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Explanation of Why this Felony Case Raises Substantial Constitutional Questions and is a Case of Great General and Public Interest

This case raises substantial constitutional questions under the Double Jeopardy Clauses of the Ohio and United States Constitutions. This case also implicates a criminal defendant's right to indictment by grand jury as required by Section 10, Article I of the Ohio Constitution. Additionally, the facts of this case raise an issue regarding a criminal defendant's right to notice of the offenses charged and due process of law as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

This felony case is a case of great general and public interest because a decision on the propositions of law presented here will clarify the proper determination of whether multiple offenses are allied offenses of similar import under R.C. 2941.25. A decision on these propositions of law will also clarify this court's decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, and address important issues regarding the appropriate procedure for a trial court to employ when determining allied offenses on remand from a court of appeals.

Although *Johnson* is clear that the prior test for allied offenses from *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699 is no longer valid, the decision leaves some questions unanswered. The need for additional clarification is evidenced not only by the propositions of law presented in this case, but also by the fact that this court has at least two other cases now pending which involve allied offenses and application of the *Johnson* decision. See *State v. Washington*, Ohio Sup. Ct. Case No. 2012-1070 and *State v. Williams*, Ohio Sup. Ct. Case No. 2011-0619. The present case raises important constitutional questions not raised in either *Washington* or *Williams* and provides this

Court with an excellent opportunity to further clarify *Johnson* and the allied offense and Double Jeopardy jurisprudence in Ohio.

Statement of the Case and Facts

The appellant, Brandon D. Mowery, entered pleas of guilty in the Fairfield County Court of Common Pleas to one count of complicity to commit arson (a fourth-degree felony), one count of retaliation (a third-degree felony), and one count of aggravated menacing (a fifth-degree felony). Additional counts in the indictment were dismissed. The trial court sentenced Mowery to eighteen months on the arson count, five years on the retaliation count, and six months on the count of aggravated menacing. The trial court ordered the sentences to run consecutively for a total prison sentence of seven years.

Mowery then appealed his sentence to the Fifth District Court of Appeals arguing that the trial court had failed to make adequate or proper findings for imposing consecutive sentences and that the trial court had erred in imposing consecutive sentences for the offenses of aggravated menacing and retaliation on the theory that the two offenses are allied offenses of similar import. See *State v. Mowery*, Fairfield App.No. 10-CA-26, 2011-Ohio-1709 (“*Mowery I*”). The Fifth District denied Mowery’s claim as to the imposition of consecutive sentences, but ordered the matter remanded for a new sentencing hearing regarding the “allied offense” issue in light of *State v. Johnson*, 128 Ohio St.3d 153, 942 N.E.2d 1061, 2010-Ohio-6314, which had been decided by this court while Mowery’s direct appeal had been pending. See *Mowery I* at ¶28.

Following remand from the Fifth District, the trial court conducted a new sentencing hearing. Because Mowery's case had resolved by a plea, rather than trial, there was an inadequate factual record for the trial court make an allied offenses determination. Therefore, the trial court heard evidence from the State and the defense on the issue of allied offenses. Testimony was presented by the State's lead investigator, Detective Nick Snyder of the Lancaster Police Department. Mowery also testified about his criminal conduct and the role he had played in committing the offenses with two other co-defendants.

The testimony from Snyder and Mowery was largely in agreement on the pertinent facts. It was undisputed that Mowery, along with co-defendant's Tara Casto and Guy Luttrell, were involved in a plot to set fire to a Chevrolet Tahoe belonging to Alishia Snoke, a caseworker with Fairfield County Child Protective Services. Mowery and Casto had three children in common and Snoke had been involved with the family in ongoing custody proceedings in the Fairfield County Juvenile Court. Mowery and Casto were upset with Snoke over the custody proceedings and had decided to retaliate against her with the help of Luttrell. According to Snyder, Luttrell agreed to participate in exchange for receiving heroin. Luttrell was known to the Lancaster Police as a drug abuser and it was believed that he had purchased narcotics off of Mowery in the past.

