ORIGINAL

IN THE SUPREME COURT OF OHIO
2011

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

JEREMY S. DAMRON,

Defendant-Appellee.

Case No. 2010-937

On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

Court of Appeals Case No. 09AP-807

REPLY BRIEF OF PLAINTIFF-APPELLANT STATE OF OHIO

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ARGUMENT

Proposition of Law One: Even when the sentence falls within the permitted statutory range, the sentence is contrary to law if the court fails to consider the mandatory provisions in R.C. Chapter 2929, or if the court relies on an erroneous legal determination that removes a sentencing option from its consideration.

Proposition of Law Two: When a court imposes concurrent prison terms under the mistaken belief that it is merging two allied offenses of similar import, sentencing error occurs, and that error can be corrected on appeal.

Defendant presents no valid basis for this Court to affirm the Tenth District's judgment. Recycling a series of flawed "plain error" and "standing" arguments, defendant devotes a substantial portion of his brief to issues unrelated to this case. Accordingly, the State stands by its initial briefing and will use this reply brief to address several important points.

I. A sentencing issue is preserved for appellate review when the issue has been called to the attention of the trial court and ruled upon.

Defendant repeats the plain-error arguments that he raised in the Tenth District and in his memorandum opposing jurisdiction. Conceding that the State requested consecutive prison terms and argued against merger (Brief at 2), defendant paradoxically claims that the State forfeited all but plain-error review merely because the prosecutor "thanked the court" after the sentence was announced. (Brief at 4, 15) There are serious flaws in this claim, the most obvious being defendant's reliance on the objection requirement in Evid.R. 103. The Rules of Evidence do not apply at sentencing proceedings. Evid.R. 101(C)(3). Even under the plain-error rule in Crim.R. 52(B), plain-error review only applies to errors that "were not brought to the attention of the court." If defendant contends that the State was required to take exception with the adverse ruling,

this contention would defy Crim.R. 51, which states: "An exception, at any stage or step of the case or matter, is unnecessary to lay a foundation for review, whenever a matter has been called to the attention of the court by objection, motion, or otherwise, and the court has ruled thereon."

In its sentencing memorandum and at the hearing, the State properly brought its sentencing challenges "to the attention of the court." The State requested consecutive sentences, argued that the two offenses do not merge under R.C. 2941.25, and even asked the trial court "to consider the purposes of sentencing." (Tr. 7/27/09, p. 5-9; R. 146) As the Tenth District recognized, "The state argued that felonious assault and domestic violence are not allied offenses of similar import, and that the circumstances of the case made imposition of consecutive sentences on the two counts appropriate." *State v. Damron*, 10th Dist. No. 09AP-807, 2010-Ohio-1821, ¶3. The trial court's adverse ruling cemented these sentencing issues for appellate review.

Equally wrong is defendant's argument that the State did not preserve its propositions of law in the Tenth District. He claims that the State "did not argue that the trial court abandoned its discretion" and "did not point to one mandatory sentencing provision that the trial court failed to comport with in its imposition of the sentence." (Brief at 5, 14) Yet, these exact two arguments *were* advanced in the first two pages of the State's reply brief—the only brief not attached to or referenced in defendant's brief. Specifically, the State contended:

> When the court mistakenly believed that it had "no alternative" but to impose concurrent sentences, it violated R.C. 2929.11 and 2929.12 by ignoring the mandatory felony-sentencing factors and guidelines. * * *
>
> In other words, the court wrongfully believed that it could not exercise discretion in an area where it was *required* to. As a result, it

> violated R.C. 2941.25 by attempting to merge two nonallied offenses through the imposition of concurrent sentences.

(Reply Brief at 1-2) Thus, not only did the State argue that the trial court abandoned its discretion, the State pointed to *three* sentencing statutes that were violated as a result. Defendant's representation of the record is incomplete.

