

IN THE SUPREME COURT OF OHIO  
Case No. 2007-01812

STATE OF OHIO :  
Appellee :  
-vs- :  
CORNELIUS HARRIS :  
Appellant :

On Appeal from the  
Hamilton County Court  
of Appeals, First  
Appellate District Court  
of Appeals  
Case No. C-060587

---

**REPLY BRIEF OF AMICUS CURIAE CUYAHOGA COUNTY PUBLIC DEFENDER**

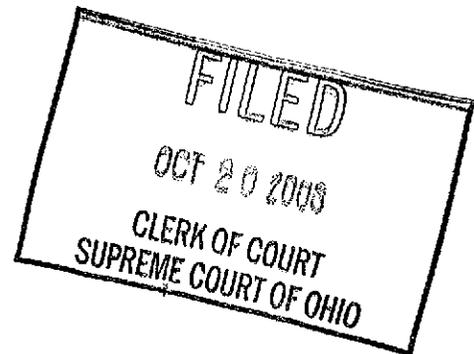
---

ROBERT L. TOBIK, ESQ.  
Cuyahoga County Public Defender  
BY: JOHN T. MARTIN, ESQ. (Counsel of Record)  
#0020606  
CULLEN SWEENEY, ESQ.  
#0077187  
Assistant Public Defenders  
310 Lakeside Avenue  
Suite 200  
Cleveland, OH 44113  
(216) 443-7583  
(216) 443-3632 FAX

COUNSEL FOR AMICUS CURIAE, CUYAHOGA COUNTY PUBLIC DEFENDER

JOSEPH T. DETERS (0012084)  
Prosecuting Attorney, Hamilton County  
James Michael Keeling (0068810)  
Assistant Prosecuting Attorney (Counsel of Record)  
230 East Ninth Street, Suite 400  
Cincinnati, Ohio 45202  
(513) 946-3178

COUNSEL FOR THE STATE OF OHIO



Theresa G. Haire (0020012)  
Assistant State Public Defender  
8 East Long Street – 11<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 466-5394

COUNSEL FOR APPELLANT CORNELIUS HARRIS

---

TABLE OF CONTENTS

	PAGES
INTEREST OF AMICUS CURIAE .....	1
ARGUMENT .....	1
<i>In Reply in Support of the First Proposition of Law posited by Appellant:</i> .....	1
<b>Aggravated robbery and robbery are allied offenses of similar import, and a defendant cannot be convicted of both offenses if the charges originate out of the same conduct. R.C. 2941.25(A), (B). A defendant also may not be convicted of two counts of felonious assault, charged pursuant to R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2), if both charges arise from the same conduct towards the same victim.</b>	
CONCLUSION.....	10
SERVICE .....	11

## TABLE OF AUTHORITIES

### **CASES**

<i>Blockburger v. United States</i> (1932), 284 U.S. 299.....	passim
<i>McKittrick v. Jeffries</i> (N.D. Ohio), 2006 U.S. Dist. LEXIS 29472 .....	8
<i>Missouri v. Hunter</i> (1983), 459 U.S. 359 .....	3
<i>North Carolina v. Pearce</i> (1969), 395 U.S. 711 .....	2
<i>Palmer v. Haviland</i> (S.D. Ohio 2005), 2005 U.S. Dist. LEXIS 41864, aff'd (C.A. 6, 2008) 273 Fed. Appx. 480, 2008 U.S. App. LEXIS 7967 .....	8, 9
<i>State v. Adams</i> , 103 Ohio St.3d 508, 2004-Ohio-5845 .....	5, 6
<i>State v. Baer</i> (1981), 67 Ohio St.2d 220 .....	4, 6
<i>State v. Blankenship</i> (1988), 38 Ohio St.3d 116 .....	2, 9, 10
<i>State v. Brown</i> , Slip Opinion 2008-Ohio-4569 .....	1, 2, 9, 10
<i>State v. Cabrales</i> , 118 Ohio St.3d 54, 2008-Ohio-1625 .....	4, 7
<i>State v. Donald</i> (1979), 57 Ohio St.2d 73.....	5
<i>State v. Evans</i> , Cuyahoga App. No. 89057, 2008-Ohio-139, pending as Case No. 2008-0363 .....	1
<i>State v. Fears</i> (1999), 86 Ohio St.3d 329 .....	5
<i>State v. Foster</i> , Hamilton App. No. C-050378, 2006-Ohio-1567.....	8
<i>State v. Frazier</i> (1979), 58 Ohio St.2d 253.....	7
<i>State v. Foust</i> , 105 Ohio St.3d 137, 2004-Ohio-7006.....	6
<i>State v. Garrett</i> , S.Ct. Case No. 2008-1802.....	1
<i>State v. Logan</i> (1979), 60 Ohio St.2d 126.....	5
<i>State v. Mitchell</i> (1983), 6 Ohio St.3d 416 .....	7
<i>State v. Norman</i> (1999), 137 Ohio App.3d 184 .....	9
<i>State v. Rance</i> (1999), 85 Ohio St. 3d 632.....	passim
<i>State v. Winn</i> , S.Ct. Case No. 2007-0184 .....	1
<i>United States v. Halper</i> (1989), 490 U.S. 435 .....	2

