ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee, vs. SCOTT D. CREECH, Defendant-Appellant.	: : : : : : : : :	Case No. 10-1250 On Appeal from the Scioto County Court of Appeals Fourth Appellate District Case No. 09-CA-3291

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT SCOTT D. CREECH

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

Despite this Court's clarification of allied-offenses law in *State v. Cabrales,* 118 Ohio St.3d 54, 2008-Ohio-1625, Ohio's courts of appeals continue to struggle with the application of R.C. 2941.25(A). That struggle, and the resulting disparate sentences, should alarm this Court. Because the courts of appeals have failed to apply *Cabrales* consistently, a criminal defendant may be subject to a longer sentence or a higher number of convictions based on his or her county of conviction instead of that defendant's actual conduct.

In the instant case, Scott D. Creech was convicted of both illegal assembly or possession of chemicals for the manufacture of drugs, and illegal manufacture of drugs. See R.C. 2925.041, 2925.04. This Court has never addressed whether assembly or possession of chemicals for the manufacture of drugs and illegal manufacture of drugs are allied offenses. Ohio's courts of appeals have come to conflicting results on the issue post-*Cabrales*.

Despite the fact that the Fourth District Court of Appeals reviewed Mr. Creech's convictions post-*Cabrales*, the court found that the offenses were not allied based on pre-*Cabrales* decisions in other courts of appeals. *State v. Creech*, 4th Dist. No. 09-CA-3291, 2010-Ohio-2553, at ¶21. Contrarily, the Fifth District Court of Appeals recently issued a decision holding that manufacture and assembly or possession of chemicals for manufacture are allied offenses of similar import under *Cabrales*. *State v. Stevenson*, 5th Dist. No. 09CA16, 2010-Ohio-2060.

Mr. Creech's case presents this Court with an opportunity to apply the new clarifications of R.C. 2941.25(A) and to direct Ohio's courts of appeals to correctly analyze the elements in the abstract. Moreover, the instant case presents this Court with an unsettled question of law – are

illegal assembly or possession of chemicals for the manufacture of drugs, and illegal manufacture of drugs allied offenses of similar import? Mr. Creech's case is also an opportunity to answer the open question of whether unlawful possession of a dangerous ordnance and having weapons while under disability are allied offenses when they relate to possession of the same item. See R.C. 2923.13 and 2923.17. Additionally, the instant case presents a mixed question of law and fact regarding what constitutes simultaneous, undifferentiated possession sufficient to prove a single animus for having weapons while under disability. This Court must accept jurisdiction and definitively answer these open questions.

STATEMENT OF THE CASE AND FACTS

In March 2008, Scott D. Creech's residence on Blue Run Road in Scioto County, Ohio was raided by law enforcement officers based on reports that it was a methamphetamines lab. Law enforcement officers uncovered a variety of items that suggested methamphetamine was being manufactured in the home. On April 30, 2008, Scott D. Creech was indicted by a Scioto County grand jury in case no. 08-CR-461 on one count of illegal assembly or possession of chemicals for the manufacture of drugs, a violation of R.C. 2925.041(A); one count of illegal manufacture of drugs, a violation of R.C. 2925.04(A)&(C)(2); three counts of having a weapon while under disability, violations of R.C. 2923.13(A); three counts of unlawful possession of a dangerous ordnance, violations of R.C. 2923.17(A); one count of illegal manufacturing or processing explosives, a violation of R.C. 2923.17(B); and one count of trafficking in methamphetamines, a violation of R.C. 2925.03(A)&(C)(1)(A).

Mr. Creech was assigned court-appointed counsel and elected to go to trial. A jury found Mr. Creech guilty of all charges except for trafficking in methamphetamines, which the State

voluntarily dismissed. On October 10, 2008, Mr. Creech was sentenced to an aggregate term of nineteen years of incarceration.

Following the grant of a motion for leave to file a delayed appeal, Mr. Creech took a direct appeal from his conviction. The Fourth District Court of Appeals affirmed in part and reversed in part Mr. Creech's convictions. *State v. Creech,* 4th Dist. No. 09-CA-3291, 2010-Ohio-2553. Specifically, the court agreed that Mr. Creech's convictions for unlawful possession of a dangerous ordnance were allied offenses of similar import and should merge. Id. at ¶37. The court also agreed that most of Mr. Creech's convictions for having a weapon while under disability were allied and should merge[1]. Id. at ¶27. However, the court of appeals held that Mr. Creech's other convictions were not allied offenses. The instant appeal follows.

ARGUMENT

PROPOSITION OF LAW I

When committed with a single animus, illegal assembly or possession of chemicals for the manufacture of drugs and illegal manufacture of drugs are allied offenses of similar import and must merge for sentencing purposes. R.C. 2941.25(A); *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625.

Ohio Revised Code Section 2941.25(A) provides that "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." In *State v. Rance,* 85 Ohio St.3d 632, 1999-Ohio-291, this Court held that to determine whether crimes are allied offenses of similar import under R.C. 2941.25(A),

[1] The court of appeals held that Counts Four, Five, and Six for having a weapon while under disability were allied, but further held that Count Three was committed separately. Id. at ¶25. (See Proposition of Law III).

courts must assess "whether the statutory elements of the crimes correspond to such a degree that the commission of one crime will result in the commission of the other." Id. at 638.