Nevertheless, the State was not required to anticipate the Tenth District's refusal to conduct any meaningful appellate review. The State's notice of appeal cited the "contrary to law" provision in R.C. 2953.08(B)(2), and the State's sole assignment of error explained how the trial court's "purported merger" violated R.C. 2929.11, 2929.12, and 2941.25. The Tenth District refused to review the trial court's merger belief, however, simply "because the trial court did not actually merge the two counts." *Damron* at ¶10. Whether or not the concurrent terms were based on "faulty reasoning," the Tenth District held that the trial court's mistake "resulted in a sentence authorized by the statutes governing sentencing." Id. at ¶11. This holding is the basis for the State's propositions of law. Defendant adds nothing to the meritless arguments contained in his memorandum opposing jurisdiction.

II. The State has standing to appeal under R.C. 2953.08(B)(2), and the State was prejudiced by the errors committed at the trial and appellate level.

Echoing another argument from prior briefing, defendant claims that only those facing criminal conviction have standing to appeal an invalid sentence. (Brief at 9, 15) This claim ignores R.C. 2953.08(B)(2), which grants the prosecution an appeal "as a matter of right" from any felony sentence claimed to be contrary to law. In addition to the State's right to meaningful appellate review, defendant ignores the State's right to judicial consideration of all valid sentencing options under R.C. 2929.11 and 2929.12.

Here, that right was expressly violated. Despite the State's request for consecutive terms, its arguments against merger, and its call for consideration of the "purposes of sentencing," the trial court stated that it had "no alternative" but to impose concurrent prison terms pursuant to *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323. But for this belief, the trial court "would have" imposed *consecutive* prison terms—a valid sentencing option—for what it called "the worst domestic violence/felonious assault I've seen since I've been on the bench." (Tr. 7/27/09, p. 15)

But other than the trial court's erroneous refusal to consider consecutive sentences, even greater damage was inflicted by the Tenth District. Now, under *Damron*, a trial court's erroneous merger ruling will be impervious to a prosecution appeal whenever the trial court attaches a "concurrent sentence" label to its ruling. "[B]ecause the trial court did not actually merge the two counts," the Tenth District held that the underlying merger justification—no matter how "faulty"—is unreviewable if the sentence itself falls within statutory limits. This "two wrongs make a right sentence" holding deprived the State of the right to meaningful appellate review, and it will cause certain prejudice to the State in future merger litigation.

III. The sentence must be reversed even under the abuse-of-discretion standard applied by the *Kalish* plurality.

In his argument that this case should be dismissed as not involving a question of great public interest, defendant ironically relies on *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, a plurality opinion that *has* created a statewide controversy over the scope of felony sentencing review. Warning that a reversal in this case will "effectively overrule *Kalish*" (Brief at 8), defendant forgets that *Kalish* did not create any controlling law in the first place. As explained in the State's initial brief, the three-justice *Kalish*

plurality, advocating an additional abuse-of-discretion analysis, lacks precedential weight because it "fail[ed] to receive the requisite support of four justices * * * in order to constitute controlling law." *Kraly v. Vannewirk* (1994), 69 Ohio St.3d 627, 633.

Defendant criticizes the State for not arguing under the *Kalish* framework in the Tenth District, but this criticism ignores the Tenth District's refusal to apply the *Kalish* approach. See *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, ¶8 ("As a plurality opinion, *Kalish* has limited precedential value. * * * And, since *Kalish*, this court has continued to rely on the standard applied in *Burton* and its progeny, i.e., whether clear and convincing evidence establishes that a sentence is contrary to law. ") Indeed, several appellate districts, recognizing the non-controlling nature of *Kalish*, continue to rely on the contrary-to-law standard in R.C. 2953.08(G)(2). See, e.g., *State v. Turks*, 3rd Dist. Nos. 1-10-02, 1-10-26, 2010-Ohio-5944, ¶45, at n. 4; *State v. Harris*, 8th Dist. No. 90699, 2008-Ohio-5873, at n. 1.

Nonetheless, even if an abuse-of-discretion standard does somehow factor into the analysis—under either the *Kalish* plurality's two-step approach or Judge Williamowski's approach—defendant's sentence should be reversed. The trial court's statement that it had "no alternative" but to impose concurrent sentences proves that the court abandoned its sentencing discretion. See *State v. Green*, 10th Dist. No. 09AP-972, 2010-Ohio-3838, ¶32 ("a court abuses its discretion when it refuses to exercise that discretion.").

IV. To determine whether a sentence is contrary to law, the appellate court must consider the entire record, including the sentencing transcript.

