

IN THE SUPREME COURT OF OHIO
CASE NOS. 2014-1278, 2014-1454

STATE OF OHIO	:	
Plaintiff-Appellee	:	On Appeal from the Eighth Appellate
	:	District, Cuyahoga County, Ohio
v.	:	Case No. 100482
	:	
ANTONIA EARLEY	:	
Defendant-Appellant	:	

MERIT BRIEF OF APPELLEE STATE OF OHIO

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INTRODUCTION

This case presents this Court with the issue of whether R.C. 2929.41(B)(3) provides sentencing courts with the discretion to impose multiple punishments for aggravated vehicular assault and OVI. On appeal, Earley argues that her convictions for aggravated vehicular assault and OVI should merge under R.C. 2941.25.

A merger claim implicates the Double Jeopardy clause, which prohibits cumulative punishments for the same offense. Appellant argues that pursuant to R.C. 2941.25, imposing sentences for both aggravated vehicular assault and its predicate offense of OVI is a violation of double jeopardy. However, as this Court recently established in *State v. Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603, ¶ 10, sentencing a defendant for an offense and its predicate does not necessarily implicate merger issues.

The power to prescribe crimes and impose punishments rests with the legislature. As such, the legislature may prescribe cumulative punishments for the same offense without violating double jeopardy protections. Proper resolution of this issue before the Court requires a careful examination of the legislature's intent. This Court must determine whether the legislature intended to impose cumulative punishments for aggravated vehicular assault and OVI pursuant to R.C. 2929.41. To determine whether the legislature intended to impose punishments for both offenses, this Court should look to the plain language and purpose of the statute. The relevant statute at issue is R.C. 2929.41(B)(3), which in relevant part 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 it is to be served consecutively.

Examination of R.C. 2929.41 shows that the General Assembly clearly and unambiguously intended to impose cumulative punishments for OVI and aggravated vehicular assault. In particular, R.C. 2929.41(B)(3) indicates a clear intent for courts to impose cumulative punishments for violations of R.C. 2903.08 and R.C. 4511.19. It follows that the legislature intended to provide an exception to R.C. 2941.25 for these two offenses. Furthermore, one of the primary purposes of the statute was to enhance punishment for OVI offenses in specified circumstances.

However, even if this Court were to determine that a conflict exists between R.C. 2929.41 and R.C. 2941.25, this Court should find that the narrower and more specific provisions in R.C. 2929.41 should prevail over the more general provision in R.C. 2941.25, which was enacted later in time. For these reasons, this Court should affirm the decision of the Eighth District Court of Appeals and hold that R.C. 2941.25 provides trial courts with the discretion to sentence defendants for both aggravated vehicular assault and OVI.

STATEMENT OF THE CASE AND FACTS

On January 3, 2013, Appellant Antonia Earley caused a car crash that resulted in permanent injuries to her one year old son Aidan. (09/19/2013 Sentencing Tr. 17 – 18). Prior to crashing her car into a pole, Appellant was driving at a rate of speed of approximately 73 miles per hour while intoxicated. (09/19/2013 Sentencing Tr. 18.). When the car hit the pole, Appellant’s son Aidan sustained injuries while riding in the front passenger seat of the vehicle without a car seat. (Id.). He suffered two broken femurs, a spinal contusion, and permanent paralysis that extended from his waist down to his feet. (Id.). Even though Aidan retained the use his arms, he lost the use of his own hands. (Id.). At the time of sentencing, he was unable to eat without the assistance of a feeding tube. (Id.).

In connection with the above-described car crash, Appellant pleaded guilty to aggravated vehicular assault¹, endangering children², and operating a vehicle while under the influence (OVI)³. (09/19/2013 Sentencing Tr. 20 – 21). The trial court accepted the guilty pleas and sentenced Appellant to concurrent terms of thirty-six months in prison for aggravated vehicular assault, thirty-six months in prison for endangering children, and six months in jail for operating a vehicle while under the influence. (Id.).

Earley appealed to the Eighth District Court of Appeals, arguing that her convictions for operating a vehicle while under the influence and aggravated vehicular assault were allied offenses

¹ In violation of R.C. 2903.08(A)(1)(a), a felony of the third degree.

