

IN THE SUPREME COURT OF OHIO

IN RE: A.G., : CASE NO. 2014-2190  
AN ADJUDICATED :  
DELINQUENT CHILD : ON APPEAL FROM THE CUYAHOGA  
: COUNTY COURT OF APPEALS  
: EIGHTH APPELLATE DISTRICT  
:  
: C.A. CASE NO. 101010

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MERIT BRIEF OF APPELLANT A.G.

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## Statement of the Case and Facts

Around 1:00 in the morning on June 29, 2012, the victim in this case, Mr. Wynn, drove to the beverage store near his home. (6/14/2013 T.p.6). He withdrew money from the ATM inside the store and walked back to his car. (6/14/2013 T.p.17). Mr. Wynn noticed a person coming towards the store. (6/14/2013 T.p.17). He described the incident as follows:

And I'm thinking he's [fixing] to go to the store, but instead he pulls a small revolver out of his pocket and tells me to get in the car. I stood there and looked at him. Then he said, get in the car \* \* \* or I will shoot you. And I looked and I turned and I ran \* \* \*.

(6/14/2013 T.p.17).

As a result of a fingerprint found in Mr. Wynn's car, a complaint was filed in Cuyahoga County Juvenile Court alleging that then 15-year-old A.G. was a delinquent child for committing aggravated robbery and kidnapping, each enhanced with a firearm specification. (Oct. 24, 2012 Complaint, pp.1-2). The State requested that the juvenile court relinquish jurisdiction of the case for adult prosecution; but, the juvenile court retained jurisdiction after determining that A.G. was amenable to rehabilitation. (6/14/2013 T.p.71; 7/12/2013 T.p.30; Feb. 26, 2013 Motion, p.1; July 12, 2013 Journal Entry Discretionary Transfer, p.1).

A.G. admitted to the offenses and the juvenile court adjudicated him delinquent. (11/13/2013 T.p.18; Nov. 19, 2013 Pre-Trial Order Delinquency and Unruly, p.1). For disposition, the juvenile court imposed two one-year firearm specification commitments to be served consecutively with two consecutive one-year commitments to the Ohio

Department of Youth Services (DYS) for kidnapping and aggravated robbery, for a total minimum period of three years, maximum to A.G.'s 21st birthday. (12/20/2013 T.pp.6-7; Jan. 8, 2014 Journal Entry D.Y.S., pp.1-2). The juvenile court recognized that the firearm specifications merged because it was a single incident, but entered separate DYS commitments for aggravated robbery and kidnapping. (12/20/2013 T.pp.6-7; Jan. 8, 2014 Journal Entry D.Y.S., pp.1-2).

A.G. filed a timely appeal to the Eighth District Court of Appeals. In his merit brief, A.G. argued that aggravated robbery and kidnapping should have merged under the analysis in *State v. Johnson. In re A.G.*, 8th Dist. Cuyahoga No. 101010, 2014-Ohio-4927, ¶ 1, citing *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. In response, the State agreed and urged the Eighth District to reverse and remand the matter for a new disposition hearing. A.G. at ¶ 7. However, at oral argument, the State "retracted its concession" and urged the court to affirm. *Id.*

The Eighth District determined that if A.G. were an adult, he would be subject to R.C. 2941.25, and the aggravated robbery and kidnapping offenses would be allied offenses of similar import. *Id.* at ¶ 19. However, because A.G. is a child and is subject to the juvenile code, R.C. 2941.25 does not apply. *Id.* at ¶ 20. Therefore, the commitments for A.G.'s offenses can be imposed consecutively, even though for an adult, these two offenses would merge. *See id.* at ¶ 19.

The Eighth District held that while children are subject to the same double jeopardy protections as adults, "this does not mean that juveniles are constitutionally entitled to the same greater statutory protections afforded adults when it comes to

consideration of allied offenses for double jeopardy purposes." *Id.* at ¶ 23. Instead, "in the absence of clear instruction from the Ohio General Assembly," the Eighth District applied the test set forth in *Blockburger v. United States*. *Id.* at ¶ 24, citing *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The Eighth District reasoned that juvenile courts "are to examine the elements of each offense without regard to the evidence to be introduced at trial." A.G. at ¶ 25. The Eighth District affirmed A.G.'s disposition, and explained that aggravated robbery and kidnapping "are not the same offenses under a *Blockburger* analysis because they each require proof of at least one element that the other does not." *Id.* at ¶ 26.

