternatively, the parties could stipulate that the offenses were committed with the same animus. And that type of plea bargaining is happening with increasing frequency since this Court’s decision in *Underwood*. In the relatively uncommon case where the State and defendant wish to leave this issue to the trial court to decide, the trial court simply goes about its ordinary business of finding facts and making a legal determination. There is nothing particularly complicated about deciding whether two offenses were committed separately (i.e. unrelated incidents) or with a separate animus (i.e. unrelated motivations). And this Court recently established clear guidelines for making such determinations at sentencing. *See State v. Washington* (2013), ___ Ohio St. 3d ___, 2013-Ohio-4982, syllabus (“When deciding whether to merge multiple offenses at sentencing pursuant to R.C. 2941.25, a court must review the entire record, including arguments and information presented at the sentencing hearing, to determine whether the offenses were committed separately or with a separate animus.”)

In short, this Court should apply the plain language of R.C. 2941.25 and reach the following holding in this case:

When it is possible to commit two offenses with the same conduct, a trial court may not impose individual sentences on those two offenses absent a finding that those two offenses were committed separately or with separate animus.

This legal rule is consistent with Ohio's allied offense statute and this Court's decisions in *Johnson* and *Underwood*, is practical, and will ensure that criminal defendants are serving legal sentences authorized by the General Assembly.

STATEMENT OF THE CASE AND FACTS

Frank Rogers entered into a plea agreement with the State of Ohio to resolve eight criminal cases. This plea agreement did not address whether any of the offenses were allied and did not include any stipulations that offenses, in any particular case, were committed separately or with a separate animus. Because this appeal only pertains to two of the cases, Mr. Rogers' procedural history is confined to those two cases.

A. Trial Court Proceedings

In Case No. 545992 ("truck case"), Mr. Rogers was charged in a six-count indictment. He ultimately pled guilty to two counts of receiving stolen property belonging to Mark Johnson (counts four and five) and possessing criminal tools for use in the commission of the receiving stolen property offenses (count six). (Tr. at 5 and 26-28). The property in count four was Johnson's "2006 Ford F 150 Pick Up Truck" and the property in count five were Johnson's "Tires & Rims." All three offenses occurred on January 5, 2011.

In Case No. 553806 ("jewelry case"), Mr. Rogers was charged in a two-count indictment with receiving stolen property (jewelry, silverware, ceramic dolls, and/or religious items) belonging to Vilma Fontana (count one) and receiving stolen property (jewelry) belonging to Rebecca Zuchowski (count two). (Tr. at 8). Both offenses occurred on August 15, 2011. Rogers pled guilty to both. (Tr. at 30-31).

The State and the defense did not enter into any agreements related to sentencing other than restitution amounts and that “there will be prison time.” (Tr. at 10 and 22). There was no agreement about the specific amount of prison time, however. (Tr. at 10).

The trial court held a sentencing hearing on February 29, 2012. At the hearing, the prosecutor explained that Zuchowski and Fontana’s homes were burglarized but emphasized that they had no evidence that Rogers committed the burglary and that Rogers was not charged with burglary.² (Tr. at 46, 53, and 60). Rogers was charged with receiving stolen property because he pawned the items stolen from both homes. (Tr. at 46-47 and 53). Both Ms. Zuchowski and Ms. Fontana spoke at the sentencing hearing. (Tr. at 47-56). Rogers also spoke at sentencing. He apologized for his conduct and explained that he had a serious drug problem. (Tr. at 44).

In the truck case, the trial court imposed an aggregate sentence of 2 years. That two-year sentence was comprised of 3 consecutive sentences of 12 months for RSP of the truck, 6 months for RSP of the tires, and 6 months for the criminal tools associated with the two RSP counts. (Tr. at 65-66). In the jewelry case, the trial court imposed an aggregate sentence of 18 months. That sentence was comprised of 12 months for the property belonging to Zuchowski and 6 months for Fontana’s property. The trial court also ordered that the sentences in those two cases (in fact in all of his cases) were to be run consecutively

² Despite the fact that the trial prosecutor readily admitted that they had no evidence that Frank Rogers was involved in the burglary of either home, the State, in its merit brief, suggests that Rogers confessed to the burglary of Zuchowski’s home. (Br. at 4-5). The State basis that suggestion on an unsworn victim’s statement at sentencing that “Frank Rogers even admitted that he looked into her room as he was later quoted saying, I looked in the bedroom and there was no lady laying in bed reading.” (Tr. at 50). Obviously there was no such confession in this case or Rogers would have, at a minimum, been charged with burglary.

with each other. (Tr. at 73).

B. Appellate Proceedings

Rogers filed a timely appeal of his sentence. On appeal, Rogers argued, in his first assignment of error, that the trial court erred in imposing consecutive sentences on allied offenses in the truck and jewelry cases.

1. Rogers I

On March 21, 2013, the Eighth District, in a 2-1 decision, affirmed Rogers' sentence and rejected his allied offense argument. *State v. Rogers*, 8th Dist. Nos. 98292, 98584-90, 2013-Ohio-1027 ("*Rogers P*"). The majority, departing from the Eighth District's prior precedent, held the sentencing judge had no obligation to "inquire into the possibility of an allied offenses sentencing issue" and that the existing record did not contained adequate facts to demonstrate that the offenses in the two cases were in fact allied offenses of similar import. *Id.* at ¶ 6. In the jewelry case, the majority recognized that it was possible for multiple RSP counts to be allied even if the property belonged to different owners:

[The receiving stolen property] statute is not defined in terms of conduct against another, but in terms of conduct against property; that is possession or disposition of property that one knows or believes to be stolen.