Snoke's Tahoe was set on fire while it was parked outside her home. While Mowery and Casto watched from a motor vehicle parked a safe distance away, Luttrell went up to the vehicle and broke one of the windows with a brick. A milk jug filled with gasoline and stuffed with a rag was then ignited and thrown into the vehicle. All three co-defendant's then fled the scene. Mowery and Casto later returned and drove by the scene to view the aftermath of the fire. Snyder testified that neither the victim nor any

member of her family had seen them return, but a firefighter did observe a vehicle drive by which closely matched the vehicle police later determined was used by the three co-defendants.

After completion of testimony at the resentencing hearing, the State argued that the offenses of complicity to commit arson, retaliation, and aggravated menacing were not allied offenses subject to merger under R.C. 2941.25 because all three offenses were conducted with a separate animus. The State reasoned that the offense of complicity to commit arson was committed when the vehicle was actually set on fire with a milk jug filled with gasoline. The retaliation offense occurred separately when Luttrell first broke a window on the Tahoe with a brick so that he could throw the jug of gasoline into the vehicle. And finally, the State argued that the offense of aggravated menacing occurred when Mowery and Casto later returned to the scene.

Defense counsel for Mowery argued that proper application of *Johnson* and R.C. 2941.25 required a finding of allied offenses and merger for purposes of sentencing. Defense counsel pointed out that the State's three distinct theories of criminal liability had not previously been advanced in either the indictment or the bill of particulars. Thus, the State was inventing new theories of criminal liability to avoid a finding of allied offenses under the more expansive test recently adopted by *Johnson*. In reality, defense counsel argued, all three offenses were originally brought based on the single criminal act of setting the Chevrolet Tahoe on fire and were therefore allied offenses.

Defense counsel further argued that due to the remand for resentencing, Mowery was entitled to take advantage of the reduced penalty now in effect for the third-degree felony offense of retaliation. In the interim, since Mowery's initial sentencing hearing, the legislature had passed 2011 Am.Sub.H.B. No. 86, effective September 30, 2011,

which reduced the maximum prison term for most third degree felonies, including retaliation, from 5 years to 36 months. Therefore, pursuant to R.C. 1.58(B), which addresses the effect of criminal penalties reduced by statutory amendment, Mowery argued that the maximum possible sentence he could receive for retaliation was now 36 months.

After considering testimony presented at the resentencing hearing and the arguments of counsel, the trial court determined that the offenses at issue were not allied offenses and they should not merge for purposes of sentencing. The trial court also determined that 2011 Am.Sub.H.B. No. 86 did not apply to reduce the maximum possible penalty for retaliation. The trial court issued a judgment entry imposing the same consecutive prison terms as before. Mowery was again sentenced to eighteen months on the arson count, five years on the retaliation count, and six months on the count of aggravated menacing.

From this decision of the trial court, Mowery brought his most recent appeal in the Fifth District arguing that the trial court had erred finding that complicity to commit arson, retaliation, and aggravated menacing were not allied offenses of similar import. Mowery further argued that the trial court had erred in imposing a five-year prison term contrary to law for the third-degree felony offense of retaliation. See *State v. Mowery*, Fairfield App.No. 11-CA-61, 2012-Ohio-4532 ("*Mowery II*"), attached hereto in the appendix.

The Fifth District declined to address the allied offense argument with respect to the arson count because Mowery's allied offense argument on initial appeal had been limited only to the offenses of retaliation and aggravated menacing. *Mowery II* at ¶10. With respect to the offenses of retaliation and aggravated menacing, the Fifth District

determined that the acts of breaking the window with a brick and then returning to scene after fleeing the burning vehicle were separate and distinct acts. Therefore, the court of appeals found that the offenses of retaliation and aggravated menacing were not allied offenses of similar import. *Mowery II* at ¶21-22. The court of appeals further found no error in the trial court's decision not to apply the H.B. 86 revisions to Mowery's sentence for retaliation. *Mowery II* at ¶28.

