

**PUNISH ONCE, PUNISH TWICE:
OHIO'S INCONSISTENT INTERPRETATION
OF ITS MULTIPLE COUNTS STATUTE**

RICHARD R. PARSONS*

It is a recognized goal of criminal law that a convicted defendant's punishment be proportionate to the crime committed.¹ Ohio's multiple counts statute, section 2941.25 of the Ohio Revised Code, represents the General Assembly's attempt to ensure that Ohio's criminal justice system honors that goal of proportionality. Unfortunately, the Ohio Supreme Court's case law interpreting that statute has varied widely, leaving both practitioners and judges to wade through the morass that is Ohio's multiple counts jurisprudence. It is unlikely that the even the court's laudable but unsatisfying recent effort² to turn this morass into a wonderland of legal clarity will be successful.

The confusing area of Ohio's multiple counts jurisprudence can be better understood through a concrete example. Consider a defendant who was found guilty and convicted of the crime of child endangering following the death of his son.³ Because the child endangering misdemeanor resulted in the unintentional death of another, the defendant was found guilty and convicted of involuntary manslaughter.⁴

Copyright © 2008, Richard R. Parsons.

* Capital University Law School, J.D. 2007. B.A., Carleton College. In fond memory of Professor Max Kravitz. I feel exceedingly fortunate that to have had the opportunity to benefit from his tutelage and even more fortunate to have had the opportunity to simply know him. I would also like to thank Paula Brown for her useful comments on this Article in Max's absence.

¹ See, e.g., Ohio Rev. Code § 2929.11(B) (LexisNexis 2006) (providing that the sentence imposed should be "commensurate with and not demeaning to the seriousness of the offender's conduct"); 18 U.S.C. § 3553(a)(2)(A) (2006) (stating that the sentence should "provide just punishment for the offense").

² State v. Cabrales, 886 N.E.2d 181 (Ohio 2008).

³ See, e.g., OHIO REV. CODE ANN. § 2919.22(A) (LexisNexis 2006). The section reads, in part: "No person, who is the parent . . . of a child under eighteen years of age . . . shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support." *Id.*

⁴ See, e.g., OHIO REV. CODE ANN. § 2903.04(B) (LexisNexis 2006). The section reads, in part: "No person shall cause the death of another . . . as a proximate result of the offender's committing or attempting to commit a misdemeanor of any degree . . ." *Id.*

Under a proper interpretation of the multiple counts statute, while the two guilty verdicts may stand, the two convictions cannot.⁵ Instead, the defendant can only be convicted of either the unintentional killing of his son or the child endangering charge because child endangering is an “allied offense”⁶ of involuntary manslaughter. To establish the involuntary manslaughter charge, the state must prove that the defendant caused the death of another as a result of committing the child endangering.⁷ Therefore, the state must prove every element of the child endangering offense to establish guilt for involuntary manslaughter. Thus, if convicted of both charges, the defendant is being punished twice for the child endangering charge, even if he is only being punished once for causing his son’s death.

The multiple counts statute, however, mandates that a defendant cannot be convicted of more than one “allied offense.” Unfortunately, exactly what constitutes an allied offense under Ohio law is anything but clear.⁸ Indeed, over the last three decades, the Ohio Supreme Court’s multiple counts jurisprudence might even be described as schizophrenic.

At first, in *State v. Logan*,⁹ the court provided a test where the elements of the offenses charged were to be compared to determine if the commission of one crime would necessarily result in the commission of the other.¹⁰ If the commission of one offense resulted in the commission of the other, the offenses were merged, and the defendant could only be convicted of one.¹¹ The court’s opinions in the late 1970s and early 1980s suggested that this inquiry required a court to compare the elements of the offenses charged *as applied to the facts of the particular case*.¹² Under this analysis, our hypothetical defendant could not be convicted of both the

⁵ OHIO REV. CODE ANN. § 2941.25(A) (LexisNexis 2006). Nowhere does the multiple counts statute prohibit a jury from finding a defendant guilty of multiple “allied offenses.” *Id.* Instead, the statute prohibits multiple *convictions* for such offenses. *Id.*

In addition, the sentence the defendant receives is irrelevant to the multiple counts inquiry. Thus, even if a defendant receives concurrent sentences for two “allied offense” convictions, he will have been twice convicted for the same conduct in violation of the statute. *Id.*

⁶ OHIO REV. CODE ANN. § 2941.25(A) (LexisNexis 2006).

⁷ *See, e.g.*, OHIO REV. CODE ANN. § 2903.04(B) (LexisNexis 2006).

⁸ *See infra* Sections II & IV.

⁹ 397 N.E.2d 1345 (Ohio 1979).

¹⁰ *Id.* at 1348.

¹¹ *Id.* at 1349.

¹² *Id.* at 1348; *see also* *State v. Donald*, 386 N.E.2d 1341 (Ohio 1979).

child endangering and involuntary manslaughter charges because, as applied to the facts of his case, the child endangering charge was a necessary element of the involuntary manslaughter charge. That is, the prosecution would have to prove all of the elements of child endangering to prove the involuntary manslaughter charge.

However, later opinions in the 1980s and the early 1990s adopted a more restrictive approach to multiple counts analysis, suggesting that the *Logan* inquiry required a court to compare the elements of the offenses charged *in the abstract*.¹³ Under this approach, our defendant could be convicted of both charges because the child endangering charge is not a necessary element of the involuntary manslaughter charge.¹⁴ Rather, the involuntary manslaughter charge requires proof only of the commission of a misdemeanor that resulted in the death of another.¹⁵ Child endangering is but one of many misdemeanors that a prosecutor could prove, in the abstract, to demonstrate culpability for involuntary manslaughter.¹⁶ Still, the court did not consistently adhere to one approach or the other, as demonstrated by its sporadic return to the fact-based inquiry during the 1990s.¹⁷ This inconsistency led to disharmony among Ohio's appellate courts.¹⁸

If these two approaches to Ohio's multiple counts statute were not enough, additional opinions of the court conflated federal double jeopardy analysis and multiple counts analysis, leaving the impression that section 2945.41's protection is coextensive with double jeopardy's protections.¹⁹ Yet other opinions of the court used a transactional approach to determine whether two offenses should merge.²⁰ Under this approach, a defendant could only be convicted for one offense that arises out of a discrete unit of

¹³ See, e.g., *State v. Bickerstaff*, 461 N.E.2d 892 (Ohio 1984); *State v. Richey*, 595 N.E.2d 915 (Ohio 1992).

¹⁴ *Bickerstaff*, 461 N.E.2d at 896.

¹⁵ OHIO REV. CODE ANN. § 2903.04(B) (LexisNexis 2006).

¹⁶ OHIO REV. CODE ANN. § 2919.22(E)(2)(a) (LexisNexis 2006).

¹⁷ See, e.g., *City of Newark v. Vazirani*, 549 N.E.2d 520 (Ohio 1990), *overruled by State v. Rance*, 710 N.E.2d 699 (Ohio 1999).

¹⁸ See *Rance*, 710 N.E.2d at 704 (citing numerous cases to demonstrate the disharmony among the appellate courts).

