

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

ANTONIA EARLEY,

Defendant-Appellant.

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Case No. 14-1278

On Appeal from the Cuyahoga  
County Court of Appeals  
Eighth Appellate District

C.A. Case No. 100482

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT ANTONIA EARLEY**

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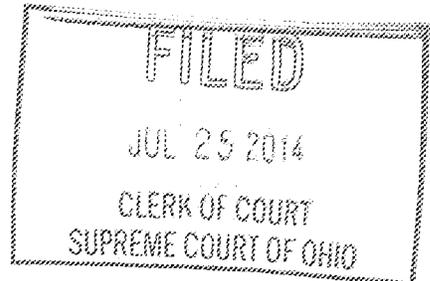
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When the offense of operating a vehicle while under the influence, R.C. 4511.19(A)(1)(a), is the predicate conduct for aggravated vehicular assault, R.C. 2903.08(A)(1)(a), Ohio’s allied-offense statute, R.C. 2941.25, must be considered before a court may determine whether concurrent or consecutive sentences will be imposed under 2929.41(B)(3). Fifth and Fourteenth Amendments, United States Constitution; Section 10, Article I, Ohio Constitution; R.C. 2941.25.....	5
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**EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

Antonia Earley’s case involves a split among Ohio’s appellate districts regarding whether the offense of driving under the influence of alcohol may ever merge as an allied offense with aggravated vehicular assault. Ms. Earley was convicted and sentenced as follows:

Count	Charge	Revised Code Section	Felony/ Misdemeanor Level	Sentence
One	Aggravated Vehicular Assault with Specification	2903.08(A)(1)(a)	Third-Degree Felony	Three-year prison term
Three	Endangering Children	2919.22(A)	Third-Degree Felony	Three-year prison term
Four	Driving Under the Influence of Alcohol	4511.19(A)(1)(a)	First-Degree Misdemeanor	Six-month prison term

September 19, 2013, Judgment Entry; *State v. Earley*, 8th Dist. Cuyahoga No. 100482, 2014-Ohio-2643. All of the prison terms were ordered to be served concurrently.

On appeal, Ms. Earley argued that the trial court erred when it failed to merge the driving-under-the-influence conviction (Count Four) with the vehicular-assault conviction (Count One). *Id.* The Eighth District Court of Appeals erroneously concluded that Ohio’s General Assembly created an “exception” to the state and federal prohibition against double jeopardy by enacting R.C. 2929.41(B)(3),<sup>1</sup> which permits consecutive—and therefore separate—sentences for violations of R.C. 4511.19 and 2903.08. *Earley* at ¶ 20.

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<sup>1</sup> R.C. 2929.41(B)(3) states: “A jail term or sentence of imprisonment imposed for a misdemeanor violation of section 4510.11, 4510.14, 4510.16, 4510.21, or 4511.19 of the Revised Code shall be served consecutively to a prison term that is imposed for a felony violation of section 2903.06, 2903.07, 2903.08, or 4511.19 of the Revised Code or a felony violation of section 2903.04 of the Revised Code involving the operation of a motor vehicle by the offender

Ohio's appellate districts disagree as to whether Ohio's allied-offense statute, R.C. 2941.25, may ever be applied to a situation involving R.C. 4511.19(A)(1)(a), operating a vehicle while under the influence, as being the predicate offense to a conviction for aggravated vehicular assault under R.C. 2903.08(A)(1)(a).<sup>2</sup> The Fifth, Tenth, and Eleventh Districts have reasoned that even "[a]ssuming, arguendo, that OVI [operation of a vehicle while under the influence of alcohol] and AVA [aggravated vehicular assault] are allied offenses, R.C. 2929.41(B)(3) creates an exception to the general rule provided in R.C. 2941.25 that allied offenses must be merged so that a defendant may be convicted . . . on either the OVI or the AVA, but not both." *State v. Bayer*, 10th Dist. Franklin No. 11AP-733, 2012-Ohio-5469, ¶ 22, *appeal not accepted*, 136 Ohio St.3d 1453, 2013-Ohio-3210, 991 N.E.2d 258 (O'Neill, J., dissenting); *State v. Kraft*, 5th Dist. Delaware No. 13 CAA 03 0013, 2013-Ohio-4658, at ¶ 33, *appeal not accepted*, 138 Ohio St.3d 1451, 2014-Ohio-1182, 5 N.E.3d 668 (Pfeifer and Kennedy, JJ., dissenting). *Accord State v. Demirci*, 11th Dist. Lake No. 2011-L-142, 2013-Ohio-2399.

