

ORIGINAL

IN THE SUPREME COURT OF OHIO
CASE NO. 2013-1441

STATE OF OHIO	:	
Plaintiff-Appellant	:	On Appeal from the First Appellate
	:	District, Hamilton County, Ohio
v.	:	Case No. C-120533, C-120534
	:	
KENNETH RUFF	:	
Defendant-Appellee	:	

**BRIEF OF AMICUS CURIAE CUYAHOGA COUNTY PROSECUTOR'S OFFICE ON
BEHALF OF APPELLANT, STATE OF OHIO**

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INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae, Cuyahoga County Prosecutor's Office ("CCPO") has an interest in the allied offense merger analysis, as it affects the sentencing options, which the CCPO may seek at the time of sentencing and has an interest in obtaining clarity to the allied-offense analysis.

"Cumulative sentencing is permitted for the commission of (1) offenses of dissimilar import and (2) offenses of similar import committed separately or with separate animus." *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶17. Since *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the allied offenses analysis has relied heavily on whether separate conduct or separate animus exists rather than ask whether offense are dissimilar or whether legislative intent permits separate punishments. At one time, the Eighth District put it, "*Johnson* ushered in a new era where trial courts are always required to delve into the factual underpinnings of the case in order to resolve the allied offense issue..." *State v. Baker*, 8th Dist. Cuyahoga No. 97139, 2012-Ohio-1833, ¶13.

The emphasis on examining the factual underpinnings in every case resulted in inconsistencies and rather unique arguments that dissimilar offenses should merge. The First District's decision in *State v. Ruff*, 1st Dist. Hamilton No. C-120533, C-120534, 996 N.E.2d 513, 2013-Ohio-3234, holding that aggravated burglary and rape merge is one of those cases. A conflicting decision was reached in *State v. Jack*, 8th Dist. Cuyahoga No. 99499, 2014-Ohio-380, where the Eighth District found the act of aggravated burglary was a separate act from the rape and held that aggravated burglary and rape were not allied. However, a seemingly inconsistent decision was reached by the Eighth District in *State v. Lacavera*, 8th Dist. Cuyahoga No. 96242, 2012-Ohio-800, when the Court determined the aggravated burglary and felonious assault merged because the crimes were committed with the same conduct and animus. *Lacavera*, ¶47.

But compare to *State v. Walker*, 8th Dist. Cuyahoga No. 97648, 2012-Ohio-4274 and *State v. Murphy*, 8th Dist. Cuyahoga No. 98124, 2013-Ohio-2196.

Other applications of *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061 have led to rather unique arguments. For example in *State v. Cowan*, 8th Dist. Cuyahoga No. 97877, 2012-Ohio-5723, the Eighth District held that the defendant committed felonious assault, having weapons under disability, improper handling of a firearm in a motor vehicle, and the discharge of a firearm near a prohibited premises with a separate animus and justified multiple sentences, by focusing on the timeline of events. *Cowan*, ¶32-39. Similar arguments were raised in *State v. Maffei*, 9th Dist. Summit No. 26686, 2013-Ohio-5787, where a defendant argued felonious assault should be merged with having weapons under disability. Even though the Ninth District rejected the argument under the particular facts of *Maffei*, it did not do so by finding the offenses were of dissimilar import, instead it delved into the factual underpinnings to determine the defendant's conduct and animus. *Maffei*, ¶35-37.

The decisions of *Cowan* and *Maffei* are alike in their focus on conduct or animus, and neither addressed whether the offenses were simply dissimilar – which could have begged the simple question: is felonious assault inherently dissimilar with having weapons under disability. This is but one example that illustrates how *Johnson* has been applied.

