ORIGINAL

IN THE SUPREME COURT OF OHIO

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| STATE OF OHIO, | : | No. 10-0937 |
| | : | |
| PLAINTIFF-APPELLANT, | : | On Discretionary Appeal from the Franklin County Court of Appeals Tenth Appellate District |
| v. | : | |
| | : | |
| JEREMY S. DAMRON, | : | |
| | : | Court of Appeals |
| DEFENDANT-APPELLEE. | : | Case No. 09AP-807 |

# MERIT BRIEF OF APPELLEE JEREMY S. DAMRON


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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE CASE AND FACTS ..... 1

ARGUMENT ..... 3

Proposition of Law No. I: Concurrent sentences for unmerged offenses do not equate to an unauthorized sentence under the Ohio Felony Sentencing Code ..... 3

Proposition of Law No. II: The State has failed under R.C. § 2953.08(B)(2) to establish that the sentence was contrary to law, and thus, an appeal of said sentence is meritless ..... 3

I. THIS COURT SHOULD DISMISS THIS CASE ..... 3

A Summary of Argument ..... 3

B. Discussion ..... 4

1. The State's propositions of law were not raised either to the trial court or the Tenth District ..... 4

a. The State forfeited the reviewable arguments contained in its propositions of law ..... 4

b. A discretionary appeal is not a substitute for briefing in the court of appeals ..... 7

2. The trial court complied with all the rules and statutes when it imposed the sentence ..... 7

3. The State was not adversely affected by the trial court's imposition of concurrent sentences in an attempt to effect a merger ..... 9

C. Conclusion ..... 10

II. THE TENTH DISTRICT'S DECISION SHOULD BE AFFIRMED ..... 10

A. The Trial Court Complied with *Foster*, *Kalish* and *Underwood* ..... 12

B. Concurrent Sentences instead of Merger only Affected the Appellee ..... 15

C. Felonious Assault and Domestic Violence are Allied Offenses..... 18

CONCLUSION..... 26

CERTIFICATE OF SERVICE..... 26

APPENDIX..... A

State's Brief to Tenth District Court of Appeals..... A1-A18

Appellee's Sentencing Memorandum.....A19-A29

R.C. § 2903.13..... A30-A32

TABLE OF AUTHORITIES

**Cases** **Page No.**

*Crosby-Edwards v. Ohio Bd. of Embalmers & Funeral Directors*, 175 Ohio App.3d 213, 221, 2008-Ohio-762..... 9

*Miller v. Wikel Mfg. Co.* (1989), 46 Ohio St. 3d 76..... 5

*Ohio Contract Carriers Assn., Inc. v. Pub. Utilities Comm.* (1942), 140 Ohio St. 160.....9

*Sherman v. Haines* (1995), 73 Ohio St.3d 125..... 7

*State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168..... 6

*State v. Adams*, Montgomery App. No. 22493, 2009-Ohio-2056..... 16

*State v. Barnes,* 94 Ohio St.3d 21, 27, 2002-Ohio-68..... 15-16

*State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569..... 19-21, 23-24

*State v. Burge* (Franklin App. 1992), 82 Ohio App.3d 244..... 13

*State v. Cabrales* (2008), 118 Ohio St.3d 54, 2008-Ohio-1625..... 20-22

*State v. Comen* (1990), 50 Ohio St.3d 206..... 15

*State v. Damron*, Franklin App. No. 09AP-807, 2010-Ohio-1821, ¶ 11 ("*Damron*")..... 7-8, 11, 14, 19

*State v. Dancy*, Montgomery App. No. 18541, 2001 WL 630550..... 23

*State v. Dunham*, Scioto App. No. 04CA2931, 2005-Ohio-3642..... 17

*State ex rel. Geauga Cty. Bd. of Commrs. v. Milligan*,
100 Ohio St.3d 366, 2003-Ohio-6608..... 12-13

*State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856..... 12-14

*State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323..... 18, 22, 25

*State v. Heidorn*, Hamilton App. No. C-030700, 2004-Ohio-3749..... 13

*State v. Johnson* (2008), 116 Ohio St.3d 541..... 13-14

*State v. Journey*, Scioto County App. 09CA3270, 2010-Ohio-2555..... 23-24

*State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912..... 4, 7-10, 13-15

*State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661..... 7

*State v. McClurkin*, Franklin App. No. 08AP 781, 2009-Ohio-4545..... 13

*State v. Minifee*, Cuyahoga App. No. 91017, 2009-Ohio-3089..... 15, 18, 23

*State v. Nagle* (1986), 23 Ohio St.3d 185..... 5

*State v. Rance* (1999), 85 Ohio St.3d 632..... 20

*State v. Russell*, Richland App. No. 06 CA 12, 2006-Ohio-4450..... 16

*State v. Ryan*, Franklin App. No. 08AP-481, 2009-Ohio-3235..... 22

*State v. Smith* (1991), 61 Ohio St.3d 284..... 5-6

*State v. Tatro*, Lucas App. No. L-84-308, 1985 WL 7096..... 23

*State v. Todd*, Franklin App. No. 06AP-1208, 2007-Ohio-4307..... 12

*State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1..... 13-17

*State v. Williams*, Cuyahoga App. No. 89726, 2008-Ohio-5286..... 22-23

*Tschantz v. Ferguson* (1989), 49 Ohio App.3d 9..... 9

**Constitutional Provisions** **Page No.**

U.S. Constitution, V Amendment..... 17

Ohio Constitution, Section 10, Article I..... 17, 20

**Statutes** **Page No.**

R.C. § 2903.11(A)(1)..... 19-25

R.C. § 2903.11(C)..... 24

R.C. § 2903.13(A), (C)..... 24-25

R.C. § 2919.25(A), (D)(2)..... 19-25

R.C. § 2929.11..... 5, 8-9

R.C. § 2929.12..... 5, 8-9

R.C. § 2929.14(A)(2), (3)..... 12-13, 16

R.C. § 2929.13(F)..... 13-14

R.C. § 2929.19(B)(3)(c)..... 14

R.C. § 2941.25..... 6, 17, 20

R.C. § 2953.08(B)(2)..... 3, 13, 18

**Rules** **Page No.**

Crim.R. 52(B)..... 15

Evid. R. 103(A)(1), (D)..... 15

**Other Resources** **Page No.**

Thomas Hagel, *Ohio Criminal Practice and Procedure,* (LexisNexis 2005), Double Jeopardy, § 17.105..... 20

## STATEMENT OF THE CASE AND FACTS

The State issued a four-count indictment against the Defendant-Appellee Jeremy S. Damron (hereinafter referred to as "Appellee") on June 27, 2008. The indictment stemmed from an alleged incident that occurred on June 21, 2008, wherein the State accused Appellee of assaulting the alleged victim, Michelle Haley, the mother of Appellee's two children and his girlfriend of ten years. The indictment consisted one count of felonious assault pursuant to Ohio Rev. Code § 2903.11, a felony of the second degree, two counts of domestic violence pursuant to R.C. § 2919.25, felonies of the third degree, and one count of rape pursuant to R.C. § 2907.02, a felony of the first degree.

The Appellee pled guilty to one count of second-degree felonious assault and one count of third-degree domestic violence, and the State nolled the other count of domestic violence and the rape count. See May 5, 2009 Plea Transcript of Proceedings ("Pt."). Neither the trial court nor the prosecutor at the plea hearing stated that the Appellee would be prevented from arguing for either concurrent sentences or for merger. See id.

The trial court sentenced the Appellee on July 27, 2009. See July 27, 2009 Sentencing Transcript of Proceedings ("St."). This incident occurred on the night of June 21, 2008 at 7700 Havens Corner Road in Franklin County in Gahanna, Ohio. The Appellee and Ms. Haley lived together, had 2 children together, and had a 10-year relationship together. Both were extremely intoxicated during the night in question. St. at 11. Ms. Haley described their long relationship as "rocky", where they both have hurt each other a lot, and she even admitted to fighting with Appellee that night. Id. at 10. Ms. Haley thought that Appellee had cheated on her, and as he was getting dressed to leave the house, an argument ensued, and the Appellee and Ms. Haley began to fight. St.

at 11. Ms. Haley picked up a chair and hit Appellee in the back during the incident, but Ms. Haley's injuries were more severe than those sustained by Appellee. Id. Ms. Haley has even been charged in the past for domestic violence against the Appellee. Id. at 11. Ms. Haley also told defense counsel that on a prior occasion she took a hard object and cracked open the Appellee's head in front of the police. Id. at 12.

The Appellee, through counsel, explained at the sentencing hearing that Ms. Haley had contacted trial counsel several times during the pendency of the case. St. at 11. *Ms. Haley explained that no rape occurred during the incident.* Id. (emphasis added). *Ms. Haley even told hospital personnel that no rape occurred.* See id and see also Appellee's Appx., A23-A25. (emphasis added). *In the end, it is clear that Appellee was wrongly accused of rape.* Ms. Haley also spoke highly of Appellee, even though acknowledging that they both have mental health and substance abuse issues. Id., A__. Appellee also had employment waiting for him upon his release. Id., A28. Appellee attended anger management classes, and AA and NA meetings, while he was incarcerated during the pendency of the case. St. at 14, and Appellee's Appx., A29.

The trial court sentenced the Appellee to eight years of imprisonment on the felonious assault count and five years of imprisonment on the domestic violence count to be run concurrently. St. at 16 and July 29, 2009 Judgment Entry ("Entry"), State's Appendix ("Appx."), A10-A11. The trial court ran the sentences concurrent with each other and cited *State v. Harris*, 2009-Ohio-3323. While the State argued that the offenses should not merge, St. at 5-6, *the State did not object to the trial court's concurrent sentence at the sentencing hearing or the trial court's alleged failure to merge.* St. at 16-

17 (emphasis added). The State's only response after the trial court rendered its sentence was to thank the trial court. Id. at 17.

The State appealed the trial court's Entry to the Franklin County Court of Appeals assigning only one error that: "The Court Erred by Purporting to Merge Defendant's Convictions for Felonious Assault and Domestic Violence.". The Tenth District affirmed the sentence. *Damron*, ¶ 11-12, infra. The State subsequently appealed the *Damron* decision from the Tenth District asserting three propositions of law. See State's Appx., A2-A3. The Court accepted the State's discretionary appeal on its first two propositions of law but not the third. See State's Appx., A1.

## ARGUMENT

**Proposition of Law No. I: Concurrent sentences for unmerged offenses do not equate to an unauthorized sentence under the Ohio Felony Sentencing Code.**

**Proposition of Law No. 2: The State has failed under R.C. § 2953.08(B)(2) to establish that the sentence was contrary to law, and thus, an appeal of said sentence is meritless.**

### I. THIS COURT SHOULD DISMISS THIS CASE

#### A. Summary of Argument

This Court should not accept the State's first and second propositions of law, because the propositions were not raised either to the trial court or the Tenth District. After the trial court rendered its concurrent sentences, the State thanked the court. In its appeal to the Tenth District the State assigned error solely on the trial court's purported attempt to the merge the convictions. The propositions accepted by this Court advance different positions and arguments not seen by either the trial court or the Tenth District.

The State's first and second propositions of law also do not warrant review under the standard of review set forth in *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912. Neither of the State's propositions of law point to mandatory sentencing provisions that were violated by the trial court. The State does not show how the trial court failed to comply with all the applicable rules and statutes in imposing the sentence. The State also failed to argue that the trial court's maximum, concurrent sentences constituted an abuse of discretion. For these reasons, Appellee argues that the Court should merely follow the standard articulated in *Kalish* and dismiss this discretionary appeal as improvidently granted.

The State's second proposition of law independently reveals that the State lacks standing to argue that the trial court erred by attempting a merger by-way-of concurrent sentences. This error inures to the defendant's detriment, in this case the Appellee's detriment. Yet, the State tries to bootstrap its new contentions in this appeal to the trial court's imposition of concurrent sentences, even though the trial court stated it intended to merge the offenses. Error predicated on this sentence only affected the Appellee.

