

ORIGINAL

IN THE SUPREME COURT OF OHIO
CASE NO. 2012-1741

STATE OF OHIO	:	
Plaintiff-Appellee	:	On Appeal from the Tenth Appellate
	:	District, Franklin County, Ohio
v.	:	Case No. 11AP-788
	:	
ARNALDO R. MIRANDA	:	
Defendant-Appellant	:	

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

RON O'BRIEN (#0017245)
Franklin County Prosecuting Attorney
SETH GILBERT (#0072929)
Assistant Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
(614) 525-3555
slgilbert@franklincountyohio.gov

DAVID RIESER (#0025247)
Two Miranova Place, Suite 710
Columbus, Ohio 43215-7052
(614) 444-6556

COUNSEL FOR APPELLEE,

COUNSEL FOR APPELLANT

TIMOTHY J. McGINTY
Cuyahoga County Prosecuting Attorney
DANIEL T. VAN (#0084614)
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800
dvan@prosecutor.cuyahogacounty.us

COUNSEL FOR AMICUS CURIAE,
CUYAHOGA COUNTY PROSECUTOR'S OFFICE

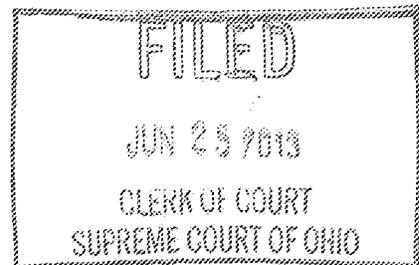


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INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE

This case presents this Court with the opportunity to address the issue of what constitutes offenses of dissimilar import as opposed to offenses of similar import that are committed separately or with separate animus. The distinction between dissimilar import and similar import becomes important within the context of engaging in a pattern of corrupt activity (RICO) prosecutions.

The Cuyahoga County Prosecutor's Office, regularly prosecutes organized criminal activity efforts under Ohio's RICO statutes. Organized crime have an interest in a strict conduct based approach to the allied offense test; as such an approach would result in reduced culpability under the RICO statutes. Under a strict conduct based approach, pattern of corrupt activity counts will merge with the predicate offenses, despite a legislative intent to impose cumulative punishments.

Since this Court's decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Eighth District has used the analysis set forth in the lead opinion to determine whether offenses are allied offenses of similar import. A conduct-based analysis, while useful to analyze two offenses of similar import, does not consider an important initial question: whether two offenses are of similar import or are of dissimilar import. Under the plain language of the allied offense statute, conduct is only considered when two offenses of similar import are implicated.

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 Appellee, State of Ohio, in its merit brief.

LAW AND ARGUMENT

AMICUS CURIAE'S PROPOSITION OF LAW I: WHEN DETERMINING WHETHER TWO OFFENSES OF SIMILAR OR SAME KIND ARE ALLIED OFFENSES OF SIMILAR IMPORT SUBJECT TO MERGER UNDER R.C. 2941.25(a), THE CONDUCT OF THE ACCUSED MUST BE CONSIDERED (STATE V. JOHNSON, 128 Ohio St.3d 153, 2010-Ohio-6314, modified).

I. Background

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 lead 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 Eighth District has referred to *Johnson* as establishing the proper analysis for determining whether offenses qualify as allied offenses subject to merger. *State v. Walker*, 8th Dist. No. 97648, 2012-Ohio-4274, ¶92. This application looks solely to conduct in determining whether offenses are allied offenses of similar import, and fails to consider whether offenses are of dissimilar import. As explained below, offenses of dissimilar import can be construed as a distinct term from similar offenses committed separately or with separate animus.

II. Statutory Construct

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”.

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.

In construing R.C. 2941.25, the language of R.C. 2941.25(A) plainly indicates that a defendant can be indicted or charged with two or more allied offenses of similar import; however the defendant can be convicted of only one. R.C. 2941.25(A), which does not provided a test to what constitute allied offenses of similar import merely states the fact that a defendant cannot be convicted of two or more allied offenses of similar import.