### Argument

#### Proposition of Law

**The merger analysis set forth in *State v. Johnson* applies to juvenile delinquency proceedings to protect a child's right against double jeopardy.**

The Eighth District Court of Appeals unequivocally announced that had A.G. been an adult, his offenses of aggravated robbery and kidnapping would have merged. A.G., 2014-Ohio-4927, at ¶ 19. But, because A.G. was a child, the juvenile court was permitted to order commitments for each of his offenses to be served consecutively. *Id.* The Eighth District's decision creates a system wherein juvenile and common pleas courts in Ohio must utilize different analyses to determine if offenses should merge. This will lead to unclear and unfair results. To ensure that children are afforded the same double jeopardy rights as adults, and to ensure clarity in the law applied

throughout Ohio courts, this Court should hold that the merger analysis set forth in *State v. Johnson* applies to juvenile delinquency proceedings.

**A. Because children are subject to a loss of liberty after adjudication, they are entitled to the same double jeopardy protections as adults.**

The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution provides that no person shall “be subject for the same [offense] to be twice put in jeopardy of life or limb.” The Double Jeopardy Clause protects against multiple prosecutions for the same offense after acquittal or conviction, and “protects against multiple punishments for the same offense.” *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). The Ohio Constitution also provides Double Jeopardy protections. Article I, Sections 2, 10 and 16, Ohio Constitution.

Double jeopardy protections are essential in the juvenile justice system. Despite its benign conceptions, the delinquency designation in the juvenile justice system “has come to involve only slightly less stigma than the term ‘criminal’ applied to adults.” *In re Gault*, 387 U.S. 1, 23-24, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Consequently, the U.S. Supreme Court has held that children are entitled to the same double jeopardy protections as adults. *Breed v. Jones*, 421 U.S. 519, 531, 95 S.Ct. 1779, 44 L.E.2d 346 (1975) (“[W]e can find no persuasive distinction in that regard between the proceeding conducted in this case \* \* \* [in juvenile court] and a criminal prosecution, each of which is designed ‘to vindicate the very vital interest in enforcement of criminal laws.’”); see also *In re Cross*, 96 Ohio St.3d 328, 2002-Ohio-4183, 774 N.E.2d 258, ¶ 21 (noting that “there are criminal aspects to juvenile court proceedings”).

When 15-year-old Gerald Gault was committed to Arizona's state industrial school for six years for making lewd phone calls to his neighbor, the Supreme Court recognized the double-edged sword of the juvenile system: an adult charged with the same offense was subject to a maximum fine of \$50 or two months in jail. *Gault* at 7-9. A delinquency proceeding provides an opportunity at rehabilitation and a chance for redemption; but, a "determination of delinquency" carries with it "the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21." *Id.* at 36-37. And, the Supreme Court recognized that juvenile incarceration is similar to adult incarceration as follows:

[i]t is of no consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routine and institutional hours.' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide.

*Id.* at 27.

The same rings true for children adjudicated delinquent in Ohio. This Court has recognized that a "child adjudged delinquent is threatened with a substantial infringement of his liberty." *Cross* at ¶ 22. And, a child committed to the Ohio Department of Youth Services is subject "to the loss of his liberty for years \* \* \* comparable in seriousness to a felony prosecution." *Id.*, quoting *Gault* at 36.

**B. Revised Code Section 2941.25 is the codification of the constitutional “merger” principle, and is not an enhanced statutory protection.**

While the Eighth District acknowledged that children are entitled to double jeopardy protections, it found that “this does not mean that juveniles are constitutionally entitled to the same greater statutory protections afforded adults when it comes to consideration of allied offenses for double jeopardy purposes.” A.G., 2014-Ohio-4927, at ¶ 23. The Eighth District has previously held R.C. 2941.25, Ohio’s allied offenses statute, “is inapplicable to juvenile delinquency cases.” *In re H.F.*, 8th Dist. Cuyahoga No. 94840, 2010-Ohio-5253, ¶ 11. In the case below, the Eighth District reasoned that R.C. 2941.25 provides greater protections against double jeopardy for adults, and because there is no corresponding juvenile statute, juveniles are not entitled to these greater protections. A.G. at ¶ 20-22.

