In the

Supreme Court of Ohio

STATE OF OHIO	:	Case No. 2007-1842
Plaintiff-Cross-Appellant,	:	
v.	:	On Appeal from the Montgomery County Court of Appeals, Second Appellate District
DAVON WINN	:	
Defendant-Cross-Appellee.	:	Court of Appeals Case No. 21710

MERIT BRIEF OF *AMICUS CURIAE*
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IN SUPPORT OF PLAINTIFF-CROSS-APPELLANT STATE OF OHIO

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INTRODUCTION

A jury convicted Davon Winn of both aggravated robbery and kidnapping stemming from a home break-in, and the trial court sentenced him separately for each offense. Winn appealed successfully, convincing the Second District that the trial court should have merged the two offenses under Ohio's multiple-count statute, R.C. 2941.25. That statute permits multiple convictions in two situations: (1) when the two crimes constitute offenses of dissimilar import, or (2) when a defendant commits crimes of similar import either separately or with a separate animus for each. R.C. 2941.25(B). According to Winn and the Second District, the facts of his case render the two offenses "allied offenses of similar import," and he committed each offense with a different animus.

Winn and the appellate court are wrong, however, because under this Court's precedent, the particular facts surrounding the defendant's offense are irrelevant to the "allied offenses of similar import" inquiry. *State v. Rance* (1999), 85 Ohio St. 3d 632, 636-37 (citing *Ohio v. Johnson* (1984), 467 U.S. 493, 499). Instead, in deciding whether two or more offenses are "allied offenses of similar import," a court must consider the offenses' elements in the abstract and determine whether one offense subsumes the other. *Id.* at 636.

Some appellate districts have questioned whether *Rance* remains good law and have eschewed the *Rance* framework in multiple-count challenges. Recently, this Court affirmed the validity of the *Rance* framework with its opinion in *State v. Cabrales* (Apr. 9, 2008), 2008 Ohio Lexis 868, 2008-Ohio-1625. Because *Rance* is alive and well, the test for whether multiple offenses are "allied offenses of similar import" turns on the statutory elements of each offense, not on a defendant's animus or on other individualized facts. Under the *Rance* test, aggravated robbery and kidnapping are not allied offenses of similar import, so a defendant charged with both offenses may be convicted of and punished for both. The Court's statement to the contrary

in *State v. Logan* (1979), 60 Ohio St. 2d 126, 130, is irreconcilable with the *Rance* framework and consequently is not good law.

STATEMENT OF AMICUS INTEREST

As Ohio's chief law officer, R.C. 109.02, Ohio Attorney General Marc Dann has a strong interest in ensuring rigorous and consistent enforcement of Ohio's criminal laws, particularly those involving eligibility for conviction and sentencing. The State's appellate courts have not consistently applied this Court's prior interpretations of R.C. 2941.25, leaving trial courts and prosecutors without guidance as to when it is permissible to impose convictions for multiple offenses committed in a single course of conduct.

Additionally, the Attorney General has a strong interest in courts' effecting the General Assembly's intent. In promulgating R.C. 2941.25, the General Assembly expressed a clear intent to allow multiple convictions both (1) when the offenses are of dissimilar import, and (2) when the defendant committed the offenses separately or with a separate animus. The confusion among the appellate courts results in inconsistent application of the statute, allowing some criminal defendants to dodge sentences to which the General Assembly clearly intended to subject them.