In clarifying an abstract analysis of the elements, this Court affirmed the First District Court of Appeals' decision holding that possession and trafficking of drugs are allied offenses of similar import. *State v. Cabrales,* at ¶23, 31. In *Cabrales, this Court* held that when two offenses correspond so that the commission of one necessarily results in the commission of the other, and when they share the same animus, a criminal defendant can be charged with both allied offenses but convicted of only one. Id. at ¶14, 23, citing *Maumee v. Geiger* (1976), 45 Ohio St.2d 238, 242. This Court further clarified that a strict textual comparison of the elements was not appropriate. *Cabrales,* at ¶23.

Here, Scott D. Creech was found guilty of both illegal assembly or possession of chemicals for manufacture of drugs and illegal manufacture of drugs. See R.C. 2925.041, 2925.04. The finding of guilt was based on multiple chemicals taken from Mr. Creech's residence, including ammonia, ethanol, ether, pseudoephedrine blister packs, and drain cleaner. Mr. Creech was sentenced to five years of incarceration for the illegal assembly or possession count and six years of incarceration for illegal manufacture of drugs. The sentences were ordered to be served concurrently.

Assembly or possession requires knowingly assembling or possessing one or more chemicals that may be used to manufacture a controlled substance with the intent to manufacture a controlled substance. R.C. 2925.041(A). Manufacturing requires knowingly manufacturing or engaging in **any part of the production** of a controlled substance. R.C. 2925.04(A). (Emphasis added.) Because possessing or assembling chemicals for the manufacture of drugs is a part of the production of making drugs, these two offenses correspond to such a degree that manufacture

of drugs cannot take place without the illegal assembly or possession of chemicals for the manufacture of drugs. See *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, at ¶25-28 (finding that felonious assault is an allied offense of attempted murder, because one is encompassed by the other, although the elements do not align exactly).

Without possessing the chemicals needed for the manufacturing of methamphetamines, there could be no manufacturing of methamphetamines. Assembly or possession of chemicals is a preliminary step in the manufacturing process. Its animus is the same as manufacturing – to make drugs. The commission of manufacturing necessarily encompasses the commission of assembly or possession of chemicals to manufacture. Otherwise, the manufacturing process would not be possible. Because both crimes were committed with the same animus – the creation of methamphetamines – these offenses are allied and must be merged. This Court must grant jurisdiction in this case and further clarify the application of *Cabrales* to the instant offenses.

PROPOSITION OF LAW II

When convictions for having weapons while under disability and unlawful possession of a dangerous ordnance relate to the same item, they are allied offenses of similar import and must merge for sentencing purposes. R.C. 2941.25(A); *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625.

Multiple convictions for having weapons while under disability and unlawful possession of a dangerous ordnance are allied offenses of similar import when they are relate to the same item. Under *Cabrales*, an abstract comparison of the elements shows that the offenses are allied. Having weapons while under disability requires a person to "knowingly acquire, have, carry, or use any firearm or **dangerous ordnance**...." R.C. 2923.13. (Emphasis added.) Likewise, unlawful possession of a dangerous ordnance requires a person to "knowingly acquire, have,

carry or use any dangerous ordnance." R.C. 2923.17. A comparison of the two statutes reveals that the elements are the same.

Here, the grounds for the unlawful possession of dangerous ordnance charges (Counts Seven through Nine) and for the having weapons while under disability charges (Counts Four through Six) stemmed from the same acts of possession. In Counts Five and Seven, Mr. Creech was alleged to have possessed ammonium nitrate. In Counts Four and Nine, he was alleged to have possessed a detonation cord, and in Counts Six and Eight he was alleged to have possessed blasting caps. These were not separate acts of possession, but rather possession of the same items that improperly served as the basis for two separate charges.

Because the elements of unlawful possession of a dangerous ordnance are encompassed in the statute for having weapons while under disability, the crimes are necessarily committed with the same animus when the same items are involved. The identical language of the statutes means that any defendant who knowingly acquires, has, carries, or uses a dangerous ordnance is guilty of both having weapons while under disability and unlawful possession of a dangerous ordnance. Therefore, unlawful possession of dangerous ordnance and having weapons while under disability are allied offenses of similar import and should merge.

Under R.C. 2941.25(A), while the State was free to indict Mr. Creech on multiple offenses, he can only be convicted of one. His singular act of possessing any of these items can result in only one conviction. This is a question of first impression for this Court, and jurisdiction must be granted to answer this open question of law.

PROPOSITION OF LAW III

A defendant's possession of weapons is simultaneous and undifferentiated when those weapons are recovered from the same residential property, making them allied offenses. R.C. 2941.25(A); *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625.

Counts Three through Six of Mr. Creech's indictment were for having weapons while under disability. Count Three was based on the discovery of a firearm in Mr. Creech's bedroom. Counts Four through Six were based on the discovery of a detonation cord, ammonium nitrate, and blasting caps in an ammunition box in the yard of the property. Because possession of each item was charged as having weapons while under disability, the elements for each charge already align. As the elements align, the next step is to determine if the possession was committed with a single animus. *Cabrales*, at ¶31.

Here, Mr. Creech's possession of a firearm in his bedroom (Count Three) was simultaneous to and undifferentiated from possession of the other three items (Counts Four-Six) found in an ammunition box on the property. Law enforcement officers testified that evidence was found throughout the house, back porch, and yard during the raid. That testimony indicated that Mr. Creech used his entire residence – house, porch, and yard – as a continuous space for manufacturing of drugs. All of the weapons seized were alleged to be used for the same purpose or animus – furthering the manufacture of drugs. Therefore, the possession of the firearm was simultaneous to and undifferentiated from possession of the items in the ammo box. The four charges constitute one allied offense and should have been merged at sentencing.

