Supreme Court of Ohio Clerk of Court - Filed February 24, 2015 - Case No. 2014-1278

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case Nos. 2014-1278, 2014-1454
Plaintiff-Appellee,	:	
	:	On Appeal from the Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
ANTONIA EARLEY,	:	Case No. 100482
	:	
Defendant-Appellant.	:	

REPLY BRIEF OF APPELLANT ANTONIA EARLEY

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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 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 Fourteenth Amendments, United States Constitution; Section 10, Article I, Ohio Constitution; R.C. 2941.25.** 1

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STATEMENT OF THE CASE AND FACTS

Ms. Earley relies upon the statement of the case and facts contained in her merit brief.

INTRODUCTION

The State and its supporters argue that an operating-a-motor-vehicle-while-under-the-influence offense (OVI), serving as the predicate conduct for an aggravated-vehicular-assault offense, cannot be merged. They offer varying rationales as to why. None are persuasive.

ARGUMENT

CERTIFIED QUESTION

> **When the offense of operating a motor vehicle while under the influence in violation of R.C. 4511.19(A)(1) is the predicate conduct for aggravated vehicular assault in violation of R.C. 2903.08(A)(1), are the two offenses allied, and if so, does R.C. 2929.41(B)(3) create an exception that allows the trial court to impose a sentence for both?**

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 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 Fourteenth Amendments, United States Constitution; Section 10, Article I, Ohio Constitution; R.C. 2941.25.**

I. The intent to double punish must be clear.

"The Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366, 108 S.Ct. 673, 74 L.Ed.2d 535 (1983). The Ohio legislature's primary statement on double punishment is R.C. 2941.25. This statute clearly prohibits double punishment for allied offenses of similar import. Thus, in order to impose such punishment for certain offenses, another statute

must clearly convey the opposite intent. *See State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 37.

R.C. 2929.41(B)(3), a sentencing statute, does not clearly convey that opposite intent. It does no more than allow a court to run certain misdemeanor sentences consecutively to certain felony sentences. This is evident on the face of the statute. The State, however, has taken this language and read into it an intent to double punish. It has done so despite the fact that this intent is not apparent from the plain language of the statute or the legislative history.

A. The plain language of the statue does not express a clear intent to double punish.

The best indicator of legislative intent is the text of the statute. *State v. Roberts*, 134 Ohio St.3d 459, 2012-Ohio-5684, 983 N.E.2d 334, ¶ 21. As such, statutes must be considered in their entirety. The State reproduces R.C. 2929.41(B)(3) twice and each time omits all of the included offenses *except* OVI and aggravated vehicular assault. *See* State's Brief at 1, 11. The other included offenses, though not at issue in this case, are important to determining the actual intent of the legislature.

The chart below lists the offenses in R.C. 2929.41(B)(3) for which courts may impose consecutive sentences when there are two sentences to impose:

Misdemeanors		Felonies	
4510.11	Driving under Suspension	2903.06	Agg. Vehicular Homicide
4510.14	OVI Suspension	2903.07	*Repealed*
4510.16	Financial Responsibility Suspension	2903.08	Agg. Vehicular Assault
4510.21	Failure to Reinstate License	4511.19	OVI (three or more previous convictions)
4511.19	OVI (1st, 2nd, or 3rd offense)	2903.04	Involuntary Manslaughter (involving vehicle)

The State's chief argument that this sentencing statute is an exception to that for merger is that it permits cumulative punishment. *See* State's Brief at 2. OVI and aggravated vehicular

assault are included in the statute. *Id.* If courts are allowed to impose consecutive sentences upon a defendant for both of those offenses, the State argues, then those offenses cannot merge. *Id.* at 12. Therefore, the legislature must have intended for this sentencing statute to act as an exception to the allied-offenses statute. *Id.* at 10, 13.

