

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO**

Plaintiff-Appellee,

vs.

**KYLE CARVER**

Defendant-Appellant.

**CASE NO. 2012-0007**

**ON APPEAL FROM THE  
MONTGOMERY COUNTY COURT  
OF APPEALS, SECOND  
APPELLATE DISTRICT**

**COURT OF APPEALS  
CASE NO: 24400**

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**MEMORANDUM IN RESPONSE**

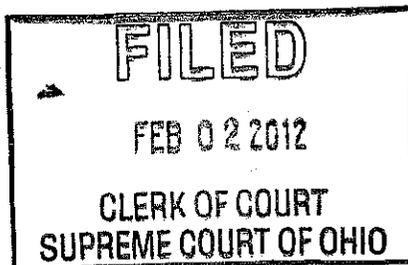
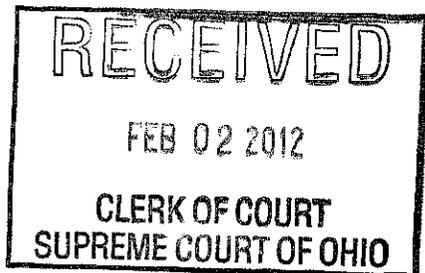
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## **WHY LEAVE TO APPEAL SHOULD NOT BE GRANTED**

This Court should decline to hear Carver's appeal because this case does not involve a substantial constitutional question, nor does it raise a matter of public or great general interest. Instead, this case involves the application of statutory law, with no constitutional implications whatsoever. Likewise, in applying R.C. 2941.25, Ohio "allied-offenses" statute, the court of appeals based its decision on facts unique to Carver's case. And even Carver himself concedes that the court of appeals, in applying the standard for determining whether offenses are allied offenses of similar import that was set forth by this Court in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, applied the standard correctly. Accordingly, Carver brings this appeal simply because he disagrees with the court of appeals' factual findings. This Court, therefore, should not allow this appeal.

## **STATEMENT OF THE CASE**

On March 10, 2005, Kyle Carver was indicted by the Montgomery County on charges of Kidnapping, Felonious Assault, Unauthorized Use of a Motor Vehicle, Gross Sexual Imposition and five counts of Rape. A jury convicted him of the Kidnapping, Felonious Assault and Unauthorized Use of a Motor Vehicle charges, acquitted him of four counts of Rape, and hung on the remaining two counts.<sup>1</sup> On October 19, 2005, Carver received an aggregate sentence of 19 years in prison, which broke down as follows: 10 years for kidnapping; consecutive to 8 years for Felonious Assault; consecutive to 12 months for Unauthorized Use of a Motor Vehicle. He was also designated a sexually-oriented offender.

Carver's conviction and sentence was affirmed on both direct appeal and a reopened direct appeal. *State v. Carver*, 2<sup>nd</sup> Dist. No. 21328, 2006-Ohio-5798, 2006 WL 314308; *State v.*

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<sup>1</sup>The one count of Rape and one count of Gross Sexual Imposition on which the jury hung were subsequently dismissed by the State.

*Carver*, 2<sup>nd</sup> Dist. No. 21328, 2008-Ohio-4631, 2008 WL 4183982. This Court declined further review on three occasions. *State v. Carver*, 113 Ohio St.3d 1441, 2007-Ohio-1266, 863 N.E.2d 658; *State v. Carver*, 113 Ohio St.3d 1516, 2007-Ohio-2208, 866 N.E.2d 513; *State v. Carver*, 120 Ohio St.3d 1507, 2008-Ohio-4631, 900 N.E.2d 624.

Carver later filed a motion for post-conviction relief, which was denied by the trial court. The court of appeals affirmed the trial court's decision. *State v. Carver*, 2<sup>nd</sup> Dist No. 22407, 2008-Ohio-5516, 2008 WL 4691781.