¹⁹ See, e.g., *State v. Johnson*, 453 N.E.2d 595, 598 (Ohio 1983), *rev'd*, 467 U.S. 493 (1984).

²⁰ See, e.g., *State v. Roberts*, 405 N.E.2d 247 (Ohio 1980).

conduct.²¹ Perhaps, then, the most apt term to describe the Ohio's Supreme Court's multiple counts jurisprudence is "accordion-like."

In *State v. Rance*, though, the court purported to reconcile its confusing precedent by deciding once and for all that the elements of offenses should be compared in the abstract to determine whether the offenses merge.²² However, Ohio Supreme Court cases subsequent to *Rance*, such as *State v. Fears*, analyzed the application of section 2941.25 without reference to *Rance*.²³ Thus, lower courts were left to deal with the same state of confusing precedent as existed before *Rance*.²⁴

Recognizing that *Rance* had led to "inconsistent, unreasonable, and, at times, absurd results," the Ohio Supreme Court recently handed down the decision in *State v. Cabrales*²⁵ to attempt to rectify confusion left behind in *Rance's* wake.²⁶ While *Cabrales*, might have clarified one problem caused by *Rance*,²⁷ the opinion nevertheless continues to adhere to the *Rance* test, thereby failing to properly effectuate the legislative intent behind the enactment of section 2945.21. Therefore, further refinement of Ohio's multiple counts jurisprudence remains necessary.

The resolution of the issues surrounding the proper application of Ohio's multiple counts statute is paramount, given that individual liberty and freedom are at stake every time a court interprets the strictures of section 2941.25. Indeed, statutes similar to section 2941.25 have been enacted in other states because legislatures are "cognizant of the fact that the sovereign has demonstrated a tendency to over-indict and over-prosecute some defendants."²⁸ Therefore, a conscientious, consistent and level-headed development of Ohio's multiple counts jurisprudence is necessary to ensure not only that similarly-situated defendants receive similar punishments, but also that the punishment rendered is proportionate to the crime(s) that a defendant has committed. In Ohio, however, an advocate has often been left to guess which test a lower court, or even the Ohio Supreme Court, will utilize. The result of this disarray means that it

²¹ See, e.g., *State v. Ikner*, 339 N.E.2d 633 (Ohio 1975).

²² *Rance*, 710 N.E.2d at 703-05.

²³ *State v. Fears*, 715 N.E.2d 136 (Ohio 1999); see also *State v. Elmore*, 857 N.E.2d 547 (Ohio 2006).

²⁴ See *infra* Section II.

²⁵ 886 N.E.2d 181 (Ohio 2008).

²⁶ *Id.* at 186.

²⁷ See *infra* Section IV.

²⁸ Dale A. Nowak & Jeffery A. Key, *Multiple Convictions Statute in Ohio: Has It Achieved Its Intended Result?*, 31 CLEV. ST. L. REV. 295, 312 (1982).

is often the creativity of an indictment, rather than the intent of Ohio's criminal code, that determines the punishment to be meted out to a defendant.

Therefore, this Article intends to aid the reader in deciphering the complex and varying interpretation of section 2941.25, highlighting the inconsistencies in the statute's application within Ohio. At the same time, it is argued that the Ohio Supreme Court has been unduly influenced by the United States Supreme Court's increasingly restrictive double jeopardy jurisprudence in interpreting the significance of section 2941.25. The Ohio Supreme Court should instead provide a more liberal interpretation of section 2941.25 compared to that which is currently afforded under the federal Double Jeopardy Clause. Such an interpretation would be a step forward in effectuating what was the apparent legislative intent behind the enactment of section 2941.25.

To this end, a brief history of the federal system's always turbulent double jeopardy caselaw²⁹ is presented in Section I to provide a frame of reference for the Ohio Supreme Court's varied analysis of section 2941.25. In Section II, the history of section 2941.25's judicial interpretation is explored. This section also comments on how Ohio's multiple counts jurisprudence has likely been influenced by the United States Supreme Court's double jeopardy caselaw. Section III attempts to ascertain the Ohio General Assembly's intent in enacting section 2941.25. Section IV analyzes whether the Ohio Supreme Court's various interpretations of section 2941.25 are consistent with the likely intent of the legislature. Section IV concludes by arguing that the federal caselaw has influenced Ohio courts, pushing their opinions to thwart the true legislative intent behind section 2941.25. Finally, Section V argues that a same transaction test is best suited to achieving the legislative goals behind the enactment of section 2941.25.

²⁹ See, e.g., *Albernaz v. United States*, 450 U.S. 333, 343 (1981) (noting that "the decisional law [regarding the Double Jeopardy Clause] is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator"); see also *Texas v. Cobb*, 532 U.S. 162, 185 (2001) (Breyer, J., dissenting) (commenting on the difficult nature of the *Blockburger* test).

I. THE RECENT EVOLUTION OF FEDERAL DOUBLE JEOPARDY JURISPRUDENCE.

At a minimum, Ohio's multiple counts statute must provide the same protections as does the federal Double Jeopardy Clause.³⁰ It is likely, however, that the Ohio General Assembly intended to provide greater protections than does the current state of federal double jeopardy jurisprudence.³¹ Nevertheless, the Ohio Supreme Court has borrowed from and been influenced by federal double jeopardy jurisprudence when formulating its approach to Ohio's multiple counts analysis.³² Therefore, an understanding of federal double jeopardy jurisprudence is essential to understanding the statute.³³

A. *The Blockburger Test.*

The modern era of federal double jeopardy jurisprudence began in 1932 with the United States Supreme Court case of *Blockburger v. United States*.³⁴ Blockburger had been charged with five violations of the Harrison Narcotic Act.³⁵ He was convicted of two counts of selling narcotics not in their original packing.³⁶ Two temporally different sales formed the basis of each count, but each sale was to the same person.³⁷ He was also convicted of selling narcotics without a proper order in relation to one of the sales that formed the basis of one of the packaging counts.³⁸ On appeal, Blockburger argued that the two convictions for the sales of

³⁰ The federal Double Jeopardy Clause provides: "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . ." U.S. CONST. amend. V. A similar provision is found in the Ohio Constitution, which states that "[n]o person shall be twice put in jeopardy for the same offense." OHIO CONST. art. I, § 10.

³¹ See *infra* Section III.

³² See *infra* Sections III & IV.

³³ This section primarily reviews the Double Jeopardy Clause's protection against multiple punishments. This protection prohibits a defendant from receiving multiple convictions for the same conduct based on one indictment. See *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by* *Alabama v. Smith*, 490 U.S. 794 (1989). The multiple punishments protection is not to be confused with the more traditional double jeopardy protection where a defendant cannot be subsequently convicted for the same offense for which he has already been convicted in a *prior* trial. See *id.*

³⁴ 284 U.S. 299 (1932).

³⁵ *Id.* at 300–01.

³⁶ *Id.* at 301.