B. Discussion

1. The State's propositions of law were not raised either to the trial court or the Tenth District.

a. The State forfeited the reviewable arguments contained in its propositions of law.

This Court should not even review the State's first and second propositions of law because the propositions were not raised either to the trial court or the Tenth District. After the trial court rendered its concurrent sentences, the State thanked the court. In its appeal to the Tenth District, the State assigned error solely on the trial court's purported

attempt to the merge domestic violence and felonious assault convictions. See Appellee's Appendix ("Appx."), A1-A18 . This sole assignment of error brought before the Tenth District is encapsulated in the State's third proposition of law that did not even receive discretionary review from this Court. The propositions accepted by this Court advance different positions and arguments most of which were not seen by either the trial court or the Tenth District.

In its merit brief the State interestingly grouped its first and second propositions of law together. In its first argument under these propositions (which basically advances the first proposition of law), the State asserted that sentencing error can occur even within the statutory range when the trial court erroneously removes consecutive prison terms from its consideration. See State's Brief at pp. 7-10. This argument relating to the trial court's alleged failure to even consider consecutive sentences was not raised as error to either the trial court or the Tenth District. In particular, the State did not argue that the trial court abandoned its consideration of the sentencing factors in R.C. §§ 2929.11 and 2929.12 when it removed the option of consecutive sentencing based on an express legal error. See State's Brief at 9. Because the State did not raise the argument associated with the first proposition of law to the trial court or in the court of appeals, it failed to meet its burden to raise and prove the issue in the lower court. See *Miller v. Wikel Mfg. Co.* (1989), 46 Ohio St. 3d 76, 78 (quoting *Republic Steel Corp. v. Bd. of Revision of Cuyahoga Cty.* (1963), 175 Ohio St. 179, syllabus) (collateral estoppel claim "cannot be raised for the first time on review"); *State v. Nagle* (1986), 23 Ohio St.3d 185, 187-188, n.2 (equal protection claim raised for first time and not argued or raised below was not timely raised). A party may not raise for the first time on appeal an argument that could

have been raised below. *State v. Smith* (1991), 61 Ohio St.3d 284. To allow parties to raise arguments for the first time on appeal would frustrate the orderly administration of justice and evade the trial court process. *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168. Accordingly, even if this Court were to agree with the State's position in its first proposition of law, the State should lose this argument, because the State did not raise or prove this argument below.

As for the second proposition of law, the State argued that the trial court's concurrent sentences were contrary to law in violation of the allied offense statute, R.C. § 2941.25. See State's Brief at pp. 10-18. Yet this proposition differs significantly from the State's sole assignment of error brought before the Tenth District that argued that the trial court erred in "purporting to merge Defendant's convictions for felonious assault and domestic violence." The State rehashed its first proposition of law relating to the trial court's alleged abandonment of considering the sentencing factors and consecutive sentencing in the first two pages and last three pages of its discussion of the second proposition of law. See State's Brief at 10-11, 16-18. The State then launched into contentions that domestic violence and felonious assault are not allied offenses of similar import; this contention was presented to the court of appeals but was not accepted for discretionary review by this Court. See id., pp. 11-14. Then the State declared that allied offenses do not merge through consecutive sentences and that the trial court erred in attempting to merge the offenses through concurrent sentences. Id., pp. 15-16. While this argument was put forth in the State's brief to the court of appeals, it was not referenced in its sole assignment of error. See Appellee's Appx., A1-A18. Because the

State did not raise the reviewable arguments in its second proposition of law to the court of appeals, this Court should deem them forfeited.

b. A discretionary appeal is not a substitute for briefing in the court of appeals.

But even if the State's belated assertions were not forfeited, this Court should not exercise its discretion to hear issues raised for the first time in a jurisdictional memorandum. This Court generally declines to consider issues raised for the first time in this Court. See e.g., *Sherman v. Haines* (1995), 73 Ohio St.3d 125, 126, n.1; *State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661, ¶ 41, n.2. Here, the State failed to make the argument below that is the essence of its brief: that the trial court erred by not considering the sentencing factors and consecutive sentencing based on an express legal error that domestic violence and felonious assault offenses merge. Parties should not use an appeal to this Court to add issues that should have been presented to the court below.

2. The trial court complied with all the rules and statutes when it imposed the sentence.

The State's first and second propositions of law also do not warrant review under the standard of review set forth in *Kalish,* 2008-Ohio-4912. The State fails to show how the trial court failed to comply with the applicable rules and statutes in imposing the sentence. While the Tenth District did not cite to *Kalish* in its opinion, it held:

> In this case, because the trial court did not actually merge the two counts, the only error the state can allege is that the trial court imposed concurrent sentences after having stated during the sentencing hearing that it would have imposed consecutive sentences if it were legally authorized to do so. *Even if we were to conclude that the court's decision to impose concurrent sentences had been based on faulty reasoning, the fact remains that the court's order that the sentences be served concurrently resulted in a sentence authorized by the statutes governing sentencing.*

*State v. Damron*, Franklin App. No. 09AP-807, 2010-Ohio-1821, ¶ 11 ("*Damron*") (emphasis added). The highlighted language from *Damron* consisted of the application of the first step in the two-step process laid out in *Kalish* for felony sentencing review. See *Kalish*, 2008-Ohio-4912, ¶ 26. In the first step, appellate courts consider whether the trial court "adhered to all applicable rules and statutes in imposing the sentence." Id., ¶ 14. "As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. § 2953.08(G)." Id. In the second step, with reference to the general principles of felony sentencing and the seriousness and recidivism factors set forth in Sections 2929.11 and 2929.12, consideration is given as to whether the trial court abused its discretion in selecting the defendant's sentence. See id., ¶ 19-20. The *Damron* court determined, even if the trial court's reasoning was amiss, that the trial court's sentence was authorized by the statutes governing sentencing, and thus passed muster under the first-step of review under *Kalish*. The State has not shown that the trial court failed to adhere to the applicable rules and statutes in this case.

Reversing *Damron*, particularly on the first proposition, will effectively overrule *Kalish* and open the door for parties to challenge a sentence if a trial judge labors under any alleged misunderstanding of the law, even though the sentence is authorized under the felony sentencing code. The State's argument that the trial court failed to consider the sentencing factors contained in R.C. §§ 2929.11 and 2929.12 fits within into the abuse of discretion inquiry set forth in the second step of *Kalish*. Yet, the State failed to argue that the trial court's maximum, concurrent sentences even constituted an abuse of discretion. And, given that the trial court stated that it considered the purposes and

general principles of felony sentencing set forth in R.C. §§ 2929.11 and R.C. 2929.12 and the felony sentences that were imposed upon the Appellee were the maximums within the permissible statutory ranges, labeling the sentence as abusive from the State's perspective is not persuasive. For these reasons, Appellee argues that the Court should merely follow the standard articulated in *Kalish* and dismiss this discretionary appeal as improvidently granted.

3. The State was not adversely affected by the trial court's imposition of concurrent sentences in an attempt to effect a merger.

The State's second proposition of law evidences the State's lack of standing to argue that the trial court erred by attempting a merger by-way-of concurrent sentences. This error only inures to the defendant's detriment, in this case the Appellee's detriment. Appellee is the one with two convictions not one, yet he choose not to appeal. The State lacks standing to challenge the trial court's attempted merger through concurrent sentences, as the separate convictions only adversely affected the Appellee. See *Crosby-Edwards v. Ohio Bd. of Embalmers & Funeral Directors*, 175 Ohio App.3d 213, 221, 2008-Ohio-762, ¶ 31 (even though not raised by either party, party's lack of standing was dispositive because she was not "adversely affected" by the board's decision). Yet, the State tries to bootstrap its new contentions in this appeal to the trial court's imposition of concurrent sentences, despite the trial court stating the offenses should merge.

Only an aggrieved party, whose rights have been adversely affected, may appeal a judgment or order of a trial court. See *Ohio Contract Carriers Assn., Inc. v. Pub. Utilities Comm.* (1942), 140 Ohio St. 160, 161; *Tschantz v. Ferguson* (1989), 49 Ohio App.3d 9, 13. Appeals are allowed only to correct errors injuriously affecting the appellant. *Ohio Contract Carriers Assn.*, syllabus. The State is not an aggrieved party

whose rights have been adversely affected merely by the trial court running the sentences concurrent instead of actually merging the offenses. As such, the State lacks standing to appeal the trial court's decision to impose concurrent sentences even though it indicated at the sentencing hearing it intended to merge the offenses.

C. Conclusion

The State's first and second propositions of law were not raised in the trial court or set forth in assignments of error raised in the court of appeals. Thus, these propositions have been forfeited, and the State's discretionary appeal should not act as a substitute for briefing these issues in the court of appeals. Even assuming away forfeiture, these propositions should be dismissed. Because the trial court complied with all rules and statutes when it imposed the sentence, the Court should merely follow the standard articulated in *Kalish* and dismiss this discretionary appeal as improvidently granted. Lastly, the State is not an aggrieved party whose rights have been adversely affected merely by the trial court running the sentences concurrent instead of actually merging the offenses. For these reasons, this Court should dismiss the State's appeal.

II. THE TENTH DISTRICT'S DECISION SHOULD BE AFFIRMED

Without even tendering an objection at sentencing, the State is in the awkward and unfamiliar position of attacking a sentence on allied offense grounds, when the trial court did not even merge the offenses. In its jurisdiction memorandum the State characterized the sentence the Appellee received as accidental, yet even if this was an apt characterization, the sentence was still lawful. "Accidental" would more fittingly apply to the State's failure to even object to the specific sentence imposed at trial, and its continued failure-in-kind to litigate the propositions of law asserted herein to the

intermediate court of appeals. Appellee notes that the Court has accepted these two propositions of law even though they were not litigated in the court of appeals. In its November 16, 2009 brief to the lower court, the State focused on merger and little else. See Appellee's Appx., A9-A15.

The Appellee pled guilty to charges of felonious assault and domestic violence based on a fight between the Appellee and his live-in girlfriend. Even though the trial court commented that it thought the felonious assault and domestic violence counts should merge, the trial court did not merge these offenses but instead imposed separate, maximum and concurrent sentences for the felonious assault and domestic violence counts. The State has no basis to appeal as it argued against merger and the trial court obliged. Yet, the State did not enter an objection to the trial court's maximum, concurrent sentences; thus, it waived all but plain error in this appeal. With a sole assignment of error challenging only the trial court's "purported merger", the State appealed the trial court's sentence, which the Ohio Court of Appeals affirmed by stating:

> ...because the trial court did not actually merge the two counts, the only error the state can allege is that the trial court imposed concurrent sentences after having stated during the sentencing hearing that it would have imposed consecutive sentences if it were legally authorized to do so. Even if we were to conclude that the court's decision to impose concurrent sentences had been based on faulty reasoning, the fact remains that the court's order that the sentences be served concurrently resulted in a sentence authorized by the statutes governing sentencing.

*Damron*, ¶ 11. While Appellee contends that felonious assault and domestic violence do indeed merge and that the trial court did not engage in "faulty reasoning", he also asserts that the answer to this question is irrelevant because the trial court's maximum and concurrent sentences were authorized by the Ohio Felony Sentencing Code.

A. The Trial Court Complied with *Foster, Kalish* and *Underwood.*

In its merit brief, the State sets forth that trial courts are to consider the remaining sentencing factors after *Foster*, infra, but it asserts that the trial court abandoned its consideration of the sentencing factors. See State's Brief at 7-12. A review of the trial court's sentencing entry belies this claim. The trial court did not abandon its discretionary role as it entered maximum sentences within the ranges spelled out in R.C. § 2929.14(A)(2), (3) and considered the sentencing guidelines and factors as it said it did in its sentencing entry. See Entry at 1 ("The Court considered the purposes and principles of sentencing set forth in R.C. § 2929.11 and the factors set forth in R.C. § 2929.12. In addition, the Court has weighed the factors set forth in the applicable provisions of R.C. § 2929.13 and R.C. § 2929.14. The Court further finds that a prison term is not mandatory pursuant to R.C. § 2929.13(F)."). See *State v. Todd*, Franklin App. No. 06AP-1208, 2007-Ohio-4307, ¶ 16 ("Here, the trial court's sentencing entry expressly states that it 'considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12.' This court held such language in a court's judgment entry belies a defendant's claim that the trial court failed to consider the purposes of felony sentencing as required in R.C. 2929.11 and 2929.12.").