² In violation of R.C. 2919.22(A), a felony of the third degree.

³ In violation of R.C. 4511.19(A)(1)(a), a misdemeanor of the first degree.

that should have been merged at sentencing. *State v. Earley*, 8th Dist. Cuyahoga App. No. 100482, 2014-Ohio-2643, ¶ 7 – 21.

The Eighth District Court of Appeals affirmed the decision of the trial court and held that R.C. 2929.41(B)(3) creates an exception to the rule that allied offenses must be merged. *Id.* at ¶ 20. In its opinion, the Eighth Appellate District recognized the conflict between its holding and opinions in the Second, Sixth, and Twelfth Districts. *Id.* ¶ 16 (referring to conflicting opinions in *State v. West*, 2d. Dist. Montgomery No. 23547, 2010-Ohio-1786; *State v. Mendoza*, 6th Dist. Wood No. WD-10-008, 2012-Ohio-5988, appeal not accepted, 129 Ohio St.3d 1489, 2011-Ohio-5129, 954 N.E.2d 662; *State v. Phelps*, 12th Dist. Butler NO. CA2009-09-243, 2010-Ohio-3257).

In reaching this holding, the Eighth District acknowledged the importance of the Double Jeopardy Clause, but also highlighted the fact that a legislature may prescribe “the imposition of cumulative punishments for crimes that constitute the same offense without violating federal or state protections against double jeopardy.” *Id.* at ¶ 18, citing *Albernaz v. United States*, 450 U.S. 333, 344, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). The appellate court further reasoned that “the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Id.* at ¶ 18, citing *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

The Eighth Appellate District also recognized the fact that the legislature may prescribe exceptions to Double Jeopardy, the Eighth District Court of Appeals then examined the intent of the legislature. *Id.* at ¶ 19. In its analysis, the appellate court highlighted the fact R.C.2929.41 was amended pursuant to Am.Sub.S.B. 22 to allow “consecutive sentences for certain misdemeanors and felony offenses.” *Id.* With respect to the amendment, the appellate court

highlighted the fact that the Ohio Legislative Service Commission “expressly stated that one of its primary purposes of the bill was to impose stricter penalties for OVI offenses.” *Id.* The Eighth District also considered the fact that R.C. 2929.41 specifically “allowed for certain misdemeanor offenses to run consecutively to certain felony offenses, including OVI and aggravated vehicular assault.” *Id.* Therefore, the Eighth District Court of Appeals concluded that “[t]he General Assembly in amending R.C. 2929.41(B)(3), 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.” *Id.*

Appellant then moved the appellate court to certify a conflict between *Earley* and cases in Second, Sixth, and Twelfth appellate districts. The Eighth District Court of Appeals certified the conflict, which this Court later accepted.

LAW AND ARGUMENT

APPELLANT’S PROPOSITION OF LAW I: 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 MERGER 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 FOURTEEN AMENDMENTS, UNITED STATES CONSTITUTION; SECTION 10, ARTICLE I, OHIO CONSTITUTION; R.C. 2941.25.

This case came before this Court on a certification of a conflict by the Court of Appeals for Cuyahoga County. (*See* 10/14/2014 Journal Entry in CA-13-100482). This Court accepted the conflict and ordered the parties to brief the issue stated in the August 13, 2014 Court of Appeals Journal Entry: “When the offense of operating a motor vehicle while under the influence in violation of R.C. 2511.19(A)(1) is the predicate conduct for aggravated vehicular assault in violation of R.C. 2903.058(A)(1), are the two offenses allied, and if so, does R.C. 2929.41(B)(3) create an exception that allow a trial court to impose a sentence for both offenses?” (Id.)

Appellant argues that the trial court erred when it did not merge her convictions for aggravated vehicular assault and OVI. Contrary to Appellant’s claim, the Ohio legislature evinced a clear intent in R.C. 2929.41(B)(3) to permit cumulative punishments when a defendant is found guilty of aggravated vehicular assault and the predicate offense of OVI. Therefore, the trial court did not err by not merging Appellant’s convictions and then imposing sentences for all her convictions.