* * *

Merger of the receiving stolen property counts is thus not barred because there were separate victims of those offenses.

Id. at ¶¶ 14-16. However, the majority held that "it is possible from the record on appeal that he attempted to dispose of the stolen items separately." *Id.* at ¶ 17. In the truck case, the majority concluded that "[t]here is nothing in the record to support Roger's argument that the tires and rims were from the stolen truck." *Id.* at ¶ 19. Accordingly, the majority rejected Rogers' assignment of error.

2. *Rogers II (en banc)*

Sua sponte the Eighth District accepted *Rogers I* for *en banc* review. After further briefing, the Eighth District issued a decision which reversed the sentence in the truck case but affirmed the sentence in the jewelry case. *Rogers II*. Judge Sean Gallagher, writing for the 11 judge majority, explained that “*Underwood* placed the duty squarely on the trial court judge to address the merger question” and held that:

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.

Id. at ¶ 27. Judge Gallagher emphasized that “not every case involving multiple convictions with a silent record will require an allied-offense determination by the trial court;” such a determination is only required in cases where a “facial review of the charges and the elements of the crimes present a viable question of merger.” *Id.* at ¶¶ 26-28. Judge Gallagher explained that defense counsel’s “failure to raise the merger issue does not relieve the trial court of its duty” to comply with “R.C. 2941.25 and address the possible merger question.” *Id.* at ¶ 37. Judge Gallagher explained that “plain error exists in the failure to address a statutory mandate.” *Id.* at ¶ 34.

Judges Kenneth Rocco and Larry Jones also wrote concurring opinions joined by 9 other judges. Judge Rocco wrote separately “to express his concern” that the dissenting opinion would relegate the trial judge “to a passive role at a time when his or her role rightfully is paramount” and to emphasize that he did not “share the dissenting opinion’s trust” that a postconviction petition would afford meaningful relief to a defendant on an issue that arguably could have been raised on direct appeal. *Id.* at ¶ 67. In his concurring opinion, Judge Jones explained that not only is a trial court obligated by statute to address

the allied offense issue at sentencing but also doing so will “in the long run . . . 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.” *Id.* at ¶ 81.

3. *The Certified Conflicts*

On the same day the Eighth District released *Rogers II*, it *sua sponte* certified a conflict on 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.

The State filed its notice of this certified conflict with this Court on August 7, 2013.

After the Eighth District issued its *en banc* decision in *Rogers II*, Frank Rogers filed a motion requesting that the Court certify a conflict on the substantive question of whether multiple receiving stolen property offenses can be allied when the property belongs to different owners. The Eighth District granted Rogers’ motion and certified a conflict on the following issue:

- (3) 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?

Frank Rogers filed his notice of certified conflict with this Court on September 20, 2013.

On October 23, 2013, this Court determined that conflicts existed on these issues, consolidated the two cases, and ordered briefing. Frank Rogers merit brief follows.

LAW AND ARGUMENT

Frank Rogers proposes that this Court answer the three issues certified as conflicts to this Court with the following:

1. **When it is possible to commit two offenses with the same conduct, a trial court may not impose individual sentences on those two offenses absent a finding that those two offenses were committed separately or with separate animus.**
 2. **A defendant does not waive his Double Jeopardy rights at a sentencing hearing when allied offenses are not discussed and does not relieve a trial court of its statutory and constitutional obligation to make an allied offense determination when the charges facially present a question of merger.**
 3. **Ohio's allied offense statute does not permit multiple convictions for receiving stolen property, even if the property belongs to multiple owners, unless the property was received in separate transactions.**
- A. The Starting Point: R.C. 2941.25 and The Test for Determining if Two Offenses are "Allied Offenses of Similar Import."**

The Double Jeopardy Clause's prohibition on multiple punishments provides a floor that prohibits double punishment for greater and lesser included offenses unless there is a State legislative intent to the contrary. *Blockburger v. United States* (1932), 284 U.S. 299. In this context, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter* (1983), 459 U.S. 359, 365. If a State so desires, it can prohibit multiple punishments even where offenses are not nested one in the other as greater and lesser-included offenses.

To that end, the General Assembly enacted R.C. 2941.25, Ohio's multiple-count statute:

- (A) When the same conduct by the 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.

“Absent a more specific legislative statement, R.C. 2941.25 is the primary indication of the General Assembly's intent to prohibit or allow multiple punishments for two or more offenses resulting from the same conduct.” *Washington*, ___ Ohio St. 3d ___, 2013-Ohio-4982, at ¶ 10.

In other words, a defendant may not be convicted of two or more allied offenses of similar import unless the offenses were “committed separately or with a separate animus as to each.” The fundamental purpose of R.C. 2941.25 is “to prevent shotgun convictions, that is multiple findings of guilt and corresponding punishments heaped on a defendant for closely related offenses arising from the same occurrence.” *Johnson*, 128 Ohio St. 3d at 161-62. When in “substance and effect but one offense has been committed,” the defendant may be convicted of only one offense. *Id.* at 162.

The legal landscape for allied offenses shifted dramatically with *Johnson*, 2010-Ohio-6314. In *Johnson*, the Court overruled *State v. Rance* (1999), 85 Ohio St. 3d 632 and established a new test for allied offenses of similar import. Under *Rance*, two offenses were only allied offenses of similar import if the elements of the two offenses, compared in the abstract, aligned sufficiently such that the commission of the one offense

would necessarily result in the commission of the other.