This Court must accept jurisdiction and clarify the instant point of law. Thus far, the terminology "simultaneous and undifferentiated" has been used by Ohio's courts of appeals to analyze whether there is a single animus, but that language has not been discussed or analyzed

by this Court. Mr. Creech's case presents this Court with an opportunity to synthesize the lower courts' use of the term "simultaneous and undifferentiated" with further clarification of the single animus step of the allied-offenses analysis.

PROPOSITION OF LAW IV

A defendant is deprived of the effective assistance of counsel when his trial counsel fails to raise an objection to allied offenses of similar import at sentencing. Sixth Amendment to the United States Constitution; Section 10, Article I of the Ohio Constitution. *Strickland v. Washington* (1984), 466 U.S. 668.

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance caused prejudice. *Strickland v. Washington* (1984), 466 U.S. 668. See *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. *Strickland* established a two-prong test for determining whether a defendant has been deprived of the right to the effective assistance of counsel. First, a defendant must show that counsel's performance was deficient. Id. at 687. Second, the defendant must show that the deficient performance prejudiced the outcome. Id. The test for determining prejudice is whether there is a reasonable probability that but for counsel's unprofessional error, the result of the proceedings would have been different. Id. at 694.

Trial counsel's failure to object to the imposition of multiple sentences for allied offenses of similar import committed with a single animus was ineffective assistance. Mr. Creech was impermissibly sentenced to multiple sentences for allied offenses of similar import that were committed with a single animus. See *Cabrales*. Trial counsel failed to object to the trial court's imposition of separate sentences for illegal assembly or possession of drugs for the manufacture of drugs and illegal manufacture of drugs, as well as for having weapons while under disability and unlawful possession of dangerous ordnance. See Propositions of Law I, II, and III. His

failure amounted to deficient performance. *Strickland*, 466 U.S. at 694. There could have been no sound trial strategy for failing to object. The result of trial counsel's omission was that Mr. Creech was convicted of multiple crimes, and sentenced for multiple crimes, when his record should reflect only one conviction and sentence for his alleged acts. But for trial counsel's unprofessional errors, the result of the proceedings would have been different. Id.

CONCLUSION

This Court should accept Mr. Creech's appeal because it raises substantial constitutional questions, involves a felony, and is of great public and general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION was sent via regular mail to Pat Apel, Assistant Scioto County Prosecutor, 602 7th Street, Portsmouth, Ohio 45662, on this 16th day of July, 2010.

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#324271

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No.
Plaintiff-Appellee,	:	
	:	On Appeal from the Scioto
vs.	:	County Court of Appeals
	:	Fourth Appellate District
SCOTT D. CREECH,	:	
	:	Case No. 09-CA-3291
Defendant-Appellant.	:	

APPENDIX TO
MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT SCOTT D. CREECH

THE COURT OF APPEALS OF OHIO
SCIOTO COUNTY
OHIO
FILED
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Lisa D. White
CLERK OF COURTS

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 09CA3291
vs.	:	
SCOTT DAVID CREECH,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

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CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:

ABELE, J.

This is an appeal from a Scioto County Common Pleas Court judgment of conviction and sentence. The jury found Scott D. Creech, defendant below and appellant herein, guilty of: (1) the illegal assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041(A); (2) the illegal manufacture of drugs in violation of R.C. 2925.04(A); (3) four counts of having a weapon under disability in violation of R.C.

[1] Different counsel represented appellant during the trial court proceedings.

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2923.13(A); (4) three counts of unlawful possession of a dangerous ordnance in violation of R.C. 2923.17(A); and (5) the illegal manufacturing or processing explosives in violation of R.C. 2923.17(B).

Appellant raises the following assignments of error for review.

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT IMPOSED SEPARATE SENTENCES WITH REGARD TO COUNTS OF ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR THE MANUFACTURE OF DRUGS AND ILLEGAL MANUFACTURING OF DRUGS, AS THOSE COUNTS WERE COMMITTED WITH A SINGLE ANIMUS, AND THEREFORE, ARE ALLIED OFFENSES OF SIMILAR IMPORT AND MUST MERGE FOR SENTENCING PURPOSES."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT IMPOSED SEPARATE SENTENCES WITH REGARD TO MULTIPLE COUNTS OF WEAPON UNDER DISABILITY, AS THOSE COUNTS WERE COMMITTED WITH A SINGLE ANIMUS, AND THEREFORE, ARE ALLIED OFFENSES OF SIMILAR IMPORT AND MUST MERGE FOR SENTENCING PURPOSES."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT IMPOSED SEPARATE SENTENCES WITH REGARD TO MULTIPLE COUNTS OF WEAPON UNDER DISABILITY AND UNLAWFUL POSSESSION OF A DANGEROUS ORDNANCE-STEMMING FROM THE SAME ITEMS AND POSSESSED WITH A SINGLE ANIMUS, AS THOSE COUNTS ARE ALLIED OFFENSES OF SIMILAR IMPORT AND MUST MERGE FOR SENTENCING PURPOSES."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT IMPOSED SEPARATE SENTENCES WITH REGARD TO MULTIPLE COUNTS OF UNLAWFUL POSSESSION OF DANGEROUS ORDNANCE, AS THOSE COUNTS WERE COMMITTED WITH A SINGLE ANIMUS, AND THEREFORE ARE ALLIED OFFENSES OF SIMILAR IMPORT AND MUST MERGE FOR SENTENCING PURPOSES."