- I. To determine whether Ohio law allows for a trial court to sentence a defendant for aggravated vehicular assault and its predicate OVI offense, this Court must first determine whether the legislature intended to allow sentencing on both aggravated vehicular assault and its predicate offense.**

Appellant's merger claim implicates the Double Jeopardy clause, which prohibits cumulative punishments for the same offense. *State v. Underwood*, 124 Ohio St.3d 365, 922 N.E.2d, 2010-Ohio-1, ¶ 23; *State v. Moss*, 69 Ohio St.2d 515, 518, 433 N.E.2d 181 (1982). This protection has been codified by the Ohio legislature in Article I, Section 10 of the Ohio Constitution and R.C. 2941.25. *State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661, 780 N.E.2d 250, ¶ 7; *see generally* R.C. 2941.25.

However, the Double Jeopardy Clause does not restrict the legislature's authority to enact law that prescribes the elements of a crime and the corresponding punishment for the commission of that crime. *Brown v. Ohio* (1977), 432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 221; *United States v. Albernaz* (1981), 450 U.S. 333, 344, 67 L.Ed.2d 275, 101 S.Ct. 1137. Therefore, the issue of whether the Double Jeopardy Clause allows for multiple punishments is fundamentally a question of legislative intent. *See Missouri v. Hunter* (1983), 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535. (“[W]here two statutory provisions proscribe the ‘same offense,’ they are construed not to authorize cumulative punishments *in the absence of a clear legislative intent.*” (Emphasis sic)).

Within this framework, “R.C. 2941.25 generally provides the appropriate test to determine whether the court may impose multiple punishments for offenses arising from the same conduct.” *State v. Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603, ¶ 10. This Court clarified the parameters for merger analysis under R.C. 2941.25 in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. Pursuant to R.C. 2941.25, the sentencing court must first determine “whether it is possible to commit one offense *and* commit the other with the same conduct.” *Id.* at ¶ 48 (Emphasis sic). If the offenses correspond to such a degree that conduct resulting in the commission of one offense will result in the commission of the other, then the

sentencing court must decide whether the offenses were committed with by a single act with a single state of mind. *Id.* at ¶ 48-49. If the sentencing court answers both questions in the affirmative, then the offenses are subject to merger and the defendant can be sentenced for only one offense. *Id.* at ¶ 50. However, if the offenses cannot be committed with the same conduct, or if the offenses were committed with separate states of mind, then the court may sentence the defendant for both offenses. *Id.* at ¶ 51. Appellant relies upon *Johnson* to argue that the trial court erred when it did not merge aggravated vehicular assault and OVI.

Appellant’s reliance upon *Johnson* is misplaced because her argument ignores a significant exception to the *Johnson* test. Specifically, the United States Supreme Court and this Court have held that the legislature may authorize cumulative punishments for crimes that constitute the same offense without violating the Double Jeopardy Clause. *Missouri v. Hunter* (1983), 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535; *Albernaz v. United States* (1981), 450 U.S. 333, 344, 101 S.Ct. 1137, 67 L.Ed.275; *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 65, 10 Ohio B. 352, 461 N.E.2d 892. In fact, when a legislature signals its intent to permit cumulative punishments for two crimes, the legislature’s intent is dispositive and *Johnson* does not apply. *State v. Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603, ¶ 10. It follows that when challenging cumulative sentences imposed in a single trial, “the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than legislature intended.” *Missouri v. Hunter* (1983), 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535; *State v. Moss*, 69 Ohio St.2d 515, 433 N.E.2d 181, paragraph one of the syllabus. Therefore, the relevant inquiry in this matter is “whether the General Assembly intended to permit multiple punishments for the offenses at issue.” *State v. Childs*, 88 Ohio St.3d 558, 561, 728 N.E.2d 379, 2000-Ohio-425.

The State submits that in R.C. 2929.41(B)(3), the legislature intended to allow sentencing courts the discretion to impose cumulative punishments for both aggravated vehicular assault and OVI. Appellant responds that in this case, an examination of sentencing statute at issue, R.C. 2929.41(B)(3), “is irrelevant because it does not explicitly call for double punishment for allied offenses.” (See Appellant’s Br., 4). However, Appellant’s argument is contradicted by recent precedent established by this Court in *State v. Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603. In *Miranda*, this Court considered whether *Johnson* is applicable to a RICO violation and its predicate offenses for the purposes of sentencing. See generally *id.* Although the RICO statute⁴ did not explicitly call for double punishment of allied offenses, this Court held that “*Johnson* is not applicable to a RICO violation and that a RICO offense does not merge with its predicate offenses for purposes of sentencing.” *Id.* at ¶ 3.