³⁷ *Id.*

³⁸ *Id.*

narcotics not in their original packaging constituted only one offense because both sales were to the same person.³⁹ He also argued that he could not be convicted for the sale of narcotics without a proper order because that violation was based on the same conduct that formed the basis of his conviction for one of the packaging counts.⁴⁰

The Court made short shrift of Blockburger's first argument, as the two sales counts clearly related to two discrete events, even if both sales happened to be to the same person.⁴¹ To analyze the defendant's second argument, the Court formed the words of the now famous *Blockburger* test: "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 offense or only one, is whether each provision requires proof of a fact which the other does not."⁴²

Unfortunately for Blockburger, while both the crimes of sale of narcotics not in their original packaging and the sale of narcotics without a written order each required proof a sale, each crime also required proof of a fact the other did not—that is, improper packing for the first and lack of a proper order for the second.⁴³ While neither Blockburger nor the Court explicitly mentioned double jeopardy in their arguments, the Court has consistently applied the *Blockburger* test to determine whether two offenses should be considered one for the purpose of double jeopardy analysis.⁴⁴

Blockburger long stood as the paramount test to determine whether multiple punishments were violative of federal double jeopardy protections.⁴⁵ In fact, based upon historical analysis by Justice Scalia, the *Blockburger* test is the proper enunciation of the Framers' intention in

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 303.

⁴² *Id.* at 304.

⁴³ *Id.* at 303–04. To provide a different example of *Blockburger* analysis, the generic offenses of robbery and murder are not the same offense under *Blockburger* because each requires proof of a fact which the other does not: murder requires proof of death of another, which robbery does not, while robbery requires the conversion of the personal property of another, which murder does not.

⁴⁴ See, e.g., *Grady v. Corbin*, 495 U.S. 508, 527 (1989) (Scalia, J., dissenting) (noting that "[i]n *Blockburger* . . . we summarized the test for determining whether conduct violating two distinct statutory provisions constitutes the 'same offence' for double jeopardy purposes").

⁴⁵ See *id.* at 528.

adopting the Double Jeopardy Clause.⁴⁶ Still, the Court eventually refined the *Blockburger* test, adding additional hurdles that a defendant must overcome to present a successful double jeopardy challenge.

B. Abernaz and Its Prodigy.

These additional hurdles were first clearly presented in 1981 in *Abernaz v. United States*,⁴⁷ which had the effect of severely debilitating federal double jeopardy protections. There, the defendant was convicted of conspiracy to import marijuana and conspiracy to distribute marijuana, with the trial court imposing consecutive sentences for the two convictions.⁴⁸ All on the Court agreed that the two charges did not constitute the same offense under *Blockburger*, as conspiracy to import marijuana required proof of importing, which conspiracy to distribute did not, while conspiracy to distribute marijuana required proof of distribution, which conspiracy to import did not.⁴⁹ Thus, no constitutional violation was caused by the imposition of the multiple convictions or consecutive sentences.

The majority, however, went further than the traditional *Blockburger* analysis and determined that when a legislature intends to impose multiple punishments for an act that would otherwise be merged under *Blockburger*, the imposition of multiple punishments does not run afoul of the Constitution.⁵⁰ The Court came to this conclusion because “[t]he *Blockburger* test is a ‘rule of statutory construction’” and only “serves as a means of discerning congressional purpose.”⁵¹ Thus, “the rule should not be controlling where . . . there is a clear indication of contrary legislative intent.”⁵² Presumably, then, federal double jeopardy protection could be *broader*, as well as narrower than that suggested by *Blockburger*.

The holding in *Abernaz* was arguably foreshadowed by language in *Whalen v. United States*.⁵³ The *Whalen* Court stated that “the question whether punishments . . . are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has

⁴⁶ *Id.* at 528–36.

⁴⁷ 450 U.S. 333 (1981).

⁴⁸ *Id.* at 334.

⁴⁹ *Id.* at 339; *id.* at 345 (Stewart, J., concurring).

⁵⁰ *Id.* at 340 (majority opinion).

⁵¹ *Id.*

⁵² *Id.*

⁵³ 445 U.S. 684 (1980).

authorized.”⁵⁴ Still, the Court judiciously applied the *Blockburger* test, not reaching the question whether some other test, if called for by a legislature, could supplant the *Blockburger* analysis.⁵⁵

In *Albernaz*, though, the Court took *Whalen’s* language one step further, holding that “the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended . . . to impose multiple punishments, imposition of such sentences does not violate the Constitution.”⁵⁶ Up to this point, *Blockburger* was the only means of determining whether the legislature had clearly intended to impose multiple punishments.⁵⁷ Now, however, as long as a court could find that the legislature intended to punish the same conduct twice, it was able to ignore a violation of *Blockburger* and impose as many multiple punishments as it wished.

The impact of the *Abernaz* holding was first felt in *Missouri v. Hunter*.⁵⁸ Hunter was convicted of robbery, armed criminal action and assault with malice after a single trial.⁵⁹ Upon review, the Missouri Court of Appeals found that the armed criminal action encompassed all the elements of the robbery charge and therefore constituted the same offense under *Blockburger*.⁶⁰ The United States Supreme Court did not take issue with the lower court’s *Blockburger* analysis, but found that the Missouri legislature had intended to punish the same conduct twice given the particular language contained in the armed criminal action statute.⁶¹ Thus, the Court for the first time allowed multiple punishments to be imposed for the same conduct, even when the offenses constituted only one offense under *Blockburger*.⁶² The Court also took the opportunity to further

⁵⁴ *Id.* at 688.

⁵⁵ *Id.* at 691–92 (noting that “[t]he assumption underlying the [*Blockburger*] rule is that Congress ordinary does not intend to punish the same offense under two different statutes”).

⁵⁶ *Albernaz*, 450 U.S. at 344.

⁵⁷ *See id.* at 345 (Stewart, J., concurring).

⁵⁸ 459 U.S. 359 (1983).

⁵⁹ *Id.* at 361.

⁶⁰ *Id.* at 362–63. The Missouri Supreme Court denied review of the court of appeal’s decision. *Id.* at 363.

⁶¹ *Id.* at 368–69. The statute stated that “any person who commits any felony . . . is *also* guilty of the crime of armed criminal action The punishment imposed . . . shall be *in addition to* any punishment provided . . . for the crime committed” *Id.* at 362 (emphases added).

⁶² *Id.* at 371 n.3 (Marshall, J., dissenting).

comment on its holdings in *Albernaz* and *Whalen*. It interpreted these cases to mean that, in the context of imposing multiple punishments for the same conduct during one trial, the federal Double Jeopardy Clause is meant only to provide a floor protection to the offender.⁶³ In other words, the Court believed that the Double Jeopardy Clause “does no more than to prevent the sentencing court from prescribing greater punishment than the legislature intended.”⁶⁴

The dissent in *Hunter* delineated the difficulties with this position. Justice Marshall in so many words argued that the Double Jeopardy Clause does not give the legislature plenary power to punish multiple times for the same offense even if it so wishes.⁶⁵ Instead, the Double Jeopardy Clause expressly “forbids . . . multiple punishments for ‘the same offence’”⁶⁶ Indeed, “[i]f the Double Jeopardy Clause imposed no restrictions on a legislature’s power to authorize multiple punishment, there would be no limit to the number of convictions that a State could obtain on the basis of the same act, state of mind, and result.”⁶⁷ Under *Albernaz-Hunter*, it would seem that the legislature is free to do exactly what Marshall feared it would.