STATEMENT OF THE CASE AND FACTS

In January 2006, Davon Winn and two accomplices broke into an apartment to steal a cache of drugs, money, or both that he believed an acquaintance had stored there. See *State v. Winn* (2d Dist.), 173 Ohio App. 3d 202, 2007-Ohio-4327, ¶¶ 2, 5. They arrived at the apartment at about 9:30 a.m. and used a crowbar to pry open the front door. *Id.* at ¶ 2. Upon breaking into the apartment, Winn and his accomplices unexpectedly came upon Treva Ann Hummons, the acquaintance's grandmother. *Id.* They ordered her, at gunpoint, to return to her bedroom down the hall and to lie face down on the bed, covering her head with a pillow. *Id.* She complied. As

she lay on the bed, she felt one of the men press a gun to the back of her head through the pillow. *Id.*

After an observant neighbor called 911, police arrived and arrested Winn and his accomplices. *Id.* at ¶ 3. After a three-day trial, the jury convicted Winn of aggravated burglary in violation of R.C. 2911.11(A)(2), aggravated robbery in violation of R.C. 2911.01(A)(1), and kidnapping in violation of R.C. 2905.01(A)(2), all with firearm specifications. *Id.* at ¶ 1. In addition, the jury convicted Winn of three counts of tampering with evidence. *Id.*

Winn appealed his convictions to the Second District Court of Appeals. Among other arguments, Winn argued that his kidnapping conviction was improper. First, he argued that it violated the United States Constitution's Double Jeopardy Clause. See U.S. Const. Art. I, Sec. 10. Second, he argued that R.C. 2941.25 prohibited the court from imposing convictions on both the aggravated robbery and kidnapping charges because they were allied offenses of similar import committed with a single animus. The Second District, relying on this Court's holding in *State v. Logan* (1979), 60 Ohio St. 2d 126, concluded that the kidnapping and aggravated robbery charges were allied offenses of similar import under the statute because "kidnapping is implicit within every robbery." *Id.* at ¶ 29. The court then held that Winn committed the two crimes in question (aggravated robbery and kidnapping) with a single animus, and therefore R.C. 2941.25(B) prohibited convictions on both charges. *Id.* at ¶ 33-34. The parties filed cross-appeals with this Court, and on February 20, 2008, the Court granted jurisdiction on the State's first two propositions of law.

ARGUMENT

***Amicus Curiae* Attorney General's Proposition of Law:**

> *Applying the test described in* State v. Rance, *aggravated robbery and kidnapping are not allied offenses of similar import under R.C. 2941.25(A), and a court may convict a criminal defendant on both charges regardless of whether the offenses were committed separately or with a separate animus.*

Under Ohio's multiple-count statute, R.C. 2941.25, a criminal defendant charged with two crimes arising from the same conduct may be convicted of, and separately sentenced for, both crimes under two circumstances: (1) when the offenses at issue are not "allied offenses of similar import," and (2) when the offenses are "allied offenses of similar import," but the defendant committed them with a separate animus. As this Court explained in *Rance*, a court considering a multiple-count challenge must first determine whether the offenses at issue are allied offenses of similar import under subsection (A) of the statute. See *Rance*, 85 Ohio St. 3d at 636. Offenses fit this definition when "the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other." *State v. Blankenship* (1988), 38 Ohio St. 3d 116, 117. In this inquiry, the facts of the particular case are irrelevant. Instead, a court considers only the relevant offenses' statutory elements in the abstract. *Rance*, 85 Ohio St. 3d at 637. If they do not overlap such that committing one offense automatically means committing the other, the defendant may receive multiple convictions and sentences. If they do, the offenses are allied offenses of similar import, and the court must then consider the underlying facts of the defendant's particular crimes to determine whether the defendant acted with a separate animus. *Id.* at 638-39.

Notwithstanding this clear directive, the lower courts have applied inconsistently the *Rance* test and the multiple-count statute. Some appellate districts have applied *Rance* faithfully. Others erroneously believe that this Court's later opinions—ones that do not even consider the

"allied offenses of similar import" issue—implicitly overruled *Rance*. And the court below committed a different error: In attempting to apply *Rance*, it sidestepped the crux of the "similar import" inquiry by relying on stale precedent that analyzed a former version of the aggravated robbery statute—one containing elements different from those in the present version.