A myriad of other cases also illustrates the application of *Johnson* when it could have only been asked whether the offenses were dissimilar: *State v. Rembert*, 8th Dist. Cuyahoga No. 99707, 2014-Ohio-300, ¶45-46 (separate animus for aggravated murder and aggravated robbery, but see legislative commission notes to R.C. 2945.67); *State v. LaSalla*, 8th Dist. Cuyahoga No. 99424, 2013-Ohio-4596 (applying *Johnson* to find that RICO and predicate were committed with separate animus but also note legislative intent), *State v. Rogers*, 8th Dist. Cuyahoga No. 98292,

98584, 98585, 2013-Ohio-3235, ¶24-26 (finding plain error because trial court did not to consider whether possession of criminal tools and receiving stolen property merged under *Johnson*), *State v. Piscura*, 8th Dist. Cuyahoga No. 98712, 2013-Ohio-1793, 991 N.E.2d 709, ¶21-28 (majority holding possession of criminal tools and possession of a dangerous ordinance merged), *State v. West*, 8th Dist. Cuyahoga No. 98274, 2013-Ohio-487, ¶41-46 (addressing under *Johnson*, whether felonious assault, having weapons under disability, and unlawful possession of firearm in a liquor establishment), *State v. Melton*, 8th Dist. Cuyahoga No. 97675, 874 N.E.2d 1112, ¶50-55 (holding under *Johnson*, felonious assault and discharge of firearm near prohibited premises merged as allied offenses of similar import), *State v. Ward*, 8th Dist. Cuyahoga No. 97219, 2012-Ohio-1199, ¶22 (rejecting on merits that tampering with evidence, felonious assault and rape merge finding separate conduct for each)

This Court in *State v. Miranda*, Slip Opinion No. 2014-Ohio-451 provided an example where courts need not resort to delving into the factual underpinning of a particular case. This case is another example because aggravated burglary and rape are inherently dissimilar. In the interest of aiding this Court's review, amicus curiae offers the following brief in support of the State of Ohio and urges reversal of the First District's decision in *State v. Ruff*, 1st Dist. Hamilton No. C-120533, C-120534, 996 N.E.2d 513, 2013-Ohio-3234.

STATEMENT OF THE CASE AND FACTS

Amicus curiae adopts and incorporates by reference the Statement of the Case and Statement of the Facts as set forth by the Appellant, State of Ohio, in its merit brief. Pertinent in this case is that Kenneth Ruff was convicted of three counts of Aggravated Burglary in violation of R.C. 2911.11(A)(1) in relation to the residences of three women. The offense is defined as follows:

(A) No person, by force, stealth or deception shall trespass into an occupied structure * * * when another person other than an accomplice of the offender is present, with purpose to commit in the structure * * * any criminal offense, if any of the following apply:

(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

Ruff was also convicted of three corresponding counts of Rape in violation of R.C. 2907.02(A)(2) for purposely compelling three women to submit to sexual conduct by force or threat of force. Ruff was also convicted of attempted rape of a fourth woman and of sexual battery of a minor. These offenses were not affected by the allied offense analysis.

LAW AND ARGUMENT

AMICUS CURIAE'S PROPOSITION OF LAW I: THE OFFENSES OF AGGRAVATED BURGLARY AND RAPE ARE INHERENTLY DISSIMILAR AS EVIDENCE BY LEGISLATIVE INTENT AND BECAUSE THE OFFENSES ARE DISSIMILAR IN THE SIGNIFICANCE AND HARMS; THEREFORE, THE CONSIDERATION OF CONDUCT IS NOT REQUIRED.

I. Statutory Construction of the Allied-Offense Statute

Offenses only merge when they are allied offenses of similar import. If the offenses are dissimilar, then they are offenses of dissimilar import. If the offenses are of similar or same kind but committed separately or with separate animus, then the offenses are of "similar import but are not allied." In other words, conduct and animus are not considered where the offenses are deemed dissimilar and are only considered when the offenses are considered the same or similar. The allied offense statute enforces the constitutional protection against double jeopardy and also prevents multiple punishments for the same crime. *State v. Rance*, 85 Ohio St.3d 632, 635, 710 N.E.2d 699 (1999).

When it was enacted, R.C. 2941.25 was meant to codify the judicial doctrines of merger and divisibility of offenses. See *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345 (1979).

