

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2013-1441
Plaintiff-Appellee,	:	
	:	On Appeal from the Hamilton County
vs.	:	Court of Appeals, First Appellate
	:	District
KENNETH RUFF,	:	Court of Appeals Case No. C120533
	:	
Defendant-Appellant.	:	

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**MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE  
OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLEE KENNETH RUFF**

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HAMILTON COUNTY PROSECUTOR'S  
OFFICE

Michaela M. Stagnaro (0059479)  
Attorney at Law

Joseph T. Deters (0012084)  
Prosecuting Attorney

The Farrish Law Firm  
810 Sycamore Street  
Cincinnati, Ohio 45202  
Phone: (513) 824-8972

Rachel Lipman Curran (0078850)  
Assistant Prosecuting Attorney

**COUNSEL FOR APPELLEE,  
KENNETH RUFF.**

230 East Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
Phone: (513) 946-3091  
Fax: (513) 946-3021

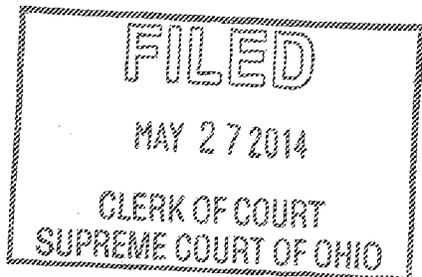
OFFICE OF THE OHIO PUBLIC  
DEFENDER

**COUNSEL FOR APPELLANT,  
THE STATE OF OHIO.**

Katherine R. Ross-Kinzie (0089762)  
Assistant State Public Defender

250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
Phone: (614) 466-5394  
Fax: (614) 752-5167  
E-mail: [katherine.ross-kinzie@opd.ohio.gov](mailto:katherine.ross-kinzie@opd.ohio.gov)

**COUNSEL FOR AMICUS CURIAE,  
OHIO PUBLIC DEFENDER**



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## STATEMENT OF THE CASE AND OF THE FACTS

Kenneth Ruff was convicted of three counts of rape, in violation of R.C. 2907.02(A)(2) and aggravated burglary, in violation of R.C. 2911.11(A)(1) of three women. He was also convicted of attempted rape, a violation of R.C. 2923.02(A), and sexual battery, a violation of R.C. 2907.03(A)(2). On appeal, the First District Court of Appeals held that the trial court should have merged Mr. Ruff's convictions for aggravated burglary and rape because they were allied offense of similar import. *State v. Ruff*, 2013-Ohio-3234, 996 N.E.2d 513, ¶ 1 (1st Dist.).

The aggravated burglaries and rapes occurred in the Westwood neighborhood of Cincinnati, over a nine-month period in 2009. Mr. Ruff's first victim, Karen Browning, lived in a group home with two other women. Before going to bed on the night in question, she took sleep medication and awoke to Mr. Ruff raping her. Ms. Browning cried and screamed for help and Mr. Ruff told her "to shut up or I will kill you." He fled when she continued to scream. *Ruff at* ¶ 4.

Mr. Ruff's second victim, Sherrie Woods, slept with an oxygen tube and CPAP machine, as well as protective underwear. Additionally, due to amputation of her toes, she used a walker and wheelchair for mobility. While home alone, Mr. Ruff knocked on her door looking for her estranged husband. After explaining that her husband no longer lived in the house, Mr. Ruff left. When she woke up later in the night, Mr. Ruff was in her bedroom and he raped her. When she attempted to resist Mr. Ruff choked her and said "[i]f you don't stop fighting, I'm going to hurt you." He left after he finished raping her. *Ruff at* ¶ 5.

His third victim, Patricia Fieger, was 75 years old. Mr. Ruff broke into her home through a first floor window and demanded money when he found Ms. Fieger in the living room. When she said she didn't have any money, Mr. Ruff raped her. She tried to scream but Mr. Ruff

choked her and told her he had “killed once already.” While raping her, he beat her on the head with his cell phone to keep her still. *Ruff* at ¶ 6.