In reaching the holding in *Miranda*, this Court closely examined the legislative intent of the Ohio RICO statute and found that the “RICO statute evinces the General Assembly’s intent that a court may sentence for both RICO offense and its predicate offenses.” *Id.* at ¶ 10. Even though the relevant statutes at issue in *Miranda* did not explicitly address any merger issue, this Court found that a *Johnson* analysis was not appropriate after it carefully examined the legislative intent of the relevant statutes. Therefore, Appellant’s argument concerning the lack of relevance of R.C. 2929.41 is not dispositive.

Here, this Court should carefully examine the relevant statutes in order to discern whether the Ohio legislature intended to allow for a defendant to receive punishment for both aggravated vehicular assault and the predicate offense of OVI. For reasons more fully explained below, the

⁴ R.C. 2923.32(A)(1).

General Assembly demonstrated a clear intent to allow for cumulative punishment of these two offenses in R.C. 2929.41(B)(3).

II. In R.C. 2929.41(B)(3), the Ohio legislature demonstrated a clear intent to allow sentencing courts to charge a defendant for cumulative punishments of aggravated vehicular assault and OVI.

Appellant argues that pursuant to R.C. 2941.25, the trial court erred when it did not merge her convictions for aggravated vehicular assault and OVI. (*See* Appellant’s Br. 8 – 10). However, R.C. 2941.25 “is not the sole legislative declaration in Ohio on the multiplicity of indictments.” *Childs, supra* at 561. While the test as outlined in R.C. 2941.25 “is helpful in construing legislative intent, it is not necessary to resort to that test when the legislature’s intent is clear from the language of the statute.” *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 37.

To determine the legislative intent of the applicable statute, this Court “first looks to the language in the statute and the purpose to be accomplished.” *State ex rel. Purdy v. Clermont Cty. Bd. of Elections*, 77 Ohio St.3d 338, 340, 1997 Ohio 278, 673 N.E.2d 1351; *State v. Cook*, 83 Ohio St.3d 404, 416, 1998 Ohio 291, 700 N.E.2d 570. If “the General Assembly has plainly and unambiguously conveyed its legislative intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law as written.” *State v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, 848 N.E.2d 496, syllabus.

A. The Plain Language of R.C. 2929.41.

The plain language of R.C. 2929.41(B)(3) unambiguously conveys the General Assembly’s intent to provide sentencing courts with the discretion to impose cumulative punishments for aggravated vehicular assault and OVI. R.C. 2929.41 (B)(3) provides, in relevant part:

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 it is to be served consecutively*.

(Emphasis added.) Therefore, the plain language of R.C. 2929.41(B)(3) expressly provides courts with the discretion to impose consecutive sentences for aggravated vehicular assault and its predicate OVI offense, which respectively correspond to R.C. 2903.08 and R.C. 4511.19.

The plain language of R.C. 2929.41 also permits sentencing courts to impose aggravated vehicular assault and OVI *concurrently*. The State emphasizes this point because the imposition of concurrent sentences is an imposition of multiple punishments. Under R.C. 2929.41(B)(3), the trial court “specifies [when sentences are] to be served consecutively” and therefore the imposition of *consecutive* sentences for these offenses is left to the sound discretion of the sentencing court. However, if a defendant is convicted of aggravated vehicular assault and a predicate offense but the trial court does not impose consecutive sentences for those offenses, subsection (A) of R.C. 2929.41 then requires that the trial court impose concurrent sentences. Therefore, the plain language of R.C. 2929.41 evinces the legislature’s intent to allow sentencing courts to impose concurrent or consecutive cumulative punishments for OVI and aggravated vehicular assault.