The Committee Comments to the statute indicate that it was designed to “prevent ‘shotgun’ convictions.” *City of Maumee v. Geiger* (1976), 45 Ohio St.2d 238, 242, 344 N.E.2d 133 citing the Legislative Services Commission comments to R.C. 2941.25. In *Geiger*, this Court recognized that R.C. 2941.25 was developed “in conformity with this Court’s prior decision in *State v. Botta* (1971), 27 Ohio St.2d 196, 199, 271 N.E.2d 776.” *Id.*

In *Botta*, this Court was asked to decide whether a defendant could be convicted of both automobile theft and receiving the same automobile. This Court found that if the defendant was convicted of theft as an aider or abettor then he could also be convicted of receiving the stolen vehicle as a principal offender. *Botta*, 27 Ohio St.2d 196, ¶1 of syllabus. In so holding, this Court defined the merger doctrine as the “penal philosophy that a major crime often includes as inherent therein the component elements of other crimes and that these component elements, in legal effect, are merged in the major crime.” *Id.* at 201. This Court, however, also noted that “[i]t is well established law in Ohio that one act may constitute several offenses and that an individual may *at the same time and in the same transaction* commit several separate and distinct crimes *and that separate sentences may be imposed for each offense.*” *Id.* at 202-203. (Emphasis Added).

R.C. 2941.25, the allied offense statute states:

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant’s conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

Under the express language of R.C. 2941.25(B), an analysis of similar conduct or separate animus is only considered when the offenses are of similar import or the same offense. Therefore, offenses of *similar* import or kind are not allied if they are committed with separate conduct or with separate animus. By contrast, offenses of dissimilar import never merge, and do not expressly refer to a consideration of animus or whether the offenses were committed separately.

The recognition of “dissimilar offenses” as a distinct form of non-allied offenses is consistent with the clear language of R.C. 2941.25(B) that implicates three scenarios in which offenses are not subject to merger: (1) the offenses are of dissimilar import; or (2) the offenses are of same or similar kind but committed (a) separately; or (b) with separate animus.¹

II. Allied offense analysis under *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699 (1999) permitted alternative methods of determining whether offenses were of similar import.

This Court eventually adopted a two-step analysis for analyzing issues pursuant to R.C. 2941.25. In *State v. Donald*, 57 Ohio St.2d 73, 386 N.E.2d 1341 (1979), this Court was asked to consider whether rape and kidnapping were “offenses of similar import.” In answering in the affirmative, this Court compared the elements of each offense and noted that “allied crimes of similar import necessarily must consist of crimes committed for the same purpose.” *Id.* at 75.

¹ The Court in *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699 (1999) also described the statute as follows:

With its multiple-count statute Ohio intends to permit a defendant to be punished for multiple offenses of *dissimilar import*. R.C. 2941.25(B); *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816, 817. If, however, a defendant's actions “can be construed to constitute two or more allied offenses of *similar import*,” the defendant may be convicted (*i.e.*, found guilty and punished) of only one. R.C. 2941.25(A). But if a defendant commits offenses of similar import separately or with a separate animus, he may be punished for both pursuant to R.C. 2941.25(B). *State v. Jones* (1997), 78 Ohio St.3d 12, 13–14, 676 N.E.2d 80, 81.

In *State v. Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979), this Court was again asked to address merger of rape and kidnapping. This Court found that *Donald*, supra, “established that in order for two crimes to constitute allied offenses of similar import, there must be a recognized similarity between the elements of the crimes committed.” *Id.* at 128. In addition, a defendant must show that the “prosecution has relied upon the same conduct to support both offenses charged.” *Id.* Even if the offenses are the same or similar kind, the defendant may be convicted of all offenses if he committed them separately or with a separate animus.

The *Logan* court went on to define animus in the context of R.C. 2941.25, finding that the General Assembly “intended the term ‘animus’ to mean purpose or, more properly, immediate motive.” *Id.* at 131. This Court explained that “[w]here an individual’s immediate motive involves the commission of one offense, but in the course of committing that crime he must, a priori, commit another, then he may well possess but a single animus, and in that event may be convicted of only one crime.” *Id.*

The *Logan* two-step analysis has, until recently, been consistently applied by this Court since its inception. In later cases, this Court went on to hold that if a defendant fails to satisfy the first step of the analysis, there is no need to consider the second step. *State v. Talley*, 18 Ohio St.3d 152, 156, 480 N.E.2d 439 (1985). Therefore, an analysis would end should a court find the offenses to be dissimilar.

In *State v. Blankenship*, 38 Ohio St.3d 116, 526 N.E.2d 816 (1988), this Court was asked to decide whether felonious assault and kidnapping are allied offenses of similar import. This Court found “on the specific facts of this case” that kidnapping pursuant to R.C. 2905.01(A)(2) and felonious assault pursuant to R.C. 2903.11(A)(1) were not allied offenses of similar import.