Although proper analysis of this case requires only the first step of the *Rance* inquiry (because aggravated robbery and kidnapping are dissimilar under the above-described test), the Court should clarify the proper application of the multiple-count statute. Doing so will ensure consistent, faithful application of the General Assembly's intent, as well as the Court's binding precedent, throughout Ohio's appellate districts. And because the elements of aggravated robbery and kidnapping do not overlap in either direction, the Court ultimately should reverse the Second District's erroneous judgment concluding that these offenses are allied offenses of similar import.

A. Under R.C. 2941.25(A), defendants charged with multiple offenses that are not "allied offenses of similar import" may be convicted of, and punished for, all such offenses.

Ohio's multiple-count statute contains two distinct provisions. Under the first provision, R.C. 2941.25(A), "[w]here 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." The second provision states, "[w]here 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(B) (emphasis added).

The statute's text thus defines two circumstances in which a court can punish a criminal defendant for multiple offenses arising from the same conduct. First, under subsection (A), anytime the offenses are not "allied offenses of similar import," multiple convictions and punishments are permissible. Second, subsection (B)'s use of the disjunctive (italicized above) demonstrates that multiple convictions and punishments are permitted when the defendant commits two or more allied offenses of similar import, but does so "separately or with a separate animus as to each." *Id.* Accordingly, when faced with a multiple-count challenge, a court must first determine whether the offenses at issue are "allied offenses of similar import"—the sole concern of subsection (A). If the offenses are not "allied offenses of similar import," the inquiry ends there, and the defendant may be punished separately for each. Only if the offenses at issue are "allied offenses of similar import" does the court reach the second step, in which it determines whether the defendant committed each of his particular offenses with a separate animus. See *Rance*, 85 Ohio St. 3d at 636 ("With its multiple-count statute Ohio intends to permit a defendant to be punished for multiple offenses of *dissimilar import*. . . . 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).").

1. In *State v. Rance*, the Court clarified that the first step of the "allied offenses" inquiry under the multiple-count statute's subsection (A) turns on the offenses' statutory elements, not specific facts.

In *Rance*, the Court noted that the first step had caused confusion. *Rance*, 85 Ohio St. 3d at 636. Courts were uncertain whether to compare the elements of the relevant offenses in the abstract, or instead to consider the facts pertinent to the particular defendant's alleged conduct. *Id.* The *Rance* Court chose the former: "we today clarify that under an R.C. 2941.25(A) analysis the statutorily defined elements of offenses that are claimed to be of similar import are compared *in the abstract*." *Id.* at 638. Thus, *Rance* rendered the facts of the particular case

irrelevant to subsection (A); the statutorily defined elements of the particular offenses at issue are the only relevant data in determining whether two offenses are "allied offenses of similar import."

Ohio's lower courts applied this precedent neither consistently nor faithfully. For instance, the First District refused to apply *Rance*, reasoning that this Court's subsequent decisions implicitly overruled *Rance*. *In re Rashid* (1st Dist.), 163 Ohio App. 3d 515, 2005-Ohio-4851, ¶¶ 17-28 (considering convictions for both kidnapping and complicity to rape). Similarly, the Eighth District ignored *Rance* altogether in *State v. White* (8th Dist.), 2007 Ohio App. Lexis 2861, 2007-Ohio-3080. Instead of citing and applying *Rance*, the court applied a pre-*Rance* precedent, *State v. Logan* (1979), 60 Ohio St. 2d 126, which leapfrogged the "allied offenses" inquiry under R.C. 2941.25(A), and dove straight into the "separate animus" inquiry under R.C. 2941.25(B). Accordingly, the *White* court never considered whether the elements of the two offenses at issue—aggravated robbery and kidnapping—when compared in the abstract overlap to such an extent that commission of one results in commission of the other. In contrast to *Rashid* and *White*, the Ninth District correctly applied *Rance* in *State v. Cruz* (9th Dist.), 2003 Ohio App. Lexis 4308, 2003-Ohio-4782, and concluded that felonious assault and kidnapping are not allied offenses of similar import. As these disparate analyses demonstrate, Ohio's lower courts have not applied *Rance* consistently. See also *State v. Cabrales*, Nos. 2007-0595 & 2007-0651, 2008 Ohio Lexis 868, 2008-Ohio-1625, ¶¶ 16-20 (noting confusion in the lower courts).