### **STATUTES**

R.C. 2903.11 .....	1
R.C. 2941.25 .....	passim

### **CONSTITUTIONAL PROVISIONS**

Fifth Amendment, United States Constitution.....	passim
Article I, Section 10, Ohio Constitution .....	2

### **LEGISLATIVE REPORTS**

109 <sup>th</sup> General Assembly, Ohio Legislative Services Commission, Summary of Am. Sub. H.B. 511.....	5, 6, 7
Ohio Legislative Services Commission, Proposed Ohio Criminal Code, Final Report of the Technical Committee to Study Ohio Criminal Laws and Procedure, March, 1971 .....	5, 7

## INTEREST OF AMICUS CURIAE

The Office of the Cuyahoga County Public Defender (“your amicus”) is legal counsel to more than one-third of all indigent persons indicted for felonies in Cuyahoga County. As such the Office is the largest single source of legal representation of criminal defendants in Ohio’s largest county. The instant case is of great importance to your amicus as well as to the people of the State of Ohio. This Court’s ruling on the issues presented will directly affect the sentences to be imposed in numerous cases. The Cuyahoga County Public Defender’s Office has represented hundreds, if not thousands, of Ohioans who have been or will be sentenced to multiple offenses and where R.C. 2941.25 may or may not apply, depending upon how that statute is interpreted.<sup>1</sup>

## ARGUMENT

### *In Reply in Support of the First Proposition of Law posited by the Appellant:*

**Aggravated robbery and robbery are allied offenses of similar import, and a defendant cannot be convicted of both offenses if the charges originate out of the same conduct. R.C. 2941.25(A), (B). A defendant also may not be convicted of two counts of felonious assault, charged pursuant to R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2), if both charges arise from the same conduct towards the same victim.**

This Court should determine whether two offenses are allied under R.C. 2941.25 by asking two questions:

First, as an abstract matter, are the two offenses sufficiently related that they can both be committed by the same conduct?

---

<sup>1</sup> The Cuyahoga County Public Defender was counsel of record in *State v. Brown*, Slip Opinion 2008-Ohio-4569, which is discussed infra. The Cuyahoga County Public Defender is counsel of record in *State v. Evans*, Cuyahoga App. No. 89057, 2008-Ohio-139 which is currently pending before the Court as Case No. 2008-0363, and is cited by Appellee State of Ohio at n. 10 of its Brief of Appellee. The Cuyahoga County Public Defender has filed as an amicus curiae in *State v. Winn*, 2007-0184, which has been heard and submitted. In addition, the Cuyahoga County Public Defender is counsel of record in *State v. Garrett*, Case No. 2008-1802, whose discretionary appeal has been noted in this Court but has yet to be either accepted or dismissed.

Second, as a factual matter, were the two offenses committed as part of the same conduct?

Cf. *State v. Blankenship* (1988), 38 Ohio St.3d 116, 119 (Whiteside, J., sitting by designation and concurring)

Analysis of the first question requires a comparison of the elements of the two crimes but does not require that the elements be in lockstep with each other. Analysis of the second question requires an examination into the specific criminal conduct, including the duration of the offense, the number of victims and the manner of commission. Only if the answers to both questions are “yes,” should the offenses be merged under R.C. 2941.25.

As discussed below, this test allows the Court to interpret R.C. 2941.25 in a practical fashion that is consistent with its legislative intent.

#### **The Protections of the Double Jeopardy Clause**

As this Court has noted, the Double Jeopardy Clause of the United States Constitution and Article I, Section 10 of the Ohio Constitution guarantee a criminal defendant three protections:

- (1) The defendant will not be prosecuted a second time after acquittal for the same offense;
- (2) The defendant will not be prosecuted a second time after conviction for the same offense; and
- (3) The defendant will not be punished more than once for the same offense.

*State v. Brown*, Slip Opinion No. 2008-Ohio-4569. Accord, *United States v. Halper* (1989), 490 U.S. 435, 440; *North Carolina v. Pearce* (1969), 395 U.S. 711, 717.