Nearly eleven years later, the Court in *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699 sought to clarify the allied offenses analysis and held that under R.C. 2945.25(A), the statutorily defined elements of the offenses that are claimed to be of similar import are compared in the abstract. *Rance* has been referred to as a rule of statutory construction to assist courts in determining legislative intent. Subsequent cases also dealt with the application of *Rance*. See *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882.

Even under *Rance* this Court did not restrain the “similar import” analysis to a comparison of the elements. In *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, this Court did not use *Rance* as the exclusive test to determine whether crimes of similar import. Instead this Court considered relevant societal interests protected by the relevant statute. Even before *Brown*, the Court in *State v. Mitchell*, 6 Ohio St.3d 416, 453 N.E.2d 593 (1983), considered the societal interests at stake in each statute was an important component of a merger analysis.

III. Similar import analysis after *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061 should not be limited to whether it is possible to commit one offense and commit the other with the same conduct.

The syllabus in *State v. Johnson*, 128, Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061 states:

When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered (*State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, overruled.)

The plurality opinion applied the following test:

In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. *Blankenship*, 38 Ohio St.3d at 119, 526 N.E.2d 816 (Whiteside, J., concurring) (“It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses can be committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses.” [Emphasis sic]). If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., “a single act, committed with a single state of mind.” *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶ 50 (Lanzinger, J., dissenting).

If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

Conversely, if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge.

State v. Johnson, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶48-51.

The concurring opinion asserted that offenses are allied “when their elements align to such a degree that commission of one offense would probably result in the commission of the other offense.” *Johnson*, at ¶66 (O’Connor, J., concurring in judgment.)

In *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 66, the Court provided some clarification by describing the allied offense analysis as a two-prong test, with the first prong looking at import. *Washington*, ¶13. The Court also identified in the negative the three scenarios in which offenses do not merge as follows: “offenses do not merge if they were ‘committed separately’ or if the offenses have a ‘dissimilar import’ [***], [and in] addition to these restrictions, R.C. 2941.25(B) identifies another bar to merger for offenses committed “with

a separate animus as to each.” *Id.* at ¶12 citing *State v. Bickerstaff*, 10 Ohio St.3d 62, 66 461 N.E.2d 892 (1984).

Recently the Court in *State v. Miranda*, Slip Opinion No. 2014-Ohio-451 addressed whether a RICO offense merged with the predicate or underlying felony. The majority did not find *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061 to be the exclusive method of determining whether the RICO offense should merge with the predicate felony. *Miranda* thus does not eliminate the *Johnson* test but instead provides that there are alternative means beyond *Johnson* to determine whether offenses should merge.

Without calling the offenses dissimilar, the Court held that it is not necessary to resort to that test when the legislature’s intent is clear from the language of the statute. *Miranda*, ¶10 citing *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶37. The Court found that, “the RICO statute evinces the General Assembly’s intent that the court may sentence a defendant for both the RICO offense and its predicate offense.” *Miranda*, ¶10.

The concurrence in *State v. Miranda*, Slip Opinion No. 2014-Ohio-451, stressed whether the RICO offense was dissimilar to the predicate offense and recognized the category of dissimilar offenses, when it determined that *Miranda*, “provides a prime example of offenses of dissimilar import.” *Miranda*, ¶25 (Lanzinger, J. concurring). Citing *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the concurrence noted that, “In practice, allied offenses of similar import are simply multiple offenses that arise out of the same conduct and are similar but not identical in the significance of the criminal wrongs committed and the resulting harm.” *Miranda*, ¶25 citing *Johnson*, 64 (O’Connor, J., concurring in judgment). Stated another way, “[i]n other words, offenses are dissimilar if they are not alike in their significance and their resulting harm.” *Id.*

After *Miranda*, there is some clarification that the dictate in *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 106, that conduct be considered is not the sole test to be used to determine whether aggravated burglary and rape are allied offenses of similar import. The Court can, and should, consider both legislative intent and concepts of dissimilar offenses, i.e. whether the offenses are alike in their significance and their resulting harm.

IV. The legislative intent supporting separate punishments for aggravated murder and the predicate offense provides support that aggravated burglary and rape can be deemed dissimilar.