The *Albernaz-Hunter* line of precedent also provides the prosecutor with greater power than the courts to decide what punishment to impose on a defendant. So long as the government can in some manner argue that the legislature clearly intended⁶⁸ to impose multiple punishments for the same

⁶³ See *id.* at 366 (majority opinion).

⁶⁴ *Id.* The Double Jeopardy Clause affords a defendant two different, although sometimes related, protections. The first protection gives a defendant the right “to be free from multiple trials for the same offense,” *id.* at 365, after either acquittal or conviction for that offense. See *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by* *Alabama v. Smith*, 490 U.S. 794 (1989). The other facet of the Double Jeopardy Clause “protects [a defendant] against multiple punishments for the same offense.” *Id.* at 717. Section 2941.25 of the Ohio Revised Code is concerned with the second aspect of double jeopardy protection as its language is directed toward permissible punishments based on one charging instrument. See OHIO REV. CODE ANN. § 2941.25 (LexisNexis 2006).

⁶⁵ See *Hunter*, 459 U.S. at 370 (Marshall, J., dissenting).

⁶⁶ *Id.* at 369.

⁶⁷ *Id.* at 371.

⁶⁸ In *Ball v. United States*, the Court found that the offense of receipt of a firearm by a convicted felon and possession of a firearm by a convicted felon constituted the same offense under *Blockburger*. *Ball v. United States*, 470 U.S. 856, 861–62 (1985). The Court then inquired into the legislative history of the two federal offenses. Finding that the possession offense was contained in an act, which was “hastily passed, with little
(continued)

offense, it can obtain convictions for as many crimes as it can charge for that conduct. One might argue, though, that these criticisms of *Abernaz* and *Hunter* are ill-conceived because a legislature, instead of imposing multiple punishments, could simply raise the penalty for the primary offense to the equivalent of the penalty if multiple punishments were imposed.⁶⁹ To the defendant, why should it make a difference if he were serving a sentence of twenty years for rape compared to consecutive sentences of fifteen years for rape and five years for kidnapping?

Justice Marshall provides the answer:

When multiple charges are brought, the defendant is “put in jeopardy” as to each charge. To retain his freedom, the defendant must obtain an acquittal on all charges; to put the defendant in prison, the prosecution need only obtain a single guilty verdict The very fact that a defendant has been arrested, charged, and brought to trial on several charges may suggest to the jury that he must be guilty of at least one of those crimes

. . . [Moreover], each separate criminal conviction typically has collateral consequences For example, a defendant who has only one prior conviction will generally not be subject to sentencing under a habitual offender statute.⁷⁰

As Justice Marshall persuasively argues, multiple charges and convictions in a single trial do have an impact beyond the term of imprisonment imposed.

discussion, no hearings, and no report,” the Court concluded that the Congress could not have intended to punish twice for the same conduct in this case. *Id.* at 863–64 (quoting *United States v. Bass*, 404 U.S. 336, 344 (1971)). Therefore, it seems that at least a portion of the *Albernaz* inquiry includes a review of the circumstances under which the legislation in question was passed. *See also* *Garrett v. United States*, 471 U.S. 773, 779 (1985) (adhering to a similar approach as that which was used in *Ball*).

⁶⁹ *See Hunter*, 459 U.S. at 371 (Marshall, J., dissenting).

⁷⁰ *Id.* at 372–73.

C. *The Court Changes Direction: Grady v. Corbin.*

Not surprisingly, some on the Court grew weary of the chipping away at double jeopardy protections.⁷¹ Those justices won the battle in *Grady v. Corbin*,⁷² even if they lost the double jeopardy war shortly thereafter. The defendant in *Grady* pled guilty to the misdemeanors of driving while intoxicated and failing to keep right of the median in an initial case brought after he was involved in an accident.⁷³ In a subsequent case related to the same accident, the defendant was indicted on charges of reckless manslaughter, vehicular manslaughter, criminally negligent homicide, reckless assault and driving while intoxicated.⁷⁴ The homicide and assault charges were to rely on proof that the defendant had operated a motor vehicle while intoxicated, had failed to keep right of the median and had driven at a speed too fast for road conditions, the same conduct that resulted in a guilty plea to the misdemeanor charges.⁷⁵ Eventually, the New York Court of Appeals prohibited prosecution of the homicide and assault charges, finding that allowing the prosecution would violate federal double jeopardy protections.⁷⁶

The United States Supreme Court affirmed the court of appeals' decision.⁷⁷ The Court did not have to apply the *Blockburger* test as the defendant conceded that the homicide charges and the misdemeanors were separate offenses under *Blockburger*.⁷⁸ The Court instead added a second

⁷¹ For an example of the contrasting views of double jeopardy protections in addition to that of Justice Marshall, see, e.g., *Albernaz v. United States*, 450 U.S. 333, 344–45 (1981) (Stewart, J., concurring).

⁷² 495 U.S. 508 (1990), *overruled by* *United States v. Dixon*, 509 U.S. 688 (1993).

⁷³ *Id.* at 511–13.

⁷⁴ *Id.* at 513.

⁷⁵ *Id.* at 513–14.

⁷⁶ *Id.* at 514–15.

⁷⁷ *Id.* at 515.

⁷⁸ *Id.* at 522. The reason the charges would not constitute the same offense under *Blockburger* is because the homicide charges could have been proven by evidence of a death being caused by the commission of *any* misdemeanor, not just driving left of the median or driving while intoxicated, as the *Blockburger* test analyzes the elements of the relevant statutes in the abstract. *Cf. id.* at 520. In other words, for the homicide charges to be sustained, the prosecution only needed to prove that *some sort* of misdemeanor was committed that resulted in death—it did not have to prove that the defendant had committed particular misdemeanor to which the defendant had pled guilty. *Cf. id.* Thus, the homicide charges required proof of death, which the misdemeanor charges did not, (continued)

step to the double jeopardy inquiry, holding that “the Double Jeopardy Clause bars any *subsequent* prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.”⁷⁹ In Grady’s case then, the government would have to prove the existence of the misdemeanors that resulted in a death of another by demonstrating that the defendant had engaged in the same conduct to which he had plead guilty to in the first case—driving while intoxicated and failing to keep right of the median. Thus, “[t]he critical inquiry [wa]s what conduct the State will prove, not the evidence the State will use to prove the conduct.”⁸⁰ This inquiry would come to be labeled the “same-conduct” rule.⁸¹ Based on this holding, the Court found the subsequent homicide prosecutions violated the Double Jeopardy Clause because the state could only prove the homicide charges by again proving that that the defendant had driven while intoxicated and had failed to keep right of the median.⁸²

While the Court limited the application of this second step of the double jeopardy inquiry to cases of prosecutions subsequent to an acquittal or conviction,⁸³ the case indicated the Court’s willingness to expand double jeopardy protections. With a more liberal view on the Court, it was quite possible that the *Albernaz-Hunter* line of precedent would be reversed in short measure. After the fall of *Albernaz-Hunter*, the next step for the Court might very well have been to tweak the *Blockburger* test in favor of the defendant, changing it so that the elements of the relevant offenses were to be analyzed with reference to the specific facts of the case rather than in the abstract.⁸⁴

while the misdemeanor charges required proof of driving while intoxicated and driving left of the median, which the homicide charges did not. *Cf. id.*

⁷⁹ *Id.* at 521 (emphasis added).