The proposition of law at issue herein raises the federal double jeopardy implications of multiple punishments for multiple offenses. The Double Jeopardy Clause’s prohibition on

multiple punishments provides a floor that prohibits double punishment for greater and lesser-included offenses unless there is a State legislative intent to the contrary. *Blockburger v. United States* (1932), 284 U.S. 299. In this context, “the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Missouri v. Hunter* (1983), 459 U.S. 359, 365.

Under *Blockburger*, the Double Jeopardy Clause thus provides the States with the ability to grant either greater or lesser protections against multiple punishments than does the United States Constitution. If a State so desires, it can prohibit multiple punishments even where offenses are not nested one in the other as greater and lesser-included offenses. On the other hand, if a State so desires, it can expand multiple punishments to even include the administration of multiple punishment for both the greater offense and the lesser-included offense. See, *State v. Rance* (1999), 85 Ohio St.3d 632.

What *Blockburger* does, however, is to establish a default standard – where a State is silent as to its intention, the *Blockburger* test applies and multiple punishments are limited to those offenses are included within one another as greater and lesser offenses. *Rance*.

### **The Language of R.C. 2941.25**

In light of *Blockburger*, an analysis of the issue of multiple punishment within a State must turn to the laws of that State. In Ohio, the General Assembly has chosen not to simply rely upon the *Blockburger* default standard of only prohibiting punishment for greater and lesser-included offenses. *Rance*. Rather, the General Assembly has specifically addressed the issue of multiple punishments via the enactment of R.C. 2941.25:

(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.

**The Purpose of R.C. 2941.25: To Expand *Blockburger* and Establish a Broader Protection from Multiple Punishments in Ohio**

The General Assembly's purpose in enacting R.C. 2941.25 was to ensure that the *Blockburger* test not be applied in Ohio with respect to multiple punishment. *State v. Baer* (1981), 67 Ohio St.2d 220, 226:

If the General Assembly, by the enactment of R.C. 2941.25, had not intended to prohibit more than one conviction and sentence in cases other than where the offenses are the same for purposes of double jeopardy, there could be no purpose in the enactment of the statute. Clearly, the General Assembly intended to extend the prohibition against multiple convictions and sentences beyond the concept of double jeopardy, by providing in R.C. 2941.25(A) that: "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." (Emphasis added.) We construe the word "may" as used in R.C. 2941.25(A), to have the meaning of "shall," thus giving it the interpretation most favorable to the defendant.

Accord, *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625 at par. 22 (no requirement that "elements of compared offenses must exactly align in order to be allied offenses of similar import under R.C. 2941.25(A).").

This intention to expand the protection against multiple punishment was evinced in the legislative history of R.C. 2941.25:

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.

109<sup>th</sup> General Assembly, Ohio Legislative Service Commission, Summary of Am. Sub. H.B. 511 at 69 (emphasis added).

In the Technical Committee’s opinion, where the same conduct by the defendant technically amounts to two or more related offenses, he should be guilty of only one offense.

Ohio Legislative Service Commission, Proposed Ohio Criminal Code, Final Report of the Technical Committee to Study Ohio Criminal Laws and Procedure, March 1971, at 308.

In the instant case, Appellee State of Ohio fails to grasp the Double Jeopardy Clause’s distinction between the prohibition on multiple *punishment*, which is controlled by R.C. 2941.25, and the prohibition on multiple *prosecution*, which employs the traditional *Blockburger* analysis. Conflating the two standards, the State argues that, because robbery is not a lesser included offense of aggravated robbery under *Blockburger*, the two offenses cannot be allied either. By adhering to a hyper technical interpretation of *Rance*, the State effectively writes R.C. 2941.25 out of existence, a criticism of *Rance* that has previously been voiced in courts below, see *infra*. Under the State’s interpretation, R.C. 2941.25 adds nothing to *Blockburger*’s default standard regarding multiple punishment. A strict *Blockburger* elemental analysis was condemned in *Baer* and is inconsistent with a host of post-*Rance* cases that have applied R.C. 2941.25 to offenses whose elements were not nested within each other to the extent required for them to be greater-and-lesser-included offenses.<sup>2</sup>

---

<sup>2</sup> For example, even though it is neither a greater nor lesser-included offense, kidnapping has traditionally merged with an accompanying crime where the restraint of liberty constituting the kidnapping was incidental to the accompanying crime. E.g., *State v. Logan* (1979), 60 Ohio St.2d 126 (kidnapping allied with aggravated robbery); *State v. Donald* (1979), 57 Ohio St.2d 73 (kidnapping allied with rape). This has not changed since *Rance*. E.g., *State v. Fears* (1999), 86 Ohio St.3d 329 (kidnapping and robbery are allied); *State v. Adams*, 103 Ohio St.3d 508, 526,

