IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
		Case No. 2021-1432
Appellant,	:	
		On Appeal from the Hamilton
v.	:	County Court of Appeals
		First Appellate District
TYTUS BAILEY,	:	
		Case No. C200386
Appellee.	:	

MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLEE TYTUS BAILEY

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STATEMENT OF THE CASE AND FACTS

Amicus curiae adopts and incorporates the statement of the case and facts as set forth by Mr. Bailey in his merit brief.

STATEMENT OF INTEREST OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender ("OPD") is a state agency that represents indigent criminal defendants and coordinates criminal-defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio law and procedural rules. A primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The mission of the OPD is to protect and defend the rights of indigent persons by providing and supporting superior representation in the criminal and juvenile justice systems.

As amicus curiae, the OPD offers this court the perspective of experienced practitioners who routinely handle criminal appeals in Ohio courts. A change in the standard of review for allied offenses questions would insulate trial court interpretations of R.C. 2941.25, creating a legal patchwork wherein some jurisdictions would merge offenses that others would not. Such an approach would also substantially constrict the ability of many of our clients to obtain meaningful review of the constitutionality of their sentences.

INTRODUCTION

In Ohio, appellate courts and trial courts perform distinct but complementary functions. Trial courts regulate the fact-finding process in each criminal case, courts of appeal maintain and apply the law. These distinct roles manifest in the scope of permissible review performed by appellate courts. Appellate courts typically defer to trial court findings of fact or regulatory decisions, intervening only when the trial court's decision amounts to an "abuse of discretion." But to perform their function as guardians of a unitary system of laws, appellate courts review a trial court's decisions of law without deference to the lower court's prior reasoning. This non-deferential *de novo* review allows appellate courts to freely intervene to preserve the coherence of legal doctrines.

Today, this court is asked to decide whether trial court applications of the allied offenses statute, R.C. 2941.25, involve questions of law necessitating *de novo* review or questions of fact necessitating "abuse of discretion" review. It is also asked to consider whether unpreserved R.C. 2941.25 errors should survive Criminal Rule 52(B)'s plain error standard. These questions have been asked before. And while this court has struggled to interpret the substantive legislative directives codified in R.C. 2941.25, it has never doubted the appropriate standards for appellate review. Issues related to R.C. 2941.25 have been reviewed *de novo* since at least 1979, and the reviewability of

unpreserved R.C. 2941.25 errors has not been in doubt since this court decided *State v. Underwood* in 2010.

The reason for this consistency is clear: R.C. 2941.25 requires a trial court to engage in statutory interpretation to discern the legal limits of its own authority to constitutionally impose multiple criminal punishments. This task requires trial courts to resolve constitutional questions, statutory interpretation questions, and questions regarding the scope of the court's own sentencing authority – all fundamental questions of law.

Undoubtedly, the allied offenses statute requires trial courts to apply the legal definitions of R.C. 2941.25 to the facts of a specific case. But that does not transmute the analysis from a question of law into a question of fact. The lodestone of the analysis remains judicial construction of legislative intent to authorize multiple punishments.

There is no cause to break with the ordinary workings of appellate review now. Meaningful appellate review is essential for the proper functioning of Ohio's allied offenses statute. Therefore, *de novo* review must be applied on direct appeal, and Criminal Rule 52(B)'s plain error standard should not preclude appellate review of unpreserved R.C. 2941.25 errors. This court should continue its enduring understanding that meaningful appellate review is appropriate where a defendant raises R.C. 2941.25 violations on appeal, even if the defendant does so for the first time.

ARGUMENT

APPELLANT'S PROPOSITION OF LAW:

A trial court's judgment to sentence two offenses separately is due deference by a reviewing court where: the record strong supports the determination that the movement of the rape was substantial enough to attain independent significance; the reviewing court was not present at trial to view the demeanor of the defendant or the victim; the defendant waived the issue and caselaw supports separate sentences in similar cases. When a reviewing court reverses, not for any apparent "manifest injustice" – but because it subjectively disagrees with the trial court's determination – it is simply substituting its judgment for that of the trial judge. Under such circumstances, the reviewing's court's reversal is itself properly reversed.