On appeal, the First District found that under the test announced in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, Mr. Ruff’s convictions for aggravated burglary and rape merge because the physical-harm element of each aggravated burglary consisted only of the conduct necessary to prove the rape convictions. *Ruff* at ¶ 33. Consequently, the appellate court vacated the aggravated burglary and rape convictions and remanded the case to the trial court so that the state could elect which allied offense it would pursue for purposes of conviction and sentencing. *Ruff* at ¶ 38. The appellate court affirmed the trial court’s judgment in all other respects. *Ruff* at ¶ 38. The State appealed to this Court, which accepted the appeal.

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

The Office of the Ohio Public Defender (OPD) is a state agency, designed to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary 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 significant criminal cases in the Ohio appellate courts. The OPD has an interest in the present case insofar as this Court may determine whether, given the specific conduct of the defendant-appellee, aggravated burglary, a violation of R.C. 2911.11(A)(1), and

rape, a violation of R.C. 2907.02(A)(2), are allied offenses of similar import. In so doing, the Court will provide further explanation of the test announced in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061.

In considering whether aggravated burglary and rape are allied offenses of similar import, the court of appeals properly applied the conduct-specific test contained in *State v. Johnson*. As illustrated by the present case, this conduct-specific analysis may produce disparate results when applied to different factual situations. Simply because the State disagrees with the conclusion properly reached by the appellate court, does not require this Court to alter its allied offense jurisprudence.

## ARGUMENT

### STATE'S PROPOSITION OF LAW

**The import of rape and aggravated burglary are inherently different and these crimes should not merge under R.C. 2941.25. (Merit Brief of Plaintiff-Appellant, p. 8.)**

When this Court decided *State v. Johnson*, it specifically overruled the prior jurisprudence on allied offenses contained in *Rance* because the previous test was unworkable. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 8. When setting forth the test in *Rance*, which required an abstract comparison of the elements of the offenses to determine whether they were of similar import, the Court intended “to create a test of ready application that would produce clear, predictable results with regard to allied offenses.” *Johnson*, citing *State v. Rance*, 85 Ohio St.3d 632, 636, 710 N.E.2d 699 (1999). However, in practice, the abstract test in *Rance* proved difficult to apply. *Johnson* at ¶ 8. In a unanimous syllabus, the *Johnson* Court overruled *Rance* and held that “the conduct of the accused must be considered” when determining whether offenses merged. *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 15, quoting *Johnson* at syllabus.

- I. In *Johnson*, this Court established the test for determining when multiple offenses merge at sentencing pursuant to R.C. 2941.25, which requires consideration of the defendant’s conduct.**

In *Johnson*, the Court looked to the intent of the General Assembly as codified in R.C. 2941.25, which instructs courts to consider the conduct of the defendant when determining if multiple offenses merge. *Johnson* at ¶ 46. The Court specifically departed from any hypothetical or abstract comparison of the offenses or their elements in favor of a case-specific analysis of conduct. *Johnson* at ¶ 47.

The test resulting from *Johnson* is a two-prong analysis that requires courts to consider first, whether the multiple offenses could be committed by the same conduct. *Johnson* at ¶ 48. This is no longer an abstract comparison of the elements of offenses, but requires courts to consider the conduct of the defendant. While the Court was divided about how to consider a defendant’s conduct in the first prong’s “similar import” analysis, a portion of the Court stated that “[i]f 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.” *Johnson* at ¶ 48; accord *State v. Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603, ¶ 8 (summarizing the test in *Johnson*).

If the offenses could be committed by the same conduct and are therefore of similar import, the court must move to the second prong and determine whether the offenses were committed separately, with a separate animus, or whether the offenses were committed with a single state of mind or animus. *Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661 at ¶ 13, citing *State v. Mitchell*, 6 Ohio St.3d 416, 418, 453 N.E.2d 593 (1983); accord *Miranda* at ¶ 8 (summarizing the test in *Johnson*). If the offenses were committed with a single state of mind, then they are allied offenses of similar import and must be merged.