Defendant's analysis overlooks the sentencing transcript and relies exclusively on one passage within the sentencing entry that denotes a judicial consideration of R.C. 2929.11, 2929.12, 2929.13, and 2929.14. But even under this entry-only review,

defendant does not mention the express error contained in the sentencing entry: the order that "CONCURRENT" sentences be imposed "pursuant to *State v. Harris*, 2009-Ohio-3323." (R. 149) Nevertheless, R.C. 2953.08(G)(2) does not confine appellate review to the sentencing entry, let alone one isolated passage within the entry. A reviewing court hearing an appeal under R.C. 2953.08(B) "shall review the record, including the findings underlying the sentence or modification given by the sentencing court." The "record on appeal in all cases" includes "[t]he original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court * * *." App.R. 9(A).

Defendant cannot meaningfully distinguish this Court's sentencing decision in *State v. Johnson*, 116 Ohio St.3d 541, 2008-Ohio-69. He claims that *Johnson* is inapposite simply because it "deals with the application of a particular sentencing statute that mandated consecutive sentences, which is not at issue in the case herein." (Brief at 14) This distinction is wrong for two reasons. First, the statute at issue in *Johnson did not* mandate consecutive sentences, hence the trial court's "mistaken belief." Second, this case, like *Johnson*, involves the application of a particular sentencing statute—R.C. 2941.25. Because the trial court wrongly believed that R.C. 2941.25 required concurrent sentences, the sentence was invalid whether or not concurrent terms were authorized.

V. Defendant presents no authority supporting the trial court's merger belief.

No appellate court has ever declared felonious assault under R.C. 2903.11(A) and felony domestic violence under R.C. 2919.25(A) & (D)(4) to be "allied offenses of similar import" under R.C. 2941.25. Whether or not the offenses arise from the same conduct, each has a dissimilar import that serves a unique legislative goal. Third-degree

felony domestic violence criminalizes the repeat abuse of family or household members resulting in physical harm or attempted physical harm, whereas felonious assault criminalizes the original infliction of serious physical harm against any member of society. These differing victim, harm, and recidivism components prove that the legislature did not intend to award a "merger discount" when a pattern of domestic abuse escalates to the level of serious physical harm.

Without mentioning the prior-conviction element, defendant purports to compare felonious assault with *misdemeanor* domestic violence. However, this Court has recognized that the existence of two or more domestic-violence related convictions under R.C. 2919.25(D)(4) is an "essential element that the state must prove beyond a reasonable doubt." *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, ¶90, citing *State v. Henderson* (1979), 58 Ohio St.2d 171, 173. Because a prior-conviction element in one offense provides a basis for holding that the offense is of dissimilar import to another offense, *State v. Rice* (1982), 69 Ohio St.2d 422, 425, defendant's failure to address the prior-conviction element in R.C. 2919.25(D)(4) is fatal to his merger claim.

Defendant minimizes another essential element of domestic violence: the "family or household member" victim requirement. As this Court has explained, "the accused's relationship with the victim is the determining element" of domestic violence. *State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723, ¶29. "In contrast to 'stranger' violence, domestic violence arises out of the *relationship* between the perpetrator and the victim." Id. at ¶31, quoting *State v. Williams* (1997), 79 Ohio St.3d 459, 462 (emphasis sic). Defendant does not dispute that the State must prove the "family or household member" status of the victim beyond a reasonable doubt in every domestic-violence prosecution,

nor does he dispute that the evidence required for such proof is innately different from the evidence required to prove the victim element of felonious assault. There is simply no authority for defendant's belief that the "family or household member" element is "a delimiting or restrictive factor, not an additional element of the crime." (Brief at 21)

Defendant also fails to address the different elements of physical harm required for each offense. His domestic-violence conviction involved the knowing infliction or attempted infliction of mere physical harm, a harm defined as "any injury, illness, or other physiological impairment, regardless of its gravity or duration." R.C. 2901.01(A)(3). However, his felonious-assault conviction involved the knowing infliction of serious physical harm, a level of harm far greater that mere physical harm or attempted physical harm. See R.C. 2901.01(A)(5).