“It has long been understood that separate statutory crimes need not be identical—either in constituent elements or in actual proof—in order to be the same within the meaning of the constitutional prohibition.” *Brown*, 432 U.S. at 164, 97 S.Ct. 2221, 53 L.Ed.2d 187. The purpose of the merger doctrine “serves principally as a restraint on courts and prosecutors.” *Id.*

For adults, R.C. 2941.25 is Ohio’s “prophylactic statute that protects a criminal defendant’s rights under the Double Jeopardy Clauses of the [U.S.] and Ohio Constitutions.” *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶ 45. This Court explained that the statute codifies the judicial doctrine of merger and that the statute’s use of “‘allied offenses’ has become the legal-vernacular shorthand for the types of offenses subject to merger.” *Id.* at ¶ 12, n.1; see also *State v. Washington*, 137 Ohio

St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 11. The statute serves the constitutional purpose against “shotgun convictions, that is, multiple findings of guilt and corresponding punishments heaped on a defendant for closely related offenses arising from the same occurrence.” *Johnson* at ¶ 43; *see also* Ohio Legis. Serv. Commission, Final Rep. of the Technical Comm. to Study Ohio Criminal Laws & Procedures, Comments to Proposed Section 2941.25, at 308 (Mar. 1971).

This Court has a lengthy history in merger jurisprudence. *Johnson* at ¶ 10-52. Initially, under the *State v. Rance* analysis, courts were tasked with matching elements of offenses in the abstract. *Id.* at ¶ 44, citing *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699 (1999). But, through several “ad hoc revisions” to the *Rance* analysis, this Court determined that the abstract, elemental matching was difficult, unworkable, and caused “absurd results.” *Johnson* at ¶ 28-40.

This Court overruled *Rance* in favor of a test that reinforces the spirit of the double jeopardy protections against “shotgun convictions.” *Id.* at ¶ 8, 41-43. And, this Court “returned its focus to the plain language and purposes of the merger statute.” *Id.* at ¶ 41. In the new analysis, a court must first determine “whether it is possible to commit one offense and commit the other with the same conduct”; and, second, “whether the offenses were committed by the same conduct, i.e., ‘a single act, committed with a single state of mind.’” *Id.* at ¶ 47-48. “If the answer to both questions is yes, then the offenses are allied offenses of similar import,” and they must be merged. *Id.* at ¶ 50. This Court shifted the focus from abstract principles to a defendant’s specific conduct. *Id.* at ¶ 44.

And, in *State v. Ruff*, this Court reaffirmed the *Johnson* test and added that “offenses are not allied offenses of similar import if they are not alike in their significance and their resulting harm.” *State v. Ruff*, Slip Opinion No. 2015-Ohio-995, ¶ 21. This Court reinforced the “subjective determination” that the analysis requires when examining a particular defendant’s conduct. *Id.* at ¶ 32. This addition supports the purpose of the Double Jeopardy protections. *See id.* at ¶ 10-11, 19.

**C. Because children are entitled to the same double jeopardy protections as adults, the merger analysis set forth in *State v. Johnson* must apply to juvenile proceedings.**

Because the Eighth District determined that adults have greater statutory protections in R.C. 2941.25, it refused to apply the analysis set forth in *Johnson* to A.G.’s case. A.G., 2014-Ohio-4927, at ¶ 23. Instead, the Eighth District reincarnated a *Rance*-like abstract, elemental-matching test for juvenile court. *Id.* at ¶ 24, citing *Blockburger*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306; *Johnson*, 128 Ohio St.3d 153, 942 N.E.2d 1061, at ¶ 42-43 (departing from “the abstract comparison of offenses charged without first considering the defendant’s actual conduct as established by the evidence”). In matching the elements, the Eighth District determined that aggravated robbery and kidnapping “are not the same offenses under a *Blockburger* analysis because they each require proof of at least one element that the other does not.” A.G. at ¶ 26.