In *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio held that "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster*, syllabus, ¶ 7. It is also axiomatic that "[a] court of record speaks only through its journal entries." *State ex rel. Geauga Cty. Bd. of Commrs. v. Milligan,* 100 Ohio St.3d 366, 2003-

Ohio-6608, ¶ 20; see also *State v. McClurkin*, Franklin App. No. 08AP 781, 2009-Ohio-4545, ¶ 20, n.1 ("It is axiomatic that a trial court speaks only through its journal entries, not by oral pronouncement.") (citation omitted).

The trial court lawfully sentenced Appellee to the maximum sentences for felonious assault and domestic violence convictions and ran the sentences concurrent; the reasoning the trial court gave for the sentences do not violate *Foster* or *Kalish*. See Entry at 2. R.C. § 2953.08(B)(2) allows the State to appeal sentences that are contrary to law. A fatal flaw to this appeal is that the trial court did not enter a sentence that was contrary to law or unauthorized under the law, i.e., that violated any mandatory sentencing provisions. See *Kalish*, ¶ 14, *Underwood*, ¶ 20, infra. The trial court entered sentences within the ranges spelled out in R.C. § 2929.14(A)(2), (3), and it considered the sentencing guidelines and factors. Entry at 1-2. The sentence in no way exceeded the trial court's authority to impose a sentence. "Generally, a court of appeals will not review the trial court's exercise of discretion in sentencing where the sentence falls within statutory limits." *State v. Burge* (Franklin App. 1992), 82 Ohio App.3d 244, 249. Because the record indicates that the trial court considered the sentencing guidelines and factors, and also considered the particular facts of the instant case, the sentence was not contrary to law. See e.g., *State v. Heidorn*, Hamilton App. No. C-030700, 2004-Ohio-3749, ¶ 15-16 (finding imposition of two four-year prison sentences concurrently was not contrary to law).

The State also relies on case law holding that consecutive sentences were not required under R.C. § 2929.13(F), a provision setting forth mandatory prison terms for particular offenses. See *State v. Johnson* (2008), 116 Ohio St.3d 541. The State's

reliance on this case and other similarly cited cases is misplaced, because *Johnson* deals with the application of a particular sentencing statute that mandated consecutive sentences, which is not at issue in the case herein. Plus, trial courts are no longer required to even make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences. *Foster,* 2006-Ohio-856, syllabus, ¶ 7 and ¶ 100.

The State also argues in these propositions of law that the *Damron* opinion licenses trial courts in the Tenth District to ignore mandatory sentencing provisions such as mandatory imprisonment (R.C. § 2929.13(F)) or post-release control notification (R.C. § 2929.19(B)(3)(c)). The State relies on *State v. Underwood,* 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 20, 27 to argue that the trial court ignored mandatory sentencing provisions. Yet, in *Underwood,* the Court juxtaposed its case with a prior decision that did not involve a mandatory sentencing provision but merely the discretionary decision to impose consecutive sentences) (citing *State v. Porterfield,* 106 Ohio St.3d 5, 2005-Ohio-3095, ¶ 25). The State is just wrong as the trial court did not ignore mandatory sentencing provisions, and the *Damron* court agreed finding that the trial court complied with the State's request not to merge the offenses and that the sentence did not violate any statutes governing sentencing; on the other hand, the *Damron* court also did not determine that a sentence was lawful merely because it falls within the statutory range. The State did not point to one mandatory sentencing provision that the trial court failed to comport with in its imposition of the sentence. The State's argument about the alleged misapplication of the sentencing factors or its disagreement with the length of the prison term are inquiries governed by an abuse of discretion standard in the second step of *Kalish,* which the State failed to even address. See *Underwood,* ¶ 22 (describing

"appeals that would otherwise challenge the court's *discretion* in imposing a sentence, such as whether the trial court complied with statutory provisions like R.C. 2929.11 (the overriding purposes of felony sentencing), 2929.12 (the seriousness and recidivism factors)[.]) (emphasis added).

The State arguments go more toward an attack on the trial court's supposed abuse of its discretion under the second step of *Kalish* when it imposed the actual prison term of eight years with a five year concurrent term. The trial court's prison sentence cannot persuasively be characterized as plainly abusive from the State's perspective, because the court exercised its discretion in handing down maximum and concurrent sentences. And, the trial court's reasoning, i.e., discretion, regarding the potential merger of felonious assault and domestic violence in this current state of flux of allied offense jurisprudence also does not constitute unreasonableness. See *Minifee*, 2009-Ohio-3089, ¶ 71, infra

B. Concurrent Sentences instead of Merger only Affected the Appellee.

It is noteworthy also that the State did not even object to the trial court's imposition of maximum, concurrent sentences at the sentencing hearing. St. at 16-17. Thus, the State waived all but plain error on review. Evid. R. 103(A)(1), (D). It is well-settled that failure to raise the issue of merger of allied offenses of similar import before the trial court constitutes a waiver of the issue on appeal absent a showing of plain error. *State v. Comen* (1990), 50 Ohio St.3d 206, 211. "To be plain within the meaning of Crim.R. 52(B), an error must be an obvious defect in the trial proceedings." *State v. Barnes,* 94 Ohio St.3d 21, 27, 2002-Ohio-68. "Plain error(s) or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). Plain error is to be used with the utmost caution, under

exceptional circumstances and only to prevent a manifest miscarriage of justice. *Barnes*, 94 Ohio St.3d at 27. The error must have affected substantial rights. Id. In order to reverse a criminal judgment based upon plain error, an appellate court must determine the following: 1) whether there was an error; 2) whether the error was plain error; and 3) whether the defendant was prejudiced by the error. *State v. Adams*, Montgomery App. No. 22493, 2009-Ohio-2056, ¶ 12 (citing *U.S. v. Olano* (1992), 507 U.S. 725).

There was no error as the trial court sentenced the Appellee to prison terms within the ranges spelled out for each offense and did not violate any other portion of the sentencing code. R.C. § 2929.14(A). Any alleged error relating to failing to merge the felonious assault and domestic violence offenses did not affect the State's substantial rights; thus, it was not plain. The State cites *Underwood* this time for the proposition that the failure to merge allied offenses of similar import constitutes plain error. However, as the *Underwood* Court pointed out "even when the sentences are to be served concurrently, *a defendant is prejudiced* by having more convictions than are authorized by law." *Underwood*, 2010-Ohio-1, ¶ 31 (emphasis added).

This particular statement in *Underwood*, though, is inapplicable to the case sub judice, because *Underwood* involved a defendant appealing his sentence, not the State appealing the sentence herein. See e.g., *State v. Russell*, Richland App. No. 06 CA 12, 2006-Ohio-4450, ¶ 13 (noting that analysis of sentencing error from a prior case was inapplicable to the current case because the prior case involved a defendant appealing his sentence, while the current case involved a state appeal challenging the validity of a sentence).

As this Court is also aware, an error related to merger affects a defendant's right to protection from double jeopardy, as set forth in the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, which prohibit a defendant from being subjected to cumulative punishments for the same offense. The same concerns are not present in the case herein as the State does not have a Double Jeopardy protection or any other substantial right present in the this analysis. See *State v. Dunham*, Scioto App. No. 04CA2931, 2005-Ohio-3642, ¶ 55 ("Violation of double jeopardy violates *an offender's substantial rights and constitutes plain error.*") (emphasis added).

The State also characterizes the imposed sentence as a "mistake" or based on an "express legal error". As to the allied offense opinion expressed by the trial court, Appellee contends that it is at least debatable and not black-letter law. See § C, infra. As to the failure to merge and the imposition of current sentences, this contention is also not persuasive, because the description of such an alleged error depends on the status and perspective of the appealing party. Imposing concurrent sentences for offenses that should merge is an error from the perspective of the defense not the State. Appellee chose not to assert this "obvious legal error", because he did not desire to challenge his eight-year sentence, and the Ohio Court of Appeals rightly did not view the court's sentence through the eyes of a defendant, given that he did not appeal the sentence.

The State also continues to assert that the trial court violated R.C. § 2941.25 even though the trial court issued separate sentences for the offenses that the State argues are not allied; thus, the allied offense statute is inapposite. The only party to this case that *State v. Underwood*, 2010-Ohio-1 provides relief to is Appellee, and Appellee chose not

to appeal the sentence. The State continues to assert that the sentence was not lawfully imposed but it cannot provide the Court with one sentencing statute or even one case that the trial court violated in its sentence. For these reasons, the Ohio Court of Appeals rejected the State's appeal, and Appellee asks this Court to affirm the Tenth District. Whether these offenses are allied, which Appellee asserts they are, is of no importance, because the trial court did not merge the offenses in compliance with the State's wishes, which rendered the disposition not contrary to law from the State's perspective under R.C. § 2953.08(B)(2).

In the end, the State seeks to challenge the trial court's alleged failure to merge felonious assault and domestic violence counts, yet it argues contradictory that those very offenses are not allied. The State cannot have it both ways, which should result in the rejection of this flawed appeal.

C. Felonious Assault and Domestic Violence are Allied Offenses.

Although the Court does not need to reach this issue, felonious assault and domestic violence are allied offenses of similar import, and the trial court did not plainly err or abuse its discretion from the State's perspective when it relied on *State v. Harris* to impose concurrent sentences. As for the state of the law on allied offenses, the Eighth District could not agree more with how one commentator described it, namely, that "one would be hard-pressed to find an area of Ohio law that is more confused than this one." *State v. Minifee*, Cuyahoga App. No. 91017, 2009-Ohio-3089, ¶ 71 (citation omitted). Assuming this confusing state of the law, Appellee also contends that this offers additional support for his argument that the trial court did not plainly err or abuse its discretion when it opined that the offenses were allied.

Because he committed only one act on the night of the incident with only one animus, Appellee maintains that consecutive sentences for both domestic violence and felonious assault would violate his double jeopardy protections. Appellee also contends that the felonious assault ("FA") count pursuant to R.C. § 2903.11(A)(1) and domestic violence ("DV") count pursuant to R.C. § 2919.25(A) are allied offenses of similar import.

As the *Damron* court held, this Court need not review the issue of whether the trial court erred by concluding that it was required to merge the FA and DV counts, because it ultimately did not even merge them. Thus, even though the sentence was not contrary to law and the trial court did not merge the FA and DV offenses, the State still persists in asserting that FA and DV are not allied offenses of similar import. Even though Appellee chose not to appeal the sentence, Appellee disagrees with the State's contention. Under the current and evolving state of Ohio's allied offense doctrine, Appellee asserts that the elements of FA and DV are similar enough to constitute allied offenses. A FA committed on a protected person under the DV statutes constitutes DV. Subjecting Appellee to double punishment for the same act against a protected person under the DV statutes is exactly what the Double Jeopardy clause sought to prevent, regardless of what the Ohio Legislature may have intended when it drafted the assault statutes.

It is well-settled that "[t]he Double Jeopardy Clause of the United States Constitution prohibits ...multiple punishments for the same offense." *State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 10 (citing *U.S. v. Halper* (1989), 490 U.S. 435, 440). "These double-jeopardy protections apply to the states through the Fourteenth

Amendment." Id. (citing *Benton v. Maryland* (1969), 395 U.S. 784, 786). In addition, Section 10, Article I of the Ohio Constitution provides that "[n]o person shall be twice put in jeopardy for the same offense."