Defendant states that the Tenth District "recently assumed" the similar import of the two offenses in *State v. Ryan*, 10th Dist. No. 08AP-481, 2009-Ohio-3235, but he fails to mention that the Tenth District assumed this proposition "arguendo." Id. at ¶25. Because the defendant's "actions constituted separate and distinct crimes," thereby making merger inappropriate whether or not the offenses shared a similar import, the Tenth District refused to compare the elements. Id. at n. 2 ("Because the convictions in this case arise from separate conduct, we express no opinion as to whether R.C. 2903.11(A)(2) and 2919.25(A) are allied offenses of similar import."). The goal of defendant's citation to *Ryan* is unclear.

Finally, defendant's merger analysis stems from a flawed double jeopardy premise that requires correction. He claims that multiple convictions in violation of R.C. 2941.25 violates his protection against double jeopardy; however, this could only be true

when the crimes first constitute the "same offense" under *Blockburger v. United States* (1932), 284 U.S. 299. Even when the offenses are the "same offense" for double jeopardy purposes, cumulative punishment may still be imposed for the "same offense," in the same prosecution, if authorized by the legislature. *Missouri v. Hunter* (1983), 459 U.S. 359, 368. In such cases, Ohio courts must apply R.C. 2941.25 (unless a more specific sign of legislative intent exists) to determine whether the legislature authorized cumulative punishment. *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, fn 1. Only in this scenario does application of R.C. 2941.25 have double jeopardy implications.

When two crimes are *not* the "same offense," however, the application of R.C. 2941.25 has no double jeopardy ramifications. "The sole question, then, is one of state statutory construction: are the offenses at issue those certain offenses for which the General Assembly has approved multiple convictions pursuant to R.C. 2941.25?" *State v. Rance* (1999), 85 Ohio St.3d 632, 639. The present case falls into this latter category. Felonious assault and felony domestic violence are not the same offense under *Blockburger*, as each crime requires proof of an element that the other does not. (See State's Brief at 1) Because the offenses are not the "same offense" under *Blockburger*, application of R.C. 2941.25 has no double jeopardy implications.

Thus, defendant's reliance on the double jeopardy analysis in *State v. Tatro* (1985), 6th Dist No. L-84-308, is inappropriate. *Tatro* is distinguishable given its comparison of *misdemeanor* domestic violence and felonious assault in the context of *successive prosecutions*, but the *Tatro* court also employed the now-defunct "same conduct" variation of *Blockburger* that the United States Supreme Court overruled in *United States v. Dixon* (1993), 509 U.S. 688. Nevertheless, the *Tatro* court made clear:

"R.C. 2941.25 is not applicable in the cause sub judice." Id. at n. 1. Defendant's reliance on the Double Jeopardy Clause and *Blockburger* is misplaced.

VI. The Tenth District's judgment should be reversed notwithstanding this Court's syllabus in *State v. Johnson*, ___ Ohio St.3d ___, 2010-Ohio-6314.

In *State v. Johnson*, ___ Ohio St.3d ___, 2010-Ohio-6314, this Court recently overruled its prior decision in *Rance*, which set forth a two-part analysis for determining whether offenses will "merge" for sentencing purposes under R.C. 2941.25. Although each of the divided opinions in *Johnson* lacked the votes necessary to create binding authority, see *Vannewirk*, 69 Ohio St.3d at 633, the unanimously approved syllabus contains the following controlling law:

> When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered. (*State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, overruled.)

Johnson, __ Ohio St.3d at syllabus.

The three-opinion impasse centered around application of the syllabus, i.e., how to consider "the conduct of the accused." The first opinion, authored by former Chief Justice Brown with concurring votes from Justices Pfiefer and Stratton ("the Brown opinion"), espoused an analysis that the second opinion, authored by current Chief Justice O'Connor with concurrences from Justices Pfieffer and Cupp ("the O'Connor opinion"), expressly opposed. *Johnson* at ¶51 (O'Connor, J. concurring). Although both opinions shared a concurring vote, each promoted a different merger analysis. The third opinion, written by Justice O'Donnell with a concurrence from Justice Stratton ("the O'Donnell opinion"), did not resolve this conflict, and Justice Lanzinger concurred in the syllabus and judgment only.