The Eighth District acknowledged that aggravated robbery and kidnapping can be committed with the same conduct. *See State v. McGee*, 8th Dist. Cuyahoga No. 92019, 2010-Ohio-2081, ¶ 51-53. And, in A.G.’s case, it found that the same conduct that constituted the aggravated robbery—brandishing the gun and ordering the victim to

get in the car or he would shoot—also constituted the kidnapping and restraining the victim’s liberty. A.G. at ¶ 53. Faced with these facts, every adult court in Ohio would have merged the offenses. *See State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, paragraph one of the syllabus. But, the same is not true in juvenile court.

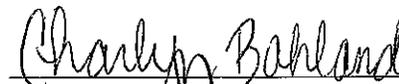
This Court should apply the merger analysis set forth in *Johnson* to juvenile delinquency proceedings. Otherwise, if the *Johnson* analysis is not applied to juvenile adjudications and commitments, youth will serve consecutive commitments for offenses that arose out of the same conduct, committed with a single state of mind, and in blatant violation of their right to be free from double jeopardy when their adult counterparts would not. *See Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶ 47-48. Therefore, like an adult defendant, a juvenile offender cannot be subject to multiple punishments for offenses that should merge. Accordingly, this Court should hold that the merger analysis set forth in *Johnson* must apply to juvenile proceedings.

### Conclusion

This Court should reverse the decision of the Eighth District Court of Appeals and remand this case for resentencing and a proper application of the *State v. Johnson* merger analysis.

Respectfully submitted,

The Office of the Ohio Public Defender

  
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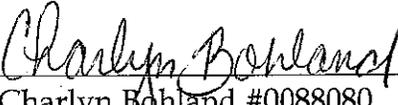
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**Certificate of Service**

I hereby certify that a copy of the foregoing **Merit Brief of Appellant A.G.** was forwarded by regular U.S. Mail this 28th day of July, 2015 to T. Allan Regas, Assistant Cuyahoga County Prosecuting Attorney, 1200 Ontario Street, 8th Floor, Cleveland, Ohio 44113.

  
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IN THE SUPREME COURT OF OHIO

IN RE: A.G., : CASE No. 2014-2190  
AN ADJUDICATED :  
DELINQUENT CHILD : ON APPEAL FROM THE CUYAHOGA  
: COUNTY COURT OF APPEALS  
: EIGHTH APPELLATE DISTRICT  
:  
: C.A. CASE No. 101010

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APPENDIX TO MERIT BRIEF OF APPELLANT A.G.

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IN THE SUPREME COURT OF OHIO

IN RE: A.G.,  
A Minor Child

Case No. 14-2190

On Appeal from the Cuyahoga  
County Court of Appeals,  
Eighth Appellate District,  
Case No. 101010

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Notice of Appeal of Appellant A.G.

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FILED

DEC 19 2014

CLERK OF COURT  
SUPREME COURT OF OHIO

**Notice of Appeal of Minor Child-Appellant A.G.**

A.G. hereby gives notice of appeal to the Supreme Court of Ohio from the Decision and Judgment Entry of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. 101010, on November 6, 2014. This case involves felony-level offenses, a substantial constitutional question, and is of public or great general interest.

Respectfully submitted,

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**Certificate of Service**

A copy of the foregoing Notice of Appeal of A.G. was served by ordinary U.S. Mail this 19th day of December, 2014 to Timothy McGinty, Cuyahoga County Prosecutor, Appeals Division, 8th Floor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113.

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# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

NOV X 6 2014

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JOURNAL ENTRY AND OPINION  
No. 101010

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**IN RE: A.G.  
A Minor Child**

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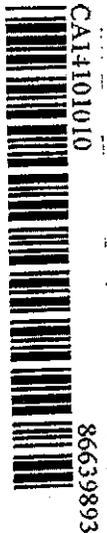
**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Juvenile Division  
Case No. DL 12117864

**BEFORE:** Stewart, J., Rocco, P.J., and E.A. Gallagher, J.

**RELEASED AND JOURNALIZED:** November 6, 2014



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PER APP.R. 22(C)

NOV X 6 2014

CUYAHOGA COUNTY CLERK  
OF THE COURT OF APPEALS  
By                      Deputy

MELODY J. STEWART, J.:

{¶1} This is a case of first impression in our court whereby we are asked to extend the substance and effect of R.C. 2941.25, the allied offenses statute, beyond its statutory boundaries and hold that a juvenile's multiple term of commitment for allied offenses of similar import violates constitutional double jeopardy protections. At this juncture, we decline to do so.