The language of R.C. 2941.25(B) clearly recognizes a distinction between offenses that are of “dissimilar import” and offenses that are of “similar import” that do not merge due to separate animus or separate conduct. Parsing plain language of R.C. 2941.25(B) 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. Thus, R.C. 2941.25 can be

construed as recognizing three categories of multiple offenses: (1) allied offenses of similar import; (2) offenses of similar import that are not allied; and (3) offenses of dissimilar import.

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.

This allied offense statute itself is used to enforce the constitutional protection against double jeopardy and to prevent 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*, 45 Ohio St.2d 238, 242, 344 N.E.2d 133 (1976) 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. *Botta*, 27 Ohio St.2d 196, par. 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).

It is with these principles in mind that the Legislature created R.C. 2941.25. While the legislature did not define many of the terms found in the statute, they did provide committee notes containing specific examples of what they opined constituted allied offenses of similar and/or dissimilar import.

The Committee provided the following examples:

- 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 Committee opined 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.”

As noted above, R.C. 2941.25 provides that some offenses will never merge. Those offenses are dissimilar. See also *State v. Brown*, 119 Ohio St.3d 447, 895 N.E.2d 149, 2008-Ohio-4569, ¶17.

By limiting the allied offense analysis to conduct, an important part of the analysis is overlooked – whether offenses are of similar import or of dissimilar import. In order to recognize the distinction between similar offenses and dissimilar offenses, it is necessary to clarify or modify *Johnson*. Therefore, the syllabus in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314 should be modified to the as follows:

When determining whether two offenses *of similar or same kind* are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered. (*State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, *modified*).

III. Determination of whether two offenses are dissimilar.

Even with a modification of *Johnson*, there is still a need to clarify the meaning of offenses of dissimilar import. Before *Johnson* where the same offense was committed against multiple victims, the offenses were referred to as offenses of dissimilar import rather than the same offense committed with separate animus.

In *State v. Jones*, 18 Ohio St.3d 116, 480 N.E.2d 408 (1985), multiple counts of aggravated vehicular homicide against each person that was killed by a reckless driver was referred to as offenses of dissimilar import. *Jones*, at 118. Following *Jones*, multiple counts of aggravated arson, where six different people were placed at risk was also referred to as offenses of dissimilar import. See *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶48. The Eighth District recently referred to multiple victims as providing a separate animus for each offense but also referred to the fact that separate animus create a “dissimilar import” for each person affected by the conduct. See *State v. Piscura*, 8th Dist. No. 98712, 2013-Ohio-1793, ¶17. The example of multiple counts of the same offense against multiple victims being referred to both as offenses with separate animus and as dissimilar offenses illustrates the need to clarify the difference between offenses of dissimilar import and offenses of same or similar kind committed with separate animus.

Prior decisions from this Court support an analysis of legislative intent and the consideration of same/separate criminal wrongs and same/separate criminal harm in determining whether offenses are of similar import or are offenses of dissimilar import.

Offenses can be construed as being offenses of dissimilar import when the legislature manifested 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. Conversely, “offenses are of ‘similar import’ when the underlying criminal conduct involves similar criminal wrongs and similar resulting harm.” *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶67 (O’Connor, C.J., concurring). Offenses of same kind could be understood as multiple counts of the same exact offense.

Excluding conduct from the determination of whether two offenses are of dissimilar import would allow consideration of whether the General Assembly intended cumulative punishments. In this case, the Tenth District determined that, “[a] person may be punished for multiple offenses arising from a single criminal act so long as the General Assembly intended cumulative punishment.” *State v. Miranda*, 10th Dist. No. 11AP-788, 2012-Ohio-3971, ¶8 citing *State v. Thomas*, 10th Dist. No. 10AP-557, 2011-Ohio-1191, ¶19 and *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶25.

Again, the language of R.C. 2941.25(B) would indicate that a defendant’s conduct or animus is only considered when the two offenses are similar or the same.

Under a strict conduct based approach, any two offenses can theoretically be construed as allied offenses of similar conduct if similar conduct is involved, yet the two offenses are intended to punish different criminal wrongs. The strict conduct based approach would also fail to take into account instances in which the General Assembly has intended cumulative punishment.