**II. District Courts of Appeal throughout Ohio are properly applying the *Johnson* test to make case-by-case determinations regarding merger. As expected by this Court, the conduct-specific test necessarily results in different merger outcomes for the same offenses under different circumstances.**

Because the test announced in *Johnson* relies on the specific conduct of the defendant at issue in a given case, this Court anticipated that the “analysis may be sometimes difficult to perform and may result in varying results for the same set of offenses in different cases. But different results are permissible, given that the statute instructs courts to examine a defendant’s conduct—an inherently subjective determination.” *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-

6314, 942 N.E.2d 1061, at ¶ 52. As expected, different appellate courts applying *Johnson* to the same set of offenses, but with different factual scenarios, have reached different conclusions regarding whether those offenses merge under R.C. 2941.25. The analysis under *Johnson* does not lead to categorical rules regarding whether certain offenses merge. Consequently, any attempt to conclude that certain offenses may never merge or alternatively, will always merge, is impossible and violative of the General Assembly's intent.

As was expected in *Johnson*, because the merger analysis is fact specific and subjective, courts of appeal properly engaging in this fact specific analysis in the realm of aggravated burglary, have concluded in some cases that merger is required and in others, have allowed multiple convictions. For example the First District's opinion below highlighted a number of cases involving aggravated burglary where courts have found that the aggravated burglary merged with another felony. *State v. Ruff*, 2013-Ohio-3234, 996 N.E.2d 513, ¶ 32 (1st Dist.), citing *State v. Shears*, 1st Dist. Hamilton No. C-120212, 2013-Ohio-1196 (merging aggravated burglary and aggravated robbery), *State v. Ozevin*, 12th Dist. Clermont No. CA2012-06-044, 2013-Ohio 1386 (merging aggravated burglary and kidnapping), *State v. Jarvi*, 11th Dist. Ashtabula No. 2011-A-0063, 2012-Ohio-5590 (merging aggravated burglary and aggravated robbery), *State v. Jacobs*, 4th Dist. Highland No. 11CA26, 2013-Ohio-1502 (merging aggravated burglary and felonious assault). Specifically, these cases involved aggravated burglary under R.C. 2911.11(A)(1), which requires a physical-harm element. The courts found that when the conduct required to satisfy the physical-harm element was the same conduct that was necessary to prove another felony, the offenses merged.

In other cases, courts have found that different conduct constituted multiple offenses, and therefore those offenses did not merge. For example, in *State v. Howard*, the Fifth District Court

of Appeals found that the defendant’s rape conviction, aggravated burglary conviction, and aggravated robbery conviction did not merge. The court found that given the facts at issue, the rape was “separate, distinct from the crimes of aggravated burglary, aggravated robbery, and kidnapping. [The defendant] acted on his own, with a separate animus to commit this crime. The act of rape was significantly independent from the acts constituting the other crimes.” *State v. Howard*, 5th Dist. Stark No. No. 2012CA00061, 2013-Ohio-2884, ¶ 69. The aggravated burglary and robbery were each supported by distinct conduct and the state did not rely on the same conduct to prove elements of any of the offenses. Consequently, the offenses were not merged.

Such an individualized approach, as opposed to a categorical approach, reflects the intent of the General Assembly. As this Court noted in *Johnson*, R.C. 2941.25 contains a mandate that court’s consider the specific conduct of a defendant when determining whether offenses merge as allied offenses of similar import. *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶ 8.

**III. The First District correctly applied *Johnson* when it determined that Mr. Ruff’s conduct constituted allied offenses of similar import and those offenses should merge.**

In this case, the offenses were properly merged. The First District properly applied *Johnson* and found that “each aggravated burglary was not completed 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. The conduct relied upon to establish rape—sex compelled by force—was the same as the conduct relied upon by the state to establish the ‘physical harm’ component in R.C. 2911.11(A)(1).” *Ruff*, 2013-Ohio-3234, 996 N.E.2d 513, at ¶ 33. The State is asking this Court to correct what it deems to be an error made in the application of *Johnson*

below. To the extent that the State is seeking error correction, this case should be dismissed as improvidently accepted.