But recognizing that Ohio's General Assembly cannot abrogate the double-jeopardy prohibition in the state and federal constitutions, and because R.C. 2929.41(B)(3) does not explicitly trump R.C. 2941.25, the Second, Sixth, and Twelfth Districts have held:

Conduct that constitutes the offense of aggravated vehicular assault, R.C. 2903.08(A)(1)(a), necessarily also constitutes the offense of operation of a vehicle while under the influence of alcohol \* \* \*, because commission of that predicate offense is a necessary component of the resulting aggravated vehicular assault offense. Because the predicate offense is subsumed into the resulting offense, the two are allied offenses of similar import for purposes of R.C. 2941.25(A). \* \* \* Defendant may be convicted of

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and that is served in a state correctional institution when the trial court specifies that it is to be served consecutively."

<sup>2</sup> Ms. Earley's motion to certify a conflict is currently pending in the Eighth District Court of Appeals.

only one, unless the two offenses were committed separately or with a separate animus as to each. R.C. 2941.25(B).

*State v. West*, 2d Dist. Montgomery No. 23547, 2010-Ohio-1786, ¶ 43-44; *State v. Mendoza*, 6th Dist. Wood No. WD-10-008, 2012-Ohio-5988, ¶ 10; *State v. Phelps*, 12th Dist. Butler No. CA2009-09-243, 2010-Ohio-3257, ¶ 32. See also *State v. Demirci*, 2013-Ohio-2399, ¶ 59-60 (Grendell, J., concurring in part and dissenting in part). Moreover, in a previous decision, the Eighth District held that R.C. 4511.19(A)(1)(a) was an allied offense to both R.C. 2903.06(A)(1)(a) (aggravated vehicular homicide) and R.C. 2903.08(A)(1)(a). *State v. Kelley*, 8th Dist. Cuyahoga No. 98928, 2013-Ohio-1899, ¶ 10-11. See also *State v. Mendoza*, 2012-Ohio-5988.

This Court should grant jurisdiction in this case to ensure that Ohio's courts are correctly and uniformly applying the merger doctrine to offenses involving R.C. 4511.19(A)(1)(a) and 2903.08(A)(1)(a).

### STATEMENT OF THE CASE AND FACTS

The Eighth District Court of Appeals explained the facts in Ms. Earley's case as follows:

This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. The purpose of an accelerated appeal is to allow the appellate court to render a brief and conclusory opinion. *Crawford v. Eastland Shopping Mall Assn.*, 11 Ohio App. 3d 158, 11 Ohio B. 240, 463 N.E.2d 655 (10th Dist.1983); App.R. 11.1(E).

Defendant-appellant, Antonia Earley, appeals her sentence. For the reasons that follow, we affirm.

In January 2013, Earley was charged in a six-count indictment—two counts of aggravated vehicular assault and operating a vehicle while under the influence (“OVI”), and one count each of endangering children and using weapons while intoxicated. Each count sought forfeiture of property or weapon. The charges stemmed from Earley driving her car while intoxicated at a high rate of speed with her one-year-old son riding in the front

passenger seat. Earley crashed the car into a pole and her child sustained serious permanent injuries as a result.

In June 2013, Earley pleaded guilty to an amended count of aggravated vehicular assault with forfeiture specifications, an amended count of endangering children with forfeiture specifications, and one count of OVI.

Earley was sentenced to thirty-six months for aggravated vehicular assault, thirty-six months for endangering children, and six months for OVI. The sentences were ordered to run concurrently, for a total sentence of three years in prison.

*State v. Earley*, 2014-Ohio-2643, at ¶ 1-5.

Ms. Earley filed a timely notice of appeal, and argued that the trial court violated the prohibition against double jeopardy and R.C. 2941.25 by failing to merge the operating-a-vehicle-while-under-the-influence conviction with the conviction for aggravated vehicular assault. *Earley* at ¶ 7. Citing to *State v. Kraft*, 2013-Ohio-458, *State v. Bayer*, 2012-Ohio-5469, and *State v. Demirci*, 2013-Ohio-2399, the Eighth District overruled Ms. Earley's argument, and held that R.C. 292941.(B)(3) created an exception to the merger doctrine, as "[t]he General Assembly . . . specifically intended to permit cumulative punishments w[h]ere a defendant is found guilty of both aggravated vehicular assault and OVI; thus, the protection against double jeopardy is not violated in these instances." *Earley* at ¶ 19. Ms. Earley now asks this Court to accept jurisdiction.