Notwithstanding the lack of a controlling or lead opinion in *Johnson*, the State acknowledges the overruling of *Rance*. As explained in Section VI.(A) below, the State respectfully requests that this Court approve the State's first and second propositions of law, reverse the Tenth District's judgment, and remand this case to the Tenth District for application of *Johnson*. Although this Court could conceivably apply *Johnson* without a remand, see Section VI.(B), infra, the State submits that a remand is the best option.

A. The State respectfully requests that this Court approve the State's propositions of law and remand this case to the Tenth District for application of the *Johnson* syllabus.

This Court declined to accept the State's merger proposition of law, *8/25/2010 Case Announcements*, 2010-Ohio-3855, making the narrow issue presented here one involving the scope of appellate sentencing review. Even if the *Johnson* syllabus validated the trial court's merger belief, the trial court erred by concluding that merger was achieved through concurrent sentences, and the Tenth District erroneously held that sentencing error cannot exist within statutory limits. If allowed to stand, this holding will insulate merger review from State sentencing appeals whenever the trial court attaches concurrent sentences to its merger ruling.

Unlike the summary reversals in which this Court remanded to the court of appeals for "application" of *Johnson*, *State v. Claycraft*, *12/29/2010 Case Announcements*, 2010-Ohio-6332, and *State v. Lanier*, *1/5/2011 Case Announcements*, 2011-Ohio-5, such a remand in this case will be futile without approval of the State's propositions of law. The Tenth District has expressly refused to decide "whether the trial court erred by concluding that it was required to merge the counts of felonious assault and domestic violence." *Damron* at ¶10. Without approving the State's proposition of

law, this refusal will become law of the case, see *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, making any application of *Johnson* impossible.

Therefore, the State requests that this Court approve the State's propositions of law and remand this case to the Tenth District for application of *Johnson*. On remand, the State reserves the right to argue that defendant's crimes were committed separately or with a separate animus under R.C. 2941.25(A) & (B).

B. The trial court's merger belief was equally wrong under the *Johnson* syllabus.

Should this Court address the trial court's merger belief without a remand for application of *Johnson*, the State maintains that the trial court erred by concluding that felony domestic violence and felonious assault merged under R.C. 2941.25. Whether or not the offenses arose from the "same conduct," merger was prohibited given the "dissimilar import" of the offenses. Further, even when defendant's conduct is considered under the merger analysis contained in the *Johnson* syllabus or the approaches proposed in the Brown and O'Connor opinions, merger is inappropriate.

1. The *Johnson* syllabus does not sever the "similar import" requirement in R.C. 2941.25.

The State respectfully submits that the *Johnson* syllabus overruled *Rance* without creating a replacement test for determining whether offenses share a "similar import" under R.C. 2941.25. Merely considering "the conduct of the accused" is only one of the assessments required for determining whether two offenses "merge" under R.C. 2941.25. In particular, 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.

R.C. 2941.25(A) & (B).

Division (A) imposes two requirements for merger: the offenses must (1) arise from the "same conduct" *and* (2) share a "similar import." Offenses of "similar import" shall be merged, and crimes of "dissimilar import" shall not be merged, *even when they arise from the same conduct*. R.C. 2941.25(A) & (B). Division (B) restates division (A) in negative terms and adds a third bar to merger (in addition to the "dissimilar import" and "committed separately" restrictions) when the crimes are committed "with a separate animus." R.C. 2941.25(B).

The subjective "same conduct" assessment and the objective "similar import" assessment cannot be condensed into one fact-based inquiry. As this Court has recognized, " '[T]he General Assembly is not presumed to do a vain or useless thing[.] * * * [W]hen language is inserted in a statute it is inserted to accomplish some definite purpose.' " *State v. Wilson* (1997), 77 Ohio St.3d 334, 336 (quotation omitted). Because it is presumed that "every word in a statute is designed to have *some* effect," every part of the statute "shall be regarded." *Ford Motor Co. v. Ohio Bureau of Employment Services* (1991), 59 Ohio St.3d 188, 190 (emphasis sic). Thus, a "same conduct" finding is only one of *two* findings required for merger, and the *Johnson* Court's directive to consider "the conduct of the accused" does not apply to the separate "similar import" finding. Disregarding the "similar import" requirement entirely would amount to judicial

legislation by effectively striking the "similar import" requirement from R.C. 2941.25. It is fundamental that, "[i]n determining legislative intent it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used." *Columbus-Suburban Coach Lines v. Pub. Util. Comm.* (1969), 20 Ohio St.2d 125, 127.