**A. The State’s understanding of the appellate court’s decision and its resulting effects are incorrect and hyperbolic.**

The State argues that when the appellate court merged Mr. Ruff’s convictions, the court removed the possibility of registering him as a sex offender. Merit Brief of Plaintiff-Appellant, p. 18. However, in making this argument, the State ignores the opinion of the appellate court. The First District held that the aggravated burglary and rape charges should merge; it did not determine, as the State alleges in its brief, that the rape convictions merged into the aggravated burglary convictions. In fact the First District remanded the case to the trial court for the State to elect which allied offense it would pursue for purposes of conviction and sentencing. *Ruff* at ¶ 38. The State has full control over the possibility of registering Mr. Ruff as a sex offender. If the State would like to pursue such an avenue, it should elect to convict and sentence Mr. Ruff of rape as opposed to aggravated burglary.

**B. The State incorrectly characterizes the *Johnson* test.**

In its merit brief, the State avers that only recently, under *Johnson*, has allied offense analysis required a detailed examination of facts. Merit Brief of Plaintiff-Appellant, p. 9. However, in *Washington*, this Court specifically stated that “[a]lthough *Johnson* abandoned the abstract component of the first prong (similar import), it did not change the second prong (conduct), which has always required courts to determine whether the offenses were committed separately or with a separate animus. As we have explained since *Johnson*, ‘[t]he consideration of a defendant’s conduct in an R.C. 2941.25 analysis is nothing new \* \* \*.’ *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 21.” *Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, at ¶ 16.

The State also alleges that since the *Johnson* opinion did not discuss offenses of dissimilar import, the effect of *Johnson* where offenses are of dissimilar import is unclear. Merit Brief of Plaintiff-Appellant, p. 10. However, *Johnson* specifically states that “if the court determines that the commission of one offense will *never* result in the commission of the other \* \* \* then, according to R.C. 2941.25(B), the offenses will not merge. *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶ 51; accord *Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603, at ¶ 9 (“if it is not possible to commit the offenses with the same conduct” then those offenses are not offenses of similar import and “then the court may sentence the defendant for all the offenses at issue”).

The State further concludes that *Johnson* does not acknowledge the plain language of R.C. 2941.25, and has in fact abrogated the merger statute. Merit Brief of Plaintiff-Appellant, p. 13. In order to reach such conclusions, the State must ignore not only the language in *Johnson* itself, but also this Court’s subsequent analysis of *Johnson*.

**C. After rejecting the test announced in *Johnson*, the State suggests a new multi-part test, which ignores the reasoning this Court gave when overruling *Rance* and establishing the *Johnson* test.**

The State suggests that under the plain language of R.C. 2941.25, a court must engage in a three-step inquiry prior to merging convictions. The first step of the state’s test requires determining if offenses are allied, which the State defines as being in the same “family of offenses.” However, the State does not define what constitutes a family of offenses, but instead concludes that “[c]ommon sense dictates that judges can and should be able to determine whether crimes are allied in these situations without a formalistic rule.” Merit Brief of Plaintiff-Appellant, p. 14-15. The second prong of the State’s test, like the first prong under the pre-*Johnson* inquiry, requires a court to determine whether offenses are of similar import without

consideration of the conduct of the defendant. In fact, in advocating for this specific inquiry, the State is suggesting a return to the abstract comparison this Court previously found unworkable when it overruled *Rance*.