Johnson's two-step analysis. In *Johnson*, the court was unanimous in adopting a syllabus that overruled *Rance*, and recognized that a defendant's conduct must be considered in the R.C. 2941.25 analysis. The plurality opinion explained that R.C. 2941.25 requires the trial court to engage in a two step-analysis. In the first step, the trial court must decide "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. *Id.* at 162-63. The second step of the analysis is to determine whether the offenses were in fact committed "by the same conduct." *Id.* (citations omitted): "If the multiple offense can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct." *Id.*, at 163. Finally, if it were possible to commit the multiple offenses via the same conduct, and if the offenses were in fact committed by the same conduct, then they must be merged. *Id.*

One problem that has plagued the jurisprudence of R.C. 2941.25 over the years has been the tendency on the part of practitioners and of courts to use the term "allied offenses" as a short-hand for offenses that must be merged. It is important to keep these concepts distinct. Consistent with R.C. 2941.25(a) and *Johnson's* first step, offenses are allied if it is possible for an offender to commit both with the same conduct. If two offenses are allied then they must merge *unless*, pursuant to R.C. 2941.25(B) and *Johnson's* second step, the trial court finds that they were committed separately or with a separate animus.

B. The trial court has an obligation to address allied offenses issues when the plea agreement "is silent on the issue of allied offenses of similar import."

R.C. 2941.25 states that "[w]here the same conduct ... can be construed to constitute

two ... allied offenses of similar import, ... the defendant may be *convicted* of only one [offense]." R.C. 2941.25 (A) (emphasis added.). In *State v. Underwood* (2010), 124 Ohio St. 3d 365, this Court held that R.C. 2941.25 provides a limitation on the sentencing authority of the trial court. R.C. 2941.25 is a "mandatory sentencing provision" that prohibits a trial court "from imposing individual sentences for counts that constitute allied offenses of similar import." *Id.* at 370-71. And this Court made clear that this limitation is *not* dependent upon the issue being raised by the parties. On the contrary, this Court made quite clear that, absent a stipulation by the parties, the trial court has an affirmative obligation to address the possibility that multiple offenses are allied:

When the plea agreement is silent on the issue of allied offenses of similar import, however, the trial court *is obligated* under R.C. 2941.25 to determine whether the offenses are allied, and if they are, to convict the defendant of only one offense.

Id. at 371 (emphasis added). The trial court's obligation to address allied offense issues at sentencing cannot even be sidestepped by the parties by virtue of an agreed sentence. Even when the parties agree to a sentence that violates R.C. 2941.25, the trial court is prohibited from imposing that agreed sentence. *Id.* at 370. *Underwood* based its conclusion on the recognition that multiple sentences for allied offenses of similar import violate R.C. 2941.25's mandatory provision prohibiting multiple sentences, and are thus "contrary to law." *Id.* at 370-71.

C. Implications of *Underwood* and *Johnson*: When it is possible to commit two offenses with the same conduct, a trial court may not impose individual sentences on those two offenses absent a finding that those two offenses were committed separately or with separate animus.

The trial court's obligation to address allied offense issues in a multiple offense case arises when "the plea agreement is silent on the issue," *Underwood*, and when "it is

possible to commit one offense *and* commit the other with the same conduct,” *Johnson*. In other words, as explained by the Eighth District in its *en banc* decision, a trial court judge has a duty to inquire and determine whether offenses are allied when “a facial question of allied offenses of similar import presents itself.” *Rogers II* at ¶ 63.

As explained by this Court in *Johnson*, an allied offense analysis is a two-step process. The first step involves a question of law—is it “possible to commit one offense *and* commit the other with the same conduct.” *Johnson*, 128 Ohio St. 3d at 162. If the answer to that largely legal question is yes, then the two offenses are allied offenses of similar import and, absent any additional factual findings by the trial court, the defendant may only be convicted of one. R.C. 2941.25(A). This is the starting point for any sentencing of allied offenses. If the trial court never goes any further, it is constrained as a matter of law to impose a single sentence.

The second step of the analysis involves a consideration of the particular facts of the case and, if certain facts are found, the trial court is empowered to impose individual sentences upon each allied offense. The trial court may impose individual sentences on allied offenses if it finds that the offenses were “committed separately or with a separate animus as to each.” R.C. 2941.25(B); *see also Johnson*, 128 Ohio St. 3d at 163 (explaining that individual sentences can be imposed on allied offenses if they were “not committed with the same conduct, i.e. ‘a single act, committed with a single state of mind.’”)

Both *Underwood* and *Johnson* make clear that it is the trial court’s responsibility to determine whether separate sentences can be imposed on allied offenses. *Id.*, at 371 (“court’s duty to merge those allied counts at sentencing” is “mandatory, not

discretionary.”). *Accord, Johnson*, at ¶ 47 (“Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct.”).

Essentially, R.C. 2941.25 imposes a requirement that a trial court make certain findings (i.e. separate animus, separate conduct) if it intends to impose separate sentences on allied offenses of similar import. Absent such findings, the trial court is constrained to impose a single sentence.