AMICUS CURAIE'S PROPOSITION OF LAW II: PATTERN OF ENGAGING IN CORRUPT ACTIVITY COUNTS ARE NOT SUBJECT TO MERGER WITH THE PREDICATE OFFENSE BECAUSE THE GENERAL ASSEMBLY INTENDED SEPARATE PUNISHMENTS.

As indicated above, offenses are of dissimilar import when the legislature manifested 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. Legislative intent that offenses are of dissimilar import is established by proof that the legislature intended cumulative punishment. Therefore, if the legislature had intended that a defendant is punished for both offenses, then the offenses are considered dissimilar, and conduct is not considered.

In *State v. Schlosser*, 79 Ohio St.3d 329, 681 N.E.2d 911 (1997), this Court considered the question of whether the General Assembly intended cumulative punishments under Ohio's RICO statute. This Court held that Ohio's RICO statute, R.C. 2923.32(A)(1), plainly indicated a purpose to impose strict liability for the pattern of corrupt activity involving the criminal enterprise.

The Eighth District in *State v. Moulton*, 8th Dist. No. 93726, 2010-Ohio-4484, held that “Ohio’s RICO statute, on the other hand, criminalizes a pattern of corrupt activity and imposes liability for a criminal enterprise.” *Moulton*, at ¶35. Following the Eleventh District’s decision in *State v. Dudas*, 11th Dist. No. 2008-L-09 and 2008-L-110, 2009-Ohio-1001, the Eighth District held that “Ohio’s RICO statute was enacted to criminalize the pattern of criminal activity and is not similar to the underlying predicate acts [and] that the Ohio legislature manifested an intention to permit separate punishments for the commission of a pattern of corrupt activity and its predicate crimes.” *Moulton*, at ¶38. The Tenth District held that the 2006 amendments to R.C. 2923.32 did not manifest an intent to permit merger of corrupt activity convictions with predicate offenses. *Miranda*, 10th Dist. No. 11AP-788, 2012-Ohio-3971, ¶11.

Nevertheless, even if considered similar offenses, courts have permitted multiple convictions, finding separate animus as to the RICO charge and the predicate offense since the formation of a criminal enterprise is separate from the intent to commit the predicate offense. See *State v. Dodson*, 12th Dist. No. CA2010-08-191, 2011-Ohio-622, ¶65. This can be distinguished from the examples of merger of Murder in violation of R.C. 2903.02(B) with the predicate offense as reviewed in *Johnson*, 128 Ohio St.3d 153, since R.C. 2903.02(B) only requires the intent to commit the predicate offense and not the intent to cause death.

CONCLUSION

Accordingly, the amicus curiae urges this Court to affirm the decision of the Tenth District in *State v. Miranda*, 10th Dist. No. 11AP-788, 2012-Ohio-3971, that Ohio's RICO statute and the predicate offense are not allied offenses of similar import that are subject to merger.

Respectfully Submitted,

TIMOTHY J. MCGINTY
Cuyahoga County Prosecuting Attorney

By: Daniel T. Van *per telephone*
DANIEL T. VAN (#0084614) *authority*
Assistant Prosecuting Attorney *0072929*
1200 Ontario Street *SLG*
Cleveland, Ohio 44113
(216) 443-7800
dvan@prosecutor.cuyahogacounty.us

CERTIFICATE OF SERVICE

A copy of the foregoing Brief Of Amicus Curiae Cuyahoga County Prosecutor's Office On Behalf Of Appellee, State Of Ohio has been sent this 25th day of June 2013, to the following:

RON O'BRIEN (#0017245)
Franklin County Prosecuting Attorney
SETH GILBERT (#0072929)
Assistant Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
(614) 525-3555
slgilbert@franklincountyohio.gov

DAVID RIESER (#0025247)
Two Miranova Place, Suite 710
Columbus, Ohio 43215-7052
(614) 444-6556

Daniel T. Van *per telephone authority*
DANIEL T. VAN (0084614) *0072929*
Assistant Prosecuting Attorney *SLG*