None of the splintered, conduct-based approaches in *Johnson* fill this "similar import" void. The Brown opinion laid out a conduct-determinative test that requires merger whenever "the offenses can be committed by the same conduct" and whenever "the offenses were committed by the same conduct." Id. at ¶49. "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." Id. at ¶50. Under this "can result" test, a "same conduct" finding would always be dispositive, regardless of whether the two crimes have a "dissimilar import." Indeed, just eleven months before *Johnson*, this Court had rejected the argument that a "can result" test applies, holding: "Such an analysis would create an irrebuttable presumption that the legislature intended an offender to receive a single punishment when a prohibited act constitutes more than one offense. We do not presume that intent, and we reject this position." *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, ¶19.

The O'Connor opinion gives some attention to the import requirement by stating that "[o]ffenses are of 'similar import' when the underlying conduct involves similar criminal wrongs and similar resulting harm." Id. at ¶67. The opinion proceeds to a discussion of how to determine the import of offenses and concludes, "[T]he trial court's consideration of whether there should be merger is aided by a review of the evidence introduced at trial." Id. at ¶¶68-69. But the O'Connor opinion, like the Brown opinion,

is not controlling law, and it leaves unclear how much weight should be given to the "conduct" and "similar import" components of the analysis.

The O'Donnell opinion does not apply a "similar import" analysis. Instead, it poses a hypothetical that suggests merger is only prohibited when two offenses are "committed separately." Id. at ¶81. But again, a separate-conduct finding is not the only bar to merger. Merger is also inappropriate when the two offenses lack a similar import or were committed with a separate animus as to each. R.C. 2941.25(A) & (B).

The lack of any cohesive test to emerge from *Johnson* reveals the impossibility of such an analysis. R.C. 2941.25 was not designed to operate without an objective "similar import" assessment. The unpredictability of a "can result" or "similar criminal wrongs" test reveals the genesis of this Court's holding in *Rance*, which served to be a predictable and effective safeguard of legislative intent. To be sure, *Rance* was only criticized as unworkable and inconsistent by courts that misapplied its two-step analysis or were unhappy with its results. In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, this Court "clarified" *Rance* by criticizing the lower courts that had misconstrued it to require a "strict textual comparison." Id. at ¶¶16-20. Later, in *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, this Court further explained that application of *Rance* is unnecessary in scenarios where "the legislature's intent is clear from the language of the statute." Id. at ¶37. The clarification in *Cabrales* and the preemptive societal-interest exception in *Brown* eliminated any need to overrule *Rance*. And again, this Court expressly rejected a "can result" test just eleven months before *Johnson*. See *Williams*, 124 Ohio St.3d at ¶19. *Johnson* did not overrule that holding, and "similar import" must have some role in the analysis. If *Johnson* held there is no such role, it should be

overruled as constituting judicial legislation that would render the statute's "similar import" requirement a dead letter.

Nevertheless, because *Johnson* has overruled *Rance* without providing a controlling legal analysis to replace it, the State will rely on the plain language of the statute and this Court's pre-*Rance* precedent. Under this framework, felony domestic violence and felonious assault do not merge.

2. Defendant's crimes, even if committed by the same conduct, do not merge, as the commission of one offense does not "necessarily result" in the commission of the other offense.