The First District in this case reasoned that the necessary physical harm to prove a violation of aggravated burglary, required merger with the acts constituting physical harm. This reasoning is inconsistent with well settled rule that felony-murder, or aggravated murder under R.C. 2903.01(A)(1), does not merge with the predicate. *State v. Keene*, 81 Ohio St.3d 646, ¶668, 693 N.E.2d (246) (1998). It is necessary to prove to commission of the predicate felony, such as aggravated burglary or the attempt to commit the predicate felony, in order to establish an element of aggravated murder. The proof of the predicate does not necessitate that aggravated murder merge with the predicate and the legislative intent confirms this.

The Legislative Service Commission notes to the allied-offense statute indicate the following:

This section provides that when an accused's conduct can be construed to amount to two or more offenses of similar import, he may be charged with all such offenses but may be convicted of only one. If his conduct constitutes two or more dissimilar offenses, or two or more offenses of the same or similar kind but committed at different times or with a separate "ill will" as to each, then he may be charged with and convicted of all such offenses.

The basic thrust of the section is to prevent "shotgun" convictions. For example, a thief theoretically is guilty not only of theft but of receiving stolen goods, insofar as he receives, retains, or disposes of the property he steals. Under this section, he may be charged with both offenses but he may be convicted of only one, and the prosecution sooner or later must elect as to which offense it wishes to pursue. On the other hand, a thief who commits theft on three separate occasions or steals

different property from three separate victims in the space, say, of 5 minutes, can be charged with and convicted of all three thefts. In the first instance the same offense is committed three different times, and in the second instance the same offense is committed against three different victims, i.e. with a different animus as to each offense. *Similarly, an armed robber who holds up a bank and purposely kills two of the victims can be charged with and convicted of one count of aggravated robbery and of two counts of aggravated murder. Robbery and murder are dissimilar offenses, and each murder is necessarily committed with a separate animus, though committed at the same time.*

(Legislative Service Commission Notes to R.C. 2941.25)

The Committee provides the example of robbery and murder as dissimilar offenses

- As an example of allied offenses of similar import—a thief stealing and then receiving the same property that he steals
- As an example of the same/similar offenses not subject to merger due to either the commission of the crime being committed on different occasions or with a separate animus—a thief who commits theft on three separate occasions or steals property from three different victims in the span of 5 minutes.
- As an example of dissimilar offenses—robbery and murder

The portion of the Commission Notes that indicates that robbery and murder are dissimilar offenses provides the most guidance in the instant case. The purposeful killing of another can elevate from murder to aggravated murder if the killing is committed in the course of committing an enumerated felony, under these circumstances the crimes would not be allied offenses of similar import, but would rather be dissimilar offenses. The notes specify that an “armed robber who holds up a bank and purposely kills two of the victims can be charged with and convicted of aggravated robbery and two counts of aggravated murder. Robbery and murder are dissimilar offenses, and each murder is necessarily committed with a separate animus, though committed at the same time.” Just as a person who commits a purposeful killing during the course of a robbery is guilty of aggravated murder, so too can a person who commits a purposeful killing during the course of a burglary be guilty of aggravated murder under R.C.

2903.02(B). Likewise if the murder and robbery are considered dissimilar, then it should follow that the murder and burglary are dissimilar.

The Court agreed in *State v. Moss*, 69 Ohio St.2d 515, 433 N.E.2d 181 (1982), holding that aggravated murder as defined in R.C. 2903.01(B) was not an “allied offense of similar import” to aggravated burglary as defined by R.C. 2911.11(A)(1). In rejecting the argument that aggravated burglary and aggravated murder should merge, the Court noted, “any ambiguity as to legislative intent that might possibly exist could hardly outlast the Committee Comment to R.C. 2941.25,” that an armed robber could be convicted of both. *Id.* at 521-522. The Court followed this logic to conclude, “the General Assembly’s intent that a trial court may, in a single criminal proceeding, impose consecutive sentences upon a defendant convicted of aggravated murder and burglary.” *Id.* Without reference to the offenses as dissimilar, the Court simply found, based on the legislative intent, that the offenses “were not allied and of similar import.” *Id.* at 520.