Argument

Proposition of Law No. 1 – A trial court's determination of allied offenses under R.C. 2941.25 may not be based on facts or theories of criminal liability which were not advanced in either the indictment or the bill of particulars.

“An individual accused of a felony is entitled to an indictment setting forth the ‘nature and cause of the accusation’ pursuant to Section 10, Article I of the Ohio Constitution and the Sixth Amendment to the United States Constitution.” *State v. Sellards* (1985), 17 Ohio St.3d 169. The government must aver all material facts constituting the essential elements of the offense so that the accused not only has adequate notice and an opportunity to defend, but also may protect himself or herself from any future prosecution for the same offending conduct. *Id.*

The United States Supreme Court has repeatedly held that fair notice of the offense charged is essential in criminal prosecutions. The Court has stated that “[n]o principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by the charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.” *Cole v. Arkansas* (1948), 333 U.S. 196, 201; see, also,

Jackson v. Virginia (1979), 443 U.S. 307, 314 (“[A] conviction upon a charge not made ... constitutes a denial of due process.”); *In re Oliver* (1948), 333 U.S. 257, 273, (“A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense ... are basic in our system of jurisprudence.”).

As the above-cited authority demonstrates, a criminal defendant may not properly be brought to trial without adequate notice from the government of his alleged criminal conduct. The alleged criminal conduct of the accused is also of paramount importance in deciding the question of allied offenses. “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.” *Johnson*, 128 Ohio St.3d 153, 2010–Ohio–6314, at syllabus. The statutory elements of each offense are not to be compared in the abstract, severed from the particular facts underlying the offenses. *Id.*, overruling *State v. Rance* (1999), 85 Ohio St.3d 632, syllabus (requiring textual comparison of elements in the abstract before a defendant’s conduct will be considered). Instead, all of the justices of this court have agreed that the conduct of the accused must be the starting point in any allied offense analysis. *Johnson* at ¶47–48; ¶64 (O’Connor, J., concurring); ¶78 (O’Donnell, J., concurring).

The question raised by this proposition of law is whether the criminal conduct considered by a trial court to determine allied offenses may differ from the criminal conduct alleged in the indictment and bill of particulars. Appellant contends that a trial court may not decide the allied offenses question and impose consecutive prison terms based on facts or theories of criminal liability for which the accused had no prior notice. To decide otherwise, would allow a criminal defendant to be imprisoned in violation of the provisions of the Ohio and United States constitutions guaranteeing notice of the

offenses charged. Furthermore, a term of imprisonment based on facts not presented in the indictment violates the State constitutional provision that “no person shall be held to answer for capital, or otherwise infamous, crime, unless on presentment or indictment of grand jury.” Section 10, Article I of the Ohio Constitution.

In this case, the State’s three separate and distinct theories of criminal liability which were argued at the resentencing hearing cannot be found in the relevant counts of the indictment which state as follows:

COUNT THREE — ARSON, F4

And the jurors of the Grand Jury aforesaid, on their oaths aforesaid, present and find, that the said BRANDON D. MOWERY, on or about the 14th day of December, 2008, at the County of Fairfield, State of Ohio, unlawfully, did knowingly, by means of fire or explosion, cause or create a substantial risk of physical harm to any property of another, to-wit: a 2001 Chevrolet Tahoe belonging to A.S., without the consent of A.S., the value of the property or the amount of physical harm involved being \$500.00 or more, in violation of Section 2909.03 (A)(1) of the Ohio Revised Code.

COUNT FOUR — RETALIATION, F3

And the jurors of the Grand Jury aforesaid, on their oaths aforesaid, present and find, that the said BRANDON D. MOWERY, on or about the 14th day of December, 2008, at the County of Fairfield, State of Ohio, unlawfully, did purposely, by force, retaliate against a public servant or witness: to wit: a caseworker who was employed by Job and Family Services and/or testified as a witness in a Job and Family Services court hearing in violation of Section 2921.05(A) of the Ohio Revised Code.