{¶2} On June 29, 2012, at 1:00 a.m., the victim in this case drove to his neighborhood beverage store. While at the store, he withdrew money from an ATM located within the store and proceeded to walk back to his car. As he approached his car, the victim was stopped by a man with a gun. The victim described the incident as: "And I'm thinking he's [fixing] to go to the store, but instead he pulls a small revolver out of his pocket and tells me to get in the car. I stood there and looked at him. Then he said, get in the car, n\*\*\*\*r, or I will shoot you. And I looked and I turned and I ran \* \* \*." Police investigated the robbery and found a fingerprint on the car that did not belong to the victim. The police traced the fingerprint to A.G., then 15 year's old.

{¶3} A two-count complaint was filed in the Cuyahoga County Court of Common Pleas, Juvenile Division against A.G. on October 24, 2012. Count 1 of the complaint alleged that A.G. was a delinquent child for committing aggravated robbery in violation of R.C. 2911.01(A)(1), a first-degree felony if committed by an adult, enhanced with a firearm specification. Count 2 of the

complaint alleged that A.G. was delinquent for committing kidnapping, in violation of R.C. 2905.01(A)(2), a first-degree felony if committed by an adult, also enhanced with a firearm specification. A.G. was subsequently arraigned and a probable cause hearing was scheduled.

{¶4} The state requested that the juvenile court relinquish jurisdiction and bind over A.G. to the general division — (criminal court) for prosecution as an adult. The juvenile court declined to do so after determining that A.G. would be amenable to rehabilitation in the juvenile system.

{¶5} A.G. admitted to the aggravated robbery and kidnapping counts in the complaint, and the court adjudicated him delinquent on both counts. At the disposition hearing on December 20, 2013, the court imposed a commitment to the Ohio Department of Youth Services (DYS) for a minimum of three years with a maximum to A.G.'s 21st birthday. In imposing this commitment, the court found that the firearm specifications merged because both specifications arose out of a single incident, but the court entered separate commitments for the aggravated robbery and kidnapping counts. Altogether, a one-year commitment was imposed for the firearm specification; 12-months for the aggravated robbery count; and 12-months for the kidnapping count. The court ordered that the commitments be served consecutively for a total minimum commitment of three years in DYS.

{¶6} A.G. now appeals the disposition of his case raising two assignments of error for our review. First A.G. argues that the juvenile court erred when it failed to merge his adjudications for aggravated robbery and kidnapping. He contends that aggravated robbery and kidnapping are allied offenses of similar import that should have merged and argues that the failure to merge the two offenses constitutes a violation of the double jeopardy protections of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 16, of the Ohio Constitution. In his second assignment of error, A.G. argues that his trial counsel was ineffective for failing to object to A.G.'s adjudication for allied offenses of similar import, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 16, of the Ohio Constitution.

{¶7} In its appellate brief, the state conceded error on the grounds that juveniles are entitled to the same double jeopardy protections as adults, and that since adult defendants have a constitutional right to be free of double jeopardy that is codified in R.C. 2941.25, then juveniles also have a right to be free from multiple terms of incarceration for offenses that should merge as allied offenses of similar import. During oral argument, however, the state retracted its concession.

{¶8} The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states that no person "shall \* \* \* be subject for the same

offense to be twice put in jeopardy of life or limb.” It has been long understood that the Double Jeopardy Clause “protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.” (Footnotes omitted.) *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969). Accordingly, the Clause serves the function of preventing both successive prosecutions and successive punishments for the same offense. *United States v. Dixon*, 509 U.S. 688, 696, 125 L.Ed.2d 556, 113 S.Ct. 2849 (1993), citing *Pearce*. The Ohio Constitution also provides the same double jeopardy protections as the United States Constitution — proscribing both successive prosecutions and successive punishments for the same offense. Article I, Section 10; *State v. Moss*, 69 Ohio St.2d 515, 518, 433 N.E.2d 181 (1982).

{¶9} The question that courts are often called upon to resolve in double jeopardy cases is what exactly constitutes the “same offense” for double jeopardy purposes. This question is analyzed differently depending on whether the defendant is being reprosecuted for the same offense or the state is attempting to impose multiple punishments for the same offense. In this case, A.G. objects to the separate commitments imposed on the aggravated robbery and kidnapping counts — two offenses that he claims constitute the same offense for double jeopardy purposes.