For decades, this Court has determined whether multiple offenses share a "similar import" by comparing the elements to determine whether the commission of one offense "will necessarily result" in the commission of the other offense. See, e.g., *State v. Donald* (1979), 57 Ohio St.2d 73 (using the word "necessarily" in discussing how rape would necessarily result in kidnapping); *State v. Logan* (1979), 60 Ohio St.2d 126, 130 ("implicit within every forcible rape * * * is a kidnapping"); *State v. Mitchell* (1983), 6 Ohio St.3d 416; *State v. Preston* (1986), 23 Ohio St.3d 64, 65 ("will automatically result"); *State v. Talley* (1985), 18 Ohio St.3d 152, 155, 156 (no merger because offenses "not necessary" or "not essential" to each other); *Bickerstaff*, 10 Ohio St.3d at 66 ("the crimes and their elements must correspond to such a degree that commission of one offense constitutes commission of the other offense"); *Rice*, 69 Ohio St.2d at 425 (offenses "are not the same, one to the other."); *State v. Moss* (1982), 69 Ohio St.2d 515; *State v. Blankenship* (1988), 38 Ohio St.3d 116, 118 ("[W]e do not find that the elements correspond to such a degree that the commission of kidnapping necessarily results in the commission of felonious assault."). *Johnson* did not overrule any of these cases.

A "will necessarily result" standard is also most consistent with the judicial doctrine of merger. Under this doctrine, "a major crime often includes as inherent therein the component elements of other crimes and * * * these component elements, in legal effect, are merged in the major crime." Id., quoting *State v. Botta* (1971), 27 Ohio St.2d 196, 201 (emphasis added). A "will necessarily result" test is most in keeping with the "inherent therein" requirement of the judicial doctrine of merger.

In this case, felony domestic violence and felonious assault do not share a "similar import," as the commission of one offense does not "necessarily result" in the commission of the other. See *Blankenship*, 38 Ohio St.3d at 116. As explained by the State's initial brief, felonious assault does not necessarily result in the commission of felony domestic violence, and, because felonious assault does not depend on the identity of the victim and does not require prior convictions, felony domestic violence does not necessarily result in felonious assault. Furthermore, felony domestic violence requires only actual or attempted physical harm, a level of harm well short of the actual serious physical harm requirement for felonious assault.

Appellate courts have arrived at this conclusion years before *Rance* when comparing the elements of domestic violence with those of felonious assault and aggravated assault. See e.g., *State v. Chitwood* (1992), 83 Ohio App.3d 443, 451 (domestic violence and felonious assault are not the same offense or allied offenses of similar import); *State v. Lentz* (1994), 6th Dist. No. L-93-206 (no merger for aggravated assault and domestic violence). The two-step analysis announced by this Court in *Rance* did nothing but solidify this result. See, e.g., *State v. Walker* (2000), 2nd Dist. No. 17678; *State v. Yun* (2001), 5th Dist. No. 2000CA00276; *State v. Williams*, 5th Dist. No.

02-CA-82, 2003-Ohio-256, ¶30; *State v. Marshall*, 9th Dist. No. 22706, 2005-Ohio-5947, ¶49; *State v. Sandridge*, 8th Dist. No. 87321, 2006-Ohio-5243, ¶33; *State v. Bowyer*, 8th Dist. No. 88014, 2007-Ohio-719, ¶24; *State v. Robinson*, 3rd Dist. No. 8-08-05, 2008-Ohio-4956, ¶26; *State v. Claycraft*, 12th Dist. Nos. CA2009-02-013, -014, 2010-Ohio-596, ¶104 (remanded for "application" of *Johnson*); *State v. Bosley*, 1st Dist. No. C-090330, 2010-Ohio-1570, ¶23; *State v. Tolbert*, 9th Dist. No. 24958, 2010-Ohio-2864, ¶55; *State v. Sanchez*, 8th Dist. Nos. 93569, 93570, 2010-Ohio-6153, ¶53.

Accordingly, with or without *Rance*, under the plain language of R.C. 2941.25, defendant's crimes do not share a "similar import," and the trial court's merger conclusion amounted to sentencing error.

3. Even under the syllabus of *Johnson* or the tests proposed by the Brown and O'Connor opinions, merger is inappropriate.

The "can result" approach contained in the Brown opinion and the "similar criminal wrongs" approach contained in the O'Connor opinion to not permit merger in this case. Under any conduct analysis, the record confirms that defendant's guilty plea to felony domestic violence under R.C. 2919.25(A) & (D) relied on conduct not required to support his guilty plea to felonious assault under R.C. 2903.11(A).