COUNT SEVEN — AGGRAVATED MENACING, F5

And the jurors of the Grand Jury aforesaid, on their oaths aforesaid, present and find, that the said BRANDON D. MOWERY, on or about the 14th day of December, 2008, at the County of Fairfield, State of Ohio, did, knowingly, cause another, to wit: A.S., to believe that the said BRANDON D. MOWERY would cause serious harm to the person or property of A.S., the victim of the offense being an employee of a public Job and Family Services Agency, and said offense relating to the employee’s performance or anticipated performance of official responsibilities or duties, in violation of Section 2903.21 of the Ohio Revised Code.

The arson count reasonably provides notice that the criminal conduct at issue was setting fire to a 2001 Chevrolet Tahoe belonging to Alisha Snoke. But nothing in the indictment would indicate that the counts of retaliation and aggravated menacing are not also based on the same criminal conduct of setting fire to the Tahoe. And obviously, there is no language in the retaliation count providing notice that the offense charged

was based on the alleged criminal act of breaking a window on the Tahoe with a brick. Likewise, there is no language in the aggravated menacing count providing notice that this offense was based on the alleged criminal act of Mowery returning to the scene after initially fleeing the burning vehicle. The bill of particulars that was later filed by the State is similarly defective and provides no notice that the retaliation and aggravated menacing charges might be based on anything other than act of setting the Tahoe on fire.

This court should accept jurisdiction as to this proposition of law and issue a decision holding that a trial court's allied offense analysis must be based on criminal conduct actually charged, and not on retrospective theories about what charges a defendant's conduct could have supported.

Proposition of Law No. 2 – A sentence that does not include the statutorily required determination of allied offenses is void, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack.

At Mowery's original sentencing hearing, he entered guilty pleas to the counts of complicity to commit arson, retaliation, and aggravated menacing. The trial court failed to address the issue of allied offenses and the issue was never mentioned by either the State or the defense at original sentencing. In Mowery's initial direct appeal, he raised an allied offense challenge with respect to the retaliation and aggravated menacing counts only. The State maintained that Mowery waived his right to challenge whether his crimes were allied offenses by pleading guilty. *Mowery I* at ¶18. But the Fifth District rejected the State's contention citing *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶26-29 for the proposition of law "that a defendant's plea

to multiple counts does not affect the trial court's duty to merge allied offenses at sentencing nor bar appellate review of the sentence." *Mowery I* at ¶18. Therefore, in *Mowery I*, when the Fifth District remanded this matter for resentencing, the court of appeals seemed to recognize that pursuant to *Underwood*, R.C. 2941.25 imposes a mandatory duty on a trial court to consider the issue of allied offenses prior to sentencing. As this court stated in *Underwood* at ¶26:

This court has previously said that allied offenses of similar import are to be merged at sentencing. See *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 43; *State v. McGuire* (1997), 80 Ohio St.3d 390, 399, 686 N.E.2d 1112. Thus, a trial court is prohibited from imposing individual sentences for counts that constitute allied offenses of similar import. A defendant's plea to multiple counts does not affect the court's duty to merge those allied counts at sentencing. This duty is mandatory, not discretionary.

On remand, the trial court also seemed to understand its mandatory duty to evaluate allied offenses prior to imposing sentence. Despite the fact that the initial appeal raised an allied offense challenge with respect to only the retaliation and aggravated menacing charges, at resentencing, the trial court heard evidence and conducted an allied offense analysis for all three of the offenses to which Mowery had entered guilty pleas. Ultimately, the trial court determined that none of the three offenses were allied offenses of similar import under R.C. 2941.25. When this decision was appealed to the Fifth District in *Mowery II*, the court of appeals declined to address the allied offense argument with respect to the arson count because Mowery's allied offense argument on initial appeal had been limited only to the offenses of retaliation and aggravated menacing. *Mowery II* at ¶10.