⁸⁰ *Id.*

⁸¹ See *United States v. Dixon*, 509 U.S. 688, 704 (1993).

⁸² *Grady*, 495 U.S. at 523.

⁸³ See *id.* at 516–18.

⁸⁴ The effect of such a change in the *Blockburger* test would be to prohibit multiple convictions for felony/misdemeanor-murder-rule statutes and the substantive underlying offense as violative of the Double Jeopardy Clause. See *infra* Section II for a more detailed explication of the difference between factually-based multiple counts analysis compared to a multiple counts analysis in the abstract. However, under *Harris v. Oklahoma*, a prosecution for a particular offense is barred by the Double Jeopardy Clause when the offense being prosecuted “expressly incorporates another statutory offense [for which the
(continued)

D. Goodbye Grady, Hello Dixon.

*United States v. Dixon*⁸⁵ made quick work of the expansion of double jeopardy protections signaled in *Grady*. *Dixon* involved the application of the Double Jeopardy Clause to prosecutions for criminal contempt and the substantive offenses underlying the criminal contempt.⁸⁶ While the defendants in *Dixon* were successful in challenging some of their convictions under *Blockburger*, the Court found that remaining convictions were not barred.⁸⁷ The Court conceded that the convictions not barred under *Blockburger* would be impermissible under *Grady*, but found it necessary to overrule *Grady*'s "same-conduct" test.⁸⁸ The majority leveled several blows to *Grady*, finding that *Grady* contained "'less than accurate' historical analysis"; it "contradicted an 'unbroken line of decisions'"; the same conduct test had proved "unstable" due to the significant exceptions to it the Court had been forced to recognize; and the case had produced "confusion" among the lower courts.⁸⁹

What is significant about *Dixon* for the purposes of Ohio's multiple counts jurisprudence is not whether it was correct in overruling *Grady*. Rather, *Dixon* signaled that the Court was unwilling to expand double jeopardy protections. Thus, while "the prohibition against double jeopardy [still] stands as an ever-present protector of individual rights and as a 'universal maxim of the common law,'"⁹⁰ the Court made that "ever-

defendant has *already* been convicted] without specifying the latter's elements," even if the two offenses are not the same offense under *Blockburger*. *Grady*, 495 U.S. at 528 (Scalia, J., dissenting) (citing *Harris v. Oklahoma*, 433 U.S. 682, 682 (1977) (per curiam).

⁸⁵ 509 U.S. 688 (1993).

⁸⁶ *Id.* at 691–94. One defendant in *Dixon* was held in contempt for violating a court order not to commit any criminal offense. *Id.* at 691.

⁸⁷ *Id.* at 700–03.

⁸⁸ *Id.* at 703–04. Recall, though, in a felony/misdemeanor-murder/manslaughter-rule situation, a subsequent prosecution for the lesser offense, i.e., the particular felony or misdemeanor, remains barred under the Double Jeopardy Clause after the defendant has been convicted for the greater offense, i.e., the murder or manslaughter, even though the two offenses are different offenses under *Blockburger*. See *Harris*, 433 U.S. at 682. *Grady* had made the converse situation, where the defendant was prosecuted for the murder after having been convicted for the lesser offense, violative of the Double Jeopardy Clause even though the two offenses were not the same offense under *Blockburger*. See *Grady*, 495 U.S. at 521–24.

⁸⁹ *Dixon*, 509 U.S. at 709, 711.

⁹⁰ Donald R. Presta, *State v. Ikner: Examining the Merger Doctrine and Double Jeopardy in Terms of Auto Theft*, 4 OHIO N.U. L. REV. 111, 111 (1977).

present protector of individual rights” applicable in as few situations as possible. Today it is therefore questionable to what extent “[t]he Double Jeopardy Clause [truly] serves . . . to protect the defendant from prosecutorial overreaching.”⁹¹ It is this history of double jeopardy jurisprudence which has undoubtedly affected the Ohio Supreme Court’s interpretation of Ohio’s multiple counts statute.

II. THE ACCORDION-LIKE EVOLUTION OF MULTIPLE COUNTS IN OHIO.

Section 2941.25 of the Ohio Revised Code, Ohio’s multiple counts statute, was first enacted in its current form in 1974.⁹² It provides that:

(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.⁹³

While the language of the statute has remained static since its enactment, the Ohio Supreme Court’s jurisprudence surrounding the statute has been anything but static.⁹⁴ Indeed, the court’s jurisprudence can be described as “accordion-like,” expanding and contracting as the court has struggled to define “allied offenses of similar import.” As described below, part of the “accordion-like” nature of the court’s jurisprudence has likely been caused, at least in part, by the similar “accordion-like” nature of the United States Supreme Court’s double jeopardy jurisprudence.

Shortly after section 2941.25’s enactment, the Ohio Supreme Court had the chance to weigh in on its interpretation of the section. The first

⁹¹ *Garrett v. United States*, 471 U.S. 773, 795 (1985) (O’Connor, J., concurring).

⁹² OHIO REV. CODE ANN. § 2941.25 (LexisNexis 2006).

⁹³ *Id.*

⁹⁴ *In re Rashid*, 839 N.E.2d 411, 412–15 (Ohio Ct. App. 2005) (discussing the Ohio Supreme Court’s jurisprudence and the creation of a “muddle”).

cases presented to the court dealt with the issue of whether kidnapping⁹⁵ and rape⁹⁶ should merge. In *State v. Donald*,⁹⁷ for example, the defendant forced his victim from her office to a men's locker room, where he raped her.⁹⁸ Based on these facts, the court found that kidnapping and rape were allied offenses of similar import because "the use of force or threat of force is a necessary element of the crime of rape, and the same force or threat may constitute one of the elements of kidnapping"⁹⁹ The court also noted that the crime of rape necessarily entails restraint of the victim, the other element of kidnapping.¹⁰⁰ In effect, kidnapping is a lesser included offense of rape because it necessarily occurs when a rape occurs. Logically, however, kidnapping may occur when a rape does not occur if the sexual intercourse is not effectuated, even though the desire for intercourse was the cause of the restraint of liberty.

The court heard slightly different facts in *State v. Logan*,¹⁰¹ but reached a similar result. There, the defendant had subdued his victim with a knife, forcing her into an alley, around a corner and down a flight of stairs.¹⁰²

⁹⁵ Kidnapping is defined, in part, under the Ohio Revised Code as follows:

(A) No person, by force, threat, or deception, . . . shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes: . . . (4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will

OHIO REV. CODE ANN. § 2905.01 (LexisNexis 2006).