The logic of the State's argument is flawed. It focuses on OVI and aggravated vehicular assault in an effort to show that the legislature intentionally carved out an exception for that particular combination of offenses. But, there are many combinations of misdemeanor and felony offenses included within the statute's scope that would generally not implicate the issue of merger:

Examples	Misdemeanors		Felonies	
Combination #1	4510.11	Driving under Suspension	2903.06	Agg. Vehicular Homicide
Combination #2	4510.14	OVI Suspension	2903.08	Agg. Vehicular Assault
Combination #3	4510.16	Financial Responsibility Suspension	2903.04	Involuntary Manslaughter (involving vehicle)
Combination #4	4510.21	Failure to Reinstate License	4511.19	OVI (three or more previous convictions)
Combination #5	4511.19	OVI Suspension	2903.04	Agg. Vehicular Assault

Because the included misdemeanors involve strict-liability offenses that are irrelevant to the quality of one's driving, they would generally not merge with any of the included felony offenses. *See, e.g.*, *State v. DeMastry*, 5th Dist. Fairfield No. 10-CA-13, 2011-Ohio-1320, ¶ 60. In fact, the OVI misdemeanor coupled with one of the included felonies is the only combination that would consistently appear to raise allied-offenses concerns. Hiding its intention to create a merger exception for these offenses within a statute that covers a wide range of conduct seems an improbable choice by the legislature. And it falls well below the "clear intent" standard this Court has used to negate the express intent of the allied-offenses statute.

That argument is further flawed in its premise. It necessarily relies on the assumption that courts can *never* impose cumulative punishment if OVI and aggravated vehicular assault are subject to merger. *See* State's Brief at 12 ("Therefore, an express provision that allows for trial courts to sentence a defendant on multiple offenses contradicts any claim that those same offenses merge."). But that is false. Though it will often be the case that the OVI misdemeanor will merge with the felony offense, it is not guaranteed.

Consider, for example, *State v. Campbell*, in which the appellate court did not merge the OVI and aggravated-vehicular-homicide offense because the record showed that the verdicts were not based upon the same conduct. 1st Dist. Hamilton No. C-090875, 2012-Ohio-4231, ¶ 15. A police officer had observed the offender speeding through a stop sign (evidence supporting the OVI conviction) before the offender crashed his car into the side of a building, killing his passenger (evidence supporting the aggravated vehicular homicide). *Id.* The offenses were not merged, so sentences could be imposed for both. Those sentences could be run consecutively to one another under R.C. 2929.41(B)(3).

Consider, as well, a scenario where an individual is charged with an OVI offense on Friday and is charged with an aggravated vehicular assault on Saturday. If the defendant were found guilty of the charges from both incidents, the court would have a misdemeanor OVI sentence to impose along with a felony aggravated-vehicular-assault sentence. Those sentences could be imposed consecutively because separate conduct resulted in separate offenses.

The inclusion of the misdemeanor OVI and felony OVI offenses within R.C. 2929.41(B)(3) also presumes consecutive sentences for offenses that involve separate conduct or separate incidents. That is, an OVI is a misdemeanor when it is the defendant's first, second, or third offense. R.C. 4511.19(G)(1). An OVI is a felony when the defendant has three or more

previous OVI convictions. *Id.* As such, a defendant could receive consecutive sentences for both a misdemeanor OVI and a felony OVI only if there were two separate incidents resulting in two separate convictions. For example, if the defendant received a third OVI charge, pled guilty, and then subsequently received another OVI charge, that new OVI charge would be a felony. The sentence for the misdemeanor OVI could be run consecutively to the sentence for the felony OVI. An example is found in *State v. Richter*, in which a defendant received a suspended jail sentence for his third misdemeanor OVI, and while on community control, was convicted of a felony OVI. The misdemeanor jail sentence was run consecutively to the prison sentence for the felony OVI. 12th Dist. Clermont No. CA2014-06-040, 2014-Ohio-5396, ¶ 3.

R.C. 2929.41(B)(3) anticipates the reality that separate incidents or conduct will result in separate offenses and separate sentences. This reality extinguishes the State's argument that the legislature intended the sentencing statute as an exception to merger simply by including both offenses within its scope. State's Brief at 15. It also renders unpersuasive the conflict-based argument that has supported the lower court decisions holding that the sentencing statute is a merger exception. The Tenth Appellate District relied upon this argument in *State v. Bayer*, explaining that "R.C. 2929.41 evidences the intent of the legislature that those two offenses should not merge—a conclusion that *necessarily follows* from the fact that a trial court could not order sentences to be served consecutively unless the court had first imposed more than just one sentence." (Emphasis added.) 10th Dist. Franklin No. 11AP-733, 2012-Ohio-5469, ¶ 21. The Fifth, Eighth, and Eleventh Districts cited to *Bayer* in their decisions and held that the sentencing statute creates a merger exception. *State v. Kraft*, 5th Dist. Delaware No. 13 CAA 03 0013, 2013-Ohio-4658, ¶ 33-34; *State v. Earley*, 8th Dist. Cuyahoga No. 100482, 2014-Ohio-2643, ¶ 14-17; *State v. Demirci*, 11th Dist. Lake No. 2011-L-142, 2013-Ohio-2399, ¶ 46-48.