The majority in *State v. Ruff*, 1st Dist. Hamilton No. C-120533, C-120534, 2013-Ohio-3234, 996 N.E.2d 513, held that the offense of aggravated burglary was not complete until the commission of the rape since aggravated burglary, as charged in *Ruff*, required an aggravating circumstances, i.e. physical harm. *Ruff*, ¶32-33. The First District concludes that the offenses were not complete until the rape was committed, and because the State relied on similar evidence, that the offenses had to merge. *Id.*, ¶34. This analysis forecloses a consideration of whether aggravated burglary and rape are inherently dissimilar offenses requiring a determination that the offenses are not allied offenses of similar import.

But contrary to *Ruff*, an analogy can be drawn to the aggravated murder and aggravated robbery example described in the Legislative Service Commission Notes to R.C. 2941.25 and with the Court’s decision in *Moss*, 69 Ohio St.2d 515, 433 N.E.2d 181.

Murder in violation R.C. 2903.02(A), only requires that the person purposely cause the death of another. The offense can become aggravated murder in violation of R.C. 2903.01(B) if the death is caused while committing or attempting to commit, or while fleeing immediately after committing an aggravated burglary. Without the aggravated robbery there can be no aggravated murder in this circumstance. If legislative intent was ignored, *Ruff* would suggest that these offenses merge. This alone does not make the offenses allied offenses of similar import and there is a suggestion that the offenses of aggravated burglary and rape can be dissimilar without regard to the conduct.

V. The offenses of aggravated burglary and rape are not alike in their significance or resulting harm.

Offenses can also be construed as being offenses of dissimilar import when the legislature manifests an intention to serve two different interests in enacting the two statutes. See *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶35 citing *Whalen v. United States* (1980), 445 U.S. 684, 714, 100 S.Ct. 1432, 63 L.Ed.2d 715. Again, an indication that offenses are dissimilar is when the offenses are not alike in their significance and their resulting harm.” *State v. Miranda*, Slip Opinion No. 2014-Ohio-451, ¶25 (Lanzinger, J. concurring).

The intent of the aggravated burglary statute was to broaden the concept of burglary from an offense against the security of the home to one against the security of persons who may be inside. *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶31. The intent of the rape statute to punish unlawful and violent sexual conduct is clear.

But aggravated burglary is not simply a crime against a person. The State correctly argues that the Eighth District has found “[a]lthough the seriousness of a burglary offense is related to the relative risk to persons, the burglary offenses punish trespasses *into structures*. [I]t is the defendant’s single entry into the dwelling with the requisite intent that constitutes the

crime.” *State v. Adkins*, 8th Dist. No. 95279, 2011-Ohio-5149, ¶39, citing *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995. See also *State v. Marriott*, 2nd Dist. Clark No. 2008 CA 48, 2010-Ohio-3115, 189 Ohio App.3d 98, 937 N.E.2d 614. And, to find otherwise would “transform burglary from an offense against the sanctity of the dwelling house into an offense against the person.” *Id.* at ¶41. The difference between aggravated burglary, burglary and breaking and entering is dependent on the respective risk of harm involved. For example the legislative service commission notes to R.C. 2911.11 indicate that,

Since aggravated burglary carries the highest degree of risk that someone may be harmed, it is the most serious of the three breaking and entering offenses in the new code. Because the risk of personal harm is emphasized in such offenses, the traditional night-day distinction is done away with, and the type of structure involved is important only insofar as it is occupied or unoccupied, or is or is not a home.

Whereas the legislative commission notes to R.C. 2911.12 indicates that:

This section defines a lesser included offense to aggravated burglary, by employing the basic elements of the more serious offense, but without the specific elements of inflicting or threatening injury, or of being armed, or that the structure involved is a home. Even without the additional elements, the offense is viewed as serious, because of the higher risk of personal harm involved in maliciously breaking and entering an occupied, as opposed to an unoccupied, structure.

And the legislative commission notes to R.C. 2911.13 indicate that:

This section defines an offense identical to burglary, except that the structure involved in a violation of this section is unoccupied rather than occupied. Also, the section in essence defines an “aggravated” species of trespass that is, trespass on land or premises with purpose to commit a felony. Because of the comparatively low risk of personal harm, an offense under this section is viewed as the least serious in the hierarchy of breaking and entering offenses in the new code.