{¶10} The Fifth Amendment double jeopardy guarantee against successive punishments serves principally as a restraint on court and prosecutorial discretion in sentencing and charging. *Ohio v. Brown*, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). As the Ohio Supreme Court instructs, the hazard, from a constitutional standpoint in double jeopardy cases of this nature, is that a court might impose a greater sentence than prescribed by the legislature. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 25. Accordingly, it is not a violation of double jeopardy for a person to be punished for multiple offenses arising from a single criminal act, as long as the General Assembly intended cumulative punishment for those offenses. *Id.*, citing *State v. Rance*, 85 Ohio St.3d 632, 635, 710 N.E.2d 699 (1999). Thus, the guiding principle for courts when determining what constitutes the "same offense" for double jeopardy purposes is whether the legislature signals its intent to either prohibit or permit cumulative punishments for a criminal act that may qualify as two crimes. *Johnson* at ¶ 25.

{¶11} While prosecutorial conduct and judicial action are constrained by the double jeopardy protections, the legislature remains free to define crimes and fix punishments. See *Moss* at 518, citing *Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981); *Whalen v. United States*, 445 U.S. 684, 689, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); *Brown* at 165. However,

once the legislature has acted by either proscribing or permitting multiple punishments or prosecutions, courts must act in accordance with those guidelines and may not impose more than one punishment for acts that the legislature deems to be the same offense. *Brown* at ¶ 161.

{¶12} It is important to note that the language of the Double Jeopardy Clause in both the United States and Ohio Constitutions does not protect a person from being sentenced or punished for allied offenses of similar import, rather double jeopardy only protects a person from being sentenced or punished for the same offense.

{¶13} At a minimum, the applicable standard for determining whether two offenses are the same for purposes of double jeopardy is laid out in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). In *Blockburger* the United States Supreme Court stated, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* The *Blockburger* test has been interpreted to mean that a defendant may be convicted of two offenses arising out of the same criminal incident if each crime contains an element that the other does not. *Dixon*, 509 U.S. at 696-697, 113 S.Ct. 2849, 125 L.Ed.2d 556. The *Blockburger* test requires courts to look strictly at the proof necessary to prove the statutory elements of

each offense without regard to the evidence to be introduced at trial. *Illinois v. Vitale*, 447 U.S. 410, 416, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980).

{¶14} The *Blockburger* test, however, is not controlling in cases where the legislature manifests a clear rule for determining what constitutes the same offense. See *Albernaz*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275, at paragraph four of the syllabus. And, of course, legislatures are free to provide greater constitutional protections than *Blockburger* provides as long as this intent is clearly shown. See *Rance*, 85 Ohio St.3d at 635, 710 N.E.2d 699.

{¶15} By enacting R.C. 2941.25, the Ohio General Assembly has signaled its intent to prohibit cumulative punishments for crimes that are considered "allied offenses of similar import." The General Assembly provided the statute as a guide for courts to determine whether particular offenses were intended to be merged as the same offense for double jeopardy purposes. *Rance* at 635-636. As the Ohio Supreme Court declared, R.C. 2941.25 is a prophylactic statute that protects a defendant's rights under the United States and Ohio Constitutions. *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶ 45. The general understanding is that the defendant is not placed in jeopardy twice for the same offense so long as courts properly apply R.C. 2941.25 to determine the intent of the General Assembly with regard to the merger of offenses. *Id.* at ¶ 25. R.C. 2941.25 provides:

(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.

{¶16} The effect of R.C. 2941.25 is that courts are to merge offenses when the offenses are closely related and arise out of the same occurrence. *Johnson* at ¶ 43. 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. *Id.* at ¶ 48, citing *Ohio v. Blankenship*, 38 Ohio St.3d 116, 119, 526 N.E.2d 816 (1988). "If the offenses correspond to such a degree that the conduct constituting commission of one offense constitutes commission of the other, then the offenses are of similar import." *Johnson* at ¶ 48.

{¶17} "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 that is 'a single act, committed with a single state of mind.'" *Johnson* at ¶ 49, citing *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50 (Lanzinger, J., concurring). "If the answer to both questions

is yes, then the offenses are allied offenses of similar import and will be merged." *Johnson* at ¶ 50.