FIFTH ASSIGNMENT OF ERROR:

"TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF MR. CREECH'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION."

On March 20, 2008, law enforcement officers raided appellant's residence upon suspicion that it contained a methamphetamine lab. The search uncovered extensive evidence that the residence was being used to manufacture methamphetamine.

On April 30, 2008, the Scioto County Grand Jury returned an indictment charging appellant with: (1) the illegal possession of chemicals for the manufacture of drugs; (2) the illegal manufacture of drugs; (3) four counts of having a weapon while under a disability, (counts three through six); (4) three counts of unlawful possession of dangerous ordnance (counts seven through nine); (5) illegally manufacturing or processing explosives; and (6) trafficking in methamphetamine.[2]

---

[2] The trial court later dismissed the trafficking count.

After hearing the evidence, the jury found appellant guilty of: (1) the illegal possession of chemicals for manufacture of methamphetamine; (2) the illegal manufacture of drugs; (3) having a weapon (a rifle) while under disability; (4) having a weapon (detonation cord) while under disability; (5) having a weapon (sensitized ammonium nitrate) while under disability; (6) having a weapon (blasting caps) while under disability; (7) unlawful possession of a dangerous ordnance (sensitized ammonium nitrate); (8) unlawful possession of dangerous ordnance (blasting caps); (9) unlawful possession of a dangerous ordnance (detonation cord); and (10) illegally manufacturing or processing explosives.

On October 10, 2008, the trial court sentenced appellant to serve a total of nineteen years in prison as follows: (1) five years for the illegal possession of chemicals for manufacture of methamphetamine (count one); (2) six years for the illegal manufacture of drugs (count two); (3) two years for having a weapon (rifle) while under disability (count three); (4) four years on each of the three having a weapon while under disability offenses that involved the detonation cord, the blasting caps, and the sensitized ammonium nitrate (counts four through six); (5) eleven months for each of the unlawful possession of dangerous ordnance offenses (counts seven though nine); and (6) seven years for illegally manufacturing or processing explosives (count ten). The court ordered: (1) the sentences for counts one

and two to be served concurrently; (2) the sentence for count three to be served consecutively to counts one and two; (3) the sentences for counts four, five, and six to be served concurrently to each other, but consecutively to counts one and two and to count three; (4) the sentences for counts seven, eight, and nine to be served concurrently to each other and concurrent to counts four through six; and (5) the sentence for count ten to be served consecutively to counts one and two, count three, and counts four, five, and six. This appeal followed.

I

In his first four assignments of error, appellant asserts that the trial court erroneously sentenced him for allied offenses of similar import. Because the same analysis governs these four assignments of error, we have combined them.

A

STANDARD FOR DETERMINING WHETHER OFFENSES CONSTITUTE ALLIED OFFENSES OF SIMILAR IMPORT

R.C. 2941.25 sets forth the statutory analysis for determining whether offenses constitute allied offenses of similar import:

> (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 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.

The Ohio Supreme Court has interpreted R.C. 2941.25 to involve a two-step analysis:

> "'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 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.'"

State v. Harris, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, at ¶10, quoting State v. Blankenship, 38 Ohio St.3d 116, 117, 526 N.E.2d 816; see, also, State v. Winn, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154; State v. Cabrales, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, at ¶14.

To determine whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts must "compare the elements of offenses in the abstract, i.e., without considering the evidence in the case * * *." Cabrales at ¶21; see, also, Harris, at ¶12. The elements need not, however, be identical for the offenses to constitute allied offenses of similar import. Winn, at ¶12. The key word is "similar," not "identical." Winn at ¶12; see, also, Harris, at ¶16 (stating that the offenses need not exactly align to constitute allied offenses). Offenses

constitute allied offenses of similar import if, "'in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other * * *.'" Winn at ¶12, quoting Cabrales at ¶22.

In Harris, a recent allied-offense-of-similar-import decision, the Ohio Supreme Court held that robbery and aggravated robbery are allied offenses of similar import and that R.C. 2903.11(A)(1) felonious assault and R.C. 2903.11(A)(2) felonious assault are allied offenses of similar import. In determining that robbery and aggravated robbery are allied offenses of similar import, the court explained:

> "Each count of robbery herein was charged under R.C. 2911.02(A)(2), which provides that no person, in attempting to commit or committing a theft offense, or fleeing immediately thereafter, shall '[i]nflict, attempt to inflict, or threaten to inflict physical harm on another.' Each count of aggravated robbery was charged under R.C. 2911.01(A)(1), which provides that no person, in attempting to commit or committing a theft offense, or in fleeing immediately thereafter, shall '[h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it.'
>
> * * * *
>
> * * * * The possession of a deadly weapon, used, shown, brandished, or made known to the victim during a theft or flight from a theft also constitutes a threat to inflict physical harm on that victim. Thus, robbery defined in R.C. 2911.02(A)(2) and aggravated robbery defined in R.C. 2911.02(A)(1) are so similar that the commission of one offense will result in commission of the other."

Id. at ¶¶15 and 17.