Although not specifically stated in the opinion, the Fifth District in *Mowery II* apparently concluded that an allied offense analysis of the arson count was barred on

appeal by the principles of res judicata. In so holding, the Fifth District essentially allowed the conviction and sentence on the arson count to remain in effect from the trial court's initial sentencing hearing where no allied offense analysis was ever conducted. In this proposition of law, appellant challenges the Fifth District's conclusion and asserts that the principles of res judicata should not bar appellate review of a sentence imposed in violation of a trial court's mandatory duty under *Underwood* to conduct an allied offense analysis prior to imposing sentence. If consecutive sentences are imposed by a trial court without compliance with the mandatory requirements of R.C. 2941.25, appellant asserts that such sentence is void and may be reviewed at any time, on direct appeal, or on collateral attack.

In addition to *Underwood*, support for appellant's proposition of law can also be found in *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, where this court held at paragraph two of the syllabus: "A defendant is not barred by res judicata from raising objections to issues that arise in a resentencing hearing, even if similar issues arose and were not objected to at the original sentencing hearing."

Further support for appellant's proposition of law can be derived from decisions of this court holding that a sentence is void if a trial court fails to comply with the mandatory statutory requirements for imposing postrelease control. "A sentence that does not include the statutorily mandated term of postrelease control is void, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, paragraph one of the syllabus; See also *State v. Bezak*, 114 OhioSt.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶ 16; *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864 (where postrelease notification is

absent from the sentencing hearing, the sentence is void and must be vacated and remanded to the trial court for de novo sentencing)

Very recently, in *State v. Billiter*, Slip Opinion No. 2012–Ohio–5144, ¶10, this court noted that” [a]s we have consistently stated, if a trial court imposes a sentence that is unauthorized by law, the sentence is void.” In the present case, Mowery’s consecutive sentence on the arson count should be considered unauthorized by law and void due to the trial court’s failure to perform the mandatory allied offense analysis required by R.C. 2941.25 and *Underwood*. Therefore, under logical application of *Underwood* and this court’s jurisprudence regarding void sentences, appellate review of Mowery’s consecutive sentence on the arson count was not properly barred by res judicata.

This court should accept jurisdiction as to this proposition of law and issue a decision holding that a sentence that does not include the statutorily required determination of allied offenses is void, is not precluded from appellate review by principles of res judicata, and may be reviewed at any time, on direct appeal or by collateral attack.

Proposition of Law No. 3 – On remand for a determination of allied offenses, a trial court is required to conduct a de novo sentencing hearing where R.C. 1.58(B) would apply with respect to any reduced criminal penalties resulting from statutory amendments.

R.C. 1.58(B) provides:

If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

The question raised by this proposition of law is whether the provisions of R.C. 1.58(B) apply on remand for resentencing to determine the issue of allied offenses. The Fifth District answered this question in the negative and held that Mowery could not benefit from the reduced maximum 36-month sentence for retaliation resulting from 2011 Am.Sub.H.B. No. 86 which had been enacted in the interim between the time of original sentencing and the later resentencing hearing. *Mowery II* at ¶28.

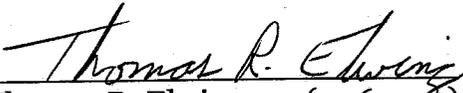
In this proposition of law, Mowery asserts that R.C. 1.58(B), by the express terms of the statute, would necessarily apply at any resentencing hearing ordered by a court of appeals. The operative words to consider from R.C. 1.58(B) are: “if not already imposed.” Thus, a criminal defendant may take advantage of reduced penalties resulting from statutory amendments if his sentence has not already been imposed. In situations where a matter has been remanded for resentencing, the defendant’s ultimate lawful sentence has not yet been imposed. Therefore, R.C. 1.58(B) would operate at the resentencing hearing and provide a defendant with the benefit of any reduced penalties resulting from statutory amendments.

This court should accept jurisdiction as to this proposition of law and issue a decision holding that on remand for a determination of allied offenses, a trial court is required to conduct a de novo sentencing hearing where R.C. 1.58(B) would apply with respect to any reduced criminal penalties resulting from statutory amendments.