More generally, the U.S. Supreme Court has held that the test for determining whether two offenses are the same for double jeopardy purposes is "whether each offense requires proof of an element that the other does not." *State v. Rance* (1999), 85 Ohio St.3d 632, 634-635 (citing *Blockburger v. U.S.* (1932), 284 U.S. 299, 304). However, "the Blockburger test does not require identical elements of proof." Thomas Hagel, *Ohio Criminal Practice and Procedure*, (LexisNexis 2005), Double Jeopardy, § 17.105 (citing *Blockburger*; *Brown v. State* (1972), 432 U.S. 161). In applying the multiple-count statute, R.C. § 2941.25, this Court has long followed a two-tiered test to determine whether two offenses constitute allied offenses of similar import. *See State v. Cabrales* (2008), 118 Ohio St.3d 54, 2008-Ohio-1625 ¶ 14.

> In the first step, the elements of the two crimes are compared. If the elements of the offenses *correspond to such a degree* that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.

Id. (citations and internal quotation marks omitted) (emphasis added). In *Cabrales*, the Court acknowledged that prior precedent had produced inconsistent, unreasonable, and, at times, absurd results. *Brown*, 2008-Ohio-4569, ¶ 20-21 (citations omitted). Thus, in *Cabrales*, this Court clarified the two-tiered test, but qualified it, holding:

> In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, *but are not required to find an exact alignment of the elements*. Instead, 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, then the offenses are allied offenses of similar import.*

*Brown*, ¶ 21 (quoting *Cabrales* at paragraph one of the syllabus) (emphasis added). R.C. § 2919.25(A), the DV statute, requires the State to show that an individual did knowingly cause physical harm to a family or household member, while the first prong of the FA statute, R.C. § 2903.11(A)(1), requires the State to show that an individual did knowingly cause serious physical harm to another person. Accordingly, DV requires proof that a defendant (1) knowingly, (2) caused (3) physical harm, (4) to a family or household member. FA requires proof that a defendant (1) knowingly, (2) caused, (3) serious physical harm, (4) to another.

The fact that the DV statute requires the harm to be visited upon a family or household member is a delimiting or restrictive factor, not an additional element of the crime. Thus, a FA upon a household or family member will necessarily result in a DV too. Even though there is not an exact alignment of elements, the FA and DV statutes correspond to *such a degree* that they should be considered allied offenses under state statutory law and state and federal constitutional law. Indeed, the commission of any assault offense under R.C. §§2903.11, 2903.12, or 2903.13 against a family or household member will result in the commission of DV. In other words, implicit in every act of DV under R.C. §2919.25(A) is an assault. Common sense and logic dictate that DV and

assault (here FA) go hand-in-hand and constitute allied offenses of similar import even though the elements do not align exactly.

A panel of the Franklin County Court of Appeals recently assumed that the crimes of FA, pursuant to R.C. § 2903.11(A)(2), and DV, pursuant to § R.C. 2919.25(A), were allied offenses of similar import under the test enunciated in *Cabrales*, see *State v. Ryan*, Franklin App. No. 08AP-481, 2009-Ohio-3235, ¶ 25, but it ultimately expressed no opinion on this precise issue. Id., n.2. In *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, ¶ 18-20, the Supreme Court of Ohio held that FA under R.C. § 2903.11(A)(1) and FA under R.C. § 2903.11(A)(2) were allied offenses of similar import, and that a defendant could not be convicted of both offenses when both are committed with the same animus against the same victim. FA under subsection (A)(1) requires serious physical harm while FA under (A)(2) requires physical harm by means of a deadly weapon. *Harris* again set forth the current interpretation of R.C. § 2941.25(A) as "not requir[ing] an exact alignment of elements." Id., ¶ 12. *Harris* found the FA charges to be allied in spite of the physical harm elementary differences and the deadly weapon component in subsection (A)(2).

In the instant case, there is less of a difference in the statutes than in *Harris*. FA under subsection (A)(1) requires serious physical harm upon another while DV requires physical harm to household or family members. The holding in *Harris* compels a finding that FA and DV are also allied offenses under the new regime that started with *Cabralas*.

Overall, the old precedent "lent itself to overly-mechanistic applications because the courts were told to compare the elements of charged offenses in the 'abstract' without considering the facts of the case." *State v. Williams*, Cuyahoga App. No. 89726, 2008-

Ohio-5286, at ¶ 27 (citation omitted). As recently stated by the Eighth District Court of Appeals, "if *either crime* is wholly subsumed within the other, then the offenses are of similar import." *Minifee*, 2009-Ohio-3089, ¶ 88 (citing *Cabrales*, ¶ 39 (Fain, J., concurring in judgment)). Appellee contends that DV is wholly subsumed by FA as DV contains a lesser physical harm element and a restriction on the type of eligible victim. See *State v. Tatro*, Lucas App. No. L-84-308, 1985 WL 7096 (numerous omitted Federal citations) (a pre-*Rance* case that examined the factual similarity between a DV and FA charge and upheld the dismissal of the FA charge on double jeopardy grounds). Although it involved a double jeopardy claim, the *Tatro* decision also pointed out the similar nature of the offenses of felonious assault or assault and domestic violence. In *Tatro,* the court found that felonious assault and domestic violence are the same for double jeopardy purposes, noting (i) that felonious assault does not contain a requirement for proof of a different fact from that of domestic violence and (ii) the absence of a legislative intent for a multiplicity of punishment. This panel of the Sixth District held that a conviction for domestic violence bars a subsequent prosecution for felonious assault based upon the same conduct. See also *State v. Dancy*, Montgomery App. No. 18541, 2001 WL 630550, *2 (finding that domestic violence and assault charges were allied offenses of similar import).

In determining whether two offenses constitute allied offenses of similar import, the Supreme Court of Ohio has also previously considered whether the legislature's intent was clear from the language of the relevant statutes. *Brown*, 2008-Ohio-4569, ¶ 37 (citations omitted). But see *State v. Journey*, Scioto County App. 09CA3270, 2010-

Ohio-2555, ¶ 16 (explaining that the *Brown* Court only examined the legislative intent of the language of the offenses after it compared the elements of the offenses).

The FA and DV statutes, like the aggravated assault subdivisions compared in *Brown*, set forth two different forms of the same offense, in each of which the legislature manifested its intent to serve the same interest, i.e., preventing physical harm to persons. Id., at ¶ 39 (citation omitted). Under *Brown,* a defendant can be found guilty of multiple offenses if in statutorily defining the offenses the legislature has manifested a clear intent to protect separate and distinct societal interests. Id., ¶ 35-40. The similarities in the elements between FA and DV do not evidence a clear intent to protect distinct societal interests. The FA statute proscribes the most severe form of assault against all people and by all people, and merely stands at the heap of all the assault and DV statutes. Looking downward, the assault statutes and DV statute proscribe conduct *for lesser degrees of harm* based, in part, on the status of the victim or defendant involved.

The FA and DV statutes generally protect the same societal interest of punishing and preventing harm to persons. The FA statute prohibits any person from causing serious physical harm to any person or causing or attempting to cause physical harm to another by means of a deadly weapon. The FA statute does not distinguish between persons, whether victims (except for law enforcement) or perpetrators. See R.C. § 2903.11, Legislative Service Commission Notes. Of note, R.C. § 2903.11(C) sets forth that "[t]he prosecution of a person under this section does not preclude prosecution of that person under section 2907.02 of the Revised Code." Note that the DV statute is not contained in this legislative carve out.

The DV statute prohibits physical harm to family or household members, which is a delimiting or restricting factor, not an additional element. R.C. § 2925.19(A). In fact, the DV statute, R.C. § 2919.25(A), (D)(2) and the general assault statute contained in R.C. § 2903.13(A), (C), see Appellee's Appx., A30-A32, do not differentiate between class of victims at their most basic levels, as both statutes set forth punishment for physical harm as a first degree misdemeanor, whether the victim is "family or household member" or "another or [] another's unborn". The FA statute merely imposes the highest penalty for an assault based on serious physical harm or the weapon used in the assault and does not distinguish among victims because such a high degree of harm is not more worthy of punishment based upon the status of the victim. It makes no sense to punish someone more severely for committing a felonious assault on a stranger versus a family member, which furthers the allied argument.

In light of this statutory language and setup, Appellee argues that the General Assembly did not intend violations of R.C. § 2903.11(A)(1) and § R.C. 2919.25(A) to be separately punishable when the offenses result from a single act undertaken with a single animus against a lone victim. The General Assembly called for the assault and domestic violence statutes to work in concert, and not to result in separate punishments, based on the similarities between the underlying domestic violence and assault statutes, and that the same penalty is set forth regardless of the victim or perpetrator at its most serious and highest level of offense in the form of the felonious assault statute.

For these reasons, Appellee maintains that the trial court did not plainly err or abuse its discretion, particular from the State's perspective, when it cited the *Harris* decision in support of its concurrent sentences for the FA and DV offenses.

Lastly, in order to find that the trial court impermissibly removed consecutive sentencing from its consideration, this Court must predicate such a finding on a determination that domestic violence and felonious assault are not allied offenses of similar import. This issue though, of the allied nature of these offenses, was not accepted for discretionary review by this Court.

## CONCLUSION

Appellee respectfully submits that the State's appeal, which is a challenge to a sentence on merger grounds, when the trial court did not even affect a merger, consists now of propositions not even litigated before the court of appeals. Aside from forfeiting the arguments now presented to the Court, Appellee urges the Court to simply follow *Kalish* and dismiss the appeal as improvidently granted or affirm the Tenth District's decision.

Respectfully submitted,

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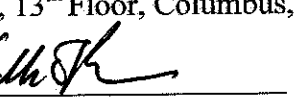
## CERTIFICATE OF SERVICE

I certify that a copy of Appellee's Merit Brief was served via U.S. Mail on December 20, 2010 to counsel for appellants, Ronald O'Brien, Franklin County Prosecuting Attorney, and John H. Cousins IV, Assistant Franklin County Prosecutor, Franklin County Prosecutor's Office, 373 South High Street, 13th Floor, Columbus, Ohio 43215.



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APPENDIX

State's Brief to Tenth District Court of Appeals..... A1-A18

Appellee's Sentencing Memorandum.....A19-A29

R.C. § 2903.13..... A30-A32

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**IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO**
**TENTH APPELLATE DISTRICT**
**2009**

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

Case No. 09AP-807
Regular Calendar

JEREMY S. DAMRON,

Defendant-Appellee.