In cases such as this, where a “legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the ‘same’ conduct under *Blockburger*, a court’s task of statutory construction is at an end and the prosecutor may seek and the trial court may impose cumulative punishment under such statutes in a single trial.” *Hunter*, 459 U.S. at 368. Despite this precedent established by the United States Supreme Court, Earley

claims that the legislature intended for aggravated vehicular assault and OVI to merge. (*See* Appellant’s Br. 5).⁵

Appellant’s claim that aggravated vehicular assault and OVI merge is contradicted by the clear and unambiguous language in R.C. 2929.41 that authorizes courts to sentence defendants for both offenses. The provisions in R.C. 2929.41 that impose sentences for both aggravated vehicular assault and OVI differ significantly from merger statutes, which instead require that a defendant is sentenced for only one allied offense. This Court has held that when two allied offenses of similar import merge, “the indictment or information may contain counts for all such offenses, *but the defendant may be convicted of only one.*” *State v. Wilson*, 129 Ohio St.3d 214, 216, 2011-Ohio-2669, ¶ 9, 951 N.E.2d 381 (Emphasis added.), citing R.C. 2941.25. Furthermore, “for purposes of R.C. 2941.25, a ‘conviction’ consists of a guilty verdict and the imposition of a sentence”. *Id.* at ¶ 12, citing *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182. Prior to sentencing on allied offenses, the State has an opportunity to elect which of the allied offenses it seeks to pursue for sentencing and those crimes merge into a single conviction for sentencing. *See generally id.* Therefore, an express provision that allows for trial courts to sentence a defendant on multiple offenses contradicts any claim that those same offenses merge. Here, the express provisions in R.C. 2929.41 that allow courts to impose concurrent or consecutive sentences for OVI and aggravated vehicular assault contradict Appellant’s claim that the legislature intended for these offenses to merge.

⁵ Appellant states the following in her brief: “A court thus has the discretion to order a sentence for OVI (a misdemeanor) to be serve consecutively to a sentence for aggravated vehicular assault (a felony). But importantly a sentencing court may only order consecutive sentence if there are multiple sentences to be imposed. Here, those offenses were allied under R.C. 2941.25 * * *.” (App.’s Br. 6). This suggests that Appellant is arguing that the legislature intended that OVI and aggravated assault should merge, yet at the same time the legislature intended for the trial court to have the authority to sentence a defendant for these two offenses.

For the aforementioned reasons, the plain language of R.C. 2929.41 evinces a clear intent to allow for cumulative punishments of aggravated vehicular assault and OVI. Appellate courts have held the same. *State v. Bayer*, 10th Dist. Franklin No. 11AP-733, 2013-Ohio-5469, ¶ 21 (“The General Assembly thereby clearly reflected its intent that a trial court may, in its discretion, sentence a defendant for both OVI and AVA.”); *see also State v. Demirci*, 11th Dist. Lake No. 2011-L-142, 2013-Ohio-2399 (holding that the trial court did not err when it did not merge the defendant’s convictions for aggravated vehicular assault and OVI for the purposes of sentencing); *accord State v. Dunham*, 5th Dist. Richland No. 2014-Ohio-1042 (finding that aggravated vehicular homicide does not merge with the predicate offense of OVI).

B. The Purpose of R.C. 2929.41.

Appellant argues that the purpose of R.C. 2929.41 is to enhance the punishment for OVI offenses in specified circumstances. (Appellant’s Br. 6 – 7). In support of this argument, Earley cites to an analysis of R.C. 2929.41 by the Legislative Service Commission: “The act, in specified circumstances, eliminates for the misdemeanor state OMVI and misdemeanor driving under suspension or revocation offenses *the existing prohibition against imposing a term of imprisonment imposed for a misdemeanor consecutively to a prison term imposed for a felony.*” *See Ohio Legislative Service Commission, Final Bill Analysis to Am.Sub.S.B.22*, at 3 (Dec. 8, 1999), available at <http://www.lsc.state.oh.us/analyses/99-sb22.pdf> (accessed January 13, 2015) (Emphasis added). The State agrees with Appellant in this respect. R.C. 2929.41 does specify some circumstances that result in increased punishment for OVI offenses. Here, R.C. 2929.41(B)(3) specifies that the punishment for a misdemeanor OVI offense may be enhanced when the same offender commits a felony violation of aggravated vehicular assault. While this

Court is not bound by the analysis of the Legislative Service Commission, this Court may refer to its analysis when it is found to be helpful and objective. *Meeks v. Papadopoulos*, 62 Ohio St.2d 187, 191, 404 N.E.2d 159 (1980).