If a trial court imposes separate sentences on allied offenses without holding a hearing or making the requisite findings, then the sentence it imposed is unauthorized by law and/or contrary to law. And the resulting sentence must be reversed on appeal. Ohio’s appellate courts have almost uniformly followed this approach. In addition to the 11 judges of the Eighth District in *Rogers*, most other appellate districts have held that, when two offenses meet the first prong of the *Johnson* test, a trial court errs when it imposes separate sentences without addressing the issue of allied offenses at sentencing. This majority view has been expressed by the Second, Fourth, Seventh, and Eleventh Districts. Each of these Appellate Districts have held that, once the first prong of the *Johnson* test is met, the case must be remanded to the trial court if the record does not establish that the offenses were committed separately or with separate animus. *See State v. Cleveland*, 2nd Dist. App. No. 24379, 2011-Ohio-4868, ¶20 (“We hold, in this case, that where the record suggests that multiple offenses of which a defendant has been found guilty may be allied offenses of similar import under R.C. 2941.25, but is inconclusive in that regard, it is plain error for the trial court not to conduct the necessary inquiry to determine whether the offenses are, in fact, allied offenses of similar import.”); *State v. Miller*, 11th Dist. App. No. 2009-P-0090, 2011-Ohio-1161, ¶¶ 56-57, n.1 (“Also, it is worth noting that waiver is not an issue

under these circumstances. The Supreme Court of Ohio has held that the failure to merge allied offenses of similar import rises to the level of plain error.”); *State v. Williams*, 7th Dist. App. No. 11 MA 131, 2012-Ohio-6277, ¶ 76;³ *State v. Osman*, 4th Dist. App. No. 09CA36, 2011-Ohio-4626, ¶ 26.

The Fourth District’s decision in *Osman* provides a particularly clear expression of Ohio’s allied offense statute as interpreted by this Court in *Johnson*:

[Step One of *Johnson*] An offender could, with the same conduct, commit aggravated robbery and felony murder. Therefore, aggravated robbery and felony murder are allied offenses of similar import.

* * *

[Step Two of *Johnson*] Even though felony murder and the predicate felony (here, aggravated robbery) are allied offenses of similar import under R.C. 2941.25(A) *Osman* may still be sentenced for both crimes. In order to sentence *Osman* for both crimes, the State must show that *Osman* committed the crimes “separately or with a separate animus.” See R.C. 2941.25(B).

[Trial court must hold hearing] Because aggravated robbery and felony murder are allied offenses of similar import, we remand the present case for resentencing. On remand, the trial court should consider whether *Osman* committed felony murder separately or with a separate animus from his aggravated robbery conviction and sentence *Osman* accordingly.

2011-Ohio-4626, ¶¶ 32-35. Like the 11-member majority in *Rogers II*, the Fourth District correctly recognized that, once the first step of the *Johnson* test is met, the two offenses are allied and can only support separate sentences *if the trial court finds* that the offenses were committed separately or with a separate animus.

The minority view has been expressed by the Sixth District in *State v. Wallace*, 6th

³ The Seventh District’s decision in *Williams* clearly overrules its prior decision in *State v. Hooper*, Columbiana App. No. 03 CO 30, 2005-Ohio-7084, a pre-*Johnson* case.

Dist. No. WD-11-031, 2012-Ohio-2675.⁴ In *Wallace*, the Sixth District held, without citing any other authority or explaining its reasoning, that, although the first step of the *Johnson* was clearly met, the trial court did not commit plain error in imposing separate sentences because the “record lacks evidence upon which to determine whether the same conduct resulted in both convictions.” *Id.* at ¶ 12. This minority view fails to appropriately recognize that the trial court’s sentencing authority is limited to imposing one sentence on allied offenses of similar import *unless* the record actually contains evidence that the offenses were committed separately or with a separate animus. The Sixth District’s approach permits sentences that exceed the duration authorized by the General Assembly and thus violate Double Jeopardy.

D. A defendant’s guilty plea does not forfeit or waive any allied offense issues.

The State’s primary argument is that, when a defendant pleads guilty in a multiple offense case, he necessarily waives any argument that any of the offenses are allied offenses of similar import. The argument that a guilty plea waives an allied offense issue, that is not ripe until sentencing, is illogical and has already been rejected by this Court. Ohio’s allied offense statute, R.C. 2941.25, requires the merger of allied offenses regardless of whether guilt is established by a plea or by a trial verdict. *See Underwood*, 124 Ohio St. 3d at 370 (“A defendant’s plea to multiple counts does not affect the court’s

⁴ Although the State also cites to the First District’s decision in *State v. Wessling*, 1st Dist. No. C-110193, 2011-Ohio-5882 as support for its position that an allied offense claim must fail unless the record is fully developed, the First District recently adopted a modified position in *State v. Anderson*, 1st Dist. No. C-110029, 2012-Ohio-3347. In *Anderson*, the First District held that, even when the defendant does not adduce a record in support of an allied offense argument, it could make an allied offense determination by reviewing “the indictment, bill of particulars, and plea-hearing materials, including a recitation of the facts surrounding the offenses, to determine the defendant’s conduct.” 2012-Ohio-3347, at ¶ 22.

duty to merge those allied counts at sentencing.”); *State v. Sawyer* (2010), 124 Ohio St. 3d 547 (applying *Underwood* to an agreed sentence based on a guilty plea); *see also State v. Damron* (2011); 129 Ohio St. 3d 86 (holding that the offenses of felonious assault and domestic violence merged after the defendant pled guilty to those two offenses).