ON APPEAL FROM THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

**BRIEF OF PLAINTIFF-APPELLANT**

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A1

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ASSIGNMENT OF ERROR PRESENTED FOR REVIEW ..... iii

STATEMENT OF ISSUE PRESENTED ..... iii

STATEMENT OF THE CASE AND FACTS ..... 1

ASSIGNMENT OF ERROR ..... 5

THE COURT ERRED BY PURPORTING TO MERGE DEFENDANT'S CONVICTIONS FOR FELONIOUS ASSAULT AND DOMESTIC VIOLENCE. (R. 149; SENT. T. 15, 16) ..... 5

CONCLUSION ..... 11

CERTIFICATE OF SERVICE ..... 11

CERTIFICATE OF SERVICE ..... 12

## TABLE OF AUTHORITIES

### Cases

*Maumee v. Geiger* (1976), 45 Ohio St.2d 238 ..... 9

*Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298 ..... 11

*State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168 ..... 11

*State v. Bowyer*, 8th Dist. No. 88014, 2007-Ohio-719 ..... 8

*State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569 ..... 7

*State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625 ..... 6, 7

*State v. Carter*, 8th Dist. No. 90504, 2009-Ohio-5961 ..... 9

*State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974 ..... 7

*State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323 ..... 5, 7

*State v. Hines*, 8th Dist. No. 84218, 2005-Ohio-4421 ..... 9

*State v. Marshall*, 9th Dist. No. 22706, 2005-Ohio-5947 ..... 8

*State v. Reid*, 8th Dist. No. 89006, 2007-Ohio-5858 ..... 9

*State v. Robinson*, 3rd Dist. No. 8-08-05, 2008-Ohio-4956 ..... 8

*State v. Ryan*, 10th Dist. No. 08AP-481, 2009-Ohio-3235 ..... 8

*State v. Sandridge*, 8th Dist. No. 87321, 2006-Ohio-5243 ..... 8

*State v. Steward*, 10th Dist. No. 08AP-974, 2009-Ohio-2990 ..... 6

*State v. Underwood*, 2nd Dist. No. 22454, 2008-Ohio-4748 ..... 9

*State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059 ..... 7

*State v. Yun* (2001), 5th Dist. No. 2000CA00276 ..... 8

*State v. Zurita-Velasquez*, 10th Dist. No. 08AP-770, 2009-Ohio-2049 ..... 7, 9

### Statutes

R.C. 2919.25 ..... 8

R.C. 2941.25(B) ..... 6

## STATEMENT OF ASSIGNMENT OF ERROR PRESENTED FOR REVIEW

THE COURT ERRED BY PURPORTING TO MERGE DEFENDANT'S CONVICTIONS FOR FELONIOUS ASSAULT AND DOMESTIC VIOLENCE. (R. 149; Sent. T. 15, 16)

## STATEMENT OF ISSUE PRESENTED

Whether the trial court erred by merging felonious assault and domestic violence through the imposition of concurrent prison terms. (See Assignment of Error)

## STATEMENT OF THE CASE AND FACTS

On June 27, 2008, a Franklin County Grand Jury indicted defendant-appellee Jeremy Damron of one count of felonious assault, a second-degree felony, two counts of domestic violence, both third-degree felonies, and one count of rape, a first-degree felony. (R. 2)

On May 5, 2009, defendant pleaded guilty to the felonious assault count and to one of the domestic violence counts. (R. 139) Defendant understood that he could be sentenced serve five years for the felonious assault count and five years for the domestic violence count, consecutively. (R. 139) At the plea hearing, the prosecution recited the following facts.

On June 21, 2008, detectives from the Franklin County Sheriff's Office responded to a domestic violence report at 7700 Havens Corner Road. (Plea T. 14) Upon their arrival, the detectives saw three children at the address: L.B. (age 11); I.D. (age seven); and Z.D. (age six). (Plea T. 14) I.D. and Z.D. are the children of Michelle Haley and defendant Jeremy Damron. (Plea T. 14)

Officers found defendant inside the home, naked. (Plea T. 14) Officers arrested him and secured him in the back of a cruiser. When the detectives arrived, Michelle had already been transported to Grant Hospital, where she was treated for serious injuries. (Plea T. 14)

After arresting defendant, deputies observed the bedroom in complete disarray; blood spatter covered the walls, bedspread, and other items throughout. (Plea T. 14, 15) A clump of hair was visible on the bed, and another was hung on a finishing nail on the door frame. (Plea T. 15) Pooling blood soaked into the floor and pillows. (Plea T. 15) A window in the bedroom was smashed, and shards of glass were lying on the floor.

(Plea T. 15) There was blood spatter on the blinds. (Plea T. 15) All but one blade from the ceiling fan had been snapped off. (Plea T. 15) They were covered in blood as well. (Plea T. 15) There was also a black chair broken into several pieces. (Plea T. 15)

I.D. and L.B. were interviewed while other detectives photographed the scene and visited Michelle at the hospital. (Plea T. 15) I.D. watched as defendant severely beat Michelle, causing swelling, contusions, and cuts to her face and body. (Plea T. 14) He told detectives that defendant had been drinking and got "very angry" before throwing a lawn tractor on its side. (Plea T. 16) Then, I.D. said, "his father had beaten his mother very badly." (Plea T. 16) I.D. was in the bedroom throughout the beating. (Plea T. 16) At first, he jumped on defendant's back and begged defendant to stop. (T. 16) But defendant grabbed I.D. off, placed him on the bed, and continued beating Michelle. (Plea T. 16) I.D. kept asking detectives why it took so long for someone to come help. (Plea T. 16)

L.B. was also inside the bedroom during the beating. (Plea T. 16) She told detectives that defendant becomes "very angry when he's been drinking and had many fights in the past." (Plea T. 16) Earlier that day, defendant was drinking at a birthday party. (Plea T. 16) He got mad at Michelle and went into the bedroom. (Plea T. 16) Defendant disabled all of the phones in the house so no one could call for help. (Plea T. 16) L.D. followed defendant with a knife but said she "didn't have the guts to hurt him." (Plea T. 16) Then, defendant threw a fan at L.B. (Plea T. 16) L.B. grabbed Z.D., and the two ran for help. (Plea T. 16)

Defendant told detectives that he warned Michelle for three days to stop talking to him in an emasculating way. (Plea T. 17) He said that Michelle would order him around

and make him feel like "hired help." (Plea T. 17) Defendant claimed that he did not remember much about the incident, since he drank beer and Skyy Vodka throughout the day. (Plea T. 17) Claiming to have "blacked out" earlier, defendant still knew he beat Michelle. (Plea T. 17) He had scratch marks and bruising on his fingers and knuckles. (Plea T. 17)

At Grant Hospital, doctors were initially unable to tell whether Michelle suffered a concussion because her eyes were completely swollen shut. (Plea T. 15) She could not speak or give detectives a statement. (Plea T. 15) Later, doctors determined that she suffered a nasal fracture and a concussion. (Plea T. 17) Michelle spent three days at Grant. (Plea T. 17)

After hearing the facts, defendant took no exception with the prosecution's recitation. (Plea T. 17)

A sentencing hearing was held on July 27, 2009. (Sent. T. 2) A presentence investigation was prepared. (P.S.I.) Based on arguments made in its sentencing memorandum, the prosecution requested a seven-year prison sentence for the felonious assault count and five years for the domestic violence count. (Sent. T. 8) The prosecution argued against merger, contending that the offenses were of dissimilar import. (Sent. T. 8; R. 146)

The defense argued that the felonious assault and domestic violence convictions should merge. (Sent. T. 9; R. 147) In her sentencing memorandum, defendant omitted R.C. 2941.25(A)—governing allied offenses of similar import—and instead argued that offenses must merge whenever they are committed with the same animus against the

same victim. (R. 147, p. 2) Defense counsel continued to ignore the first element of R.C. 2941.25 at sentencing. (Sent. T. 9)

After listening to counsel and defendant, the court stated the following:

> * * * I have to be real frank with you, Mr. Damron. This is probably the worst domestic violence/felonious assault I've seen since I've been on the bench; okay? I mean, nobody deserves that. If you love somebody, they don't deserve that. I know you're not justifying it. That rage, and there's, what, three other incidents where this has happened before. This is clearly the worst situation I've seen.
>
> Based upon that, it will be an eight-year sentence on count one; a five-year sentence on count two.
>
> I do agree with [defense counsel] in *State vs. Harris*, needs to merge. *I would have found, if I did not think that Harris dictated that, that those would run consecutive to each other.* By appeal, I feel I have no alternative but to run them concurrent. That's pursuant to the *State vs. Harris* 2009-Ohio-3323.

(T. 15, 16) (emphasis added)

In relevant part, the court's July 29, 2009, journal entry stated:

> The Court hereby imposes the following sentence: **EIGHT (8) YEARS as to Count One and FIVE (5) YEARS as to Count Three, to be served CONCURRENT to each other pursuant to *State v. Harris*, 2009-Ohio-3323 at the OHIO DEPARTMENT OF REHABILITATION AND CORRECTION.**

(R. 149)

## ASSIGNMENT OF ERROR

THE COURT ERRED BY PURPORTING TO MERGE DEFENDANT'S CONVICTIONS FOR FELONIOUS ASSAULT AND DOMESTIC VIOLENCE. (R. 149; SENT. T. 15, 16)

The lower court's sentence requires reversal. While felonious assault cannot merge with domestic violence, merger can never be accomplished through the imposition of concurrent sentences. Therefore, the trial court should be given a second chance to do what it originally intended and impose consecutive prison terms for the "worst domestic violence/felonious assault" it had ever seen. (T. 15)

### I. The Ohio Supreme Court's decision in *State v. Harris* did not change or broaden its earlier decisions in *State v. Rance* and *State v. Cabrales*.

At sentencing and in its entry, the court stated that merger was required by the Supreme Court of Ohio's opinion in *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323. (Sent. T. 15, 16; R. 149) Despite the contrary authority cited by the State, the court stated that it agreed with the analysis provided by defendant. (T. 15, 16) This reliance was misplaced, however, as *Harris* did not change or broaden Ohio's merger analysis.

Ohio's multiple count statute, R.C. 2941.25, provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

In *State v. Rance*, 85 Ohio St.3d 632, 635, the Supreme Court of Ohio set forth a two-part analysis for determining whether offenses will "merge" for sentencing purposes under R.C. 2941.25. First, under R.C. 2941.25(A), a court must determine whether the elements of the offenses correspond to such a degree that the commission of one offense will automatically result in the commission of the other offense. *Rance*, 85 Ohio St.3d at 636, 638, 639. In this step, the elements are compared in the *statutory* abstract, i.e., at the level of the statute as written, not at the level of how the indictment is worded. Id. at 637. If the offenses do not satisfy this test, then the offenses have a dissimilar import, the "merger" inquiry ends, and multiple sentences are allowed. Id. at 636.

If the offenses have similar import under the first step, the analysis proceeds to a second step under R.C. 2941.25(B), where the court must determine whether the offenses were committed separately or with a separate animus. *Rance*, 85 Ohio St.3d at 636. If the offenses were committed separately or with a separate animus, the defendant may be punished for both. Id. If not, the court must merge the offenses of similar import. Id. The burden of persuasion is on the defendant to prove entitlement to merger. *State v. Mughni* (1987), 33 Ohio St.3d 65, 67.

The Court's decision in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, did not change the *Rance* analysis. To be sure, the *Cabrales* Court criticized those lower courts that had purported to invoke *Rance* to impose a "strict textual comparison" test on the first prong of the allied-offenses analysis, but *Cabrales* said it was merely clarifying *Rance* and otherwise adhered to the *Rance* comparing-elements-in-abstract approach. This Court recognized as much in *State v. Steward*, 10th Dist. No. 08AP-974, 2009-Ohio-2990, ¶ 15, holding that "there is nothing in *Cabrales* to suggest the court meant to

change or broaden the test in *Rance* or meant to overrule the ultimate conclusion reached in *Rance*."

The continuing validity of the *Rance* abstract "elements" test was confirmed by the Supreme Court again in *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, which applied the abstract "elements" test as "set forth in *Rance* and clarified in *Cabrales*." Id. at ¶ 34. The *Brown* Court then superimposed over the *Rance-Cabrales* test a "same societal interest" test to address multiple convictions occurring under the same criminal statute for a single criminal act.

The Supreme Court adhered to the *Rance-Cabrales* abstract-element-comparison approach in *State v. Harris*, and *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059. *Winn* reiterated *Rance's* holding that "the first step * * * requires comparing the statutory elements in the abstract, rather than comparing the offenses as charged in a particular indictment." *Winn*, at ¶ 11. *Harris* reiterated that "*Rance* requires courts to compare the elements of offenses in the abstract * * *." *Harris*, at ¶ 12 (quoting *Cabrales*).

In judging whether one offense (in the abstract) will necessarily result in the other (in the abstract), *Harris* and *Winn* support the view that implausible hypotheticals will not defeat a merger argument under the first step of the test. In the lesser-included-offense discussion in *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, ¶¶ 24-25, the Court discussed *Winn* and characterized that decision as not allowing "implausible scenarios" to defeat a merger claim. This Court views *Winn* as an affirmance of *Rance* and *Cabrales*—nothing more. See *State v. Zurita-Velasquez*, 10th Dist. No. 08AP-770, 2009-Ohio-2049, ¶ 25.