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

### PROPOSITION OF LAW

**When the offense of operating a vehicle while under the influence, R.C. 4511.19(A)(1)(a), is the predicate conduct for aggravated vehicular assault, R.C. 2903.08(A)(1)(a), Ohio's allied-offense statute, R.C. 2941.25, must be considered before a court may determine whether concurrent or consecutive sentences will be imposed under 2929.41(B)(3). Fifth and Fourteenth Amendments, United States Constitution; Section 10, Article I, Ohio Constitution; R.C. 2941.25.**

The General Assembly did not intend for R.C. 2929.41 to override Ohio's allied-offense statute, R.C. 2941.25. Revised Code Section 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. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, this Court re-addressed the application of Ohio's multiple-count statute and the manner in which courts are to determine whether two offenses are allied offenses of similar import and should merge for sentencing purposes. In doing so, this Court overruled its previous decision in *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699 regarding the application of R.C. 2941.25, and explained how the statute is to be applied. *State v. Johnson*, 2010-Ohio-6314, at ¶ 41-52.

Ohio Revised Code Section 2941.25 instructs courts to look at a defendant's conduct when evaluating whether his or her offenses are allied. This Court has consistently recognized that the purpose of R.C. 2941.25 is to prevent shotgun convictions, that is, multiple findings of

guilt and corresponding punishments heaped upon a defendant for closely related offenses arising from the same occurrence. *Maumee v. Geiger*, 45 Ohio St.2d 238, 242, 344 N.E.2d 133 (1976). In *Johnson*, this Court explained that “[t]his is a broad purpose and ought not to be watered down with artificial and academic equivocation regarding the similarities of the crimes. When ‘in substance and effect but one offense has been committed,’ the defendant may be convicted of only one offense.” (Internal citation omitted.) *Johnson* at ¶ 43.

In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other. If the offenses in a particular case correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import. *Johnson* at ¶ 48. If the multiple offenses *can* be committed by the same conduct, then the court must determine whether the offenses *were* committed by the same conduct. In other words, whether the multiple offenses constitute a single act, committed with a single state of mind. *Johnson* at ¶ 49. If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged. *Johnson* at ¶ 50. If a court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge. *Johnson* at ¶ 51. Furthermore, this Court has also held that convictions for allied offenses of similar import, in violation of R.C. 2941.25, constitute plain error, even when those sentences are imposed concurrently. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 31.

Aggravated vehicular assault under R.C. 2903.08(A)(1)(a) provides:

No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause serious physical harm to another person \* \* \* [a]s the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance[.]

Revised Code Section 4511.19(A)(1)(a) states that “[n]o person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, \* \* \* [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them.”

Conduct that constitutes the offense of aggravated vehicular assault under R.C. 2903.08(A)(1)(a) necessarily also constitutes the offense of operation of a vehicle while under the influence of alcohol, as defined by R.C. 4511.19(A)(1)(a), because commission of that predicate offense is a necessary component of the resulting vehicular-assault offense. Because the predicate offense is subsumed into the resulting offense, the two offenses (driving under the influence and vehicular assault) are allied offenses of similar import for purposes of R.C. 2941.25(A). *See State v. Duncan*, 5th Dist.<sup>3</sup> Richland No. 2009CA028, 2009-Ohio-5668 (the Fifth District concluded that driving under the influence was an allied offense with aggravated vehicular assault, and declined to hold that R.C. 2929.41 created an exception to the merger doctrine); *State v. Kelley*, 2013-Ohio-1899, ¶ 10-11 (the Eighth District concluded that R.C. 4511.19(A)(1)(a) was an allied offense to both R.C. 2903.06(A)(1)(a) (aggravated vehicular homicide) and R.C. 2903.08(A)(1)(a)); *State v. Mendoza*, 2012-Ohio-5988. The merger

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<sup>3</sup> It should be noted that the Fifth District decided *Duncan* approximately four years before issuing the opinion in *State v. Kraft*, 2013-Ohio-458. As such, the Fifth District disregarded its own precedent when, in *State v. Kraft*, it held that R.C. 2929.41 created an exception to the merger doctrine. Similarly, the Eighth District declined to follow its previous decision in *State v. Kelley*. *See* page 3, *supra*.