## **The Two-Part Criteria of R.C. 2941.25**

That the General Assembly intended to limit the application of multiple convictions for multiple offenses in Ohio only begins this Court's inquiry. The natural question that then arises is "How does R.C. 2941.25 limit multiple punishment?" The statute does so via a two-part test. First, in part (A), the statute requires a trial court to examine the two offenses and determine if they are allied offenses of similar or dissimilar import; by the express terms of the statute, only allied offenses of similar import fall under R.C. 2941.25(A). Second, the statute requires the trial court to determine whether the offenses were committed either separately or with a separate animus. R.C. 2941.25(B). *Id.* Only allied offenses of similar import that were not committed separately and were not committed with separate animi are covered by the statute.

### **The First Criterion: Are the Offenses Allied and of Similar Import?**

The first criterion under the statute, encompassed by R.C. 2941.25(A), is the criterion at issue in this case.

The key to legislative intent from use of the words "allied offenses of similar import" in R.C. 2941.25(A), and "offenses of dissimilar import," in R.C. 2941.25(B), arises in great part from the word "import," which by dictionary definition would have reference to "allied offenses" of similar importance, consequence and signification intended from use of the word "import."

*Baer*, 67 Ohio St.2d at 226.

The legislative history made clear that not all offenses were of similar import merely because they were committed in the same transaction. For example, robbery and murder, i.e., the purposeful killing of another, were considered by the Legislative Service Commission to be "dissimilar offenses." 109<sup>th</sup> General Assembly, Ohio Legislative Service Commission, Summary

---

2004-Ohio-5845 (kidnapping and rape), *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006 (same). The allied nature of kidnapping is again before the Court in *Winn*.

of Am. Sub. H.B. 511 at 69.<sup>3</sup> This Court's caselaw has also recognized that certain offenses present disparate risks that cause them not to be of "similar import." *State v. Mitchell* (1983), 6 Ohio St.3d 416, 419 ("General Assembly intended to distinguish between aggravated burglary and theft and make them separately punishable.")<sup>4</sup>

On the other hand, the legislative history indicated that the determination of what offenses were and were not of similar import was not based on a strict elemental analysis, but on a common-sense evaluation of the types of offenses involved. Theft and receiving stolen property were considered the prototypical example of merged offenses. 109<sup>th</sup> General Assembly, Ohio Legislative Service Commission, Summary of Am. Sub. H.B. 511 at 69. But other offenses were also considered of similar import.

For example, obtaining title to an automobile by deception can technically constitute an offense under proposed section 2913.41 (Fraud) [hiring a motor vehicle with purpose to defraud] or proposed section 2913.43 (Securing writings by deception). Under division (A) of proposed section 2941.25, the offender could be indicted for both but convicted of only one.

Ohio Legislative Service Commission, Proposed Ohio Criminal Code, Final Report of the Technical Committee to Study Ohio Criminal Laws and Procedure, March 1971, at 308.

This is not to say that the abstract elemental analysis of *Rance* is misplaced. Rather, it is to reinforce what *Cabrales* recently recognized: That *Rance* was not to be so scrupulously interpreted as has been done by a myriad of lower courts.

---

<sup>3</sup> At the time of the 109<sup>th</sup> General Assembly, the felony murder provision of R.C. 2903.02(B) was not yet in existence. "Murder," as that term is used in the legislative history, referred to the purposeful killing of another.

<sup>4</sup> Prior to *Mitchell*, burglary offenses had been distinguished from the crime that was the object of the burglary by virtue of their having been "separate" under R.C. 2941.25(B), because the burglary was complete upon entry into the structure, and the object crime was not committed until after entry had been accomplished. See generally, *State v. Frazier* (1979), 58 Ohio St.2d 253 (assuming, arguendo, that offenses are of similar import, aggravated burglary was

### **Why *Rance* Has Been Misinterpreted: Formulating a Workable Standard.**

That *Rance* has been the subject of misinterpretation by other courts is clear. *Cabrales*. The fluidity of post-*Rance* precedent in the lower courts has resulted in inconsistency in the interpretation of R.C. 2941.25. See *McKitrick v. Jeffries* (N.D. Ohio), 2006 U.S. Dist. LEXIS 29472 at 24-30 (collecting cases). But trying to explain what went wrong is not as simple a task. And while this Court's decision in *Cabrales* has provided meaningful insight into what *Rance* did *not* intend, the question still arises as to how to apply *Rance* in the future.