Ohio’s allied offense statute permits a defendant to be charged and found guilty of allied offenses of similar import but provides that the defendant “may be *convicted* of only one.” R.C. 2941.25(A) (emphasis added). A guilty plea is the functional equivalent of a jury’s verdict as both provide the trial court the basis to enter a finding of guilt and to sentence the defendant. There is nothing in R.C. 2941.25(A) that explicitly or implicitly limits its application to convictions resulting from a trial. Indeed, such an interpretation would lead to absurd results whereby a defendant benefits by the mere fact that he was found guilty after a trial. For instance, a defendant, who has been charged with two first-degree felony offenses for drug possession and drug trafficking (in violation of R.C. 2925.03(A)(2)) involving the same controlled substance, would have perverse incentive to go to trial even if there is no question about guilt. If that defendant pleads guilty, he or she faces, under the State’s proposed rule, two convictions and 22 years in prison. If that same defendant is convicted after a trial, he or she would, pursuant to *State v. Cabrales* (2008), 118 Ohio St. 3d 54, only receive one conviction and would face a maximum prison sentence of eleven years. Such an absurd outcome cannot have been intended by the General Assembly. Moreover, such an absurd outcome would cause the statute to violate the Fourteenth Amendment to the United States Constitution, both as a matter of due process (fundamentally unfair to penalize a defendant at sentencing for accepting

responsibility and pleading guilty), and equal protection (irrational to penalize those who accept responsibility and plead guilty vis-à-vis those who go to trial).

In arguing that a defendant waives all allied offense arguments by pleading guilty, the State relies on several cases that stand for the general proposition that a properly entered guilty plea “waives all non-jurisdictional defects.” (State’s Br. at 14). This legal principle does not, however, have any bearing on the application of the allied offense statute. There is no “defect” in charging an individual with allied offense or with an individual pleading guilty to allied offenses. R.C. 2941.25 clearly permits that. The defect only arises if the defendant is *convicted* of multiple allied offenses. Under Ohio law, a “conviction” does not occur “until sentence is imposed.” *See State v. Carter* (1992), 64 Ohio St. 3d 218, 222. The “defect” of imposing separate sentences upon allied offenses does not arise until the sentencing hearing, *after* the defendant entered his or her guilty plea. Because there is no allied offense defect for the defendant to waive at the time he or she pleads guilty, the State’s reliance on case law, regarding the waiver of non-jurisdictional defects by guilty pleas, is misplaced.

Moreover, the State’s argument that a guilty plea waives any issue regarding a conviction for allied offenses ignores the reality that such a rule could result in sentences contrary to law and two convictions where the law only permits one. When two offenses are allied offenses of similar import, any consecutive sentence that exceeds the maximum sentence on a single offense exceeds the punishment authorized by law.

Such a sentence, beyond the maximum allowed by the law, is void and a nullity. *See State v. Beasley* (1984), 14 Ohio St. 3d 74, 75; *see also State v. Payne* (2008), 114 Ohio St.3d 502, 508 n.3 (“It is axiomatic that imposing a sentence outside the statutory range,

contrary to the statute, is outside a court's jurisdiction, thereby rendering the sentence void ab initio.") As such, the illegality of the sentence can be raised at any time, including for the first time on appeal or even in a collateral proceeding. *Cf. State v. Simpkins* (2008), 117 Ohio St. 3d 420 (allowing the correction of a void sentence more than seven years after it was imposed and well after the time for direct appeal had expired). Moreover, even if the sentence did not exceed the maximum permitted by law, this Court has repeatedly made clear that R.C. 2941.25 prohibits multiple convictions on allied offenses, even when concurrent sentences were imposed. See e.g. *State v. Whitfield* (2010), 124 Ohio St. 3d 319, 324; *Damron*, 129 Ohio St. 3d at 89.

In sum, allied offense determinations must be made by the trial court at sentencing regardless of whether the defendant pled guilty or was found guilty after a trial. The State's proposed rule that a guilty plea forecloses an allied offense determination is contrary to law and causes absurd results.

E. Because a trial court may not impose sentences unauthorized by law, it has an independent duty to merge allied offenses regardless of whether the issue is raised by the parties.

As discussed *supra* in Sections A to C, a trial court has an independent obligation to merge allied offenses regardless of whether the issue is raised by the parties. Because R.C. 2941.25 provides a limitation on the sentencing authority of the trial court, a trial court can no more impose multiple sentences on allied offenses than it can impose 10 years on a felony of the fifth degree. Neither sentence is authorized by law and both must be reversed on appeal.

In its alternative argument, the State argues that a defendant's silence at his sentencing hearing on the issue of allied offenses constitutes a forfeiture of his protection

against Double Jeopardy and effectively authorizes the trial court to impose punishment beyond what is authorized by the General Assembly. The principle basis for the State's argument is a short statement from this Court's decision in *State v. Comen* that the defendant's failure to raise an allied offense issue in the trial court "constitutes a waiver of the error claimed." (1990), 50 Ohio St. 3d 206, 211. *Comen* is not good law for several reasons and, even if it were, it is not controlling in this case.

1. *Comen* was overruled by *Underwood*: Silence does not constitute a waiver of a defendant's fundamental constitutional right to be free from impermissible multiple punishments.

In *Underwood*, this Court held that a defendant's silence at sentencing does not constitute a waiver of an allied offense argument. 124 Ohio St.3d at 372. *Underwood* went so far as to recognize that a defendant cannot even waive a right to appeal a sentence by agreeing to serve a fixed sentence encompassing multiple convictions for allied offenses of similar import because such a sentence is not "authorized by law." *Id.* at 371-72.

Underwood thus overruled *Comen*'s statement that a defendant waives an allied offense issue by not raising it in the trial court.