 A11

## II. Under R.C. 2941.25 and *Rance*, felonious assault and domestic violence cannot be merged.

Felonious assault and domestic violence are not allied offenses of similar import. Domestic violence can occur when one knowingly attempts to cause physical harm to a family or household member, but a person can commit felonious assault by knowingly causing serious physical harm to another—irrespective of their relationship to the victim. To constitute a third-degree felony, the domestic violence statute also requires proof that the offender has two prior convictions for certain offenses where the victim was a family or household member. R.C. 2919.25(A) and (D)(4). Therefore, when comparing the statutory elements in the abstract, the two offenses possess a dissimilar import and cannot be merged. Felonious assault does not automatically or necessarily result in the commission of domestic violence, and, vice versa, domestic violence does not automatically or necessarily result in felonious assault. Indeed, the commission of each offense often occurs without the commission of the other.

Several Ohio appellate districts have reached the same conclusion. See *State v. Robinson*, 3rd Dist. No. 8-08-05, 2008-Ohio-4956, ¶ 26 (after *Cabrales*, the court held, "Felonious assault requires a finding of serious physical harm committed against any person, whereas domestic violence only requires a lesser degree of harm, and requires the additional circumstance that the act be against a family or household member."); see, also, *State v. Bowyer*, 8th Dist. No. 88014, 2007-Ohio-719, ¶ 24; *State v. Sandridge*, 8th Dist. No. 87321, 2006-Ohio-5243; *State v. Marshall*, 9th Dist. No. 22706, 2005-Ohio-5947; *State v. Yun* (2001), 5th Dist. No. 2000CA00276.

This Court in *State v. Ryan*, 10th Dist. No. 08AP-481, 2009-Ohio-3235, was confronted with a similar issue; but rather than determine whether felonious assault and

domestic violence were allied offenses, the Court disposed of the matter since each crime was committed with a separate animus. Notably, *Ryan* demonstrates the continued vitality of *Rance* and *Cabrales*. Id. ¶¶ 20-22. While *Ryan* was decided before *Harris*, this Court has stated in more recent cases that *Winn* "affirmed" *Rance* and *Cabrales*. See *Zurita-Velasquez*, at ¶ 25. The State respectfully requests that this Court view *Harris* the same.

Accordingly, under *Rance* and *Cabrales*, felonious assault and domestic violence are not allied offenses of similar import, and the lower court's attempt to merge the two offenses violates R.C. 2941.25(A) and warrants a resentencing.

**III. Two offenses cannot be "merged" through concurrent prison sentences.**

"[R]unning counts concurrent is not the equivalent of merging them." *State v. Carter*, 8th Dist. No. 90504, 2009-Ohio-5961, ¶ 11. Under R.C. 2941.25, only "multiple counts" can be merged; multiple convictions cannot.

As stated in *Harris*, "[t]wo allied offenses of similar import must be merged into a *single* conviction." At ¶ 21 (emphasis added), citing *Brown*, at ¶ 42. "An accused may be tried for both but may be convicted and sentenced for only one. The choice is given to the prosecution to pursue one offense or the other, and it is plainly the intent of the General Assembly that the election may be of either offense." *Harris*, at ¶ 21, quoting *Maumee v. Geiger* (1976), 45 Ohio St.2d 238, 244.

The lower court erred by convicting defendant of two separate offenses and sentencing him to concurrent prison terms on both. Such an error is not harmless simply because a defendant ultimately receives the same prison term. See *Carter*, supra; *State v. Reid*, 8th Dist. No. 89006, 2007-Ohio-5858, at ¶ 8; *State v. Hines*, 8th Dist. No. 84218,

2005-Ohio-4421, at ¶ 20; *State v. Underwood*, 2nd Dist. No. 22454, 2008-Ohio-4748, at ¶ 27-28 ("The failure to merge allied offenses of similar import constitutes plain error, even when the defendant received concurrent sentences.") In short, the court erred in all respects, both by "merging" these offenses of dissimilar import, and by then relying on such purported "merger" to conclude that it could only impose concurrent sentences.

Therefore, the State's assignment of error should be sustained.

## CONCLUSION

Both the logic and execution of defendant's sentence were incorrect. Merger cannot be accomplished through concurrent sentences. Even so, felonious assault and domestic violence can never merge since they are not allied offenses of similar import. Therefore, the State respectfully requests that the judgment be mostly affirmed but that it be reversed in part and remanded for resentencing.[1]

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney

JOHN H. COUSINS IV 0083498
Assistant Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
614-462-3555

Counsel for Plaintiff-Appellant

## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, November 16, 2009, to KEITH O'KORN, 1188 South High Street, Columbus, OH 43206; Counsel for Defendant-Appellee.

JOHN H. COUSINS IV 0083498
Assistant Prosecuting Attorney

[1] If this Court *sua sponte* contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 301 & n. 3; *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170.

## CERTIFICATE OF SERVICE

Judgment Entry dated July 29, 2009 ..... A-1

57308 - Q94

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

FILED
COMMON PLEAS COURT
FRANKLIN CO., OHIO
2009 JUL 29 AM 9:20
CLERK OF COURTS

| | | |
|---|---|---|
| STATE OF OHIO, | : | **Termination No. 13 by LL** |
| Plaintiff, | : | |
| v. | : | Case No. 08CR-06-4804 |
| JEREMY S. DAMRON, | : | Judge HOLBROOK |
| Defendant. | : | |

TERMINATION NO.

## JUDGMENT ENTRY
**(Prison Imposed)**

On May 5, 2009, the State of Ohio was represented by Assistant Prosecuting Attorney Megan Jewett and the Defendant was represented by attorney, Isabella Dixon Thomas. The Defendant, after being advised of his rights entered a plea of guilty to **Count One** of the Indictment, to wit: **FELONIOUS ASSAULT**, in violation of **Section 2903.11** of the Ohio Revised Code, being a **Felony** of the **Second Degree** and guilty to **Count Three** of the Indictment, to wit: **DOMESTIC VIOLENCE,** in violation of **Section 2919.25** of the Revised Code, a **Felony** of the **Third Degree.** Upon application of the Assistant Prosecuting Attorney, and for good cause shown, it is hereby **ORDERED** that a nolle prosequi be entered for **COUNTS TWO and FOUR with specifications** of the Indictment.

The Court found the Defendant guilty of the charge to which the plea was entered and ordered a pre-sentence investigation.

On July 27, 2009, a sentencing hearing was held pursuant to R.C. 2929.19. The State of Ohio was represented by Assistant Prosecuting Attorney Megan Jewett and the Defendant was represented by attorney Isabella Dixon-Thomas. The Assistant Prosecuting Attorney and the Defendant's attorney **did not** recommend a sentence.

The Court afforded counsel an opportunity to speak on behalf of the Defendant and addressed the Defendant personally affording him an opportunity to make a statement on his own behalf in the form of mitigation and to present information regarding the existence or non-existence of the factors the Court has considered and weighed.

The Court has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the Court has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14. The Court further finds that a prison term **is not** mandatory pursuant to R.C. 2929.13(F).

A17

57308 - Q95

The Court hereby imposes the following sentence: **EIGHT (8) YEARS as to Count One and FIVE (5) YEARS as to Count Three, to be served CONCURRENT to each other pursuant to *State v. Harris,* 2009-Ohio-3323** at the OHIO DEPARTMENT OF REHABILITATION AND CORRECTION.

After imposing sentence, the Court stated its reasons as required by R.C. 2929.19 and consistent with *State v. Foster*, 2006-Ohio-856.

The Court has considered the Defendant's present and future ability to pay a fine and financial sanction and does, pursuant to R.C. 2929.18, hereby render judgment for the following fine and/or financial sanctions: **Defendant shall pay court costs in an amount to be determined. No fine imposed.**

The total fine and financial sanction judgment is **$0 plus costs.**

The Court notified the Defendant pursuant to R.C. 2929.19(B)(3) that the applicable period of post-release control is three (3) years optional.

**The Defendant was notified of the Ohio Department of Rehabilitation and Correction's Shock Incarceration Programs and Post Release Control in writing and orally.**

The Court finds that the Defendant has **four hundred and two (402) days** of jail credit and hereby certifies the time to the Ohio Department of Corrections. The Defendant is to receive jail time credit for all additional jail time served while awaiting transportation to the institution from the date of the imposition of this sentence.

MICHAEL J. HOLBROOK, JUDGE

cc: Assistant Prosecuting Attorney
Defendant's Attorney

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

STATE OF OHIO,
Plaintiff,

Case No.: 08CR-4804

JUDGE HOLBROOK

vs.

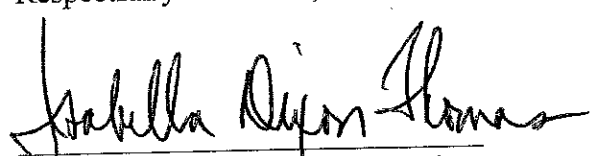
JEREMY DAMRON,
Defendant.

**SENTENCING MEMORANDUM**

A pre-sentence report has been filed with this Court. In addition to the pre-sentence report, a netcare evaluation was conducted and the report was stipulated to by both the state and defense.. The information contained in the pre-sentence report is accurate and there are no objections to its contents. The report and conclusions by Dr. Joan Williams address Jeremy Damron's emotional, educational and family background. On behalf of Jeremy Damron, it is respectfully requested that the Court sentence him to a term of community control. A memorandum in support is attached.

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2009 JUL 27 AM 9: 22
CLERK OF COURTS

Respectfully submitted,



Isabella Dixon Thomas#0039650
1058 Mt. Vernon Avenue
Columbus, Ohio 43203-1518
(614) 252-8788
Attorney for Jeremy Damron

A19

23

## MEMORANDUM IN SUPPORT

On May 5, 2009, Jeremy Damron entered guilty pleas to count one of the indictment and count three of the indictment. Count one of the indictment is felonious assault a felony of the second degree and count three is domestic violence, a felony of the third degree. The victim in count one and count three is Michelle Haley. The location of the offense in both counts was 7700 Havens Corner Road, Franklin County, Ohio. Also, the offenses in both counts occurred on the same date at the same time.

The Ohio Supreme Court, in State v. Harris, Slip Opinion No. 2009-Ohio-3323 ( attached and marked Exhibit 1), held that "... a defendant cannot be convicted of both offenses when both are committed with the same animus against the same victim." In reaching its conclusion, the Court looked at Ohio Revised Code Section 2941.25 which provides :

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

The Court has used a two step process in determining whether conduct constitutes allied offenses of similar import. The first step is to compare the elements of the crimes. The second step is to look at the defendant's conduct. In this instance, while the elements are not the same, Jeremy Damron could not commit a felonious assault against Michelle Haley without also committing a domestic violence. Also, there is one animus and one victim. Consequently, the domestic violence merges with the felonious assault.

In this case there are community control sanctions which would adequately punish Jeremy and not demean the seriousness of his crime. Jeremy has spent 402 days in

the Franklin County Corrections Center. The conditions there are deplorable. He never sees daylight unless he is brought to or from court. He has been punished.

Jeremy was wrongfully accused of rape. In this case, from the first time I met with Jeremy he denied raping Michelle. He admitted that they have had a rocky relationship. Michelle has had domestic violence charges against Jeremy but those were dismissed. Both Jeremy and Michelle have mental health issues. Both Jeremy and Michelle have substance abuse issues. They have a tumultuous relationship where mutual combat had become the norm. Jeremy is extremely remorseful for what he has done to Michelle and he is aware that he needs ongoing counseling.

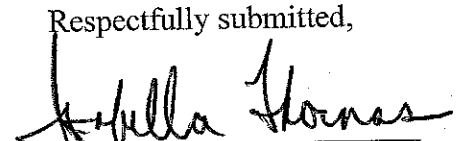
Recidivism is an issue. Jeremy knows he cannot see or contact Michelle or his children. He misses his children and they miss him. He has never been away from his children for this amount of time. He is willing to take the necessary steps to make himself a better person. He has had a great deal of adversity in his life. Dealing with the reality of what he did to Michelle has been sobering. Jeremy is committed to change.