⁹⁶ Rape is defined, in part, under the Ohio Revised Code as follows:

(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies: . . . (a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by . . . force, threat of force, or deception.

OHIO REV. CODE ANN. § 2907.02 (LexisNexis 2006).

⁹⁷ 386 N.E.2d 1341 (Ohio 1979).

⁹⁸ *Id.* at 1341.

⁹⁹ *Id.* at 1342.

¹⁰⁰ *Id.*

¹⁰¹ 397 N.E.2d 1345 (Ohio 1979).

¹⁰² *Id.* at 1347.

The victim was then raped and released.¹⁰³ The court first provided a more explicit definition of what it viewed to be the meaning of allied offenses:

[I]n order for two crimes to constitute allied offenses of similar import, there must be a recognized similarity between the elements of the crimes committed. The offenses and their elements must correspond to such a degree that commission of the one offense will result in the commission of the other.¹⁰⁴

This refinement of the test alluded to in *Donald* more clearly shows that an “allied offense” may be thought of as an offense that is completely subsumed in the elements of another offense, like a species of lesser-included offense. The court also highlighted that to enjoy the protection of section 2941.25(A), the defendant must prove the prosecution relied upon the same conduct to support the allied offense.¹⁰⁵

The court then added a second tier to the expanded *Donald* analysis, as was required by the language of section 2941.25(B). It held that, even if two offenses are determined to be allied, a defendant may still be convicted of both if “he committed them separately, or if he possessed a separate ‘animus’ as to each.”¹⁰⁶ The court also provided some guideposts to determine when a separate animus exists for the crime of kidnapping. By way of example, the court noted that a “standstill” rape would surely merge with kidnapping, while a rape preceded by a week long restraint where the victim is transported out of state would demonstrate a separate animus for the rape and the kidnapping.¹⁰⁷ Similarly, a person who commits a traditional robbery could only be convicted of the robbery, not both robbery and kidnapping, as the kidnapping’s only purpose is to effectuate the robbery.¹⁰⁸ In such a case, the offender has but one animus, to commit robbery.¹⁰⁹

With these observations in mind, the court announced that the primary inquiry for section 2941.25(B) regarding kidnapping is “whether the restraint or movement of the victim is merely incidental to a separate underlying crime or, instead, whether it has a significance independent of

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1348.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1350.

¹⁰⁸ *See id.*

¹⁰⁹ *See id.*

the other offense.”¹¹⁰ The court also held that a separate animus could be proven by showing that the kidnapping subjected the victim to a “substantial increase in the risk of harm separate from that involved in the underlying crime.”¹¹¹ Using this inquiry, the court found that the purpose of the restraint and movement of the victim, while of greater scope than that in *Donald*, was only to effectuate the rape; therefore, there was no separate animus, and the kidnapping conviction was reversed.¹¹²

The more refined test announced in *Logan* ostensibly remained unchanged for over two decades, until the court’s decision in *State v. Rance*.¹¹³ Some intervening cases, however, appeared to abandon the *Logan* analysis, instead relying solely on federal double jeopardy jurisprudence to resolve section 2941.25 issues. In *State v. Johnson*,¹¹⁴ for example, the court stated that “[t]he General Assembly has further effectuated the principles contained in the Double Jeopardy Clause by means of [section] 2941.25.”¹¹⁵ While one might think that the “further” indicated the statute was meant to provide defendants with *greater protection* than the federal Double Jeopardy Clause, the court did not adhere to this view. Instead, after quoting section 2941.25, it used the *Blockburger* test to determine whether the trial court properly merged the aggravated robbery and theft charges, and murder and involuntary manslaughter, respectively.¹¹⁶ The court concluded that both sets of offenses were properly merged because both failed the *Blockburger* test.¹¹⁷

Johnson was reversed by the United States Supreme Court, but not because of the Ohio Supreme Court’s decision that the offenses should merge, which the Court found to be based on state law grounds, and necessarily, section 2941.25.¹¹⁸ Rather, the Court found that the Ohio

¹¹⁰ *Id.* at 1351.

¹¹¹ *Id.* at 1352.

¹¹² *Id.* at 1351–52.

¹¹³ 710 N.E.2d 699 (Ohio 1999).

¹¹⁴ 453 N.E.2d 595 (Ohio 1983), *rev’d*, Ohio v. Johnson, 467 U.S. 493 (1984).

¹¹⁵ *Id.* at 598.

¹¹⁶ *See id.* at 596–98. The court also noted that under *Brown v. Ohio*, “the two offenses need not be identical in constituent elements or in actual proof in order to be the same for double jeopardy purposes.” *Id.* at 598 (citing *Brown v. Ohio*, 432 U.S. 161, 164 (1977)).

¹¹⁷ *Id.* at 599.

¹¹⁸ *Johnson*, 467 U.S. at 499.

Supreme Court had improperly treated the case as a multiple punishments case,¹¹⁹ when in fact it was not.¹²⁰

Specifically, the defendant had pled guilty to the charges of involuntary manslaughter and grand theft at his arraignment.¹²¹ The trial court subsequently dismissed the murder and aggravated robbery charges as violative of the Double Jeopardy Clause.¹²² The dismissal of the greater charges was the decision that the Ohio Supreme Court affirmed under section 2941.25.¹²³ However, the Ohio Supreme Court failed to consider that the defendant had yet to be punished twice for the same conduct because the defendant was never convicted of the greater charges; therefore, the federal Double Jeopardy Clause was not yet implicated.¹²⁴ Because all charges were brought during a single trial, the prosecution was free to continue its case on the greater charges.¹²⁵ In the event the defendant were to be found guilty on the greater charges, the trial court would then have to deal with the multiple punishments issue.¹²⁶ Because the Ohio Supreme Court had already found that the two sets of charges were properly merged under section 2941.25 (using the *Blockburger* test), the trial court necessarily could have only imposed punishment for either the lesser *or* the greater charges, if the defendant were in fact convicted of the greater charges.

While *Johnson* muddied the difference, if any, between the *Blockburger* and section 2941.25 inquiries, additional cases demonstrated that the Ohio Supreme Court used three different species of analysis to resolve multiple counts cases: an abstract-elemental approach, a fact-based approach and a transactional approach. Under the first view, exemplified

¹¹⁹ *Id.* at 497. Recall that multiple punishments refers to cases where a defendant is punished more than once for the same offense based on the same indictment. See *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989).

¹²⁰ *Johnson*, 467 U.S. at 497.

¹²¹ *Id.* at 496.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 499.

¹²⁵ *Id.* at 500; see also *Brown v. Ohio*, 432 U.S. 161 (1977). If, however, the defendant had pled guilty to the lesser charges and was then indicted in a second, subsequent prosecution on the greater charges, the second prosecution would have been barred under the Double Jeopardy Clause. *Johnson*, 467 U.S. at 498–99.