mandated by R.C. 2941.25 is not avoided because vehicular assault requires a further finding that serious physical harm (R.C. 2903.08(A)(1)(a)) resulted from the predicate R.C. 4511.19(A) offense. *State v. West*, 2010-Ohio-1786, at ¶ 43. “Requiring an identity of all elements of both offenses would limit the application of R.C. 2941.25(A) to two violations of the same section of the Revised Code, which double jeopardy bars when offenses are predicated on the same conduct.” *Id.*

Moreover, the *State v. Kraft*, 2013-Ohio-458; *State v. Bayer*, 2012-Ohio-5469; and *State v. Demirci*, 2013-Ohio-2399 decisions are not persuasive. The statute relied upon by the Fifth, Tenth, and Eleventh Districts in those cases, R.C. 2929.41, addresses the issue of whether sentences may be served concurrently or consecutively, not whether allied offenses must be merged. The idea that trial courts have discretion as to whether allied offenses should merge is dubious. The General Assembly established the constitutional parameters for imposing multiple punishments for the same offense in R.C. 2941.25, not R.C. 2929.41. *Johnson*, 2010-Ohio-6314, at ¶ 26 (a “defendant is not placed in jeopardy twice for the same offense so long as courts properly apply R.C. 2941.25 to determine the intent of the General Assembly with regard to the merger of offenses”). A careful consideration of this Court’s jurisprudence demonstrates this point.

This Court has stated that merger, for purposes of R.C. 2941.25, occurs after a verdict is returned (or plea entered) and *before sentencing*. “Allied offenses of similar import do not merge until sentencing, since a conviction consists of verdict and sentence.” *State v. McGuire*, 80 Ohio St.3d 390, 399, 686 N.E.2d 1112 (1997); *Johnson* at ¶ 47 (“[u]nder R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct”). If the trial court must apply R.C. 2941.25 prior to sentencing, it does not follow at all,

let alone “necessarily” follow, as the *Bayer* court concluded, that R.C. 2929.41(B)(3) constitutes an exception to the multiple-counts statute, inasmuch as R.C. 2929.41(B)(3) could only apply to allied offenses when the offenses are committed separately and/or with a separate animus.

In other words, the situation addressed in R.C. 2929.41(B)(3) presupposes separate convictions and sentences for aggravated vehicular assault and operating a vehicle under the influence of alcohol. As the *Bayer* court surmised, “a trial court could not order sentences to be served consecutively unless the court had first imposed more than just one sentence.” 2012-Ohio-5469, at ¶ 21. The multiple-counts statute, however, is applied *prior* to sentencing and prevents separate convictions from being entered.

In *State v. Green*, 11th Dist. Lake No. 2011-L-037, 2012-Ohio-2355, the Eleventh District applied such reasoning to reject the State’s argument that former R.C. 2929.14(E)(3) mandated that a sentence imposed for grand theft had to be served consecutively to any other prison term imposed, including those for allied offenses. The *Green* court held:

The State’s claim that former R.C. 2929.14(E)(3) mandates a separate prison sentence for Grand Theft is incorrect. Former R.C. 2929.14(E)(3) (now R.C. 2929.14(C)(3)) provided that, “[i]f a prison term is imposed for \* \* \* a violation of division (A) of section 2913.02 [Grand Theft] of the Revised Code in which the stolen property is a firearm or dangerous ordnance \* \* \* the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.” The imposition of a mandatory consecutive sentence for Grand Theft is conditional upon the offender’s conviction for Grand Theft. As noted above, the merger of allied offenses occurs at the time of sentencing, i.e., prior to conviction “since a conviction consists of verdict and sentence.” *McGuire*, 80 Ohio St.3d at 399, 686 N.E.2d 1112. In the present case, the trial court should have merged the verdicts for Burglary and Grand Theft prior to sentencing.

*Id.* at ¶ 67.