Finally, despite the State's adamant assertion that the legislature wants to "enhance punishment" for offenders like Ms. Earley, the statute itself belies that intent. Though OVI offenses are encompassed by the statute, the legislature has more specifically targeted repeat offenders—whether their offenses are related to drunk driving or not. That is, the legislature has expressed an intent to permit cumulative punishment for individuals who have already been warned or sanctioned for their on-the-road offenses and who have subsequently engaged in a more serious driving offense. This is apparent when the entire class of misdemeanor offenses is considered. Drunk-driving offenses are not singled out. And when those misdemeanors occur in addition to a separate felony offense involving a motor vehicle, the punishment can be enhanced through consecutive sentencing. This intent also parallels the intent that is obvious from the rest of the sentencing scheme for OVI and license-suspension offenses—that repeated violations should result in more severe sanctions.

B. The legislative history does not express a clear intent to double punish.

Courts may also look to legislative history for guidance on interpreting a statute's text. *See State v. Roberts*, 134 Ohio St.3d 459, 2012-Ohio-5684, 983 N.E.2d 334, ¶ 12. The State argues that the legislative history here evinces the intent to create an exception to the allied-offenses statute through R.C. 2929.41(B)(3). State's Brief at 13-15. Its efforts fail.

First, the State invokes the purpose of Amended Substitute Senate Bill 22, the act which amended R.C. 2929.41. *Id*. at 14. The State argues that the bill's purpose was to "enhance punishment for OVI offenses in specified circumstances." *Id*. at 2. From this broad statement, the State leaps to the conclusion that the legislature sought to impose double punishment for OVI offenders. But, this sort of broad and generalized intent is insufficient to curtail the double-

jeopardy protection for individuals whose one act results in two different offenses. As explained previously by both Ms. Earley and the State, the legislative intent to double punish must be clear.

The State further asserts that lifting the prohibition against consecutive misdemeanor and felony sentences is equivalent to lifting the prohibition against double punishment. This is also in error. R.C. 2929.41(B)(3) *does not* "specif[y] that the punishment for a misdemeanor OVI offense may be enhanced when the same offender commits a felony violation of aggravated vehicular assault." *Id*. at 13. The provision *does* specify that a court may run a sentence for misdemeanor OVI consecutively to a sentence for a felony violation of aggravated vehicular assault. R.C. 2929.41(B)(3). And in doing so, it does nothing to alter the fact that merger occurs before sentencing. If there are two remaining sentences to be imposed, they may be run consecutively. If there is only one remaining sentence to be imposed, the statute is not implicated.

Lastly, the State references Comment 1 from the Legislative Service Commission's bill analysis regarding the relevance of prior convictions. State's Brief at 14. This reference is misplaced. Though the State relies upon this comment to support its claim that the legislature intended double punishment for those offenses outlined in R.C. 2929.41(B)(3), the comment is actually clarifying an entirely separate substantive-offense provision. The analysis states:

> R.C. 4511.99 sets forth the sanctions for a conviction of state OMVI. The sanctions varied, depending upon the number of times within the preceding six years that the offender had been convicted of any specified *vehicle-related and alcohol-related offense* (see **COMMENT 1** for a listing of those offense).

(Emphasis sic.) Ohio Legislative Service Commission, Final Bill Analysis to Am.Sub.S.B. 22 (Dec. 8, 1999), available at http://www.lsc.state.oh.us/analyses/99-sb22.pdf. As such, this particular reference to the legislative history offers no support to the State's position, but does

further strengthen that the legislature was more concerned with enhancing punishment for repeat offenders than it was with removing the double-jeopardy protection for individuals like Ms. Earley.