On December 3, 2010, Carver was returned to court pursuant to R.C. 2929.191 so that the provisions of his post-release control could be corrected. Prior to re-sentencing, Carver raised for the first time the issue of merger of his convictions. The trial court rejected Carver's arguments and re-imposed the original term of imprisonment. The Second District Court of Appeals affirmed the trial court's decision, finding that, under the facts of this case, the acts committed by Carver that constituted the offense of Kidnapping were committed separately from the acts constituting the offense of Felonious Assault. *State v. Carver*, 2<sup>nd</sup> Dist. No. 24400, 2011-Ohio-5955, 2011 WL 5822719, ¶ 37-39.

Carver's notice of appeal and memorandum in support of jurisdiction were filed with this Court on January 3, 2012.

### **STATEMENT OF FACTS**

For purposes of this memorandum in response, the State adopts by reference the statement of facts set forth in the court of appeals' opinion below, *Carver*, at ¶ 3-12.

## ARGUMENT

### Response to Carver's First Proposition of Law:

**Where the acts committed by a defendant that constitute Kidnapping are committed separately and with a separate animus then the acts constituting a Felonious Assault, the defendant is not entitled to have his convictions for those offenses merged at sentencing.**

Carver argues that he was entitled to a merger of his Kidnapping and Felonious Assault convictions because, under the new rule established by this Court in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, those offenses were allied offenses of similar import. But as he did in the court of appeals below, Carver misapplies what is meant by the phrase "separate animus" in cases involving Kidnapping charges brought in connection with other charges, and he likewise misinterprets of the facts of this case as they apply to each crime he committed against his victim. Accordingly, a proper application of law and fact, as was performed by the courts of appeals below, reveals that Carver's argument has no merit.

Carver was convicted of Kidnapping, in violation of R.C. 2905.01(A)(4), which provides that no person, by force, threat, or deception, shall remove another person from the place where they are found or restrain the liberty of the other person, in order to engage in sexual activity with the victim against the victim's will. Here, Carver was guilty of Kidnapping because he threatened to strangle "B" if she screamed or made noise, led "B" into the bedroom, told her he was going to "give [her] want [she] wanted," and then forced "B" to have oral sex and vaginal intercourse.

Carver was also convicted of Felonious Assault, in violation of R.C. 2903.11(A)(1), which provides that no person, shall knowingly cause serious physical harm to another. Carver committed Felonious Assault when, after he had already held "B" captive for several hours and had raped her repeatedly, he choked "B" to the point of near unconsciousness.

Carver argues that, according to *Johnson, supra*, these two offenses are allied offenses of similar import and that his convictions should have merged. He's wrong.

According to *Johnson*, the rule for determining when offenses are allied offenses under R.C. 2941.25 and, if allied offenses, when they must merge, is as follows:

Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. \* \* \*

\* \* \* [T]he 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. \* \* \* 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., "single act, committed with a single state of mind." \* \* \*

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

*Johnson*, 128 Ohio St.3d 153 at ¶ 47-50. Accordingly, in affirming the trial court's decision not to merge Carver's Kidnapping and Felonious Assault convictions, the court of appeals applied *Johnson* and concluded that Carver's actions against his victim constituting Kidnapping were not committed by the same conduct constituting his offense of Felonious Assault, i.e., that the offenses of Kidnapping and Felonious Assault were not committed by a single act and with a single state of mind. *Carver*, at ¶ 39-40.

The court of appeals came to this conclusion by also applying the rule set out by this Court in *State v. Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979), which provided the following guidelines for analyzing whether Kidnapping and an offense of similar import are committed with separate animus:

(a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain

separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;

(b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.

*Id.* at syllabus.

In further expanding upon the holding in *Logan*, this Court subsequently concluded that “prolonged restraint, secretive confinement, and substantial movement apart from that involved in the other crime were factors necessary to establish a ‘separate animus as to each offense sufficient to support separate convictions’ for Kidnapping and another crime. *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, ¶ 134, citing *Logan* at subparagraph (a) of the syllabus. Applying these principles here shows that the court of appeals was correct in concluding that Carver’s commission of Kidnapping and Felonious Assault were committed by separate conduct and with a separate animus.