2. The Court recently reaffirmed the *Rance* framework in *State v. Cabrales*.

This Court recently resolved this confusion with its opinion in *Cabrales*, which confirmed that the *Rance* framework applies to subsection (A) of the multiple-count statute. *Id.* at ¶¶ 28-33, see also *id.* at ¶ 25 (stating that the Court did not overrule or modify *Rance* in later cases). *Cabrales* also confirmed that the facts of the defendant's particular conduct is irrelevant to

analyzing the "allied offenses of similar import" issue under R.C. 2941.25(A). Further, the Court's analysis illustrates that if the offenses in question are not "allied offenses of similar import," the court should not consider whether the defendant committed the particular offenses with a separate animus (the inquiry under R.C. 2941.25(B)). See *id.* at ¶ 29. Finally, the Court further clarified that the offenses' elements need not align word-for-word to qualify as "allied offenses of similar import." *Id.* at ¶ 27.

B. Under the *Rance* test, aggravated robbery and kidnapping are not allied offenses of similar import, so a defendant may be convicted of and punished for each, even when both charges arise from the same conduct.

The trial court correctly convicted Winn of, and sentenced him for, the separate offenses of aggravated robbery under R.C. 2911.01(A)(1), and kidnapping under R.C. 2905.01(A)(2) because these offenses are not "allied offenses of similar import" under subsection (A) of the multiple-count statute. Applying the *Rance* framework and considering both offenses' statutory elements in the abstract confirms as much.

One can commit aggravated robbery without committing a kidnapping and vice-versa. Under R.C. 2911.01(A)(1), the elements of aggravated robbery are:

- possessing a deadly weapon on one's person and
- displaying, brandishing, using, or indicating the possession of the weapon while
- attempting, committing, or fleeing immediately after attempting or committing a theft offense.

The elements of kidnapping under R.C. 2905.01(A)(2) are:

- moving or restraining the movement of the victim
- by force, threat, or deception
- for the purpose of facilitating the commission of a felony or flight thereafter.

Considering these offenses' elements in the abstract reveals that they do not "correspond to such a degree that the commission of one crime will result in the commission of the other," *Blankenship*, 38 Ohio St. 3d at 117, because each offense contains at least one element foreign to the other. More specifically, possessing a deadly weapon is a prerequisite to aggravated robbery under R.C. 2911.01(A)(1), but not for kidnapping under R.C. 2905.01(A)(2), so one can commit a kidnapping without committing an aggravated robbery (e.g., by tying up the victim). Just the same, moving or restraining the victim is a prerequisite to kidnapping, but not to aggravated robbery. A person who breaks into an unattended jewelry store, steals jewelry, and flees the scene with a gun in hand, visible to witnesses, satisfies all the elements of aggravated robbery, but not the elements of kidnapping. Because aggravated robbery and kidnapping each can be committed without committing the other, they are not allied offenses of similar import under R.C. 2941.25(A). Accordingly, a court may convict a defendant of both offenses and punish him separately for each, regardless of the facts of his particular offenses.

C. The Court's stale precedent in *State v. Logan* cannot be reconciled with the *Rance* framework.

The Second District erred by sidestepping the abstract comparison of elements that *Rance* requires and instead relying upon obsolete dicta in *State v. Logan* (1979), 60 Ohio St. 2d 126. Although the Second District noted that *Rance* requires comparing the elements of the different offenses in the abstract, it did not do so. *State v. Winn* (2d Dist.), 173 Ohio App. 3d 202, 2007-Ohio-4327, ¶ 27. Instead, it stated that this Court "has previously compared the elements of kidnapping and robbery and found that kidnapping is implicit within every robbery." *Id.* at ¶ 29

(citing *Logan*). While it is true that the *Logan* Court said that every robbery (aggravated or otherwise)[1] necessarily contains a kidnapping, this assertion is not good law for three reasons.