FIRST RESPONSE OF AMICUS CURIAE

An appellate court must conduct a *de novo* review of a trial court's application of Revised Code Section 2941.25 and *State v.* Ruff, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.2d 892.

The questions raised by this case go to the heart of Ohio's judicial scheme. To identify the appropriate standard of review for R.C. 2941.25, this court must consider the critical-but-distinct roles of trial courts and appellate courts in our orderly system of laws. Appellate courts, not trial courts, are primarily charged with stewarding legal principles and legislative intent. In no other context is that role more important than when preserving the constitutionality of the legislature's statewide statutory scheme for punishing criminal offenses.

Put plainly, the question raised by R.C. 2941.25 is not "what happened in this case?" but "what is a sentencing court legally authorized to do about it?" Answering this question requires a trial court to resolve constitutional questions, interpret statutes, and declare the scope of its own legal authority to impose sentences. In all three respects, R.C. 2941.25 raises questions of law. As a result, appellate courts must have the authority to freely review trial court merger decisions on direct appeal. Any other standard of review would hamstring the ability of Ohio's judiciary to preserve the intent of the General Assembly and protect constitutional rights of criminal litigants.

I. To carry out their role as stewards of a unitary system of law, appellate courts must conduct nondeferential *de novo* reviews regarding the application of R.C. 2941.25.

Appellate courts and trial courts perform distinct and complementary functions within Ohio's justice system. While trial courts principally regulate the fact-finding process of criminal proceedings, the primary function of appellate courts is "expositor of law." *Miller v. Fenton*, 474 U.S. 104, 114, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985), cited in *Ornelas v. United States*, 517 U.S. 690, 697, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). These differentiated roles maintain a "unitary system of law" crucial for the orderly administration of justice. *Ornelas*, 517 U.S. at 697, cited in *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 27.

To perform this caretaking role, an appellate court "may properly substitute its judgment for that of the trial court" on questions of law through *de novo* appellate

review. *Castlebrook, Ltd. v. Dayton Properties Ltd. Partnership*, 78 Ohio Spp.3d 340, 346 (2d Dist. Montgomery 1992); cited approvingly in *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 16. "De novo appellate review produces a more consistent jurisprudence" necessary to maintain a unitary system of law. *Williams*, 2012-Ohio-5699, ¶ 27. Because "legal rules acquire content only through application," "independent review is . . . necessary if appellate courts are to maintain control of, and to clarify, legal principles." *Id*. And while these are generally compelling prudential concerns, they take on even greater importance when a litigants' constitutional rights are inextricably bound up in the proper interpretation of the statute at issue. *See In re A.G.*, 148 Ohio St.3d 118, 2016-Ohio-3306, 69 N.E.3d 646, ¶ 10-11; *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5737, 70 N.E. 508, ¶ 97 (holding that evidentiary rulings that normally receive "abuse of discretion" review should receive *de novo* review when they involve the constitution's confrontation clause).

As demonstrated below, R.C. 2941.25 review implicates the stewardship function of appellate courts in three different but equally compelling ways. First, applications of R.C. 2941.25 inherently raise constitutional questions regarding double jeopardy protections that must receive unfettered appellate review. Second, applying R.C. 2941.25 to the facts of any case is an act of statutory interpretation of legislative intent, a classic example of a question of law. Third, trial courts applying R.C. 2941.25 are essentially interpreting the scope of their own lawful authority to impose a criminal

sentence. On such fundamental questions as constitutional rights, legislative intent, and a trial court's authority to impose a lawful sentence, appellate courts must be afforded *de novo* review.

II. R.C. 2941.25 inextricably raises constitutional questions regarding double jeopardy rights that must be reviewed *de novo*.