Your amicus submits that the answer lies in recognizing that the convictions that are being compared in the abstract under R.C. 2941.25(A) must be examined in the context of their *having both been committed*. This merely recognizes what the jury has already determined – both offenses were committed. When this becomes the starting point, the analysis under R.C. 2941.25(A) becomes in keeping with the legislative intent and this Court's earlier precedent.

Thus, the analysis under R.C. 2941.25(A) asks not, for example, “whether one can commit aggravated robbery without also committing robbery.” This question, which is at the core of the State's analysis, results in the type of absurd answers condemned in *Cabrales* as well as by the myriad of pre-*Cabrales* cases that have criticized *Rance*. See, e.g., *State v. Foster*, Hamilton App. No. C-050378, 2006-Ohio-1567 (applying *Rance* and affirming convictions for transporting drugs and possessing the same drugs); see also, *id.* (Painter, J. concurring) (criticizing *Rance* as “wrongly decided”). See also, *Palmer v. Haviland* (S.D., Ohio 2005), 2005 U.S. Dist. LEXIS 41864 (criticizing *Rance* but, following its dictates, finding no constitutional violation where defendant convicted of aggravated robbery and robbery), *aff'd* (C.A. 6, 2008),

---

nonetheless completed by virtue of entry into home, before aggravated robbery was committed once inside the home).

273 Fed. Appx. 480, 2008 U.S. App. LEXIS 7967 (unpublished); *State v. Norman* (1999), 137 Ohio App.3d 184, 203 (same).

Rather, the first question in an allied-offense analysis that needs to be asked is “Now that the jury has told us that both offenses were committed, are they so related that the two crimes could be committed by the same conduct.” This latter question directs the trial court to examine the elements of the crime without delving into the facts of the case. *Rance*. It also allows the Court to divine legislative intent by looking at how the General Assembly envisioned the two offenses, for example, by examining whether the General Assembly looked upon the two offenses as being alternate means of committing a single offense. *Brown*.

This first step of the allied-offense analysis suggested by your amicus will avoid the strained hypothetical analysis that has plagued post-*Rance* decision-making in lower courts, see *supra*. Under the analysis suggested by your amicus:

In determining whether the two offenses are allied offenses of similar import, a comparison of the elements of the two offenses must be made. However, in making this comparison, it is not a comparison as to whether one offense cannot possibly be committed without committing the other, but rather whether the nature of the elements of the offenses is such that in some instances they may overlap, that is, that in certain instances, both crimes may be committed by the same conduct. 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.

*State v. Blankenship* (1988), 38 Ohio St.3d 116, 119 (Whiteside, J., sitting by designation and concurring) (citations omitted).

If the answer to this first question is “yes,” then the Court must also address the second question: were the two offenses committed as part of the same conduct? This second question has not posed problems for lower courts in the past and there is no reason to believe that it will in the future. In answering this second question, courts look to seek whether the two offenses were

committed as part of a single course of conduct with a common animus. A single course of conduct “must be such as to constitute the commission of all of the elements of one offense and at least one of the elements of the other.” Id. Even then, the two offenses must be joined by “the same purpose, intent or motive since this is the meaning of the word ‘animus.’” Id.

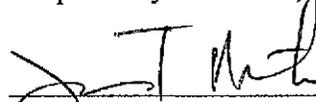
### **Applying the Revised Allied Offense Standard to the Case Sub Judice**

Under the analysis proposed herein, aggravated robbery and robbery are allied and of similar import under R.C. 2941.25(A): When aggravated robbery and robbery have been committed in the same transaction with respect to the same victim, then one act of robbery has resulted in a victim having been robbed but one time – by a single armed robber who, in committing a single theft offense, used a gun (aggravated robbery) to inflict or attempted to inflict physical harm (robbery). While a trial judge, in fashioning a single sentence, can consider the use of the firearm and the injuries that were caused or could have been caused, the trial judge cannot punish Mr. Harris twice. Similarly, there can be but one felonious assault as to each victim, a conclusion that has been pre-ordained by the intervening decision in *Brown*.

### **CONCLUSION**

Wherefore, the decision of the court of appeals should be reversed.

Respectfully submitted,

 per   
JOHN T. MARTIN  
CULLEN SWEENEY  
Assistant Public Defenders

**CERTIFICATE OF SERVICE**

A copy of the foregoing Reply Brief was sent via U.S. mail to Theresa Haire, Counsel for Mr. Harris 8 East Long Street, Columbus, Ohio 43215, and Assistant County Prosecutor James Keeling, Counsel for the State of Ohio, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202 this 20th day of October, 2008.

  
JOHN T. MARTIN, ESQ.  
Assistant Public Defender

*per James*