Again, the stated purpose of the statute is to enhance punishment under certain circumstances. This generalized intention is inadequate to convey the clear intent needed to carve out an exception to the allied-offenses statute.

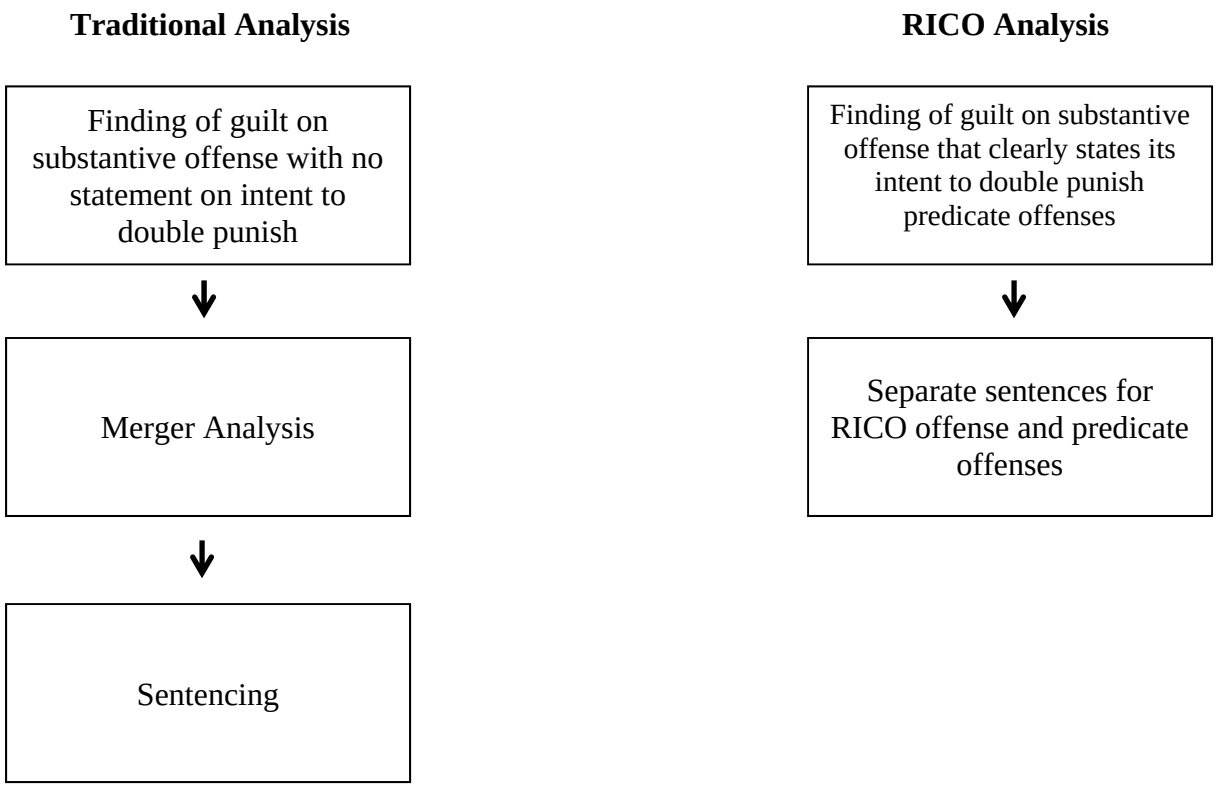
II. *Miranda* is distinguishable.

The State leans heavily on *State v. Miranda*, 138 Ohio. St.3d 184, 2014-Ohio-451, N.E.3d 603. It attempts to wield the narrow holding of that case to broadly argue that the intent to permit consecutive punishment clearly demonstrates an intent to double punish when the offenses are committed through the same conduct or with a single animus. But, this case is distinguishable from *Miranda*, and a legislature's intent to allow cumulative punishment in specified circumstances does not automatically equate to a clear intent to allow double punishment for allied offenses of similar import.

The decision in *Miranda* not to merge the RICO offense with its predicate offenses was rooted in legislative intent that was clearly expressed through the abundance of legislative history accompanying both the federal and Ohio RICO statutes. *Miranda* at ¶ 11-16 (describing the "wealth of authority" indicating intent to impose cumulative liability). This Court had the benefit of federal and state case law interpreting the comparable statutes and express statements by the legislature regarding its purpose. *Id.* at ¶ 14. None of that exists here. With regard to legislative history in this case, the State only offers the Ohio Legislative Service Commission's Final Bill Analysis. State's Brief at 13-15; *see also* Part I(B), above.