Michelle does not want Jeremy to go to prison.(Exhibit 2) Michelle was quite candid with me during our first conversation when she told me that Jeremy did not rape her. I insisted on getting the hospital records because she told me that she kept telling the people at the hospital that there was no sexual assault. (Exhibit 3) Michelle indicated that both she and Jeremy have done things in front of the children that they should not have. They do their best as parents. Michelle believes that Jeremy is a good person and a good father. This is not a situation where she is expressing an opinion out of fear or desperation. She has not seen or spoken to Jeremy in over a year. The time has given her an opportunity to reflect as well. Jeremy has a job and a place to live if he were to be

placed upon community control (Exhibit 4) Even though he cannot see his children he can still support them.

It is respectfully requested that Jeremy Damron be sentenced to a term of Community Control with intensive supervision.

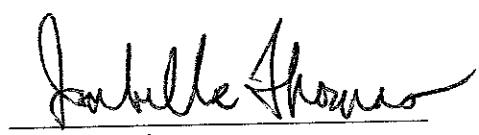
Respectfully submitted,



Isabella Thomas #0039650
1058 Mt. Vernon Avenue
Columbus, Ohio 43203
614/252-8788

**CERTIFICATE OF SERVICE**

A true copy of the foregoing Notice has been hand delivered to Megan Jewett this 27th day of July 2009.



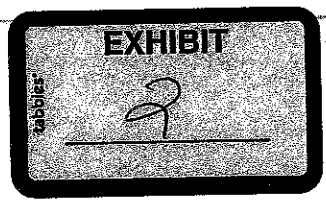
Isabella Thomas

Isabella Thomas <ithomas229@gmail.com>

# (no subject)

1 message

**Michelle Haley <mhaley@reliant-cap.com>** **Fri, Jul 24, 2009 at 10:19 AM**
To: ITHOMAS229@gmail.com




Dear Mrs. Thomas ,

My name is Michelle Haley and I am writing to you to give you some information about your client Jeremy Damron that I am hoping you will pass on to the judge is his current case.

Jeremy is the father of my 2 young sons . He and I had a relationship for 10 years from 1998 to 2008. Last year there was an incident between he and I that ended in me being hurt and Jeremy being placed in jail . I just wanted to say that Jeremy and I have has a rocky relationship where we have both hurt each other a lot. This incident last year was definetly the worst and has caused us both to suffer greatly. I know what he did was wrong and so does he but I want what is best for all of us and I do not feel him going to prison is it. Jeremy is a good person and father at heart but has had a long hard life and it has caused him to make mistakes that will affect all of us for the rest of life. Please ask the judge to get him the help he needs to get better for himself and our children .I believe with the right help he can change and be the man I know he wants to be .

Thank you for your help and time and please call me if you have any questions.

Sincerely,

Michelle Haley

Phone # 614-515-7628

Michelle Haley
750 Cross Pointe Rd. Ste G
Gahanna, OH 43230
1-866-738-3182 Ext. 145

614-452-6093

**This communication is from a debt collector. This is an attempt to collect a debt and any information obtained will be used for that purpose.**

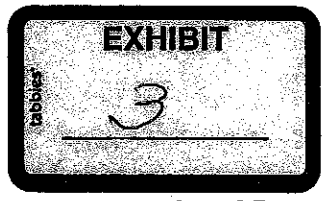
CONFIDENTIAL NOTICE: If you have received this email in error, please immediately notify the sender by email at the address shown above. This email may contain confidential or legally privileged information that is intended only for the use of the individual or entity named in this email. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or reliance upon the contents of this email is strictly prohibited. Please delete from your files if you are not the intended recipient. Thank you for your compliance

A23

OHIOHEALTH
RANT MEDICAL CENTER
111 S. GRANT AVE.
COLUMBUS, OHIO 43215

HALEY, MICHELLE
MR # 0006465762
ATTENDING VICTOR V. DIZON, DO

ACCT # 0817320218
DOB
DATE 06/21/2008




TRAUMA NOTE

CORRECTED REPORT
Category 2 trauma. This is an approximately 35-year-old female, who was transferred by EMS from the patient's home for assault by the patient's husband and possible sexual assault as stated by the medics. The patient denied sexual assault through the trauma service.

REVIEW OF SYSTEMS
The patient complained of face pain.

ALLERGIES
The patient has no allergies.

MEDICATIONS
The patient denies taking any current medications.

PAST MEDICAL HISTORY
The patient denies.

PAST SURGICAL HISTORY
The patient denies.

Primary surgery and secondary survey are constructed to strict ATLS guidelines.

PRIMARY SURVEY
Airway is patent. The patient is breathing spontaneously. Breath sounds are clear to auscultation bilaterally and unlabored. Femoral, dorsalis pedis, and posterior tibial pulses palpable and 2+. The patient was alert and oriented times 4, and moving all extremities equally to command. GCS was 15. Blood pressure is 148/87, pulse 148, sinus tachycardia on telemetry, respiratory rate 16, pulse oximetry 100% on 100% nonrebreather, and temperature is 98.7.

SECONDARY SURVEY
HEENT is normocephalic. Facial bones stable and tender to palpation. PERRLA. Tympanic membranes are clear. No otorrhea or rhinorrhea noted. C-spine - the patient arrived to the trauma bay without C-collar and head of the bed at 45 degrees. A C-collar was immediately placed. C-spine was nontender and without crepitus or deformity. Chest - symmetrical respirations, nontender with palpation, breath sounds equal and clear to auscultation. Back - T, L and S spine nontender without palpable stepoffs or deformity, and with abrasion to right shoulder

A24

blade and ecchymosis to right hip. Abdomen was soft and nontender. Bilateral inguinal fold ecchymosis and suprapubic ecchymosis is noted. Pelvis is stable and nontender. A Foley and urine DIP is deferred at this time, but will be done during a later assessment. Rectal tone was positive, guaiac was negative. The patient was able to move,all extremities and bilateral ecchymosis was found to upper extremities. The patient had bilateral periorbital ecchymosis, multiple bilateral lower extremities abrasions and ecchymosis, bilateral thigh ecchymosis and contusions.

LABS
Hemoglobin 11.0, sodium 147, potassium 3.6, calcium 4.20. ABG was pH of 7.34, CO2 44, pO2 199, bicarb 23, oxygen saturation 99%, base excess -2.0, lactate 0.9. Chest x-ray film was negative. Pelvis x-ray film was negative. Fast was negative.

INITIAL INJURY ASSESSMENT
1. Status post assault.
2. Concussion.
3. Periorbital ecchymosis.
4. Multiple contusions and abrasions.

The patient denied stain exam.

PLAN
The plan is to do a CT of the head, CT of the cervical spine, CT of thoracic and lumbar spine, angio of the neck, and maxillofacial CT scan. Dr. Dizon was present in the trauma bay and the patient's assessment and plan was discussed with him. The patient will be admitted to the seventh floor with telemetry. Further disposition will be determined after CT scan results and reviewed.

Dictated by: SARAH SIANO, PA

VICTOR V. DIZON, DO

DD: 06/22/2008 00:33:39
DT: 06/22/2008 06:59:04
TL: 5095676/JOB: d:/CIG/51554/reports/work/Dn77540_330771147_99
Authenticated by VICTOR V DIZON, MD On 06/24/2008 10:44:45 PM

A25

28 middle [illegible]

Date: 6/21/08 Time: 2358 Alert Category: (CIRCLE ONE) I (II) Consult

**HISTORY**

Traumatic Event: assault
possible sexual assault (pt denies sexual assault)
bilateral periorbital ecchymosis
☐ Patient Unable to Participate in History

Allergies: NKDA
Medications: ∅
Past Medical/Surgical History: ∅

**REVIEW OF SYSTEMS**

ROS *(review of systems)*

☐ Constitutional (wt loss, etc) ☐ Eyes ☐ Ears, nose, mouth, throat ☐ Card/vasc ☐ Resp ☐ GI ☐ GU ☐ Musculo ☐ Integumentary (skin, breast) ☐ Neuro ☐ Psych ☐ Endo ☐ Hem/lymph ☐ All/imm ☐ "All others negative"

**PRIMARY SURVEY**

Airway: breathing spontaneous; patent
Breathing: breath sounds CTA bil, unlabored
Circulation: Femoral/DP/PT pulses palpable 2+
Neuro: A&O x4, moves all extremities = to command
GCS 15

B/P: 148/87
P 148 ST
RR 16
$SaO_2$ 100% on 100% NRB
Temp 98.7

**SECONDARY SURVEY**

HEENT: normocephalic. facial bones stable & tender to palpation. PERRLA. Tympanic membrane clear. No otterhea or rhinorhea noted, nares patent
C-spine: pt arrived to trauma bay 5 C-collar and HOB 45°. C-collar placed. Non-tender & 5 crepitus
Chest: symmetrical, non-tender to palpation; breath sounds CTA bil
Back/T/L/S Spine: $S_1$ $S_2$ non tender 5 palpable step offs, deformity and abrasions to (R) shoulder blade; ecchymosis to (R) hip
Abdomen: bilateral inguinal fold ecchymosis; soft, non-tender. Fast (-) supranubic ecchymosis
Pelvis: stable non tender
GU: urine dip + / - / gross hematuria — ecchymosis & edema to labial minora
Rectal: tone (+) - guaiac + / (-)
Extremities: bilateral ecchymosis to upper extremities
Skin: bilateral periorbital ecchymosis, multiple bil. lower extremity abrasion bilateral thigh, inguinal fold (bil), ecchymosis

Grant Medical Center
OhioHealth

TRAUMA
HISTORY & PHYSICAL ASSESSMENT NOTE

ADDRESSOGRAPH
0817320218 06/22/08 IPG
0006465762 EDMG TRA
HALEY, MICHELLE
03/31/79 29Y F
A- DIZON, VICTOR V
R- GMC, ER

PRINTED BY: TXP106 DATE 03/13/2009
Chart Tab: H&P/NSG ASSESSMENT

A26

0817320218 06/21/08 EMG
0006465762 EDMG TRA
TRAUMA,X
01/01/80 128Y M
A- DIZON,VICTOR V
R- PATIENT,SELF REFE

*TRAUMA/FS*

## VITAL SIGNS

| Time | BP | P | R | $SaO_2$ | Temp | Pain Scale 0-10 | Notes |
|---|---|---|---|---|---|---|---|
| 2354 | 148/87 | 132 | 18 | 99% | 98.7 | 10 | ~~denying~~ denying denies sexual |
| 0001 | 127/63 | 121 | 18 | 99% | - | [illegible] | ~~assault~~ ~~collar applied~~ |
| 0005 | 137/86 | 110 | 19 | | | | abrasions contusions to |
| 0015 | 132/100 | 111 | 18 | 97% | RA | | perineal area swelling to |
| | | | | | | | labia minora Abrasions to |
| | | | | | | | Symphius pubis. |
| | | | | | | | Bruising to Both arms Both legs |
| | | | | | | | pt answers questions appropriately |
| | | | | | | | voice clear |

## DEPARTMENT INTERVENTIONS

| Time | Procedures: |
|---|---|
| Ø | Intubation Oral/Nasal Size ____ cm @ Lip ____ |
| Ø | Cricothyrotomy Tube Size ____ |
| Ø | Chest Needle Decompression ☐ Right ☐ Left<br>Air Returned ☐ Yes ☐ No |
| Ø | Chest Tube ☐ Right ☐ Left Tube Size ____ |
| Ø | Thoracotomy ☐ Right ☐ Left |
| 0002 | Fast ☐ + ☒ - |
| Ø | DPL ☐ + ☐ - CCS: In ____ Out ____ |
| Ø | NG/OG ☐ Right ☐ Left Size ____ |
| Ø | Foley Size ____ Urine ____ |
| Ø | 12 Lead EKG |
| Ø | Restraints |
| Ø | Suture/Staples |
| Ø | Rewarming ☐ Lights ☐ Blankets ☐ Fluids ☐ Hothead |