In State v. Winn, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, the court held that kidnapping and aggravated robbery are allied offenses of similar import. The court first examined the elements of the offenses in the abstract, and then concluded that the commission of one necessarily results in commission of the other:

> "In essence, the elements to be compared in the abstract are the restraint, by force, threat, or deception, of the liberty of another to 'facilitate the commission of any felony' (kidnapping, R.C. 2905.01(A)(2)) and having 'a deadly weapon on or about the offender's person or under the offender's control and either display[ing] the weapon, brandish[ing] it, indicat[ing] that the offender possesses it, or us[ing] it' in attempting to commit or committing a theft offense (aggravated robbery, R.C. 2911.01(A)(1)). It is difficult to see how the presence of a weapon that has been shown or used, or whose possession has been made known to the victim during the commission of a theft offense, does not also forcibly restrain the liberty of another. These two offenses are 'so similar that the commission of one offense will necessarily result in commission of the other.' Cabrales, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, paragraph one of the syllabus."

Id. at ¶21.

In State v. Brown, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, the court held that aggravated assault under R.C. 2903.12(A)(1) and (A)(2) are allied offenses of similar import, even though commission of one offense does not necessarily result in the commission of the other. The court determined that because R.C. 2903.12(A)(1) aggravated assault required proof of serious physical harm and R.C. 2903.12(A)(2) did not, the

commission of R.C. 2903.12(A)(2) would not necessarily result in the commission of R.C. 2903.12(A)(1). Instead of ending its analysis here, however, the Brown court further examined the legislative intent to determine whether the two offenses constituted allied offenses of similar import. The court stated that to determine whether the legislature intended to permit multiple punishment, a court may look to the societal interests protected under the statutes at issue. The Brown court referred to Justice Rehnquist's dissenting opinion in Whalen v. United States (1980), 445 U.S. 684, 709-711, 100 S.Ct. 1432, 63 L.Ed.2d 715, in which he wrote: "'[B]y asking whether two separate statutes each include an element the other does not, a court is really asking whether the legislature manifested an intention to serve two different interests in enacting the two statutes.'" Brown, at ¶35, quoting Whalen, 445 U.S. at 714 (Rehnquist, J., dissenting). The court stated that it has "previously considered the societal interests protected by the relevant statutes" when determining whether two offenses constitute allied offenses of similar import. Id. at ¶36. Brown noted its previous holding in State v. Mitchell (1983), 6 Ohio St.3d 416, 453 N.E.2d 593, in which the court held that aggravated burglary and theft protected different societal interests. The court explained that in Mitchell, it "acknowledged that the theft statute seeks to prohibit the nonconsensual taking of property by any means, while

the focus of the aggravated-burglary statutes seeks to minimize the risk of harm to persons." Id. at ¶36. Thus, Mitchell held that because the statutes protect different societal interests, "the General Assembly intended to distinguish the offenses of aggravated burglary and theft and permit separate punishments for their commission." Brown at ¶36. Brown ultimately concluded that R.C. 2903.12(A)(1) aggravated assault and R.C. 2903.12(A)(2) aggravated assault are allied offenses of similar import and noted that the "subdivisions set forth two different forms of the same offense, in each of which the legislature manifested its intent to serve the same interest-preventing physical harm to persons." Brown at ¶39.

In Cabrales, the court compared the elements of possession of drugs and trafficking and drugs and held that they are allied offenses of similar import. Cabrales at ¶30. The court explained:

> "To be guilty of possession under R.C. 2925.11(A), the offender must 'knowingly obtain, possess, or use a controlled substance.' To be guilty of trafficking under R.C. 2925.03(A)(2), the offender must knowingly prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, knowing, or having reason to know, that the substance is intended for sale. In order to ship a controlled substance, deliver it, distribute it, or prepare it for shipping, etc., the offender must 'hav[e] control over' it. R.C. 2925.01(K) (defining 'possession'). Thus, trafficking in a controlled substance under R.C. 2925.03(A)(2) and possession of that same controlled substance under R.C. 2925.11(A) are allied offenses of similar import because commission of the first offense necessarily results in commission of the second."

Cabrales at ¶31.

In State v. Minifee, Cuyahoga App. No. 91017, 2009-Ohio-3089, at ¶¶88-89, the court summarized the current state of the law regarding allied offenses of similar import as follows:

> "In sum, after reviewing the whirlwind of Cabrales, Brown, and Winn, we find that under the first step, court must still 'compare the elements in the abstract,' but that the elements do not have to 'exactly align' (as courts had previously interpreted Rance to mean). If when comparing the elements, 'the offenses are so similar that the commission of one will necessarily result in the commission of the other [but not both, meaning the opposite does not have to be true], then the offenses are allied offenses of similar import.' That means that if either crime 'is wholly subsumed within the other,' then the offenses are of similar import. Cabrales, at ¶39 (Fain, J., concurring).
>
> It may be helpful to state the test another way. When comparing the offenses, if either offense could not be committed without also committing the other * * * then the offenses are allied. But if both offenses require 'proof of an element that the other does not,' meaning both offenses can be committed without committing the other * * * then the offenses are not allied."

With the foregoing principles in mind, we turn to appellant's argument that several of the offenses of which the trial court convicted him constitute allied offenses of similar import.

B

PLAIN ERROR

Before we consider the merits of appellant's allied offense assignments of error, we first address the prosecution's argument that appellant's failure to object at the sentencing hearing

failed to preserve the alleged errors for appellate review.