By pleading guilty to a third-degree felony violation of the domestic-violence statute, defendant admitted that he had a prior conviction for domestic violence and a prior conviction for negligent assault involving a family or household member. R.C. 2919.25(A) & (D)(4). The existence of these prior convictions was not required for defendant's felonious-assault count. Also, the victim element of the domestic-violence count relied on conduct different from the conduct required to prove the victim element of the felonious-assault count. R.C. 2903.11(A). Defendant admitted to sharing a

"family or household member" relationship with the victim. Bearing in mind that each guilty plea was a complete admission of factual guilt, see *Menna v. New York* (1975), 423 U.S. 61, 62 n. 2, the elements of each offense required proof of different conduct.

The prosecutor's uncontested factual recitation at the plea hearing also detailed a prolonged, savage beating divided into separate attacks. (Tr. 5/5/09, p. 14-17) At different times, the children attempted to intervene, but defendant repelled each of them and continued beating M.H. Either one of these beatings satisfied the "physical harm" or "attempted physical harm" requirement for domestic violence. The prosecutor established the "serious physical harm" requirement for felonious assault by noting the nasal fracture and concussion suffered by M.H. (Id. at 17)

The State notes that the prosecutor did not rely on the separate-conduct prong of *Rance* at the sentencing hearing (due to the settled "dissimilar import" of the crimes), and, as such, the parties did not have a full opportunity to litigate whether the offenses were committed separately. (This is another reason to remand this case to the Tenth District for "application" of *Johnson*, see Section VI.(A), supra.) Nevertheless, even under the *Johnson* syllabus or the conduct-based approaches contained within *Johnson*, the record here proves that defendant's crimes arose from separate conduct.

The State's first and second propositions of law should be sustained.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the State's initial merit brief, the State respectfully requests that this Court hold that sentencing error can occur within the statutory range when the trial court imposes concurrent prison terms under the mistaken belief that it is merging counts of felonious assault and domestic violence. The

State asks that this Court reverse the judgment of the Tenth District Court of Appeals, and remand this case to the Tenth District for application of *Johnson*.

Alternatively, should this Court apply *Johnson* directly, the State requests that this Court reverse the judgment of the Tenth District and remand this case for resentencing. Because the record proves that the trial court "would have" imposed consecutive prison terms for defendant's felonious assault and domestic violence counts, this Court should instruct the trial court to impose consecutive prison terms for those counts. The length of each prison term, however, should be decided by the trial court pursuant to R.C. 2929.11, 2929.12, 2929.13, and 2929.14.

Respectfully submitted,

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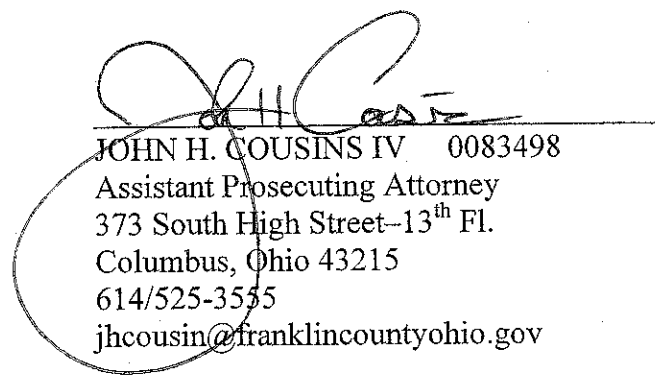

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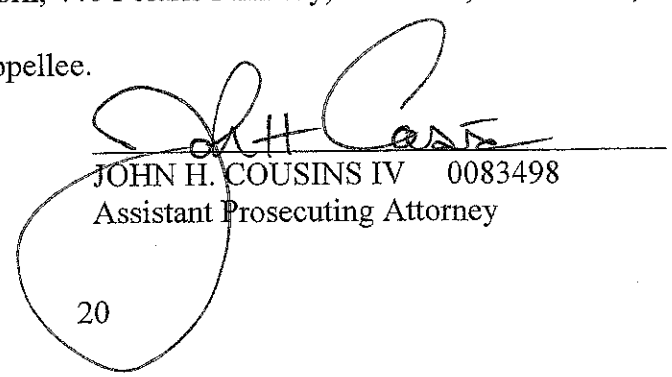
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, January 28, 2011, to Keith O'Korn, 440 Polaris Parkway, Suite 150, Westerville, OH 43082; Counsel for Defendant-Appellee.



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