The position that R.C. 2929.41 does not constitute an exception to the multiple-counts statute is further supported by this Court's decision in *State v. Moss*, 69 Ohio St.2d 515, 433 N.E.2d 181 (1982). In *Moss*, this Court construed both statutes at issue herein—R.C. 2929.41 and 2941.25. And this Court recognized that “R.C. 2929.41 does empower trial courts, in a single criminal proceeding, to sentence defendants to serve consecutive terms of imprisonment for the violation of more than one criminal statute.” *Id.* at 518. But, rather than finding that R.C. 2929.41 was an exception to the constitutional limitations expressed in R.C. 2941.25, this Court found R.C. 2929.41 was *subject to those limitations*. Indeed, this Court held that a “trial court’s discretion to order such cumulative sentences is not . . . constitutionally unbridled. The General Assembly must have, in effect, authorized the imposition of the consecutive sentences.” *Id.* at 518-519. This Court continued, stating:

The General Assembly then has authorized trial courts, in a single criminal proceeding, to convict and to sentence a defendant for two or more offenses, having as their genesis the same criminal conduct or transaction, *provided that the offenses (1) were not allied and of similar import, (2) were committed separately or (3) were committed with a separate animus as to each offense*. We find that, as the offenses with which appellee was charged were not allied and were committed separately, the trial court did not exceed its legislatively endowed authority by sentencing him to serve consecutive terms of imprisonment.

(Emphasis added.) *Id.* at 519-520.

Revised Code Section 2929.41(A) provides that a jail term or sentence of imprisonment for a misdemeanor is to be imposed concurrently with a prison term or sentence of imprisonment for a felony. But, by also enacting R.C. 2929.41(B)(3), the General Assembly signaled its intent to allow a trial court to impose consecutive—and therefore separate—sentences for certain misdemeanor convictions when paired with certain felony convictions. Those misdemeanor offenses include driving under suspension (R.C. 4510.11); driving under an OVI suspension

(R.C. 4510.14); driving under a financial-responsibility law suspension (R.C. 4510.16); failing to reinstate a license (R.C. 4510.21); and the statute at issue in Ms. Earley's case, driving under the influence of alcohol (R.C. 4511.19). Even a cursory glance at the misdemeanor statutes named in R.C. 2929.41 evidences that beyond the particular statutes and sub-sections of those statutes involved in Ms. Earley's case (R.C. 4511.19(A)(1)(a) and R.C. 2903.08(A)(1)(a)), a person charged and convicted of any one of the misdemeanor statutes delineated in R.C. 2929.41(B)(3), and paired with one of the statute's named felonies, could most likely never argue that R.C. 2941.25 should apply. Moreover, a number of different scenarios still exist in which convictions under R.C. 4511.19 and 2903.08 would still result in separate and/or consecutive sentences:

- Revised Code Section 2903.08 prohibits a person from recklessly causing the death and/or serious physical harm of another person. R.C. 2903.08(A)(2)(b). An argument may be made that a conviction under the reckless-conduct provisions result in a separate animus from the conduct by which a conviction under R.C. 4511.19(A)(1)(a) is had, thereby permitting consecutive sentences under R.C. 2929.41.
- Revised Code Section 2903.08 prohibits the death or serious physical harm of another while speeding in a construction zone. R.C. 2903.08(A)(2)/(3). A separate animus would most certainly exist for convictions under R.C. 2903.08(A)(2)/(3) and R.C. 4511.19, thereby allowing for consecutive sentences.
- A person could also be convicted of OVI and aggravated vehicular assault based upon a violation of R.C. 4561.15 for destroying, tampering, altering, removing or carrying away aviation marking devices.

The General Assembly, in enacting R.C. 2929.41, intended that the general rule be that misdemeanor sentences would be run concurrently with felony sentences, with some enumerated exceptions upon certain findings being made by the trial court, and never evinced an intent that an allied-offense analysis not be conducted for those offenses that should constitutionally merge.

The General Assembly created a general provision concerning blended felony and misdemeanor sentences, understanding that a more specific statute would prevail. *See* R.C. 1.51; *State v. Volpe*, 38 Ohio St.3d 191, 194, 527 N.E.2d 818 (1988) (“[w]here there is no manifest

legislative intent that a general provision of the Revised Code prevail over a special provision, the special provision takes precedence”); *State, ex rel. Myers, v. Chiaramonte*, 46 Ohio St.2d 230, 348 N.E.2d 323 (1976), paragraph one of the syllabus; *Cincinnati v. Thomas Soft Ice Cream, Inc.*, 52 Ohio St.2d 76, 369 N.E.2d 778, (1977), paragraph one of the syllabus; and *Leach v. Collins*, 123 Ohio St. 530, 533, 176 N.E. 77 (1931), citing *Rodgers v. United States*, 185 U.S. 83, 22 S.Ct. 582, 46 L.Ed. 816 (1902).