The Kidnapping was committed for the purpose of engaging in sexual activity – and Carver fulfilled his purpose when he raped and molested “B” on multiple separate occasions over the course of three hours. The restraint was “prolonged,” lasting from approximately 3:00 a.m. to approximately 6:00 a.m., and the confinement was “secretive,” occurring within “B’s” home. And the “force, threat or deception” employed by Carver in restraining “B” and in committing the Kidnapping was his repeated threat to strangle “B” if she screamed or made a noise.

On the other hand, Carver’s commission of Felonious Assault had nothing to do with engaging in sexual activity or in otherwise straining “B” of her liberty – Carver kidnapped “B” for the purpose of engaging in sexual activity and not in order to assault her. Rather, Carver

committed Felonious Assault when, for no apparent reason, he choked “B” to the point of near unconsciousness – after he had already kidnapped “B” and after he had already raped her repeatedly. Thus, while choking “B” can be construed as a form of restraint, it was not, under the facts in this case, restraint incidental to Carver’s ultimate purpose of kidnapping “B” in order to engage in sexual activity. Accordingly, because Carver’s offenses were committed separately and with a separate animus, they did not merge.

And finally, the facts demonstrate that the restraint associated with Carver choking “B” exposed “B” to a substantial increase in harm, above and beyond the restraint necessary for Carver to achieve his purpose of engaging in sexual activity. For that reason as well, his conduct is deemed to have been committed with a separate animus, *State v. Logan*, supra, at subparagraph (b) of the syllabus.

In short, as the court of appeals correctly found, the offenses of Kidnapping and Felonious Assault for which Carver was convicted were not committed by a single act and with a single state of mind and, therefore, did not merge for sentencing. Therefore, given that this case does not involve a substantial constitutional question, does it raise a matter of public or great general interest, and because the court of appeals’ decision below is well-reasoned and limited solely to the unique facts of Carver’s own particular case, leave to appeal should not be granted.

**Response to Carver's Second Proposition of Law:**

**A court does not deprive a defendant of his right to trial by jury and due process simply because, in ascertaining whether two offenses are allied offenses of similar import subject to merger, the court relies upon all of the defendant's conduct in committed his many offenses, and not just the minimum level of conduct necessary to complete each crime.**

Carver suggests that the court of appeals violated his right to trial by jury and deprived him of his right to due process when it look at the totality of his conduct, as established by the evidence at trial, as opposed to limiting itself to consideration of only the amount of evidence necessary to satisfy the elements of the crimes charged. Carver is mistaken. As required by *Johnson, supra*, a court *must* consider all of the defendant's conduct in order to properly determine "whether it is possible to commit one offense and commit the other with the same conduct." *Johnson*, at ¶ 48. And then, if the multiple offenses can be committed by the same conduct, a court *must* consider all of the defendant's conduct in order to properly determine "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Id.* at ¶ 49. That is precisely what the court of appeals did in this case and, in doing so, the court of appeals did not err.

Because there is no merit to Carver's second proposition of law, leave to appeal should not be granted.

**CONCLUSION**

For the reasons set forth above, the State of Ohio, Appellee herein, respectfully requests that this Court find Carver's propositions of law meritless and deny him jurisdiction to appeal.

Respectfully submitted,

**MATHIAS H. HECK, JR.**  
PROSECUTING ATTORNEY

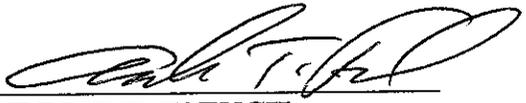
By

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum in Response was sent by first class mail on this 1<sup>st</sup> day of February, 2012 to: Barry W. Wilford, 492 City Park Avenue, Columbus, OH 43215.

By

  
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