The double jeopardy clauses of the United States and Ohio Constitutions protect criminal defendants against three abuses: (1) "a second prosecution for the same offenses after acquittal," (2) "a second prosecution for the same offense after conviction," and (3) "multiple punishments for the same offense." *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 10, citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 33 L.Ed.2d 656 (1969); U.S. Constitution, Fifth Amendment Double Jeopardy Clause and Fourteenth Amendment Due Process Clause; Ohio Constitution, Article I, Section 10. *See In re A.G.*, 148 Ohio St.3d 118, 2016-Ohio-3306, 69 N.E.3d 646, ¶ 10-11. Ohio's allied offenses statute, R.C. 2941.25, implicates the third protection; freedom from multiple punishments for the same offense. *Ruff*, 2015-Ohio-995, ¶ 10.

The double jeopardy protection against multiple punishments for the same offense is a rule of statutory construction. *Missouri v. Hunter*, 459 U.S. 359, 367, 103 S.Ct. 673, 74 L.Ed.2d 535 (1982). Its purpose is to "ensure that the sentencing discretion of courts is confined to the limits established by the legislature," which is vested with "the

substantive power to prescribe crimes and determine punishments." *Ohio v. Johnson*, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984). Thus, the rule is:

> Where. . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the … trial court … may impose cumulative punishment under such statutes in a single trial."

Hunter, 459 U.S. at 368-69. Importantly, there must be a "clear indication of legislative intent" to impose multiple punishments before a trial court may constitutionally do so. *Id*. at 367. If this court finds 2941.25 to be "unclear" or ambiguous as applied in any given case, doubts should be construed on favor of the Defendant. *Cf. Albernaz v. United States*, 450 U.S. 333, 342-43; 101 S.Ct. 1137; 67 L.Ed.2d 275 (1981); *State v. Moss*, 69 Ohio St.3d 515, 433 N.E.2d 181 (1982).

In answer to *Missouri v. Hunter* and preceding cases, the Ohio General Assembly enacted the allied offenses statute, R.C. 2941.25, to express its intent to authorize multiple punishments in some circumstances. *In re A.G.*, 2016-Ohio-3306, ¶ 10-11 (agreeing that "the merging of allied offenses is rooted in the Double Jeopardy Clauses of both Constitutions and that R.C. 2941.25 accordingly represents a codification of a constitutional principle."); *Ruff*, 2015-Ohio-995, ¶ 12 (noting that the General Assembly codified double-jeopardy protections through R.C. 2941.25); *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 8 ("By its enactment of R.C. 2941.25(A), the General Assembly has clearly expressed its intention to prohibit multiple punishments

for allied offenses of similar import."); *State v. Rance*, 85 Ohio St.3d 632, 635, 710 N.E.2d 699 (1999) ("[O]hio's multiple-count statute is a clear indication of the General Assembly's intent to permit cumulative sentencing for the commission of certain offenses"). The General Assembly expressed its intent to authorize multiple punishments as follows:

> (A) Where the same conduct by a defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

R.C. 2941.25.

Ever since, the question of whether an Ohio trial court is constitutionally authorized to impose multiple punishments for the same conduct has been a matter of statutory construction. *See In re A.G.*, 2016-Ohio-3306, ¶ 10-11; *Ruff*, 2015-Ohio-995, ¶ 10-13. The constitutional imperative when applying the statute is to "ensure that the sentencing discretion of courts is confined to the limits established by the legislature." *Johnson*, 467 U.S. 499. If the trial court gets the analysis wrong, and a criminal defendant receives multiple sentences where the General Assembly intended only one, then a defendant has been unconstitutionally punished twice for the same offense in violation of the double jeopardy doctrine.