When the legislature specifically bans convictions and sentencing for allied offenses of similar import, there needs to be something more specific in a statute purported to override that ban in order to find a contrary intent, particularly when constitutional, double-jeopardy provisions are at issue. Revised Code Section 2929.41 was not enacted or designed by the legislature to create any exception to the allied-offenses statute, and it is an error of great magnitude by the Fifth, Eighth, Tenth, and Eleventh Districts to hold that it does. Because that error will impact innumerable future cases and defendants, this Court should rule that R.C. 2929.41(B)(3) was not intended to override R.C. 2941.25.

### CONCLUSION

This case involves substantial constitutional questions, as well as questions of public or great general interest. This Court should grant jurisdiction.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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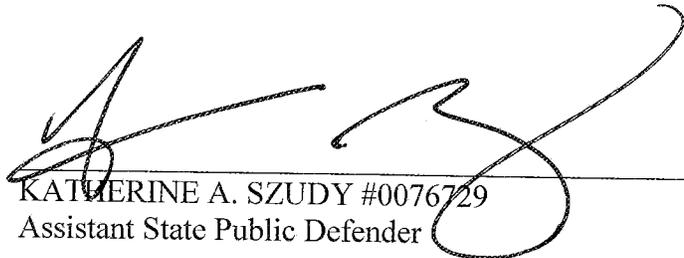
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT ANTONIA EARLEY** was forwarded by regular U.S. Mail, on this 25<sup>th</sup> day of July, 2014, to the Cuyahoga County Prosecutor's Office, Attorney Holly Welsh, Assistant Cuyahoga County Prosecutor, 9th Floor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113.



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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No.
Plaintiff-Appellee,	:	
	:	On Appeal from the Cuyahoga
vs.	:	County Court of Appeals
	:	Eighth Appellate District
ANTONIA EARLEY,	:	
	:	C.A. Case No. 100482
Defendant-Appellant.	:	

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**APPENDIX TO  
MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT ANTONIA EARLEY**

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# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 100482

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**ANTONIA EARLEY**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-13-571171

**BEFORE:** Keough, J., Celebrezze, P.J., and E.A. Gallagher, J.

**RELEASED AND JOURNALIZED:** June 19, 2014



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FILED AND JOURNALIZED  
PER APP.R. 22(C)

JUN 19 2014

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KATHLEEN ANN KEOUGH, J.:

{¶1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. The purpose of an accelerated appeal is to allow the appellate court to render a brief and conclusory opinion. *Crawford v. Eastland Shopping Mall Assn.*, 11 Ohio App.3d 158, 463 N.E.2d 655 (10th Dist.1983); App.R. 11.1(E).

{¶2} Defendant-appellant, Antonia Earley, appeals her sentence. For the reasons that follow, we affirm.

{¶3} In January 2013, Earley was charged in a six-count indictment — two counts of aggravated vehicular assault and operating a vehicle while under the influence (“OVI”), and one count each of endangering children and using weapons while intoxicated. Each count sought forfeiture of property or weapon. The charges stemmed from Earley driving her car while intoxicated at a high rate of speed with her one-year-old son riding in the front passenger seat. Earley crashed the car into a pole and her child sustained serious permanent injuries as a result.

{¶4} In June 2013, Earley pleaded guilty to an amended count of aggravated vehicular assault with forfeiture specifications, an amended count of endangering children with forfeiture specifications, and one count of OVI.

{¶5} Earley was sentenced to thirty-six months for aggravated vehicular assault, thirty-six months for endangering children, and six months for OVI.

The sentences were ordered to run concurrently, for a total sentence of three years in prison.

{¶6} Earley now appeals, raising three assignments of error.

### I. Allied Offenses

{¶7} In her first assignment of error, Earley contends that the trial court erred by failing to merge allied offenses of similar import for purposes of sentencing. Specifically, she contends that aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a) and OVI in violation of R.C. 4511.19(A)(1)(a) are allied offenses and should merge for sentencing.

{¶8} Although Earley did not raise the issue of allied offenses at the time of sentencing, this court has held that the issue of allied offenses may constitute plain error, which this court can address on appeal. *State v. Rogers*, 2013-Ohio-3235, 994 N.E.2d 499 (8th Dist.).