First, *Logan* predated *Rance* and did not apply the now-applicable test. The *Logan* Court reached its decision without comparing the elements of the two offenses in the abstract to determine the degree of overlap. Accordingly, *Logan* cannot determine the outcome of the *Rance* test.

Second, not only has the framework changed, but so has the robbery statute. At the time the Court decided *Logan*, possessing a deadly weapon was not an element of robbery. Instead, the threat or use of force against the victim during the commission of (or immediate flight from) a theft offense was all that was necessary to constitute robbery. See fmr. R.C. 2911.02(A) (1974) ("No person, in attempting or committing a theft offense . . . or in fleeing immediately after such attempt or offense, shall use or threaten the immediate use of force against another."). Because the present version of the robbery statute requires possession of a deadly weapon, but does not require the use or threat of force,[2] *Logan* cannot control. A fresh look is necessary into whether robbery, as presently defined, and kidnapping are allied offenses.

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[1] The Court reached a similar conclusion regarding *aggravated* robbery in *State v. Jenkins* (1984), 15 Ohio St. 3d 164. There, the Court considered whether, in a felony murder trial, capital specifications for both aggravated robbery and kidnapping—both under R.C. 2929.04(A)(7)—were duplicative. *Id.* at 195. Relying on *Logan*, the Court concluded that applying both specifications to a capital defendant was unnecessarily cumulative. *Id.* at 197. Although the *Jenkins* Court did not specifically apply the multiple-count statute, it stated that its analysis was "guided by principles espoused in considering the doctrine of merger under" the statute. *Id.* at 197 n.27. In addition to this distinction, the first two distinctions between Winn's case and *Logan* described above apply equally to *Jenkins*. In sum, *Jenkins* and *Logan* are equally outdated.

[2] Notably, *Logan*'s dicta addressed robbery under R.C. 2911.02, while this case concerns aggravated robbery under R.C. 2911.01(A)(1). As illustrated above, the present version of R.C. 2911.01(A)(1)—like the present robbery statute—does not require the use or threat of force, which is an element of kidnapping under R.C. 2905.01(A)(2). Accordingly, *Logan* cannot control multiple-count analysis of either robbery or aggravated robbery.

Third, the passage in *Logan* upon which the Second District relied is dicta. *Logan* addressed whether forcible rape and kidnapping are allied offenses of similar import. Answering in the affirmative, the Court stated, "implicit within every forcible rape (R. C. 2907.02(A)(1)) is a kidnapping. The same may be said of robbery (R.C. 2911.02) . . . ." *Logan*, 60 Ohio St. 2d at 130. Logan had not been charged with robbery, so this statement was irrelevant to the Court's disposition of the case.

For each of these reasons, the dicta in *Logan* is not valid or binding law. Further, as shown in Part B above, *Logan*'s holding that robbery and kidnapping are allied offenses of similar import is incompatible with the *Rance* framework. Accordingly, the Court should clarify that, since *Rance*, *Logan* has not been good law, and it should hold that aggravated robbery under R.C. 2911.01(A)(1) and kidnapping under R.C. 2905.01(A)(2) do not qualify as allied offenses of similar import. Thus, the Court should reverse the Second District's judgment concluding that Winn could not be convicted of and punished for both crimes.

CONCLUSION

For the above reasons, the Court should reverse the judgment below and reinstate the convictions against Winn.

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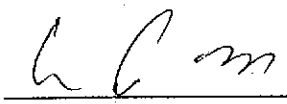

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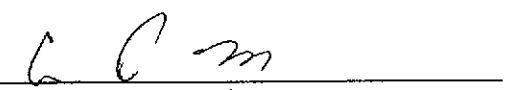

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