Because R.C. 2941.25 cannot be applied without implicating a constitutional question, *de novo* review is necessary. *See State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5737, 70 N.E. 508 ¶ 97 (holding that evidentiary rulings that normally receive "abuse of discretion" review should receive de novo review when they implicate the constitution's confrontation clause). No matter the specific context, constitutional questions are reviewed *de novo*. *Id*. *See e.g., State v. Gossman*, 3d Dist. Henry No. 7-21-01, 2021-Ohio-1928, ¶ 6 (constitutionality of Reagan Tokes Law); *State v. Burgette*, 4th Dist. Athens No. 13CA50, 2014-Ohio-3483, ¶ 10 (equal protection in revocation of community control); *State v. Colston*, 5th Dist. Muskingum No. CT2019-00076, 2020-Ohio-3879, ¶ 47 (freedom from self-incrimination); *Bd. Of Lucas County Comm'rs v. Waterville Twp. Bd of Trs.*, 6th Dist. Lucas Nos. L-06-1074, L-06-1091, 2007-Ohio-2141, ¶ 20 (equal protection in voting restrictions in unincorporated areas); *In re A.R.*, 8th Dist. Cuyahoga Nos. 104869, 104870, 104871, 104872, 104873, 104875, and 104876, 2017-Ohio-8058, ¶ 15 (procedural due process in juvenile proceedings); *Hanners v. Ho Wah Genting Wire & Cable SDN BHD*, 10th Dist. Franklin No. 09AP-361, 2009-Ohio-6481, ¶ 14 (separation of powers); *State v. Wolford-Lee*, 11th Dist. Lake Nos. 2017-L-122, 2017-L-123, 2017-L-124, 2017-L-125, 2018-Ohio-5064, ¶ 14 (due process right to present a complete defense); *Krusling v. Ohio Bd. Of Pharm.*, 12th Dist. Clermont No. CA2012-03-023, 2012-Ohio-5356, ¶ 9 (procedural due process in agency proceedings).

Appellate courts maintain the integrity of constitutional principles in Ohio by reviewing constitutional questions *de novo*. *See McKelton*, 2016-Ohio-5737, ¶ 97. R.C. 2941.25's role as a constitutional linchpin in Ohio's double jeopardy doctrine is settled law. *In re A.G.*, 2016-Ohio-3306, ¶ 10-11; *Ruff*, 2015-Ohio-995, ¶ 12. Its application by trial courts must therefore be reviewed *de novo*.

III. Trial courts applying R.C. 2941.25 are engaging in an exercise of statutory interpretation, a quintessential question of law.

Applying R.C. 2941.25 to the facts of any given case is also an act of statutory interpretation. *See State v. Pariag*, 137 Ohio St.3d 81, 2013-Ohio-4010, 998 N.E.2d 401, ¶ 9. "The statute manifests the General Assembly's intent to permit, in appropriate cases, cumulative punishments for the same conduct. The sole question, then, is one of statutory construction . . . ." *Rance*, 85 Ohio St.3d 632, 639, 710 N.E.2d 699 (1999), overruled on other grounds in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 44-45, and *Ruff*, 2015-Ohio-995. Statutory interpretation goes to the heart of a court's judicial power to "say what the law is." *See State v. Parker*, 157 Ohio St.3d 460, 2019-Ohio-3848, 137 N.E.3d 1151, ¶ 31. It is an archetypical question of law. *See Pariag*, 2013-Ohio-4010, ¶ 9.

Discerning the scope of a trial court's authority to impose multiple sentences requires the statutory interpretation of not just R.C. 2941.25 but also the substantive offense statutes involved: i.e., in this case, the rape and kidnapping statues. *State v. Childs*, 88 Ohio St.3d 558, 561, 728 N.E.2d 379 (2000). When examining the substantive

offense statute, courts should ask what conduct, exactly, the General Assembly intended to criminalize. *See State v. Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603, ¶ 13. If two statutes criminalize the same conduct in a specific case, a court must interpret the language of R.C. 2941.25 to determine whether "each offense caused separate, identifiable harm," was "committed separately," or was committed with a "separate animus or motivation." *Ruff*, 2015-Ohio-995, ¶ 25. If so, a trial court is legislatively authorized to impose separate sentences for each legal offense based on the same conduct. *Id*. If not, only one sentence is permitted, and the other offense must merge into the sentenced offense. *Id*.