This Court's decision in *Underwood* is sound law. Ohio's allied offense statute "incorporates the constitutional protections against double jeopardy" including multiple punishments for the same offense. *State v. Whitfield* (2010), 124 Ohio St. 3d 319,321. By enacting R.C. 2941.25, Ohio's General Assembly has defined when multiple punishment is forbidden (R.C. 2941.25(A)) and when it is allowed (R.C. 2941.25(B)). *Id.* Thus, where two offenses constitute allied offenses of similar import, the Double Jeopardy Clause forbids the imposition of separate sentences and convictions for both offenses. *Id.* at 323.

Because Ohio's allied offense statute incorporates a fundamental constitutional right,

a defendant cannot waive that fundamental constitutional protection by silence. *Underwood*, 124 Ohio St. 3d at 372. On the contrary, both this Court and the United States Supreme Court have repeatedly held that “courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights.” *Johnson v. Zerbst* (1938), 304 U.S. 458, 464; *State v. Adams* (1989), 43 Ohio St. 3d 67, 69; *Underwood*, 124 Ohio St. 3d at 372. For a waiver of a constitutional right to be effective, it must be shown that there was “an intentional relinquishment of a known right or privilege.” *Adams*, 43 Ohio St. 3d at 68 (*quoting Zerbst*, 303 U.S. at 464). “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.” *Id.* (*quoting Brady v. United States* (1970), 397 U.S. 742, 748). A waiver of a fundamental constitutional right will not be presumed from a “silent record.” *State v. Wellman* (1974), 37 Ohio St. 2d 162, 171 (*citing Carnley v. Cochran* (1962), 369 U.S. 506, 516).

For a defendant to waive the double jeopardy protections embodied in Ohio’s allied offense statute, the record must establish that the defendant “was informed that he was agreeing to be convicted of allied offenses, thereby waiving his constitutional right to be free from double jeopardy.” *Underwood*, 124 Ohio St. 3d at 372. The record in this case, which is silent on the issue of allied offenses, clearly does not establish knowing and intelligent waiver by Rogers of his constitutional right to be free from double jeopardy.

2. *Comen* is distinguishable because it involved two offenses that could not be committed with the same conduct.

Even if this Court did not overrule *Comen* with *Underwood*, *Comen* does not control the outcome of this case. *Comen* dealt with two crimes (aggravated burglary and receiving

stolen property) which, on their respective faces, could never be committed with the same conduct. It is not possible for a defendant to commit aggravated burglary (breaking into a dwelling to commit a felony, either with a dangerous weapon or during which physical harm was caused) while at the same time and with the same conduct, receive stolen property. See, e.g., *State v. Frazier*, 58 Ohio St.2d 253, 389 N.E.2d 1118 (1979) (aggravated burglary completed once defendant entered the home, before aggravated robbery committed inside the home; offenses not allied). Because these two offenses fail the first step of the *Johnson* test, they are not allied offenses of similar import and there would be no need for any further inquiry at the sentencing hearing. Because aggravated burglary and receiving stolen property can never be allied offenses of similar import, a trial court has the authority to sentence a defendant on both without any allied offense inquiry and without making any additional findings. Put in terms of the Eighth District's decision, a "facial review of the charges and the elements of the crimes [does not] present a viable question of merger," *Rogers II*, and so no allied offense inquiry is required.

3. A trial court commits plain error when it imposes separate sentences on allied offenses without making the determination that the offenses were committed separately or with a separate animus.

As discussed in detail above, *Rogers* maintains that R.C. 2941.25 imposes a statutory and constitutional limitation on the sentencing authority of the trial court. Pursuant to R.C. 2941.25, *Johnson*, and *Underwood*, a trial court cannot impose separate sentences on two offenses that *can* be committed with the same conduct *without* finding that the offenses were committed separately or with a separate animus. Its imposition of separate sentences on allied offenses of similar import without these findings is plain error.

In its brief, the State continually asserts that the Eighth District reversed the trial

court “on the mere possibility that error occurred.” (State’s Br. at 18-25). That is not accurate. The error here is that the trial court imposed separate sentences for allied offenses of similar import without determining whether those separate sentences were authorized by law. Such an error is similar, though obviously a more serious constitutional error, to imposing consecutive sentences without making the statutorily required findings. Regardless of whether the defendant formally objects to consecutive sentences, the trial court is still not authorized to impose them without making certain findings. Likewise, regardless of whether the defendant formally objects to separate sentences for allied offenses, the trial court is still not authorized to impose them without making certain findings. “Every judge has a *duty* to impose lawful sentences” and a concomitant duty to correct unlawful ones. *Simpkins* (2008), 117 Ohio St. 3d at 425-26 (emphasis added).

If this Court were to accept the State’s limited view of plain error, it would effectively legitimize illegal sentences. By remanding Rogers’ case to the trial court, the Eighth District is simply ensuring that the trial court imposes a sentence authorized by the General Assembly and that Rogers does not relinquish his Double Jeopardy rights by silence. If the offenses were committed with a separate animus, then the separate sentences are justified. If, however, the offenses were not committed separately or with a separate animus, then Rogers is presently serving an illegal sentence. If the latter is the case, then the legal rule proposed by the State not only offends Rogers’ constitutional rights but also contravenes the punishment specifically authorized by the General Assembly. It will also spur unnecessary additional litigation as the defendant, without the benefit of appointed counsel, attempts to pursue other remedies to correct the illegally imposed sentence.