Aggravated burglary is the highest offense in the hierarchy of breaking and entering offense, which is a crime against the habitation. Aggravated burglary is punished more severely based on the relative increase in risk of harm. Rape punishes not the risk of harm that the breaking and entering results in but punishes a separate harm, the sexual assault. Accordingly, aggravated burglary and rape are not alike in the significance of the offenses and the harms. As such, the offenses are dissimilar, and provide another reason to reverse the First District's decision in *State v. Ruff*, 1st Dist. Hamilton No. C-120533, C-120534, 2013-Ohio-3234, 996 N.E.2d 513.

AMICUS CURIAE'S PROPOSITION OF LAW II: EVEN IF AGGRAVATED BURGLARY AND RAPE ARE SIMILAR, THEY ARE NOT ALLIED OFFENSES OF SIMILAR IMPORT BECAUSE THEY INHERENTLY INVOLVE BOTH SEPARATE CONDUCT AND SEPARATE ANIMUS.

Even if the Court were to find that aggravated burglary in violation of R.C. 2911.11(A)(1) is of similar import with rape in violation of R.C. 2907.02(A)(2), the analysis does not end. Under the allied offense analysis, the analysis then turns to whether the crimes were committed separately or with separate animus. The First District in *Ruff* concludes that because the commission of rape was a necessary requirement of aggravated burglary, the offenses were allied. Such analysis precludes a consideration of animus.

Aggravated burglary and rape are not allied offenses because they inherently consist of separate and distinct acts and are committed with separate animus. Aggravated burglary includes the separate act of committing a trespass, which also has its own independent animus from a subsequent rape offense committed inside the structure. The existence of "aggravating factors" as the First District put it in *Ruff*, does not require merger in this case.

In *State v. Johnson*, 128 Ohio St.3d 153, 2010–Ohio–6314, 942 N.E.2d 1061, this Court instructed that, in applying the two-prong test, the conduct of the accused must be considered in determining whether two offenses should be merged as allied offenses of similar import under R.C. 2941.25. In the, *State v. Washington*, 137 Ohio St.3d 427, 999 N.E.2d 661, 2013–Ohio–4982, the court reiterated the two-prong test as follows:

The first prong looks to the import of the offenses [if] the offenses share a similar import. Only then can the merger analysis proceed to the second prong. The second prong looks to the defendant's conduct and requires a determination whether the offenses were committed separately or with a separate animus. If the offenses were committed by the same conduct and with a single animus, the offenses merge.

Id. at ¶ 13.

As such, under the second prong, multiple offenses are allied “if the defendant's conduct is such that a single act could lead to the commission of separately defined offenses, but those separate offenses were committed with a state of mind to commit only one act.” *State v. Thompson*, 8th Dist. Cuyahoga No. 99628, 2014–Ohio–202, ¶ 18. This aptly provides one way of considering crimes with separate animus.

The commission of murder in violation of R.C. 2903.02(B) as considered by this Court in *Johnson*, 128 Ohio St.3d 153, 2010–Ohio–6314, 942 N.E.2d 1061 exemplifies an example of one act, one state of mind. Murder in violation of R.C. 2903.02(B) does not require an intent or state of mind to cause the death of another person. Instead, the murder arises when the defendant only intends to commit the predicate felony and the predicate felony becomes the proximate cause of the victim's death. Therefore, the murder and predicate felony should not be consider

allied offenses of similar import because of overlapping conduct, instead they are allied because by nature there is a single act, single state of mind.²

Pertinent to the allied analysis in this case, the Defendant was found guilty of three counts of rape under R.C. 2907.02(A)(2), which provides that: "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

He was also convicted of three corresponding counts of aggravated burglary involving the same victims as the rape offenses. The aggravated burglary statute, R.C. 2911.11, provides:

(A) No person, by force, stealth or deception shall trespass into an occupied structure * * * when another person other than an accomplice of the offender is present, with purpose to commit in the structure * * * any criminal offense, if any of the following apply:

(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

The court in *Ruff* concluded that the aggravated burglary and rape offense for each victim were allied because, "each aggravated burglary was not complete until Mr. Ruff raped his victims, and the state necessarily relied upon evidence of the rapes to establish the elements of the aggravated-burglary offenses [and] the 'aggravating' factors in each aggravated burglary was the rape." *Ruff*, ¶¶33-36. In reaching this conclusion, the court relied exclusively on the fact that both offenses included an element of physical harm.