R.C. 2941.25 undoubtedly requires a court to examine the facts of a case to decide whether the "dissimilar import" or "separate animus" legal standards apply. But as this court recognized shortly after it first recognized that R.C. 2941.25 is a conduct-specific inquiry, that statute's fact-based analysis does not transmute the analysis from a question of law to a question of fact:

> Appellate courts apply the law to the facts of individual cases to make a legal determination as to whether R.C. 2941.25 allows multiple convictions. That facts are involved in the analysis does not make the issue a question of fact deserving of deference to a trial court:
>
> > [A] review of the evidence is more often than not vital to the resolution of a question of law. But the fact that a question of law involves a consideration of the facts or the evidence does not turn it into a question of fact. Nor does that consideration involve the court in weighing the evidence or passing upon its credibility.

Williams, 2012-Ohio-5699, ¶ 25, quoting *O'Day v. Webb*, 29 Ohio St.2d 215, 219, 280 N.E.2d 896 (1972).

This case illustrates why the dispute between these parties is a legal dispute requiring *de novo* review, not a factual dispute deserving deference. As is evidenced in their jurisdictional memoranda, the parties agree on the facts. Both sides agree that, according to the jury verdict, Appellee Bailey threatened to harm A.R. if she did not travel one city block to a parking garage to engage in sexual conduct. A.R.'s testimony clearly shows that she experienced fear as she traveled the city block, and that she experienced fear and pain as she endured the sexual assault. And both sides agree that Appellee Bailey was convicted of one count of rape and one count of kidnapping for this conduct.

The dispute here is over the legal effect of these facts. The merger questions presented here are either (1) "was the fear experienced during A.R.'s walk toward the city block a legally cognizable 'separate harm' from the harm she sustained during the sexual assault," or (2) "would the General Assembly recognize two separately punishable instances of criminal animus in Appellee Bailey's motive to commit the kidnapping and his motive to commit the rape?"[1] *Ruff*, 2015-Ohio-995, ¶ 12, *State v. Logan*, 60 Ohio St.2d 126, 135, 397 N.E.2d 1345 (1979) ("The primary issue . . . is whether

[1] Neither the appellant, the appellee, nor the First District Court of Appeals suggested that the facts of this case fit *Ruff*'s "committed separately" test for offenses of dissimilar import. Accordingly, that prong of the *Ruff* test is not addressed here.

the restraint or movement of the victim is merely incidental to a separate underlying crime or, instead, whether it has significance independent of the other offense."). If the answer to either of these questions is "yes," the General Assembly has authorized the multiple sentences below. If the answer to both questions is "no," multiple sentences were not authorized, and one offense must be merged into the other. The "significance" that the *Logan* court spoke of was legal significance, not factual significance. *Id*.

While R.C. 2941.25(B) requires courts to refer to the facts of a case, the overall objective is to interpret the General Assembly's intent to punish criminal conduct. *Rance*, 85 Ohio St.3d at 639. Because this is an act of statutory interpretation, not fact finding, the First District Court of Appeals owed no deference to the trial court's interpretation of the General Assembly's statutory intent, and neither does this court. Any other conclusion would improperly insulate trial court statutory interpretations from appellate review contrary to the design of Ohio's judicial system.

IV. The merger of criminal offenses pre-dates R.C. 2941.25 and has always been treated as a question of law.

Finally, this court has long understood substantive limitations on sentencing authority to raise questions of law, not fact. A sentencing court applying R.C. 2941.25 is interpreting how the statute limits its own sentencing authority. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 21-22. *See Pariag*, 2013-Ohio-4010, ¶ 9 ("when construing a statute, a court's objective is to determine and give effect to the legislative intent"). Therefore, in this third respect, R.C. 2941.25 raises questions of law.

In crafting the legal limits expressed in R.C. 2941.25, the General Assembly relied on a then-existing, judicially-created doctrine regarding the merger of criminal offenses. *Whitfield*, 2010-Ohio-2, ¶ 16 ("…R.C. 2941.25(A) codifies the judicial doctrine of merger,") citing *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 42 and *Logan*, 60 Ohio St.3d 126, 131. *See also State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2 661, ¶ 11.