F. Application of *Underwood* and *Johnson* to the instant case.

1. The truck case: *It is possible to commit, with the same conduct, two receiving stolen property offenses (when the property belongs to the same owner) and possession of criminal tools.*

The State does not contest the Eighth District's determination that it was possible Rogers to have committed the multiple offenses in the truck case with the same conduct. Accordingly, if this Court agrees that a trial court must address allied offense issues when it is possible to commit multiple offenses with the same conduct, then this Court should affirm the Eighth District's remand of the truck case to the trial court for a new sentencing hearing.

2. The jewelry case: *It is possible to commit, with the same conduct, two receiving stolen property offenses when the stolen property belongs to different owners.*

In the jewelry case, Frank Rogers pled guilty to receiving stolen property belonging to two different owners. Despite the fact that Rogers receipt of the stolen property occurred on the same day, the Eighth District held that “[s]eparate victims alone established a separate animus for each offense” even if the defendant “cannot distinguish one victim’s goods from another’s.” *Rogers II*, 2013-Ohio-3235, at ¶ 22. In short, the Eighth District established a bright-line rule that, even if a defendant receives stolen property in a single transaction, he can be convicted and sentence on as many offenses as there are different owners. The Eighth District’s holding on this point violates R.C. 2941.25, is inconsistent with R.C. 2913.51 and 2913.61, and should be reversed by this Court.

- a. *R.C. 2913.61 does not permit multiple sentences for stolen property received at the same time merely because the property belonged to multiple owners.*

When a defendant receives stolen property in a single transaction, he commits a single crime regardless of whether the property belonged to different owners. The offense

of receiving stolen property is defined by the type and amount of property and not in terms of the specific owners of that property. Indeed, the General Assembly has enacted a specific statute, R.C. 2913.61, that provides for the aggregation of property involved in a “theft offense,” including receiving stolen property.⁵

R.C. 2913.61(B) provides in pertinent part:

If more than one item of property or services is involved in a theft offense . . . , the value of the property or services involved for the purpose of determining the value as required by division (A) of this section is the aggregate value of *all property* or services involved in the offense.

Thus, when a defendant receives stolen property at the same time, he commits a single offense, the seriousness of which is defined by the aggregation of the value of all the stolen property. Indeed, were the rule otherwise, then the State’s ability to prosecute more serious violations of receiving stolen property would be severely hampered and more culpable criminal defendants could receive less serious sentences by serendipity alone. A defendant who knowingly received stolen jewels valued at eight thousand dollars could only be prosecuted with first-degree misdemeanors if the jewelry belonged to enough separate owners so that no individual lost more than \$999.99. At the same time, a defendant could be convicted of a felony offense for receiving stolen jewels valued at one thousand dollars if the jewels all came from the same owner. The General Assembly enacted R.C. 2913.61(B) to avoid such an irrational result.

b. *Even if R.C. 2913.61(B) did not require the aggregation of stolen property received in a single transaction, Ohio’s allied offense statute requires that the offenses be merged into a single conviction.*

Even if there was not a specific statute that required the accumulation of stolen

⁵ Theft offense is defined to include the offense of receiving stolen property, in violation of R.C. 2913.51. R.C. 2913.01(K).

property received in a single transaction, such offenses are nonetheless allied offenses of similar import, pursuant to R.C. 2941.25. With respect to the first step of the *Johnson* allied offense analysis, there is no serious dispute that it is “possible” for a defendant to receive stolen property belonging to multiple owners with the same conduct. Indeed, neither the Eighth District nor the State contends otherwise. The only question in this case is whether, as a matter of law, a single act of receiving stolen property can result in multiple convictions for receiving stolen property merely because the property happened to belong to multiple owners. The Eighth District established a bright-line rule that “[s]eparate victims alone established a separate animus for each offense” even if the defendant “cannot distinguish one victim’s goods from another’s.” *Rogers II*, 2013-Ohio-3235, at ¶ 22. The Eighth District’s bright-line rule is inconsistent with Ohio’s allied offense statute and should be rejected by this Court.

The fundamental purpose of R.C. 2941.25 is “to prevent shotgun convictions, that is multiple findings of guilt and corresponding punishments heaped on a defendant for closely related offenses arising from the same occurrence.” *Johnson*, 128 Ohio St. 3d at 161. When in “substance and effect but one offense has been committed,” the defendant may be convicted of only one offense. *Id.* at 162-63.

Receiving stolen property provides a prototypical example of situation where “shotgun convictions” could result, absent R.C. 2941.25, from a single act of criminal conduct based on nothing more than pure happenstance. When one knowingly receives stolen property, he or she is not committing a criminal act with a separate animus against any and all owners of that property. Rather, the criminal act is committed with a singular animus—a knowing possession of property that belongs to another. The criminal offense

of receiving stolen property does not depend on and is unrelated to any knowledge regarding the ownership of the property other than it was “obtained through the commission of a theft offense.” R.C. 2913.51.

Most courts that have addressed this issue have held that a single act of receiving stolen property can result in only a single conviction regardless of how many individuals had an ownership interest in the property. *See e.g. State v. Sanders* (1978), 59 Ohio App. 2d 187 ; *State v. Hankerson*, 1st Dist. No. C-800542, 1981 WL 9939, *aff’d State v. Hankerson* (1982), 70 Ohio St. 2d 87;⁶ *State v. Wilson* (1985), 21 Ohio App. 3d 171; *State v. Nixon*, 8th Dist. No. 47582-84, 1984 WL 5588, *2 (holding that five receiving stolen property counts for property belong to five different people or entities “may still be allied where the defendant has no knowledge of the number of thefts and the property is received in a single continuous transaction from the same source at the same time.”). Indeed, this legal proposition is so uncontroversial that it has previously be conceded by some prosecutor’s offices on appeal. *See e.g. State v. Konstantinov*, 5th Dist. No. 09 CAA 090075, 2010-Ohio-3098, ¶¶ 5 and 11-12 (noting that the State conceded that three counts of stolen property based on the receipt of clothing stolen from three different stores were allied offenses of similar import).