The majority in *Ruff*, 1st Dist. Hamilton No. C-120533, C-120534, 2013-Ohio-3234, 996 N.E.2d 513, ended the analysis when it found that the aggravated burglary and rape relied upon the same conduct.

² Murder under R.C. 2903.02(B) and the predicate offense merger is distinguishable from the Aggravated murder under R.C. 2903.01(B) and the predicate offense because the latter requires a purpose to kill in addition to the commission of the predicate offense.

This is a misapplication of the second prong of the merger test because the court failed to consider the Defendant's trespass in committing the aggravated burglary offense and did not take into consideration Ruff's animus. Under *Johnson* and R.C. 2941.25, a court must review every act necessary to commit the offenses under review. A court then must determine whether the offenses were committed by a single act, not merely share conduct as an element, i.e., causing physical harm/sexual conduct by force. Merely because conduct may overlap does not make Ruff the same type of single-act, single-state of mind scenario involved in *Johnson*. In *Johnson*, there was only a state of mind to commit the child endangering. Here, the aggravated burglaries and rapes were not committed by a single act nor was a single state of mind involved.

Recently, in *State v. Jack*, 8th Dist. Cuyahoga No. 99499, 2014-Ohio-380, the Eighth District observed the separate act required for aggravated burglary.

Under the first prong, Jack's conduct—of trespassing into the victim's home with purpose to commit a crime (resulting in his inflicting or threatening to inflict harm) and the rape of the victim—was not a single act leading to the commission of two separately defined offenses. Rather, Jack engaged in two separate, distinct acts, regardless of whether the only purpose behind his conduct was to compel the victim to submit to sexual conduct with him. Therefore, the allied offenses inquiry ends here, and we do not proceed to the second prong.

Jack, at ¶ 36. Thus, aggravated burglary requires additional prior conduct (i.e., trespass) that is not needed to prove the rape offense.

“Animus” means “purpose or, more properly, immediate motive.” *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345 (1979). Here, the burglary required an intent to commit a trespass. Prior to committing each rape offense, the Defendant devised and executed a plan to gain access to the victims' residences.

Here separate conduct and separate animus supports separate convictions. For example, in the case of S.W., Defendant visited S.W.'s residence while pretending to look for S.W.'s estranged husband. Later that night he broke into her home through a bay window. In the case of P.F., the defendant located a first floor window to gain access. Once inside, he attempted to rob P.F. When she did not have money, he proceeded to rape her. Before raping K.B., the Defendant moved a gas grill below K.B.'s window and climbed it to gain access. These trespasses, whether by force, stealth or both, required a separate state of mind from the subsequent rape offenses. As the dissent noted in *Ruff*, "[t]he nucleus of the aggravated-burglary conduct, and *Ruff's immediate motive, was to trespass*. To hold otherwise would all but vitiate the crime of aggravated burglary, as it cannot be committed without concurrently intending to commit some further criminal offense once entry has been achieved." *Ruff* at ¶ 42 (Dinkelacker, J., dissenting).

Thus, separate conduct and separate animus support separate convictions for the aggravated burglaries and rapes in this case. This reason too requires reversal of the First District's decision in *State v. Ruff*, 1st Dist. Hamilton No. C-120533, C-120534, 996 N.E.2d 513, 2013-Ohio-3234.

CONCLUSION

The Court should again clarify that allied offense analysis is not limited to *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061 and find that aggravated burglary and rape are inherently dissimilar because they are different in their significance and because the legislature has suggested that these offenses are not the type of shotgun convictions R.C. 2945.67 seeks to avoid. Even if *Johnson* were applied, the failure to consider animus is fatal and the facts of this case clearly illustrate that each act of rape and aggravated burglary

were committed separately and with separate animus. The CCPO, in support of the State of Ohio, urges this Court to reverse the decision in *State v. Ruff*, 1st Dist. Hamilton No. C-120533, C-120534, 996 N.E.2d 513, 2013-Ohio-3234.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief Of Amicus Curiae Cuyahoga County Prosecutor's Office On Behalf Of Appellant, State Of Ohio has been sent this 7th day of April, 2014 via U.S. mail to the following:

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