The primary purpose of R.C. 2929.41 (B)(3) is to enhance the penalties of OVI offenses in specified circumstances. On May 17, 2000, the General Assembly amended R.C. 2929.41 through Am.Sub.S.B.22 to incorporate the language now enumerated in subsection (B)(3). In the synopsis of this legislation, the Ohio Legislative Commission indicated that some of the purposes of this bill included (1) establishing stricter penalties for OMNI offenders with blood alcohol content levels of .17 of one percent or higher; (2) increase penalties for a second subsequent felony state OMVI conviction; and (3) remove the prohibition against imposing a consecutive sentence for state OMVI violations consecutive certain felony offenses. It is clear then that one of the primary purposes of Am.Sub.S.B. 22 is the enhancement of penalties in certain circumstances for OVI offenses.

Furthermore, the comments provided by the Legislative Service Commission to this act explain that whether or not the offender committed aggravated vehicular assault is relevant for the purposes of determining the sanctions imposed for an OVI conviction. *See* Ohio Legislative Service Commission, Final Bill Analysis to Am.Sub.S.B.22, at 18 (Dec. 8, 1999), available at <http://www.lsc.state.oh.us/analyses/99-sb22.pdf> (accessed January 13, 2015) (Emphasis added). More specifically, the Legislative Service Commission stated the following with respect to this amendment:

Under continuing law, the following alcohol-related and motor vehicle related offenses are the offenses the convictions of which are relevant for purposes of determining the sanctions to be imposed for state OMVI: * * * (e) aggravated vehicular homicide, vehicular homicide, aggravated vehicular, assault, or a municipal ordinance substantially similar to vehicular homicide in a case in which

the jury or judge found that the offender was under the influence of alcohol, a drug of abuse, or both * * *.

Id.

Therefore, the purpose of the statute evinces the legislature's intent to permit cumulative punishments for both aggravated vehicular assault and OVI.

III. Even if the two statutes conflict, the specific provisions in R.C. 2929.41(B)(3) prevail over the more general provisions in R.C. 2941.25

Both Appellant Antonia Early and the State maintain that the intent of R.C. 2929.41(B)(3) is unambiguous and does not conflict with R.C. 2941.25.⁶ Appellant however, contends that the rule of lenity should be applied if R.C. 2929.41(B)(3) is found to be ambiguous. The rule of lenity is codified in R.C. 2901.04(A). This rule is a principal of statutory construction that provides that the definitions of offenses and penalties shall be liberally construed in favor of the defendant. R.C. 2901.04. The rule of lenity should only be applied "if the intended scope of the statute is ambiguous." *State v. Elmore*, 122 Ohio St. 3d 472, 2009-Ohio-3478, 912 N.E.2d 582, ¶ 38. In fact, the rule of lenity is inapplicable when the statute is unambiguous. *State v. Davis*, 139 Ohio St.3d 122, 2014-Ohio-1615, 9 N.E.3d 1031, ¶ 35. Here, the legislature evinced a clear intent of R.C. 2929.41(B)(3) to permit sentencing courts the discretion to impose concurrent or consecutive sentences for aggravated vehicular assault and OVI. Therefore, this Court should find that rule of lenity is inapplicable to R.C. 2929.41.

⁶ Appellant claims that the State is arguing that the plain language of R.C. 2929.41(B)(3) is in conflict with the merger statute. (Appellant's Br. 8). This is not the State's argument. Instead, the State is asserting that the legislature specifically intended to create an exception to the merger statute when it amended R.C. 2929.41(B)(3).

Instead, if this Court does find that R.C. 2929.41 conflicts with the merger statute, R.C. 1.51 is the correct tool of statutory construction to apply in this case. In relevant part, R.C. 1.51 provides:

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

Here, R.C. 2941.25 is the more general of the two statutes. R.C. 2941.25 was enacted on January 1, 1974 and concerns any case where a defendant may have committed two offenses of a similar import and similar animus. By contrast, the legislature's amendment to R.C. 2929.41 in Am.Sub.S.B.22 established narrower and more specifically defined provisions. The May 17, 2000 amendments to R.C. 2929.41 provided for enhanced penalties for OVI offenses in certain specified circumstances. It follows that the more specific provisions of R.C. 2929.41 prevail over the more general provisions of R.C. 2941.25. In addition, the fact that subsection (B)(3) of R.C. 2929.41 was enacted significantly later than R.C. 2941.25 supports a finding that R.C. 2929.41(B)(3) prevails in this case. *See* R.C. 1.52(a) ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date prevails."); *see also* R.C. 1.52(b) ("If the amendments are substantively irreconcilable, the latest in date of enactment prevails.").