Conclusion

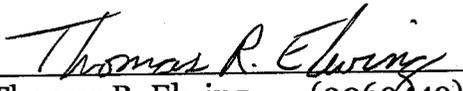
For the foregoing reasons, this Court should accept jurisdiction, reverse the decision of court of appeals, adopt appellant’s propositions of law, and remand this case for further consideration.

Respectfully submitted,


Thomas R. Elwing (0069449)
Attorney for Appellant

Proof of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was served on November 13, 2012 to Counsel for Appellee by regular U.S. mail addressed to Jocelyn S. Kelly, Assistant Prosecuting Attorney, Fairfield County Prosecutor's Office, 239 West Main Street, Suite 101, Lancaster, Ohio 43130.


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COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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Book 18 Pgs. 207-215

DEBORAH SHALLEY
CLERK OF COURTS
FAIRFIELD CO. OHIO

STATE OF OHIO

Plaintiff-Appellee

-vs-

BRANDON D. MOWERY

Defendant-Appellant

JUDGES:

Hon. Patricia A. Delaney, P. J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 11 CA 61

OPINION

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No 09 CR 259

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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Wise, J.

{¶1} Appellant Brandon D. Mowery appeals from the decision of the Court of Common Pleas, Fairfield County, which resentenced him pursuant to a remand order from this Court in his prior appeal. The relevant facts leading to this appeal are as follows.

{¶2} On March 23, 2010, appellant entered pleas of guilty, in the Fairfield County Court of Common Pleas, to one count of complicity to commit arson (a fourth-degree felony), one count of retaliation (a third-degree felony), and one count of menacing (a fifth-degree felony). Additional counts in the indictment were dismissed.

{¶3} Via a judgment entry filed April 22, 2010, appellant was sentenced to eighteen months on the arson count, five years on the retaliation count, and six months on the count of aggravated menacing. The trial court ordered the sentences to run consecutively to one another and to a previously-imposed sentence in another matter. Appellant also was ordered to pay restitution to the victim, a public children services agency caseworker.

{¶4} Appellant thereupon appealed to this Court, arguing that the trial court had failed to make adequate or proper findings for imposing consecutive sentences and that the trial court had erred in imposing consecutive sentences for the offenses of aggravated menacing and retaliation on the theory that the two are allied offenses of similar import. See *State v. Mowery*, Fairfield App.No. 10-CA-26, 2011-Ohio-1709, ¶7, ¶17 ("*Mowery I*"). Upon review, this Court denied appellant's claim as to the imposition of consecutive sentences, but we ordered the matter remanded for a new sentencing hearing regarding the "allied offense" issue in light of *State v. Johnson*, 128 Ohio St.3d

153, 2010-Ohio-6314, which had been decided by the Ohio Supreme Court while appellant's direct appeal was pending. See *Mowery I* at ¶28.

{¶5} Following our remand, the trial court conducted a new sentencing hearing on October 24, 2011. The trial court issued a judgment entry on October 27, 2011, finding that the offenses at issue would not merge and that appellant's original consecutive prison terms would stand.

{¶6} On November 22, 2011, appellant filed a notice of appeal. He herein raises the following two Assignments of Error:

{¶7} "I. THE TRIAL COURT ERRED IN DETERMINING THAT THE OFFENSES OF COMPLICITY TO ARSON, RETALIATION, AND AGGRAVATED MENACING ARE NOT ALLIED OFFENSES OF SIMILAR IMPORT SUBJECT TO THE MERGER STATUTE.

{¶8} "II. THE TRIAL COURT ERRED IN IMPOSING A PRISON TERM CONTRARY TO LAW FOR THE THIRD-DEGREE FELONY OFFENSE OF RETALIATION."

I.

{¶9} In his First Assignment of Error, appellant argues the trial court erred in finding that his offenses are not allied offenses of similar import. We disagree.