An early statement of the judicial merger doctrine shows that, like its modern descendent, R.C. 2941.25, the judicial merger doctrine was a conduct-specific analysis designed to circumscribe a trial court's sentencing authority:

> [W]here two similar, and closely allied, offenses arise *from the same transaction, and each must be established, if at all, by substantially the same evidence*, each should be permitted to be set forth, in separate counts, in the same indictment. This course is pursued in this state in prosecutions for feloneous cutting, stabbing, or shooting. The approved practice is to charge in one count the act that was done with intent to kill, and in a second count that it was done with intent to wound, and the prisoner is convicted, if at all, on that count which corresponds to the intent established by the evidence.

(Emphasis added.) *State v. Bailey*, 50 Ohio St. 636, 641, 36 N.E. 233 (1893). *See also State v. Botta*, 27 Ohio St.2d 169, 203, 271 N.E.2d 776 (1971) ("Where . . . in substance and effect but one offense has been committed, a verdict of guilty by the jury under more than one count does not require a retrial but only requires that the court not impose more than one sentence.")

Despite its emphasis on a defendant's conduct, the judicial merger of criminal offenses was considered a question of law. Applications of the judicially-created merger doctrine received *de novo* review on appeal. *See Bailey*, 50 Ohio St. at 641. Articulating its understanding that judicial merger raised a question of law, not fact, this court explained in *State v. Botta*:

> [T]here is a clear-cut distinction between the right of the jury to pass on the *factual* issue of guilt and the right of the *court* to impose *sentence*. The former involves basically considerations of fact; the latter involves basically considerations of law. The same considerations which would preclude imposition of separate sentences do not necessarily preclude separate factual determinations of guilt."

27 Ohio St.2d at 198. For at least one-hundred years, this court has not deferred to lower-court attempts to understand how the merger doctrine limits their own sentencing powers. *See Bailey*, 50 Ohio St. at 641 (1893) (distinguishing a trial court's discretion to join offenses in a manner similar to modern-day Crim. R. 8 from a trial court's application of the merger doctrine, with the former receiving abuse of discretion review and the latter receiving a scope of review analogous to contemporary *de novo* review).

The understanding that the merger doctrine raises questions of law endures in the post-R.C. 2941.25 era. *Williams*, 2012-Ohio-5699, ¶ 25. This court has acknowledged that R.C. 2941.25, like its judicially crafted predecessor, articulates the edges of a trial court's lawful authority to impose multiple sentences. *Underwood*, 2010-Ohio-1, ¶ 21-22. *See State v. Jones*, 18 Ohio St.3d 116, 480 N.E.2d 408 (1985). And while the statute also

requires a court to consider the facts of a specific case, the analysis remains a legal one. *Ruff*, 2015-Ohio-995, ¶ 2. *Williams*, 2012-Ohio-5699, ¶ 25.[2]

There is no need to depart from tradition now. This court was correct all along—the merger of allied offenses, whether through the former judicial merger doctrine or its legislative successor R.C. 2941.25, raises a question of law regarding the scope of a trial court's legal authority to impose a sentence. *See Jones*, 18 Ohio St.3d at 116. That the legislature's chosen approach requires trial courts to apply law to facts makes no difference. Without *de novo* review of R.C. 2941.25, trial courts would define their own sentencing authorities unchecked.

V. *De novo* review of R.C. 2941.25 decisions is appropriate.

Any one of these three considerations would justify allowing appellate courts unfettered discretion to review trial court merger decisions *de novo*. But because R.C. 2941.25 entangles constitutional rights, legislative intent, and the scope of a trial court's authority to impose sentences, *de novo* review is essential here. Nondeferential review is indispensable if appellate courts are to maintain coherent and uniform understandings of Ohio's double jeopardy protections, the General Assembly's intended sentencing scheme, and a trial court's legal authority to punish crime.