{¶18} Thus, unlike *Blockburger*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306, which mandates that each offense require proof of an element that the other does not in order to find that two offenses are not the same offense, under R.C. 2941.25 all that is required to find that two offenses are allied and should merge is whether it is possible to commit one offense and commit the other with the same conduct. Therefore, R.C. 2941.25 provides greater protection against double jeopardy violations than that prescribed in *Blockburger*.

{¶19} Here, we recognize that the offenses of aggravated robbery and kidnapping can be committed with the same conduct and therefore are potentially allied offenses of similar import if they arise out of the same conduct. Indeed, in *State v. McGee*, 8th Dist. Cuyahoga No. 92019, 2010-Ohio-2081 (defendant convicted and sentenced for kidnapping and aggravated robbery after he and codefendants robbed a check-cashing business at gun point) we held that there was no evidence to suggest that the kidnapping was anything but incidental to the aggravated robbery. *Id.* at ¶ 51-53. Similar to the facts in *McGee*, A.G. held the victim at gun point in order to effectuate a robbery. Brandishing the gun and ordering the victim to get in the car in this instance is the same conduct that constituted both the aggravated robbery and the kidnapping. During the probable cause hearing, the victim testified that the

entire encounter with A.G. lasted three minutes. Therefore we recognize that these crimes are allied offenses of similar import under R.C. 2941.25.

{¶20} In Ohio however, courts (including this one) have held that R.C. 2941.25, a criminal statute, does not apply to juvenile delinquency proceedings that are not criminal in nature. *In re J.H.*, 8th Dist. Cuyahoga No. 85753, 2005-Ohio-5694, ¶ 15. See also *In re M.C.*, 6th Dist. Erie No. E-12-031, 2013-Ohio-2808, ¶ 21, *discretionary appeal not allowed*, 137 Ohio St.3d 1413, 2013-Ohio-5096, 998 N.E.2d 512; *In re M.K.*, 6th Dist. Erie No. E-12-025, 2013-Ohio-2027, ¶ 11; *In re Bowers*, 11th Dist. Ashtabula No. 2002-A-0010, 2002-Ohio-6913, ¶ 23; *In re J.H.*, 8th Dist. Cuyahoga No. 85753, 2005-Ohio-5694, ¶ 15-20; *In re H.F.*, 8th Dist. Cuyahoga No. 94840, 2010-Ohio-5253, ¶ 13-15; *In re S.S.*, 4th Dist. Vinton No. 10CA682, 2011-Ohio-4081, ¶ 29.

{¶21} In *In re Skeens*, 10th Dist. Franklin Nos. 81AP-882 and 81AP-883, 1982 Ohio App. LEXIS 12181 (Feb. 25, 1982), the Tenth District Court of Appeals set forth the rationale for holding that R.C. 2941.25 does not apply to juveniles:

R.C. 2941.25(A) does not apply to situations where a minor is alleged to be a delinquent minor since, under our Juvenile Code, such a minor is not charged with a crime. While the commission of acts which would constitute a crime if committed by an adult sets the machinery of the Juvenile Court in motion, the issue before the court is whether or not the minor has engaged in the kind of conduct that constitutes delinquency and will therefore justify the intervention of the state to assume his protection and custody. Evidence that the minor committed acts that would constitute a

crime if committed by an adult is used only for the purpose of establishing that the minor is delinquent, not to convict him of a crime and to subject him to punishment for that crime.

*Id.* at 6-7.

{¶22} *Skeens* was decided over 30 years ago, yet the General Assembly has not enacted a statute codifying double jeopardy protections in juvenile delinquency proceedings. Likewise, there is no Ohio case that illuminates the standard for applying the multiple punishment-double jeopardy protections to delinquency proceedings when a juvenile is adjudicated delinquent for committing offenses subject to merger if committed by an adult. And the Ohio Supreme Court has declined discretionary appeal on the issue. *See In re M.C.*, 137 Ohio St.3d 1413, 2013-Ohio-5096, 998 N.E.2d 512, *reconsideration denied*; 01/22/2014 *Case Announcements*, 2014-Ohio-176.