Only under the third prong of the State’s test, would there be any fact-specific inquiry. Under this prong, courts would determine whether the offenses were committed separately or with a separate animus by looking to the defendant’s conduct. Further, when analyzing the conduct, instead of looking at the entire course of the defendant’s conduct, as this Court did in *Johnson*, the State would require parsing out the conduct and would only require merger if a single action simultaneously caused more than one offense. *Compare Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶ 56 (holding that the offenses merged where the state relied on the same conduct to prove child endangering and felony murder and declining to “parse Johnson’s conduct into a blow-by-blow in order to sustain multiple convictions . . .”).

Though the State suggests it is not asking this Court to overrule *Johnson*, that is exactly what the State is asking. In *Johnson*, this Court specifically overruled the abstract comparison required by *Rance* in favor of a conduct-specific inquiry because of the intent of the General Assembly as codified in R.C. 2941.25. However, the State’s test would return merger analysis to a multi-step test with an unworkable abstract inquiry and a limitation on any consideration of the defendant’s conduct until the prong regarding animus.

**IV. This Court’s recent decision in *State v. Miranda* is a limited decision regarding the RICO statute and does not negate the *Johnson* test. The limited holding is inapplicable to the case here.**

In *State v. Miranda*, this Court recently held that *Johnson* is not applicable to RICO charges under R.C. 2923.32(A)(1) and that a RICO offense does not merge with its predicate offenses for purposes of sentencing. *Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d

603, at ¶ 3. Specifically, this Court acknowledged the intention of the General Assembly, as expressed in the RICO statute, that a court may sentence a defendant for both the RICO offense and its predicate offense. *Miranda* at ¶ 10. This decision was specific to the RICO statute; the result was dependent upon the legislative intent that cumulative punishment was allowed in that specific situation.

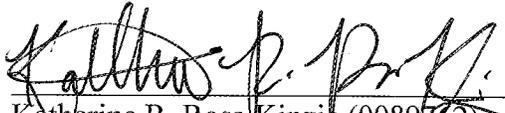
In other statutes, the legislature has not expressed its specific intent to allow cumulative punishment. Given such a statute, where the legislative intent regarding whether a court may impose multiple punishments for offenses arising out of the same conduct is not clearly expressed, R.C. 2941.25 and its corresponding test under *Johnson* provide the proper analysis. Unlike in the RICO statute at issue in *Miranda*, the General Assembly has not specifically expressed an intent that aggravated burglary or rape, that statutes at issue in this case, intend cumulative punishment. Because there is no such express intent of the General Assembly, the First District properly applied R.C. 2941.25 and the *Johnson* test.

## CONCLUSION

The Office of the Ohio Public Defender, as amicus curiae, urges this Court to affirm the judgment of the First District Court of Appeals. In considering whether aggravated burglary with a physical-harm element and rape are allied offenses of similar import, the court of appeals properly applied the conduct-specific test contained in *State v. Johnson*. As illustrated by the present case, this conduct-specific analysis may produce disparate results when applied to different factual situations. Simply because the State disagrees with the conclusion properly reached by the appellate court, does not require this Court to alter its allied offense jurisprudence.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



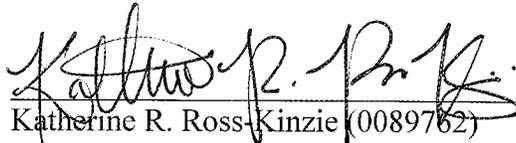
Katherine R. Ross-Kinzie (0089762)  
Assistant State Public Defender

250 East Broad Street  
Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 (Fax)  
E-mail: katherine.ross-kinzie @opd.ohio.gov

COUNSEL FOR AMICUS CURIAE,  
OHIO PUBLIC DEFENDER

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLEE KENNETH RUFF** was forwarded by regular U.S. Mail, postage prepaid to Joseph T. Deters, Hamilton County Prosecutor's Office, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, and Michaela M. Stagnaro, at The Farrish Law Firm, 810 Sycamore Street, Cincinnati, Ohio 45202, on this 27th day of May, 2014.

  
Katherine R. Ross-Kinzie (0089762)  
Assistant State Public Defender

#418943