If a defendant fails to object to multiple convictions for allied offenses of similar import, we may nonetheless recognize the error if it constitutes plain error. It is well-settled that we may notice plain errors or defects affecting substantial rights, despite an appellant's failure to bring them to the attention of the trial court. Crim.R. 52(B). Plain error exists when the error is plain or obvious and when the error "affect[s] 'substantial rights.'" The error affects substantial rights when "'but for the error, the outcome of the trial [proceeding] clearly would have been otherwise.'" State v. Litreal, 170 Ohio App.3d 670, 2006-Ohio-5416, 868 N.E.2d 1018, at ¶11, quoting State v. Barnes, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. We take notice of plain error with the utmost of caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. State v. Gardner, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, at ¶78; State v. Patterson, Washington App. No. 05CA16, 2006-Ohio-1902, at ¶13. A reviewing court should consider noticing plain error only if the error "'"seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."'" Barnes, 94 Ohio St.3d at 27, quoting United States v. Olano (1993), 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508, quoting in turn United States v. Atkinson (1936), 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555.

We have previously recognized that plain error exists when a defendant is convicted of multiple offenses that constitute allied offenses of similar import. See State v. Shaw, Scioto App. No. 07CA3190, 2008-Ohio-5910, at ¶16.

Furthermore, we observe that trial counsel objected to the imposition of multiple punishments for the offenses alleged in counts three though six and seven through nine after the prosecution presented its case, before the jury retired, and at the sentencing hearing. Consequently, appellant properly preserved these issues for appellate review. Appellant, however, did not object to the imposition of multiple punishment regarding counts one and two-the illegal possession of chemicals for the manufacture of methamphetamine and the illegal manufacture of drugs. We therefore review this argument under a plain error analysis.

C

ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR THE MANUFACTURE OF DRUGS AND ILLEGAL MANUFACTURE OF DRUGS

In his first assignment of error, appellant asserts that the trial court should have merged his convictions for the illegal assembly or possession of chemicals for the manufacture of drugs and the illegal manufacture of drugs. Pursuant to Cabrales, we begin our analysis by comparing the elements in the abstract. R.C. 2925.04(A) prohibits the illegal manufacture of drugs and states: "No person shall knowingly cultivate marijuana or

knowingly manufacture or otherwise engage in any part of the production of a controlled substance." R.C. 2925.041(A) prohibits the illegal assembly or possession of chemicals for the manufacture of drugs and states: "No person shall knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance in schedule I or II with the intent to manufacture a controlled substance in schedule I or II in violation of section 2925.04 of the Revised Code."

Thus, the elements we must compare are (1) "knowingly," (2) "manufacture or otherwise engage in any part of the production," and (3) "controlled substance," (illegal manufacture), with (1) "knowingly," (2) "assemble or possess," (3) "chemicals that may be used to manufacture a controlled substance," and (4) "intent to manufacture a controlled substance" (illegal assembly/possession).

A comparison of the elements in the abstract reveals that the elements are not so similar that the commission of one crime necessarily results in the commission of the other. A defendant can knowingly assemble or possess chemicals that may be used to manufacture a controlled substance without also knowingly manufacturing or otherwise engaging in any part of the production of a controlled substance. A defendant may assemble or may possess the ingredients to create a controlled substance without also taking the steps necessary to manufacture or engage in any

part of the production of the controlled substance. See State v. Seljan, Cuyahoga App. No. 89845, 2009-Ohio-340 (stating that R.C. 2925.04 and R.C. 2925.041 are not allied offenses of similar import because R.C. 2925.04 "prohibits many activities that could constitute otherwise engaging in any part of the production of a controlled substance"); see, also, State v. Perry, 157 Ohio App.3d 443, 2004-Ohio-3020, 811 N.E.2d 614. A defendant could manufacture or otherwise engage in the manufacture of a controlled substance without also assembling or possessing a chemical used to make that substance.

Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

D

HAVING A WEAPON WHILE UNDER DISABILITY

In his second assignment of error, appellant contends that the trial court should have merged all of the having a weapon while under disability convictions (counts three, four, five and six). The prosecution argues that count three, which involved the possession of a rifle, stands separate and apart from counts four, five, and six, which involved the possession of explosive materials found together in a single location, i.e., a green Army ammunition box. Moreover, we note that the prosecution conceded at sentencing that counts four, five, and six should merge.

We find our prior decision in State v. Pitts, Scioto App. No. 99CA2675, 2000-Ohio-1986, dispositive of this assignment of error. In Pitts, the prosecution charged the defendant with eight counts of having a weapon while under a disability. Law enforcement officers recovered seven handguns from a "pink purse" and discovered a rifle in a different location. On appeal, we held that the seven counts relating to the seven handguns merged, but that the count involving the rifle did not:

> "The [having a weapon while under disability] statute does not address whether simultaneous, undifferentiated possession of multiple firearms is one offense or multiple offenses. See State v. Woods (1982), 8 Ohio App.3d 56, 60 (making same observation with similarly-worded R.C. 2923.12, the concealed-weapons statute). Moreover, * * * the statutory language does not evince an intent to make each weapon the relevant unit of prosecution rather than the transaction of having the weapons. See State v. Hipple (May 21, 1999), Miami App. No. 98CA49, unreported. In other words, a defendant's simultaneous possession of several weapons in one location at one time is a continuous, indivisible act. Woods, supra, 8 Ohio App.3d at 60; accord State v. Foltz (June 28, 1999), Fairfield App. No. 98CA58. Thus, the simultaneous, undifferentiated possession of weapons by a person under a disability constitutes only one offense and not separate offenses for each weapon. State v. Thompson (1988), 46 Ohio App .3d 157, 159; cf. State v. Jones (May 15, 1991), Washington App. No. 89CA23, unreported (following Woods and Thompson to hold that simultaneous possession of multiple firearms in motor vehicle was one offense under R.C. 2923.16[B]).
>
> In this case, the appellant was convicted for eight separate counts for eight different weapons. The record shows that seven of these weapons (all of them handguns) were found in the same location, viz. inside a 'pink purse' in an outbuilding directly behind the appellant's dwelling house. The appellant's possession of these handguns was simultaneous and undifferentiated and could therefore constitute only one offense. Absent

> some evidence that she acquired or placed them there at different times, the trial court should have sentenced the appellant on only one violation of R.C. 2923.13 for the seven handguns alleged in counts seven through thirteen of the indictment.
>
> The trial court did not err, however, in sentencing the appellant for illegally possessing the .22 caliber rifle (count five of the indictment). The evidence established that officers found the rifle in a different outbuilding from the other guns. Because the weapon was in a different location, we cannot characterize the appellant's possession as being 'simultaneous and undifferentiated.' Having the rifle while under a disability was therefore a separate offense from having the handguns. See State v. Carna (Aug. 19, 1992), Washington App. No. 91CA32, unreported; State v. Herda (Apr. 21, 1997), Licking App. No. 96CA00127, unreported."

We find the facts in the case at bar similar to those in Pitts. Law enforcement officers recovered three items (a detonation cord, blasting caps, and ammonium nitrate) from a single location (a green Army ammunition box). The fourth item (a rifle) was located in a different location and was not in the green Army ammunition box. Therefore, appellant's possession of the rifle was not simultaneous and undifferentiated from his possession of the contents in the ammunition box. Consequently, appellant committed the having a weapon while under disability offense relating to the rifle separately from the having a weapon while under a disability offenses relating to the weapons in the ammunition box.

Appellant did not, however, commit the three other weapons offenses separately. The weapons that formed the basis for these three other offenses (counts four, five, and six) were all

recovered in the same location, i.e., an ammunition box. Appellant's possession of these three items was simultaneous and undifferentiated. Consequently, the trial court should have merged these offenses. Because the trial court sentenced appellant on each of these three offenses, we must reverse the trial court's judgment on counts four, five, and six and remand for re-sentencing.

Accordingly, we overrule appellant's second assignment of error as it relates to the trial court's failure to merge counts three with counts four, five, and six. We sustain his second assignment of error to the extent he argues that the trial court should have merged counts four, five, and six.

D

HAVING A WEAPON WHILE UNDER DISABILITY AND UNLAWFUL POSSESSION OF A DANGEROUS ORDNANCE

In his third assignment of error, appellant argues that the trial court should have merged three of the having a weapon under disability offenses (counts four, five, and six) with the three unlawful possession of a dangerous ordnance offenses (counts seven, eight, and nine). He asserts that he committed the offenses with the same animus.

The prosecution concedes that counts four, five, and six constitute allied offenses of similar import and that counts seven, eight, and nine constitute allied offenses of similar import. The prosecution does not agree, however, that the two

sets of offenses constitute allied offenses of similar import.

We begin our analysis by comparing the elements of the offenses in the abstract. R.C. 2923.13(A)(3) sets forth the offense of having a weapon under disability as charged in the case sub judice and states:

> (A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:
>
> * * *
>
> (3) The person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.

R.C. 2923.17(A) sets forth the offense of unlawful possession of dangerous ordnance as charged in the case at bar and states: "(A) No person shall knowingly acquire, have, carry, or use any dangerous ordnance."

In State v. Hines (1987), 39 Ohio App.3d 129, 529 N.E.2d 1286, the court held that the elements of having a weapon while under disability and the unlawful possession of a dangerous ordnance do not correspond to such a degree that commission of one offense will result in commission of the other. The court stated:

> "Facts establishing possession of a dangerous ordnance will not establish having a weapon while under disability in the absence of proof of the additional

> element required for establishing having a weapon while under disability, i.e., evidence of a disability as defined by R.C. 2923.13(A)(1) through (5).
>
> Facts establishing having a weapon while under disability will not necessarily establish unlawful possession of a dangerous ordnance because having a weapon while under disability can be established where any firearm or dangerous ordnance is involved, whereas unlawful possession of a dangerous ordnance is proved only by evidence of a dangerous ordnance. 'Dangerous ordinance,' as it pertains to firearms, is a subclass of 'firearm.'"

See, also, State v. Lewis (Apr. 4, 1997), Greene App. No. 96CA12; State v. Perkins (Nov. 2, 1995), Cuyahoga App. No. 68580.

We likewise conclude that having a weapon while under disability and the unlawful possession of dangerous ordnance do not constitute allied offenses of similar import. One who violates the unlawful possession of dangerous ordnance statute does not also necessarily violate the having a weapon while under a disability statute. An individual can acquire, have, carry, or use any dangerous ordnance without also acquiring, having, carrying, or using any firearm or dangerous ordnance while under a disability.