{¶10} As an initial matter, we are compelled to delineate the parameters of our analysis of this assigned error. In *Mowery I*, at ¶ 28, we directed that "the matter will be remanded for a new sentencing hearing to analyze appellant's conduct *in the offenses at issue* pursuant to *Johnson* and, if necessary, to review potential merger of the offenses for sentencing." (Emphasis added.) In *Mowery I*, appellant's "allied offense"

argument was limited to the offenses of aggravated menacing and retaliation. See *id.* at ¶ 17. We will therefore limit our discussion herein to these two offenses, and we will not review appellant's "allied offense" arguments regarding the arson count.

{¶11} R.C. 2941.25 protects a criminal defendant's rights under the Double Jeopardy Clauses of the United States and Ohio Constitutions. See *State v. Jackson*, Montgomery App.No. 24430, 2012-Ohio-2335, ¶ 133, citing *State v. Johnson*, 128 Ohio St.3d 153, 942 N.E.2d 1061, 2010-Ohio-6314, ¶ 45. The statute reads as follows:

{¶12} "(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.

{¶13} "(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."

{¶14} For approximately the first decade of this century, law interpreting R.C. 2941.25 was based on *State v. Rance*, 85 Ohio St.3d 632, 636, 710 N.E.2d 699, 1999-Ohio-291, wherein the Ohio Supreme Court had held that offenses are of similar import if the offenses "correspond to such a degree that the commission of one crime will result in the commission of the other." *Id.* The *Rance* court further held that courts should compare the statutory elements in the abstract. *Id.*

{¶15} However, the Ohio Supreme Court, in *State v. Johnson*, 128 Ohio St.3d 153, 942 N.E.2d 1061, 2010-Ohio-6314, specifically overruled the 1999 *Rance*

decision. The Court held: "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." *Id.*, at the syllabus. As recited in *State v. Nickel*, Ottawa App.No. OT-10-004, 2011-Ohio-1550, ¶ 5, the new test in *Johnson* for determining whether offenses are subject to merger under R.C. 2921.25 is two-fold: "First, the court must determine whether the offenses are allied and of similar import. In so doing, the pertinent question is 'whether it is possible to commit one offense *and* commit the other offense with the same conduct, not whether it is possible to commit one *without* committing the other.' (Emphasis sic.) *Id.* at ¶ 48. Second, 'the court must determine whether the offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind." ' *Id.* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 50 (Lanzinger, J., concurring in judgment). If both questions are answered in the affirmative, then the offenses are allied offenses of similar import and will be merged. *Johnson*, at ¶ 50."

{¶16} The offense of retaliation as charged in the case sub judice is set forth in R.C. 2921.05(A) as follows:

{¶17} "No person, purposely and by force or by unlawful threat of harm to any person or property, shall retaliate against a public servant, a party official, or an attorney or witness who was involved in a civil or criminal action or proceeding because the public servant, party official, attorney, or witness discharged the duties of the public servant, party official, attorney, or witness."

{¶18} The offense of aggravated menacing, R.C. 2903.21(A) and (B), as pertinent to the case sub judice, reads as follows:

{¶19} "No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family. *** 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, aggravated menacing is a felony of the fifth degree ***."

{¶20} In the case sub judice, our review leads us to initially conclude that the first question under *Johnson*, i.e., whether it is possible to commit retaliation against a public children services agency caseworker and commit aggravated menacing against said victim with the same conduct, would be answered in the affirmative under the circumstances.

{¶21} We thus proceed to an examination of the second question under *Johnson*. The record indicates that appellant's accomplice threw a brick through the window of the victim's Chevrolet Tahoe, which was parked beside her residence. Appellant's accomplice then tossed into the vehicle a firebomb device made with gasoline and a milk jug. According to the investigating officer, the act of aggravated menacing occurred at a later time, when appellant and a co-defendant returned to the scene after fleeing the burning vehicle. See Tr., Resentencing Hearing, at 16-17.

{¶22} Accordingly, we are persuaded that the act and animus of retaliation as charged herein under R.C. 2921.05(A) were separate and distinct from the aggravated menacing conduct targeting the victim under R.C. 2903.21.

{¶23} We therefore find the trial court did not err in convicting and sentencing appellant on both of the aforesaid counts.