{¶9} The question as to whether crimes are allied offenses arises from the Double Jeopardy Clause of the Fifth Amendment, which protects individuals from multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). The Ohio legislature has codified this protection in R.C. 2941.25. In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the court held that a defendant's conduct must be considered when determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25. *Johnson* at ¶ 44. Thus,

a defendant can be convicted and sentenced on more than one offense if the evidence shows that the defendant's conduct satisfies the elements of two or more disparate offenses. But if the conduct satisfies elements of offenses of similar import, then a defendant can be convicted and sentenced on only one, unless they were committed with separate intent.

*State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, ¶ 36

(Lanzinger, J., concurring in part and dissenting in part).

{¶10} In other words,

[i]f the multiple offenses can be committed by the same conduct, then 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." If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

*Johnson* at ¶ 49-50, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50 (Lanzinger, J., dissenting).

{¶11} In this case, Earley pleaded guilty to aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a), which provides

No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause serious physical harm to another person \* \* \* [a]s the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance[.]

{¶12} Earley also pleaded guilty to OVI, in violation of R.C. 4511.19(A)(1)(a), which provides that "[n]o person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation,

\* \* \* [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them.”

{¶13} In support of her argument that aggravated vehicular assault and OVI are allied and should merge for sentencing, Earley cites to this court’s decision in *State v. Kelley*, 8th Dist. Cuyahoga No. 98928, 2013-Ohio-1899. In *Kelley*, the defendant assigned as error that the trial court erred in failing to merge the offenses of aggravated vehicular assault and OVI because the two offenses were allied. The state conceded the error, therefore, no independent analysis was conducted by this court as to whether the offenses were actually allied and merged for sentencing; rather, this court reversed the sentence and remanded the case for resentencing.

{¶14} In this case, however, the state does not concede that the offenses of aggravated vehicular assault and OVI are allied offenses. Instead, the state directs this court to consider the holdings of the Fifth, Tenth, and Eleventh Districts for the proposition that *even assuming arguendo* that OVI and aggravated vehicular assault are allied offenses, R.C. 2929.41(B)(3) creates an exception to the general rule provided in R.C. 2941.25 that allied offenses must be merged so that a defendant may be convicted on either the offenses, but not both. *See State v. Kraft*, 5th Dist. Delaware No. 13 CAA 03 0013, 2013-Ohio-4658, *appeal not accepted*, 138 Ohio St.3d 1451, 2014-Ohio-1182, 5 N.E.3d 668; *State v. Bayer*, 10th Dist. Franklin No. 11AP-733, 2012-Ohio-5469, *appeal not*

accepted, 136 Ohio St.3d 1453, 2013-Ohio-3210, 991 N.E.2d 258, *State v. Demirci*, 11th Dist. Lake No. 2011-L-142, 2013-Ohio-2399 (Grendell, J., dissenting). The exception being that a trial court possesses the discretion to sentence a defendant for both of these crimes pursuant to R.C. 2929.41(B)(3).

{¶15} Specifically, R.C. 2929.41(B)(3) provides,

A jail term or sentence of imprisonment imposed for a misdemeanor violation of section \* \* \* 4511.19 of the Revised Code shall be served consecutively to a prison term that is imposed for a felony violation of section \* \* \* 2903.08 \* \* \* of the Revised Code or a felony violation of section 2903.04 of the Revised Code involving the operation of a motor vehicle by the offender and that is served in a state correctional institution when the trial court specifies that it is to be served consecutively.

{¶16} The state maintains that this section evidences the legislature's intent that a trial court may, in its discretion, sentence a defendant for both OVI and aggravated vehicular assault. The state concedes this intent conflicts with the legislature's intent in R.C. 2941.25 against multiple punishments.

{¶17} This conflict has also been recognized in the Second, Sixth, and Twelfth Districts; however, these district have taken an opposing view that Ohio's General Assembly cannot abrogate the double-jeopardy prohibition of multiple punishments for the same offense, and because R.C. 2929.41(B)(3) does not explicitly trump R.C. 2941.25, aggravated vehicular assault and OVI can be allied offenses that merge for sentencing. *See State v. West*, 2d Dist. Montgomery No. 23547, 2010-Ohio-1786, *State v. Mendoza*, 6th Dist. Wood No.

the Ohio Legislative Service Commission expressly stated that one of its primary purposes of the bill was to impose stricter penalties for OVI offenses. While the bill also amended the overall penalties for OVI under R.C. 4511.19, it also allowed for certain misdemeanor offenses to run consecutively to certain felony offenses, including OVI and aggravated vehicular assault. The General Assembly in amending R.C. 2929.41(B)(3), specifically intended to permit cumulative punishments were a defendant is found guilty of both aggravated vehicular assault and OVI; thus, the protection against double jeopardy is not violated in these instances.