The Ninth District’s decisions in *Sanders* and *Wilson* are particularly analogous to the circumstances in this case. In *Sanders*, the Ninth District held that four receiving stolen property offenses involving the property of different owners should merge as allied offenses

⁶ In *Hankerson*, the State did not cross-appeal the First District’s allied offense determination and so this Court did not specifically address it. 70 Ohio St. 2d at 93-94 (“The State not having cross-appealed the Court of Appeals’ holding that the two counts [of receiving stolen property] were offenses of similar import, the judgment of the Court of Appeals is affirmed.”).

because the State “offered no evidence to show that the defendant harbored a separate animus toward each individual, or that [the defendant] participated in the original theft offenses.” 59 Ohio App. 2d at 191. Similarly, in *Wilson*, the Ninth District held that the trial court erred in failing to merge three receiving stolen property offenses involving the property of three different owners. 21 Ohio App. 3d at 172. Like the instant case, the property was reported stolen in two separate burglaries, and, like the instant case, the State did not present evidence that the defendant participated in the burglaries. *Id.* And, because the State had no evidence to suggest that the defendant had separately received or disposed of the property, the Ninth District held that they must merge. *Id.* Rogers’ two offenses of receiving stolen jewelry should likewise merge.

In its brief, the State argues that, while “Rogers may have had a single goal of selling the stolen items to a Lakewood pawnshop,” he can be convicted of two offenses because the property belonged to two different people. (State’s Br. at 31-32). In explaining why the number of owners is significant, the State relies on the erroneous reasoning of the Eighth District that, despite the fact that the defendant “cannot distinguish one victim’s goods from another’s,” his singular criminal act impacts “multiple victims.” *Rogers II* at ¶ 22. The Eighth District’s reasoning is misplaced because it squarely ignores the animus of the defendant and looks instead to the impact of the criminal conduct. To justify the imposition of separate sentences for offenses committed with the same conduct, the State must show that the defendant acted with separate animus. And a separate animus cannot be established by the mere fact that the defendant received property that, unbeknownst to him, belonged to different owners.

Moreover, this Court’s decision in *State v. Jones* (1985), 18 Ohio St. 3d 116 does

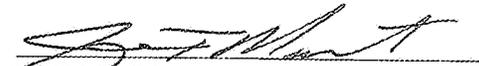
not compel a different result. In *Jones*, this Court held that a defendant may be convicted of two counts of aggravated vehicular homicide “for each person killed as the result of a single instance of that individual’s reckless operation of his vehicle.” *Id.* at 117-18. In reaching this conclusion, this Court emphasized that R.C. 2903.06 is a “homicide statute” where the prohibited conduct is not the act of driving recklessly but rather the act of “recklessly causing the death of another.” *Id.* Because the General Assembly choose to specifically criminalize the conduct as a homicide, this Court found that it intended to authorize separate convictions for each person killed by a reckless driver. *Id.*

Here, on the other hand, no reasonable construction of the receiving stolen property statute could lead to a conclusion that the General Assembly intended to authorize separate conviction for each person who had an ownership interest in stolen property received by an individual. Indeed, receiving stolen property is not defined in terms of conduct against another, but rather in terms of conduct against property. And its penalties are determined on the aggregation of all of the property received regardless of the existence of multiple owners. In this regard, the property-related crime of receiving stolen property can be analogized to burglary. As explained in *State v. Mariott*, the crime of burglary “punish[es] trespasses into structures” and “is not meant to criminalize an offender’s conduct toward the occupants of the structure.” (2010), 189 Ohio App. 3d 98, 103 and 107. The number of people inside the home is “immaterial;” there is a single burglary regardless of the number of people inside the home. *State v. White*, Cuyahoga App. No. 92972, 2010-Ohio-2342, at ¶¶ 42-43. Like burglary, which criminalizes conduct committed against the home of another, receiving stolen property criminalizes conduct committed against the property of another. The number of people who own the home or own the property is irrelevant.

CONCLUSION

For the reasons set forth above, Frank Rogers respectfully requests that this Court affirm the Eighth District's decision in part, and reverse it in part. Specifically, this Court should affirm the Eighth District's holding that "[w]here a facial question of allied offenses of similar presents itself, a trial court judge has a duty to inquire and determine under R.C. 2941.25 whether those offenses should merge" and his or her failure to do so constitutes reversible error. *Rogers II* at ¶ 63. However, this Court should reverse the Eighth District's holding that two receiving stolen property offenses can never be allied if the property belonged to multiple owners. And Mr. Rogers respectfully requests that this Court remand his case for a new sentencing hearing in both CR-545992 and 553806.

Respectfully submitted,


CULLEN SWEENEY, ESQ.
JOHN T. MARTIN, ESQ.
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing was served upon Timothy J. McGinty, Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, OH 44113 by ordinary mail on this 25th day of February, 2014.


CULLEN SWEENEY, ESQ.
JOHN T. MARTIN, ESQ.
Counsel for Appellant