{¶24} Appellant's First Assignment of Error is overruled.

II.

{¶25} In his Second Assignment of Error, appellant contends the trial court erred in again sentencing him to a five-year prison term for his offense of retaliation, a third-degree felony, upon his resentencing following our prior remand. We disagree.

{¶26} Current R.C. 2929.14(A)(3)(b), following the revisions under 2011 Am.Sub.H.B. No. 86, effective September 30, 2011, reduced the maximum prison term for many third-degree felonies from 5 years to 36 months. Retaliation under R.C. 2921.05 is implicitly one of the offenses subject to this new statutory 36-month maximum. As indicated in our recitation of facts in this matter, appellant was originally sentenced in April 2010, prior to the effective date of H.B. 86.

{¶27} We note R.C. 1.58(B) states as follows: "If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended." In *State v. Henderson*, Ashland App.No. 11-COA-045, 2012-Ohio-2709, we reviewed an appellant's claim that the trial court had erred in not applying the provisions of H.B. 86 at his resentencing, following an appellate remand. *Id.* at ¶ 45. Applying R.C. 1.58(B), *supra*, we rejected that argument, determining that Henderson's "sentence had already been imposed prior to the enactment of H.B. 86; therefore, the trial court did not err in not applying the amendments therein." *Id.* at ¶ 51. Although in *Henderson* our prior remand to the trial court for resentencing had been on

the limited issue of post-release control, we find that the same rationale applies where, as here, the prior appellate remand for a new sentencing hearing was for the purpose of reviewing the issue of allied offenses in light of the Ohio Supreme Court's new guidance in *Johnson, supra*. Cf., also, *State v. Craycraft*, Clermont App.Nos. CA2011-04-029 and CA2011-04-030, 2012-Ohio-884, ¶ 16, (concluding that "nothing in the language of 2011 Am.Sub.H.B. No. 86, nor anything in its legislative history, suggests that the General Assembly intended for those newly enacted statutory provisions to be applied by [the appellate] court when reviewing a sentence imposed by the trial court prior to its effective date.").

{¶28} We therefore find no error in the trial court's decision not to apply the H.B. 86 revisions to appellant's sentence for retaliation in the case sub judice. Appellant's Second Assignment of Error is overruled.

{¶29} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Fairfield County, Ohio, is hereby affirmed.

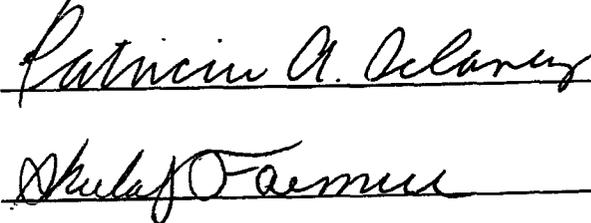
By: Wise, J.

Delaney, P. J., and

Farmer, J., concur.



Patricia A. Delaney



Sheryl Farmer

JUDGES

JWW/d 0911

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED

2012 SEP 26 PM 2:50

DEBORAH SMALLEY
CLERK OF COURTS
FAIRFIELD CO. OHIO

STATE OF OHIO

Plaintiff-Appellee

-vs-

BRANDON D. MOWERY

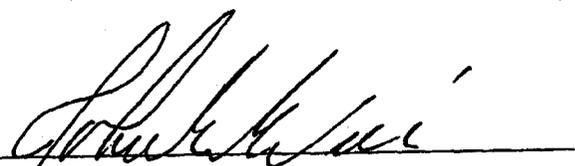
Defendant-Appellant

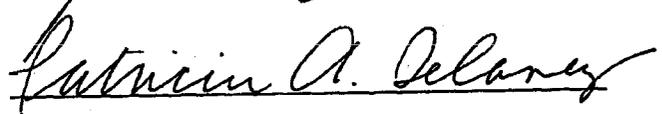
JUDGMENT ENTRY

Case No. 11 CA 61

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is affirmed.

Costs assessed to appellant.







JUDGES