## GLASGOW COMA SCALE

| Time | | 2354 | 0001 | 0005 | 0015 | | | | |
|---|---|---|---|---|---|---|---|---|---|
| **1. Best Eye Opening Response** | | 4 | 4 | 4 | 4 | | | | |
| Spontaneous | 4 | | | | | | | | |
| To Voice | 3 | | | | | | | | |
| To Pain | 2 | | | | | | | | |
| No Response | 1 | | | | | | | | |
| **2. Best Verbal Response** | | 5 | 5 | 5 | 5 | | | | |
| Oriented | 5 | | | | | | | | |
| Confused | 4 | | | | | | | | |
| Inappropriate Words | 3 | | | | | | | | |
| Incomprehensive Words | 2 | | | | | | | | |
| No Response | 1 | | | | | | | | |
| **3. Best Motor Response** | | 6 | 6 | 6 | 6 | | | | |
| Obeys Command | 6 | | | | | | | | |
| Localizes to Stimuli | 5 | | | | | | | | |
| Normal Flexion Withdrawal | 4 | | | | | | | | |
| Abnormal Flexion | 3 | | | | | | | | |
| Abnormal Extension | 2 | | | | | | | | |
| No Response | 1 | | | | | | | | |
| **Glasgow Coma Scale** | Total | 15 | 15 | 15 | 15 | | | | |

PRINTED BY: TXP106 DATE 03/13/2009



A27

Isabella Thomas <ithomas229@gmail.com>

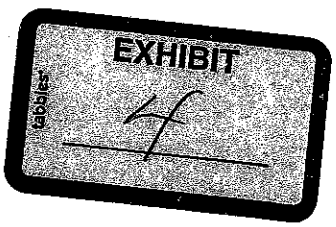
# jonathon damron

1 message

**jonny dam <extrasuperultramega@inbox.com>** **Fri, Jul 24, 2009 at 12:09 AM**
To: ithomas229@gmail.com

hello Isabella,
below is my statment i also put as Attachment

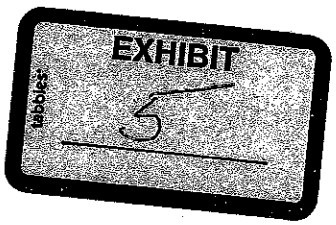
my name is Jonathon damron I'm Jeremy damron's younger bother.
I'm very saddened by what has happen to my family and i would do
anything to make things right for all of them.
im a proud uncle and spend every weekend i can with his kids
i love my family very much and would do anything
for my brother when he is released.
I'm a full time electrician and worked at berwick electric for
the past 2yrs and plan on being there for a long time.
Jeremy has also worked for berwick and there's a job and a place
to live waiting for him when he is released.




**jonathon damrons statment.txt**
1K

A28

# FRANKLIN COUNTY CORRECTIONS CENTER II
# SOCIAL SERVICES DIVISION




DATE: July 16, 2009

TO: Franklin County Court of Common Pleas
Honorable Judge Michael Holbrook
Courtroom 9A 9th Fl.
369 South High St.
Columbus, Oh 43215

FROM: Syble L. Saxon, Social Worker II
Franklin County Corrections Center II
2460 Jackson Pike
Columbus, Oh 43223

RE: Jeremy S. Damron

DOB: 07-10-1976

SSN: 290-70-9374

Please be advised that the inmate Jeremy S. Damron, is currently enrolled and participating in the Anger Management Classes here at the Franklin County Correctional Center II. Meetings are held every Wednesday and Friday from 12pm to 2pm. Class began on July 08th 2009 and is six weeks long. The purpose of the class is to focus on identifying why do we get angry, What triggers our anger that lead to criminal behavior. The individual looks back at what made him or her take the destructive path in their life that got them here today. The participants also look at how to change their thought patterns to be successful in life without committing criminal acts. If Mr. Damron successfully completes the class on August 14th 2009 he will receive a Certificate of Completion. If you have any questions, please contact me at (614) 462-7142 between 7am and 3pm.

Sincerely,

Syble L. Saxon

Syble L. Saxon
Social Worker II
Class Facilitator
614-462-7142

2460 JACKSON PIKE • COLUMBUS • 43223
PHONE: 614-462-7142 • FAX: 614-462-6229

Baldwin's Ohio Revised Code Annotated Currentness
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2903. Homicide and Assault
Assault
**2903.13 Assault**

(A) No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn.

(B) No person shall recklessly cause serious physical harm to another or to another's unborn.

(C) Whoever violates this section is guilty of assault, and the court shall sentence the offender as provided in this division and divisions (C)(1), (2), (3), (4), (5), and (6) of this section. Except as otherwise provided in division (C)(1), (2), (3), (4), or (5) of this section, assault is a misdemeanor of the first degree.

(1) Except as otherwise provided in this division, if the offense is committed by a caretaker against a functionally impaired person under the caretaker's care, assault is a felony of the fourth degree. If the offense is committed by a caretaker against a functionally impaired person under the caretaker's care, if the offender previously has been convicted of or pleaded guilty to a violation of this section or section 2903.11 or 2903.16 of the Revised Code, and if in relation to the previous conviction the offender was a caretaker and the victim was a functionally impaired person under the offender's care, assault is a felony of the third degree.

(2) If the offense is committed in any of the following circumstances, assault is a felony of the fifth degree:

(a) The offense occurs in or on the grounds of a state correctional institution or an institution of the department of youth services, the victim of the offense is an employee of the department of rehabilitation and correction, the department of youth services, or a probation department or is on the premises of the particular institution for business purposes or as a visitor, and the offense is committed by a person incarcerated in the state correctional institution, by a person institutionalized in the department of youth services institution pursuant to a commitment to the department of youth services, by a parolee, by an offender under transitional control, under a community control sanction, or on an escorted visit, by a person under post-release control, or by an offender under any other type of supervision by a government agency.

(b) The offense occurs in or on the grounds of a local correctional facility, the victim of the offense is an employee of the local correctional facility or a probation department or is on the premises of the facility for business purposes or as a visitor, and the offense is committed by a person who is under custody in the facility subsequent to the person's arrest for any crime or delinquent act, subsequent to the person's being charged with or convicted of any crime, or subsequent to the person's being alleged to be or adjudicated a delinquent child.

(c) The offense occurs off the grounds of a state correctional institution and off the grounds of an institution of the department of youth services, the victim of the offense is an employee of the department of rehabilitation and correction, the department of youth services, or a probation department, the offense occurs during the employee's official work hours and while the employee is engaged in official work responsibilities, and the offense is committed by a person incarcerated in a state correctional institution or institutionalized in the department of youth services who temporarily is outside of the institution for any purpose, by a parolee, by an offender under transitional control, under a community control sanction, or on an escorted visit, by a person under post-release control, or by an offender

A30

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under any other type of supervision by a government agency.

(d) The offense occurs off the grounds of a local correctional facility, the victim of the offense is an employee of the local correctional facility or a probation department, the offense occurs during the employee's official work hours and while the employee is engaged in official work responsibilities, and the offense is committed by a person who is under custody in the facility subsequent to the person's arrest for any crime or delinquent act, subsequent to the person being charged with or convicted of any crime, or subsequent to the person being alleged to be or adjudicated a delinquent child and who temporarily is outside of the facility for any purpose or by a parolee, by an offender under transitional control, under a community control sanction, or on an escorted visit, by a person under post-release control, or by an offender under any other type of supervision by a government agency.

(e) The victim of the offense is a school teacher or administrator or a school bus operator, and the offense occurs in a school, on school premises, in a school building, on a school bus, or while the victim is outside of school premises or a school bus and is engaged in duties or official responsibilities associated with the victim's employment or position as a school teacher or administrator or a school bus operator, including, but not limited to, driving, accompanying, or chaperoning students at or on class or field trips, athletic events, or other school extracurricular activities or functions outside of school premises.

(3) If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, a firefighter, or a person performing emergency medical service, while in the performance of their official duties, assault is a felony of the fourth degree.

(4) If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation and if the victim suffered serious physical harm as a result of the commission of the offense, assault is a felony of the fourth degree, and the court, pursuant to division (F) of section 2929.13 of the Revised Code, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the fourth degree that is at least twelve months in duration.

(5) If the victim of the offense is an officer or employee of a public children services agency or a private child placing agency and the offense relates to the officer's or employee's performance or anticipated performance of official responsibilities or duties, assault is either a felony of the fifth degree or, if the offender previously has been convicted of or pleaded guilty to an offense of violence, the victim of that prior offense was an officer or employee of a public children services agency or private child placing agency, and that prior offense related to the officer's or employee's performance or anticipated performance of official responsibilities or duties, a felony of the fourth degree.

(6) If an offender who is convicted of or pleads guilty to assault when it is a misdemeanor also is convicted of or pleads guilty to a specification as described in section 2941.1423 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, the court shall sentence the offender to a mandatory jail term as provided in division (G) of section 2929.24 of the Revised Code.

If an offender who is convicted of or pleads guilty to assault when it is a felony also is convicted of or pleads guilty to a specification as described in section 2941.1423 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, except as otherwise provided in division (C)(4) of this section, the court shall sentence the offender to a mandatory prison term as provided in division (D)(8) of section 2929.14 of the Revised Code.

(D) As used in this section:

(1) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.



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(2) "Firefighter" has the same meaning as in section 3937.41 of the Revised Code.

(3) "Emergency medical service" has the same meaning as in section 4765.01 of the Revised Code.

(4) "Local correctional facility" means a county, multicounty, municipal, municipal-county, or multicounty-municipal jail or workhouse, a minimum security jail established under section 341.23 or 753.21 of the Revised Code, or another county, multicounty, municipal, municipal-county, or multicounty-municipal facility used for the custody of persons arrested for any crime or delinquent act, persons charged with or convicted of any crime, or persons alleged to be or adjudicated a delinquent child.

(5) "Employee of a local correctional facility" means a person who is an employee of the political subdivision or of one or more of the affiliated political subdivisions that operates the local correctional facility and who operates or assists in the operation of the facility.

(6) "School teacher or administrator" means either of the following:

(a) A person who is employed in the public schools of the state under a contract described in section 3319.08 of the Revised Code in a position in which the person is required to have a certificate issued pursuant to sections 3319.22 to 3319.311 of the Revised Code.

(b) A person who is employed by a nonpublic school for which the state board of education prescribes minimum standards under section 3301.07 of the Revised Code and who is certificated in accordance with section 3301.071 of the Revised Code.

(7) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(8) "Escorted visit" means an escorted visit granted under section 2967.27 of the Revised Code.

(9) "Post-release control" and "transitional control" have the same meanings as in section 2967.01 of the Revised Code.

(10) "Investigator of the bureau of criminal identification and investigation" has the same meaning as in section 2903.11 of the Revised Code.

CREDIT(S)

(2008 H 280, eff. 4-7-09; 2006 H 347, eff. 3-14-07; 2002 H 490, eff. 1-1-04; 2000 H 412, eff. 4-10-01; 1999 S 142, eff. 2-3-00; 1999 S 1, eff. 8-6-99; 1997 S 111, eff. 3-17-98; 1997 H 106, eff. 11-21-97; 1996 H 480, eff. 10-16-96; 1996 S 239, eff. 9-6-96; 1995 S 2, eff. 7-1-96; 1994 H 571, eff. 10-6-94; 1994 S 116, eff. 9-29-94; 1992 H 561, eff. 4-9-93; 1988 H 642; 1972 H 511)

UNCODIFIED LAW

1996 S 239, § 4: See Uncodified Law under RC 2903.09.

1996 H 614, § 1 to 6, eff. 6-17-96, read:

Section 1. Am. Sub. S.B. 116 of the 120th General Assembly, 145 Ohio Laws 1089, enacted on May 24, 1994, amended R.C. 2903.13, among other purposes, to make assaulting a police officer who is acting in the line of duty a

A32

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