Another significant distinction between *Miranda* and this case is that *Miranda* dealt with the interpretation of a substantive offense. Here, the Court must interpret a sentencing statute not directly connected to the affected offenses and gauge its impact on R.C. 2941.25. This difference matters because at the sentencing stage, merger analyses must be executed to determine how many offenses remain for sentencing.

As this Court explained in *Miranda*, the purpose behind creating a RICO offense was to "impose cumulative liability for the criminal enterprise." *Miranda* at ¶ 14, quoting *State v. Schlosser*, 79 Ohio St.3d 332, 681 N.E.2d 911 (1997). That purpose would have been undermined by merging the RICO offense with its underlying predicate offenses. *Miranda* at ¶ 14. It would have subverted the clear legislative intent apparent from the existence of the substantive offense. *Id.* For those reasons, the standard execution of merger is skipped in the RICO context:



As the RICO diagram illustrates, because the legislature clearly declared its intent to double punish RICO offenses and their predicate offenses in the substantive-offense statute itself, this Court found *Johnson* inapplicable. *Miranda* at ¶ 20. But that is not the case here.

The aggravated-vehicular-assault and OVI substantive offenses were not drafted to impose cumulative liability. There is no suggestion in the Revised Code that these offenses would not be subject to merger under *Johnson*. The mere allowance of cumulative punishment is not a clear intent to mandate double punishment when the offenses were committed through the same conduct. Accordingly, these offenses follow the traditional analysis illustrated above.

The legislature knows how to express such a clear intent in order to negate or override other Revised Code mandates. If it wanted courts to skip merger under the circumstances of this case, it would have explicitly stated that intent in the substantive offenses themselves, or in the sentencing statute. Notably, the term "notwithstanding" appears nearly 2,000 times in the Revised Code, including at least eight times in Chapter 2929. *See, e.g.*, R.C. 2929.13(D)(2); R.C. 2929.14(B)(4); R.C. 2929.14(B)(8); R.C. 2929.142; R.C. 2929.18(B)(4); R.C. 2929.201; R.C. 2929.32(A)(1); R.C. 2929.32(C)(1). If the legislature clearly intended to double punish aggravated vehicular assault and misdemeanor drunk driving when they were committed through the same conduct, it had concise, viable language to do so. It did not use that language.

Finally, the State misunderstands the force of R.C. 2929.41(B)(3). The State argues that "the Ohio legislature evinced a clear intent in R.C. 2929.41(B)(3) to permit cumulative punishment when a defendant is found guilty of aggravated vehicular assault and the predicate offense of OVI." State's Brief at 6. This is false. The sentencing statute does not state that such sentences may be imposed when a defendant is found guilty of both offenses. It states that "a sentence of imprisonment imposed for a misdemeanor violation * * * shall be served

consecutively to a prison term that is imposed for a felony violation * * *" R.C. 2929.41(B)(3). The State ignores the fact that the "trial court's discretion to order cumulative sentences is not * * * constitutionally unbridled. The General Assembly must have, in effect, authorized the imposition of the consecutive sentences." *State v. Moss*, 69 Ohio St.2d 515, 518-519, 433 N.E.2d 181 (1982). The authorization to impose consecutive sentences comes from an analysis of the substantive offenses themselves and the allied-offenses statute. This is what happened in *Miranda*. The authorization cannot come from a sentencing statute that is only relevant once more than one sentence has been determined necessary.

III. Neither the rule of lenity nor R.C. 1.51 supports an "exception" interpretation.

The State argues that the rule of lenity is inapplicable in this case and that R.C. 1.51 should be applied instead. State's Brief at 15.

R.C. 1.51 provides that

> *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.

(Emphasis added.)