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[2] While this court briefly strayed from R.C. 2941.25's fact-dependent analytical roots in *State v. Blankenship*, 38 Ohio St.3d 116, 117, 526 N.E.2d 816 (1988), and *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699 (1999), it eventually reversed course, returning contemporary merger analysis to its roots in the fact-dependent judicial merger doctrine. *See State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6317, 942 N.E.2d 1061, ¶ 48.

Few subject areas prove the need for a unifying appellate arbiter of law more plainly than the fraught litigation history of R.C. 2941.25. *See generally Blankenship*, 38 Ohio St.3d 116; *Rance*, 85 Ohio St.3d 632; *Johnson*, 2010-Ohio-6314; *Ruff*, 2015-Ohio-995. *De novo* review has allowed this court to steer its R.C. 2941.25 jurisprudence towards a more accurate understanding of the General Assembly's legislative intent. *See generally Ruff*, 2015-Ohio-995, ¶ 15-16; *Johnson*, 2010-Ohio-6316, ¶ 7- 40.

Any other scope of review would imperil double jeopardy rights in this state by foreclosing meaningful appellate relief for trial-level constitutional injuries. Misplaced deference to trial court applications of law would result in an unworkable and disparate legal patchwork teetering on contradictory understandings of the same statutory language. And hamstringing appellate review of a trial court's declaration of its own sentencing authority would undermine the delicate systems of judicial checks and balances established by the Ohio constitution.

For these reasons, this court should reaffirm its decision in *Williams*, 2012-Ohio-5699, ¶ 27, and hold that trial court applications of R.C. 2941.25 must be reviewed *de novo*.

SECOND RESPONSE OF AMICUS CURIAE:

A trial court's failure to correctly apply R.C. 2941.25, a mandatory sentencing provision, is plain error.

The same concerns necessitating *de novo* review likewise require courts considering unpreserved R.C. 2941.25 errors to pierce restrictions expressed in Criminal

Rule 52(B). A trial court's failure to properly merge sentences under R.C. 2941.25 is plain error because the statutory violation goes to the heart of a trial court's legal authority to impose criminal sentences. *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 23-32. Unlike evidentiary errors, jury instruction errors, or even errors related to a defendant's constitutional trial rights, errors resulting in the unlawful exercise of power by a trial court encroach upon the General Assembly's authority to define and punish crime. *State v. Williams*, 1148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 22-29. Such errors are plain errors. *Underwood*, 2010-Ohio-1, ¶ 23-32. *Cf. Williams*, 2016-Ohio-7658, ¶ 28, with *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, ¶ 35 (reaffirming *Underwood's* holding that a trial court's failure to merge offenses under R.C. 2941.25 results in a sentence "not authorized by law," but casting doubt on whether R.C. 2941.25 error can be raised on collateral attack or may only be raised in a direct appeal).

There are two threads of law in Ohio regarding Criminal Rule 52(B)'s plain error rule. One thread finds its modern roots in *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68, 759 N.E.2d 1240. *Barnes* announced a three-part test that permits appellate courts to review errors "not brought to the attention of the [trial] court" only if three criteria are met. *Id*. at 27. First, there must be a legal error. *Id*. Second, the error must be "plain," i.e., there must be some clear prior decision of law on the issue that the trial court did not

correctly apply. *Id*. And third, the error must affect a "substantial right" of the defendant. *Id*.

The *Barnes* rule is rooted in the "familiar" procedural principle that "a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right *before a tribunal having jurisdiction to determine it*." (Emphasis added, internal quotations omitted). *State v. West*, Slip Opinion No. 2022-Ohio-1556, ¶ 22. Thus, the *Barnes* rule has foreclosed appellate review of belatedly challenged trial court decisions on evidentiary issues, *State v. Tench*, 156 Ohio St.3d 85, 2018-Ohio-5205, 123 N.E.3d 955, ¶ 217-218; jury instructions, *Barnes*, 94 Ohio St.3d at 27; and even a defendant's constitutional trial rights. *State v. McAlpin*, Slip Opinion. 2022-Ohio-1567, ¶ 62-66.