IV. The Conflict Cases in Other Appellate Districts Recognized by the Eighth District Court of Appeals are Dissimilar from the Instant Case and Should not Serve as Persuasive Authority

This case proceeded to this Court from an order to certify a conflict, which this Court later accepted. On June 30, 2014, Appellant filed her motion to certify a conflict, asserting that opinion of the Eighth District Court of Appeals in this matter conflicted with *State v. West*, 2d. Dist. Montgomery No.23547, 2010-Ohio-1786, *State v. Mendoza*, 6th Dist. Wood No. WD-10-008,

2012-Ohio-5988, appeal not accepted, 129 Ohio St.3d 1489, 2011-Ohio-5129, 954 N.E.2d 662, *State v. Phelps*, 12th Dist. Butler No. CA2009-09-243, 2010-Ohio-3257, and *State v. Kelley*, 8th Dist. Cuyahoga No. 98928, 2013-Ohio-1899.

The State highlights the fact that the cases of *West*, *Mendoza*, *Phelps*, and *Kelley* are critically different from the instant appeal. In these conflict cases, the appellate courts did not consider whether R.C. 2929.41(B)(3) creates an exception that would allow trial courts to impose sentences for both aggravated vehicular assault and OVI. More particularly, in *West*, the appellant's convictions of aggravated vehicular assault and OVI were reversed for a trial court to make a factual determination as to whether those convictions constituted allied offenses of similar import; the Second District never reviewed the implications of R.C. 2929.41(B)(3). In *Mendoza*, *Phelps*, and *Kelley*, the Sixth, Twelfth, and Eighth District Court of Appeals respectively reversed and remanded convictions because each appellate court determined that aggravated vehicular assault and OVI merged for sentencing purposes; again, none of these appellate districts considered whether R.C. 2929.41(B)(3) allowed for a trial court to sentence a defendant for both aggravated vehicular assault and OVI.

Because the appellate courts in these conflicts cases never performed an analysis as to whether R.C. 2929.41(B)(3) allows for imposing both crimes, these courts reached opposite conclusions from the instant case. However, for reasons previously explored in depth, an independent examination of R.C. 2929.41 is critical for determining the intent of the legislature. Without examining R.C. 2929.41, these courts did not carefully consider the fact that the legislature may authorize cumulative punishments for crimes that constitute the same offense without violating the Double Jeopardy Clause. *State v. Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 60; *see also Missouri v. Hunter* (1983), 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d

535. Here, the Ohio legislature clearly expressed its intent to impose cumulative punishments for aggravated vehicular assault and OVI through the plain language of R.C. 2929.41. It is also notable that appellate courts that did consider the implications of R.C. 2929.41 have found that the cumulative punishments of both offenses may be imposed. *State v. Bayer*, 10th Dist. Franklin No. 11AP-733, 2013-Ohio-5469, ¶ 21 (“The General Assembly thereby clearly reflected its intent that a trial court may, in its discretion, sentence a defendant for both OVI and AVA.”); *see also State v. Demirci*, 11th Dist. Lake No. 2011-L-142, 2013-Ohio-2399. For these reasons, this Court should decline to follow the holdings of the conflict cases cited by Appellant.

CONCLUSION

Appellee asks this Court to affirm the decision of the Eighth District in *State v. Earley*, 8th Dist. Cuyahoga No. 100482, 2014-Ohio-2641, which held that the trial court properly imposed separate and concurrent sentences for aggravated vehicular assault and OVI. Because the Ohio legislature intended to create an exception to the merger doctrine under R.C. 2929.41(B)(3) for these two offenses, this Court should find that the legislature’s expressed intent on this matter is dispositive.

Respectfully Submitted,

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