Though the State relies upon R.C. 1.51 to argue that the "specific" provisions of R.C. 2929.41(B)(4) should prevail over the "general" provisions of the allied-offenses statute, it assumes without explanation that it is not possible to give effect to both statutes. *See* State's Brief at 16. Importantly, one statute prevails over another only *after* a court has determined that it is not possible to give effect to both statutes. R.C. 1.51. In other words, this Court would have to determine that the conflict between the two statutes is "irreconcilable" to hold that the sentencing statute is an exception to the allied-offenses statute. *Id.*

But, it is entirely possible to adhere to both statutes without any conflict at all. By following the established court procedure of merging offenses before imposing sentences, courts can avoid conflict and give effect to both provisions. So, even if this Court determines that the more applicable rule of statutory construction is R.C. 1.51, it should still hold that the sentencing statute does not negate a court's duty to merge an OVI misdemeanor and aggravated-vehicular-assault felony when appropriate.

However, given that a criminal sentencing statute is at issue, R.C. 1.51 is not the most appropriate rule to use. The rule of lenity, codified in R.C. 2901.04(A), specifically applies to ambiguous criminal statutes. *State v. Stevens*, 139 Ohio St.3d 247, 2014-Ohio-1932, 11 N.E.3d 252, ¶ 12. A criminal statute is ambiguous if it is "susceptible of more than one reasonable interpretation." *Id.* at ¶ 11. Once the statute is deemed ambiguous, the analysis ends and the ambiguity is construed in favor of the defendant. *Id.* at ¶ 13.

Again, the sentencing statute does not evince a clear intent to double punish under the facts of Ms. Earley's case. But if the statute is ambiguous, and even if the State's construction of the statute was deemed "reasonable," the rule of lenity nonetheless counsels this Court to construe the statute in Ms. Earley's favor and to hold that R.C. 2929.41(B)(3) does no more than is apparent on its face: it allows a court to impose consecutive sentences when it has multiple sentences to impose. It does not abrogate the protection of the allied-offenses statute and it does not allow courts to punish drunk drivers beyond the mandates of the legislature.

IV. Amici's requests are misplaced.

A. The Franklin County Prosecutor's request for a reversal of *Johnson* and a return to the pre-*Johnson* abstract analysis should be denied.

Amicus Franklin County Prosecutor wants this Court to reverse *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. Amicus Franklin County Prosecutor's Brief

at 10-12. It seeks a return to what is essentially the same abstract analysis that controlled questions of merger under *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699 (1999). Its rationale for this request is unpersuasive. Notably, the State does not join amicus in this request.

This case centers on the interpretation of a sentencing statute and its effect on the allied-offenses statute. That question can be answered without an entirely separate review of allied-offenses jurisprudence or a weighing of the benefits and disadvantages of the *Johnson* test. As such, this case does not provide a helpful opportunity to delve into such a question and instead threatens to complicate the main issue before the Court.

Further, though amicus believes the proposed will-necessarily-result test will provide clarity to lower courts that have been left "rudderless in assessing the first prong of the merger test," history demonstrates otherwise. Amicus Franklin County Prosecutor's Brief at 8. *Johnson* extensively discussed the problems with applying an abstract, elements-based test. *See Johnson* at ¶ 28-40. This type of ethereal exercise produces "inconsistent, unreasonable, and, at times, absurd results." *Id.* at ¶ 29, quoting *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶ 20. Adopting amicus's proposed test calls for more of the same.

B. MADD's request to parse conduct was already considered and rejected in *Johnson*.

Amicus Mothers Against Drunk Driving (MADD) asks this Court to hold that an OVI offense and aggravated-vehicular-assault offense can never be allied offenses. Amicus MADD's Brief at 2. Its argument is supported only by "parsing out" a single course of conduct resulting in an aggravated-vehicular-assault offense. *See id.* at 5. This strategy for obtaining "shotgun convictions" was rejected in *Johnson*. *Johnson* at ¶ 56. If this Court was unwilling to parse conduct in *Johnson* to allow separate convictions for both felony murder and its predicate conduct of child endangering, then it should not parse conduct here to allow separate convictions

for aggravated vehicular assault and its predicate conduct of drunk driving. MADD's reliance upon *Johnson* to support its argument is fatal to its request for non-merger in this case. Moreover, it calls for this Court to ignore its statutory interpretation jurisprudence and the clear sentencing provisions enacted by the legislature.

CONCLUSION

If the legislature wants to permit the type of "shotgun convictions" that the Double Jeopardy Clause was aimed at preventing, then it must clearly say so. It has not done so here.

Respectfully submitted,

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