¹²⁶ See *Johnson*, 467 U.S. at 500.

by *State v. Richey*,¹²⁷ the court compared the elements of the relevant statutes in the abstract to determine if they were allied offenses.¹²⁸ In *Richey*, the court found that the offense of aggravated murder in its felony-murder-rule form, and aggravated arson did not merge under section 2941.25.¹²⁹ Its analysis was as follows:

Aggravated murder requires purposefully causing the death of another while committing one of nine specified felonies, of which aggravated arson is only one. Moreover, aggravated arson does not require a purposeful killing; instead, it requires a substantial risk of physical harm by fire or explosion. Thus, “[t]he two offenses are not prerequisites, one for the other. To consummate either offense, the other need not by definition be committed.”¹³⁰

Thus, the court viewed one of the elements of aggravated murder to be the committing of a felony—that is, *any* one of the specified felonies.¹³¹ To prove the murder, the state only needed to prove the defendant committed a felony, not the particular felony with which the defendant was charged.

Different cases espoused a fact-based merger inquiry under section 2941.25. *City of Newark v. Vazirani*¹³² exemplifies this approach. Vazirani was convicted of selling beer to a minor and of acting in a way tending to cause a child to become an unruly or delinquent child.¹³³ The elements of the first offense were described by the court as “illegal sale, of beer, to a [minor].”¹³⁴ The elements of the second offense were parsed out by the court as “an act, that tends to cause unruliness or delinquency, [in a minor].”¹³⁵ Under the *Richey* abstract-elements approach, these two crimes would not be merged because the prosecution would only have to prove “an act” to convict for the delinquency charge, which did not necessarily have to be sale of a beer to a minor.

¹²⁷ 595 N.E.2d 915 (Ohio 1992).

¹²⁸ *Id.* at 928.

¹²⁹ *Id.*

¹³⁰ *Id.* (quoting *State v. Moss*, 433 N.E.2d 181, 186 (Ohio 1982)).

¹³¹ *Id.*

¹³² 549 N.E.2d 520 (Ohio 1990), *overruled by* *State v. Rance*, 710 N.E.2d 699 (Ohio 1999).

¹³³ *Id.* at 521.

¹³⁴ *Id.* at 522.

¹³⁵ *Id.*

This time, however, the court read in the specific facts of the case to the delinquency charge.¹³⁶ Therefore, the elements of delinquency, as applied to the facts of the case, were (1) the sale of beer to a minor (2) “that tends to cause unruliness or delinquency” (3) in a minor.¹³⁷ This approach is similar to the “same conduct” test from *Grady* in that the prosecution would have to rely on the same conduct to support both the sale charge and the “act” element of the delinquency charge—that is, sale of beer to a minor. Because the “two crimes [we]re so similar that the commission of one offense necessarily result[ed] in the commission of the other offense as applied to the facts of this case,” the court found that the offenses should have been merged.¹³⁸

The third view of section 2941.25 seemed to provide that the court would use a transactional approach in determining whether two offenses should merge under section 2941.25(A). For example, in *State v. Roberts*,¹³⁹ the court found that the offenses of sale of narcotics and possession with intent to sell narcotics were to be merged.¹⁴⁰ The court’s logic followed that of the comparison of rape and kidnapping, in that the illegal sale of narcotics by a defendant necessarily means that the defendant possessed those drugs: “[w]hen the state proved all elements necessary to establish defendant’s culpability for the illegal sale of a narcotic drug, it simultaneously proved his illegal possession for sale of the same quantity of the same drug.”¹⁴¹

Necessarily, though, the court had used a transactional approach in its merger analysis because possession and sale of narcotics would not merge under either an abstract or fact-based elemental analysis. First, possession merely requires proof of possession of a narcotic to convict.¹⁴² Sale, however, requires only the knowing sale of a narcotic.¹⁴³ The definition of sale nowhere lists “possession” as an element of the offense.¹⁴⁴ Thus, neither statute shares its primary element in common with the other. Even

¹³⁶ *Id.*

¹³⁷ *Cf. id.*

¹³⁸ *Id.* at 522–23.

¹³⁹ 405 N.E.2d 247 (Ohio 1980).

¹⁴⁰ *Id.* at 251.

¹⁴¹ *Id.* at 250.

¹⁴² OHIO REV. CODE ANN. § 2925.11(A) (LexisNexis 2006 & Supp. 2007) (at the time the defendant in *Roberts* was charged, the relevant provision was section 3719.20(A)).

¹⁴³ OHIO REV. CODE ANN. § 2925.03(A)(1) (LexisNexis 2006) (at the time the defendant in *Roberts* was charged, the relevant provision was section 3719.20(B)).

¹⁴⁴ *See id.*

under a fact-based approach, then, the offenses would not merge because each offense requires proof of a fact the other does not: sale requires proof of sale, which possession does not, while possession requires proof of possession, which sale does not.

Why did the court merge the offenses, then? Because the court necessarily eschewed an elemental analysis and instead looked to the actual facts of the criminal *transaction*. Without looking at the elements of the offenses of sale and possession, it is intuitive that in order to sell a drug, one must possess it first.¹⁴⁵ Thus, “[i]mplicit in this defendant’s [sale of narcotics] was a concomitant [possession of narcotics].”¹⁴⁶ Indeed, inherent in almost every sale of narcotics is the possession of those narcotics.¹⁴⁷ Therefore, the court, even though it stated that it looked to the elements of both offenses,¹⁴⁸ necessarily used a transactional approach in deciding that possession and sale of narcotics should merge, at least, under some factual situations.

In sum, during the 1980s and throughout much of the 1990s lower courts seemingly could choose from the *Blockburger*,¹⁴⁹ *Richey*, *Newark*, or *Roberts* tests to determine if multiple punishments violated section 2941.25 of the Ohio Revised Code. As the Ohio Supreme Court eventually

¹⁴⁵ Of course, there could be some situations where the seller of narcotics never has actual possession of the drugs, but rather acts as an intermediary between the possessor and the buyer. In such a situation, though, the offender could not be charged with possession in the first place because he or she never possessed the drugs.

¹⁴⁶ *Roberts*, 405 N.E.2d at 250.

¹⁴⁷ *Id.* The court noted that a defendant might be convicted of both offenses if he were to possess more than the quantity of narcotics sold, but did not elaborate on this point. *See id.* at 251. Logically, though, the intent to make a different sale of narcotics could exist, providing a separate animus for that crime. Alternatively, the possession charge could be supported by viewing the extra quantity as “separate conduct” under section 2941.25(B). Under such a view, the quantity actually sold would not have been used by the state to prove the possession charge, only the quantity still possessed after the sale.

¹⁴⁸ *Id.* at 250.