{¶23} Still, the United States Supreme Court and the Ohio Supreme Court agree that the Double Jeopardy provisions of the United States Constitution and the Ohio Constitution apply to both juveniles and adults alike. While the Supreme Courts are in agreement, *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.E.2d 346 (1975); *see In re Cross*, 96 Ohio St.3d 328, 2002-Ohio-4183, 774 N.E.2d 258, ¶ 23 (recognizing that double jeopardy protections apply in juvenile delinquency proceedings), this does not mean that juveniles are constitutionally entitled to the same greater statutory protections

afforded adults when it comes to consideration of allied offenses for double jeopardy purposes.

{¶24} This leaves us at the crossroads of deciding how to evaluate whether constitutional double jeopardy protections have been abridged in a juvenile delinquency proceeding when the adjudication involves the same or "allied" offenses. We hold that in the absence of clear instruction from the Ohio General Assembly, the test to be employed is set forth in *Blockburger*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306.

{¶25} As previously noted, in order to determine whether offenses should merge as the same offense under *Blockburger*, an appellate court is to examine the elements of multiple offenses and decide whether each offense requires proof of an element that the other does not. Courts are to examine the elements of each offense without regard to the evidence to be introduced at trial. If two offenses require proof of a separate element, then the two offenses are not the same and should not be merged.

{¶26} In the present case, aggravated robbery, R.C. 2911.01, and kidnapping, R.C. 2905.01, are not the same offenses under a *Blockburger* analysis because they each require proof of at least one element that the other does not. For instance, aggravated robbery requires that the perpetrator commit or attempt to commit a theft offense. Kidnapping has no such requirement. Furthermore, kidnapping requires a person's liberty to be

restrained, whereas aggravated robbery has no such requirement. While it is possible that the attempt to commit, or the commission of, a theft may result in the restraint of one's liberty and can thus be allied if they arise out of the same conduct, this is not the applicable analysis for deciding whether the offenses are the same under *Blockburger*. Accordingly, the trial court did not error by failing to merge the two offenses.

{¶27} A.G.'s first assignment of error is overruled. Resolution of this assigned error renders the second one, that trial counsel rendered ineffective assistance of counsel by failing to object to A.G.'s adjudication for allied offenses of similar import, moot.

{¶28} Judgment affirmed.

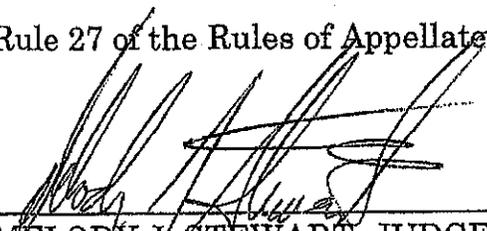
It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court — Juvenile Division to carry this judgment into execution. The finding of delinquency having been affirmed, any bail or stay of execution pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to

Rule 27 of the Rules of Appellate Procedure.



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MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and  
EILEEN A. GALLAGHER, J., CONCUR

The State of Ohio, }  
Cuyahoga County. } ss.

I, ANDREA F. ROCCO, Clerk of the Court of

Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied

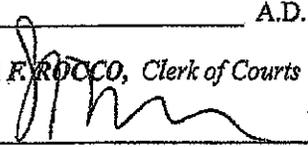
from the Journal entry dated on 11-06-2014 CA 101010

of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal entry dated on 11-06-2014

CA-101010 and that the same is correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 6th day of November A.D. 20 14

ANDREA F. ROCCO, Clerk of Courts

By  Deputy Clerk

## AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

### AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

# CONSTITUTION OF THE STATE OF OHIO

## ARTICLE I: BILL OF RIGHTS

### §2 EQUAL PROTECTION AND BENEFIT

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

# CONSTITUTION OF THE STATE OF OHIO

## ARTICLE I: BILL OF RIGHTS

**§ 10** [Trial of accused persons and their rights; depositions by state and comment on failure to testify in criminal cases.]

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 16 REDRESS FOR INJURY; DUE PROCESS

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

\*\*\* Current through Legislation passed by the 131st General Assembly and filed with  
the Secretary of State through file 6 (SB 38) \*\*\*

Title 29: Crimes -- Procedure  
Chapter 2941: Indictment  
Form and Sufficiency

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2941.25 (2015)*

**§ 2941.25 Multiple counts.**

(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.

**HISTORY:** 134 v H 511. Eff 1-1-74.

**NOTES:** Committee Comment to H 511