{¶20} Accordingly, we follow the rationale of the Fifth, Tenth, and Eleventh Districts that, even assuming aggravated vehicular assault and OVI are allied offenses, R.C. 2929.41(B)(3) creates an exception that allows a trial court to impose a sentence for both offenses.

{¶21} In this case, the trial court entered convictions on both aggravated vehicular assault and OVI and ordered them to be served concurrently, which is authorized by the discretion afforded to the court under R.C. 2929.41(B)(3). We find no plain error; Earley's first assignment of error is overruled.

## II. Overstatement of Postrelease Control

{¶22} In her second assignment of error, Earley contends that the trial court erred when it imposed a mandatory period of postrelease control of three years.

{¶23} During the plea hearing, the trial court advised Earley that she would be subject to a period of postrelease control “up to three years.” However, at sentencing, the trial court advised Earley that she would be subject to “three years” of postrelease control. The sentencing journal entry correctly stated “postrelease control is part of this prison sentence for up to 3 years for the above felony(s) under R.C. 2967.28.”

{¶24} We addressed this issue in a factually similar case in *State v. Cromwell*, 8th Dist. Cuyahoga No. 91452, 2010-Ohio-768, wherein we concluded that when a trial court overstates the penalty for violating postrelease control at the sentencing hearing, but remedies such overstatement in the journal entry, the error is harmless, and, unless the defendant can demonstrate prejudice, the sentence will not be rendered void. *Id.* at ¶ 8-11, citing *State v. Spears*, 9th Dist. Medina No. 07CA0036-M, 2008-Ohio-4045.

{¶25} Because the overstatement of postrelease control was made during sentencing and both the plea colloquy and sentencing journal entry accurately reflect both the discretionary nature and length of term of postrelease control, we find no prejudice to Earley. The error in the trial court’s pronouncement during sentencing was harmless. *See* Crim.R. 52(A); *see also Spears*.

{¶26} Accordingly, because Earley cannot demonstrate prejudice, we find no error and overrule her second assignment of error.

### III. Sentence — Contrary to Law

{¶27} In her third assignment of error, Early contends that her sentence is contrary to law. Specifically, Earley contends that the record is devoid of any indication that the trial court considered the relevant factors under R.C. 2929.11 and 2929.12.

{¶28} As for the argument that the court disregarded the applicable statutory factors, the sentencing entry states that “the court considered all required factors of the law” and “that prison is consistent with the purpose of R.C. 2929.11.” These statements, without more, are sufficient to fulfill the court’s obligations under the sentencing statutes. *State v. Saunders*, 8th Dist. Cuyahoga No. 98379, 2013-Ohio-490, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 18; *State v. Kamleh*, 8th Dist. Cuyahoga No. 97092, 2012-Ohio-2061, ¶ 61.

{¶29} We also find Earley’s sentence was not contrary to law under R.C. 2953.08(A)(4) because her sentence does not fall outside the statutory limits for the particular degree of offenses. Earley pleaded guilty to aggravated vehicular assault, endangering children, and OVI. She faced a mandatory prison term of at least nine months, with a maximum penalty of six and one-half years. Earley was sentenced to a three-year sentence, which is well within the statutory range. Accordingly, her sentence is not contrary to law.

{¶30} Earley’s third assignment of error is overruled.

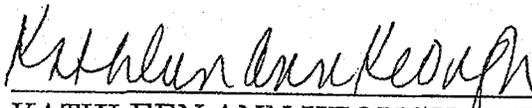
{¶31} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

  
KATHLEEN ANN KEOUGH, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and  
EILEEN A. GALLAGHER, J., CONCUR

The State of Ohio, }  
Cuyahoga County. } ss.

I, ANDREA F. ROCCO, Clerk of the Court of

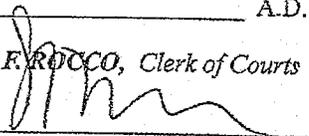
Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be kept, hereby certify that the foregoing is taken and copied from the Journal entry dated on 06-19-2014 CA-100482

of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal entry dated on 06-19-2014

CA-100482 and that the same is correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 19th day of June A.D. 20 14

ANDREA F. ROCCO, Clerk of Courts

By  Deputy Clerk