Furthermore, we believe that the two statutes protect different societal interests. See Brown, supra. The having a weapon while under disability statute applies to a defined set of individuals whom the legislature deems deserves a specific punishment for possessing a weapon. The unlawful possession of a dangerous ordnance statute applies to the public at large and prohibits anyone from possessing "any dangerous ordnance."

Consequently, the trial court did not err by failing to merge the weapons offenses with the dangerous ordnance offenses. Accordingly, based upon the foregoing reasons, we hereby overrule appellant's third assignment of error.

E

UNLAWFUL POSSESSION OF A DANGEROUS ORDNANCE

In his fourth assignment of error, appellant asserts that the trial court erred by failing to merge the three unlawful possession of dangerous ordnance offenses. The prosecution concedes the correctness of appellant's fourth assignment of error and it is hereby sustained.

Accordingly, based upon the foregoing reasons, we sustain appellant's fourth assignment of error, we reverse the trial court's judgment of conviction and sentence for counts seven, eight, and nine and hereby remand the matter consistent with this opinion.

II

In his fifth assignment of error, appellant asserts that trial counsel failed to provide effective assistance of counsel. Appellant argues that trial counsel's failure to object to the imposition of multiple punishments for allied offenses of similar import constituted ineffective assistance of counsel.

Criminal defendants have a right to counsel, including a right to the effective assistance from counsel. See McCann v.

Richardson (1970), 397 U.S. 759, 770, 90 S.Ct. 1441, 25 L.Ed.2d 763; State v. Stout, Gallia App. No. 07CA5, 2008-Ohio-1366. To establish constitutionally ineffective assistance of counsel, a defendant must show (1) his counsel's performance was deficient, and (2) such deficient performance prejudiced the defense and deprived him of a fair trial. See Strickland v. Washington (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; see, also, State v. Issa (2001), 93 Ohio St.3d 49, 67, 752 N.E.2d 904; State v. Goff (1998), 82 Ohio St.3d 123, 139, 694 N.E.2d 916. "In order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." State v. Conway, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, at ¶95 (citations omitted). "Failure to establish either element is fatal to the claim." State v. Jones, Scioto App. No. 06CA3116, 2008-Ohio-968, at ¶14. Therefore, if one element is dispositive, a court need not analyze both. See State v. Madrigal (2000), 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (stating that a defendant's failure to satisfy one of the elements "negates a court's need to consider the other").

When considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. "A properly licensed attorney is presumed to execute his duties in an ethical and competent manner." State v. Taylor, Washington App. No. 07CA11, 2008-Ohio-482, at ¶10, citing State v. Smith (1985), 17 Ohio St.3d 98, 100, 477 N.E.2d 1128. Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. See State v. Gondor, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, at ¶62; State v. Hamblin (1988), 37 Ohio St.3d 153, 156, 524 N.E.2d 476.

To establish prejudice, a defendant must demonstrate that a reasonable probability exists that, but for counsel's errors, the result of the trial would have been different. See State v. White (1998), 82 Ohio St.3d 16, 23, 693 N.E.2d 772; State v. Bradley (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, at paragraph three of the syllabus. Furthermore, courts may not simply assume the existence of prejudice, but require that prejudice be affirmatively demonstrated. See State v. Clark, Pike App. No. 02CA684, 2003-Ohio-1707, at ¶22; State v. Tucker (Apr. 2, 2002), Ross App. No. 01 CA2592; State v. Kuntz (Feb. 26, 1992), Ross

App. No. 1691.

In the case at bar, we determined in our discussion of appellant's first assignment of error that counts one and two are not allied offenses of similar import. Therefore, trial counsel's decision not to object to multiple punishments for these two offenses was reasonable. Furthermore, we determined that count three combined with counts four, five, and six do not constitute allied offenses of similar import. Therefore, trial counsel's decision not to object to multiple punishments for these offenses was reasonable. Additionally, we point out that trial counsel objected before sentencing that counts three through six should merge and that counts seven through nine should merge. Counsel's performance, therefore, was not deficient. Additionally, even if we assume for purposes of argument that counsel's performance was, in fact, deficient, we have reversed the trial court's judgment sentencing appellant for counts four through six and for counts seven through nine.

Accordingly, based upon the foregoing reasons, we overrule appellant's fifth assignment of error. Therefore, we hereby affirm in part and reverse in part the trial court's judgment and remand for further proceedings consistent with this opinion.

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART AND REMANDED
FOR FURTHER PROCEEDINGS
CONSISTENT WITH THIS OPINION.

Harsha J., concurring:

Logic and common sense tell us that possessing the chemicals for the manufacture of drugs and using those same chemicals to actually manufacture them are "so similar that the commission of one offense will necessarily result in the commission of the other." But, alas, we are duty bound to apply the law rather than either of those two processes. Thus, we will continue to reach absurd results like this one until we can use the actual facts of the case instead of comparing elements in the abstract to determine whether two offenses are allied and of similar import. See, *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, Justice Lanzinger, dissenting at ¶35.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. Appellee and appellant shall equally share the 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 Scioto County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J.: Concurs with Concurring Opinion
Kline, J.: Concurs in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

THE STATE OF OHIO
SCIOTO COUNTY, SS.
CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL DOCUMENT NOW ON FILE IN MY OFFICE WITNESS MY HAND SEAL OF SAID COURT
JUN 01 2010
BY C Shockurb DEPUTY

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.