The second thread of plain error cases, however, holds that plain error lies where the record on direct appeal reveals an unpreserved error implicating a trial court's lawful authority to impose punishment. *See Underwood*, 2010-Ohio-1, ¶ 23-32 (holding that the imposition of multiple sentences in violation of R.C. 2941.25 is plain error), *Cf. State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22 (declining to find plain error where, in a case involving a guilty plea, the record did not prove either way whether the trial court violated R.C. 2941.25 when imposing multiple punishments in a single indictment), as discussed in *Williams*, 2016-Ohio-7658, ¶ 22-29.

In *State v. Underwood*, Underwood pleaded guilty to four counts of theft involving two different victims. *Underwood*, 2010-Ohio-1, ¶ 2. As part of his negotiated plea, he agreed to serve a maximum two-year prison sentence. *Id*. at ¶ 4. At sentencing, Underwood received four separate sentences, all of which were imposed concurrently for an aggregate sentence of two-years imprisonment. *Id*. at ¶ 6. Underwood did not object to the imposition of the four separate sentences at any time in the trial court. *Id*. On appeal, he argued for the first time that he should have received two total sentences, not four, because two offenses were allied offenses of similar import as defined by R.C. 2941.25. *Id*. at ¶ 9. *Cf. Whitfield*, 2010-Ohio-2, ¶ 17-24.

Rejecting the state's arguments that Underwood's guilty plea and negotiated sentence foreclosed *any* appellate review under R.C. 2953.08(D)(1), this court held that, even where a defendant fails to object to a sentence that he willingly negotiated, the agreement cannot "insulate [such sentences] from appellate review, for they are not authorized by law." *Id*. at ¶ 20. For the same reasons, the court held that violation of R.C. 2941.25 is plain error under Criminal Rule 52(B) because the violation affects "substantial rights" and the outcome of a case. *Id*. at ¶ 31. *State v. Underwood* makes no mention of *State v. Barnes*.

This court has reached the same conclusion every time it has considered whether a demonstrated R.C. 2941.25 violation raised on direct appeal amounts to plain error. *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 96-102 (holding

that a violation of R.C. 2941.25 is a plain error affecting substantial rights and citing *State v. Barnes*); *In re A.G.*,148 Ohio St.3d 118, 2016-Ohio-3306, 69 N.E.3d 646, ¶ 4 (reaching the merits despite trial counsel's failure to raise the allied offenses issue below); *Whitfield*, 2010-Ohio-2, ¶ 3 (finding no error in the lower court's holding that plain error occurred when the trial court violated R.C. 2941.25 and unlawfully imposed multiple sentences). *Cf Rogers*, 2015-Ohio-2459, ¶ 22; *Williams*, 2016-Ohio-7658, ¶ 22-29.

Even in the case of plain error review, where courts are typically most reluctant to upset trial court decisions, appellate courts must have authority to review R.C. 2941.25 violations that encroach upon the General Assembly's authority to define offenses and prescribe punishments. *See Williams*, 2016-Ohio-7658, ¶ 22-29; *Underwood*, 2010-Ohio-1, ¶ 75. Any other outcome would jeopardize the balance of power between this state's judiciary and its legislature. *See Williams*, 2016-Ohio-7658, ¶ 22-29.

CONCLUSION

This court's R.C. 2941.25 jurisprudence is clear: appellate courts must be able to freely consider R.C. 2941.25 violations on direct appeal. *De novo* review is needed to protect defendants' constitutional rights, to preserve the statutory intent of the Ohio General Assembly, and to allow appellate courts to adequately police a trial court's exercise of sentencing powers. And unpreserved R.C. 2941.25 errors must survive plain error review to ensure trial courts do not impose sentences "not authorized by law," thereby undermining the role of Ohio's legislature.

This court should not depart from its well-reasoned decisions holding as much now.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was forwarded by e-mail to Phillip R. Cummings, Assistant Hamilton County Prosecutor, phil.cummings@hcpros.org, and John D. Hill, Jr., The Law Office of John D. Hill, LLC, attorneyjohnhill@gmail.com, on this 18th day of May, 2022.

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