¹⁴⁹ In reality, the *Blockburger* test is substantially equivalent to the *Richey* test, as both compare the elements of the relevant offenses in the abstract, although the wording of the *Richey* test, which incorporates the language from *Logan*, differs from the wording of the *Blockburger* test. *See State v. Rance*, 710 N.E. 2d 699, 704 (Ohio 1999). What is more significant regarding the Ohio Supreme Court’s use of the *Blockburger* test is its implication for what the court views as the protections section 2941.25 affords.

noted, this state of affairs was untenable, leading to massive confusion and inconsistent judgments and punishments among the lower courts.¹⁵⁰

In *State v. Rance*, the Ohio Supreme Court purported to clear the ever muddying waters of section 2941.25. Rance had been convicted of aggravated robbery and involuntary manslaughter, with the robbery charge as the predicate offense of the manslaughter charge.¹⁵¹ The court of appeals found that the aggravated robbery and involuntary manslaughter counts should have been merged under section 2941.25(A).¹⁵² In making this determination, the court of appeals looked to the particular facts of the case, finding that the aggravated robbery was necessarily subsumed within the involuntary manslaughter because the aggravated robbery had to be proved in its entirety to prove the involuntary manslaughter.¹⁵³ In other words, the defendant “beat[] the victim to facilitate taking his property” (the elements of aggravated robbery, as applied to the facts of the case) and “beat[] the victim *to death* to facilitate taking his property” (the elements of involuntary manslaughter, as applied to the facts of the case).¹⁵⁴

The Ohio Supreme Court disagreed with the lower court’s analysis. The court first provided the reader with an overview of double jeopardy jurisprudence,¹⁵⁵ again decreasing the clarity as to whether the court views section 2941.25 as a mere codification of double jeopardy protections, or whether it believes the statute provides different, if not greater, protection

¹⁵⁰ *Id.* (identifying several cases that demonstrated the state of confusion among the lower courts).

¹⁵¹ *Id.* Ohio’s aggravated robbery statute provides:

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following: (1) Have a deadly weapon on or about the offender’s person or under the offender’s control and either display the weapon, brandish it, indicate that the offender possesses it, or use it; (2) Have a dangerous ordnance on or about the offender’s person or under the offender’s control; (3) Inflict, or attempt to inflict, serious physical harm on another.

OHIO REV. CODE ANN. § 2911.01(A) (LexisNexis 2006). Ohio’s involuntary manslaughter statute provides: “(A) No person shall cause the death of another or the unlawful termination of another’s pregnancy as a proximate result of the offender’s committing or attempting to commit a felony.” OHIO REV. CODE ANN. § 2903.04(A) (LexisNexis 2006).

¹⁵² *Rance*, 710 N.E.2d at 704.

¹⁵³ *Id.* at 704–05.

¹⁵⁴ *Id.* at 704.

¹⁵⁵ *Id.* at 702.

against prosecutorial overreaching. However, the court made clear, citing to *Albernaz*, that it was not required to merge the relevant charges even if they constituted one offense under *Blockburger*, so long as the legislature had “expresse[d] its intent to permit cumulative punishments”¹⁵⁶ The court then held that section 2941.25 was the vehicle through which it was to decide whether the legislature intended cumulative punishments notwithstanding a failure of the *Blockburger* test.¹⁵⁷

Oddly, after noting that the United States Supreme Court viewed the *Blockburger* inquiry as merely one manner of discerning legislative intent, the Ohio Supreme Court next turned to *Blockburger* jurisprudence to assist it in the interpretation of section 2941.25.¹⁵⁸ This represents a rather tautological thought process by the court: (1) *Blockburger* is not the dispositive inquiry when a legislature expresses a contrary intent to punish cumulatively; (2) section 2941.25 is how the legislature expresses its intent within Ohio; (3) we use *Blockburger* to determine the outcome of a section 2941.25 analysis.¹⁵⁹

In any event, the court adopted Justice Rehnquist’s views on double jeopardy and held “that if it is necessary to compare criminal elements in order to resolve a case, those elements should be compared in the statutory abstract.”¹⁶⁰ Therefore, the court refined the court of appeal’s analysis as follows: “[i]nvoluntary manslaughter requires causing the death of another as a proximate result of committing . . . a felony.”¹⁶¹ Aggravated robbery is merely one of a myriad of felonies that could (hypothetically, in the abstract) provide proof that involuntary manslaughter was committed.¹⁶² Therefore, proof that the defendant committed a theft is not an element of involuntary manslaughter, in the abstract.¹⁶³ Whether or not this holding comported with what the legislature had intended in enacting section 2941.25, it at least cleared the muddied waters of Ohio’s multiple counts jurisprudence . . . for three months.

¹⁵⁶ See *id.* (citing *Albernaz v. United States*, 450 U.S. 333, 340 (1981)).

¹⁵⁷ *Id.* at 703.

¹⁵⁸ *Id.*

¹⁵⁹ See also *Copeland v. Jackson*, No. C-1-05-823, 2007 WL 3244227, at *13–15 (S.D. Ohio Nov. 2, 2007) (engaging in just this sort of tautological analysis).

¹⁶⁰ *Rance*, 710 N.E.2d at 704.

¹⁶¹ *Id.* at 705.

¹⁶² See *id.*

¹⁶³ See *id.*

After those three months of bliss, the court decided the case of *State v. Fears*.¹⁶⁴ In *Fears*, the court returned to the issue of kidnapping, this time to determine whether it merged with aggravated robbery.¹⁶⁵ *Fears* followed the precedent preceding *Rance*, holding that the two offenses did merge.¹⁶⁶ The court also found that aggravated robbery and burglary specifications did not merge, also based on pre-*Rance* precedent.¹⁶⁷ *Fears*, however, did not once cite to *Rance* or engage in the abstract elemental approach adopted by that opinion. In fact, some language in *Fears* suggested that a factually based elemental inquiry was still a viable option in the section 2941.25 analysis: “the aggravated burglary *in this case* does not merge with the aggravated robbery.”¹⁶⁸ Thus, given *Fears*, *Rance* had done little to resolve the confusion regarding what constitutes an allied offense under section 2941.25. Instead, it has raised new questions: Was *Rance* still good law in Ohio? Was *Rance* a deviation from a more consistent line of merger law precedent? Was *Rance* an exception to Ohio’s merger law? Did *Fears* overrule *Rance*?¹⁶⁹

The questions raised by *Fears* were tackled by the lower courts, and, not surprisingly, the lower courts arrived at different answers to those questions. For example, the First Appellate District of Ohio held that *Fears* implicitly overruled *Rance* and abandoned the abstract elements inquiry altogether.¹⁷⁰ A United States District Court cited the First District of Ohio with approval when attempting to determine if it was ineffective assistance of counsel not to raise a section 2941.25 assignment of error

¹⁶⁴ 715 N.E.2d 136 (Ohio 1999).

¹⁶⁵ *Id.* at 151.

¹⁶⁶ *Id.* (quoting *State v. Jenkins*, 473 N.E.2d 264, 295 n.29 (Ohio 1984), to support the proposition that “implicit within every robbery (and aggravated robbery) is a kidnapping”).

¹⁶⁷ *Id.* (citing to *State v. Frazier*, 389 N.E.2d 1118, 1120 (Ohio 1979), to support the proposition that aggravated robbery and burglary do not merge).

¹⁶⁸ *Id.* (emphasis added).

¹⁶⁹ Mike Stultz, *Criminal Merger in Ohio: From Blockburger to Rance to Fears: What is the Current Law of Criminal Merger in Ohio?*, PowerPoint Presentation generated for the Hon. Reginald J. Routson, Hancock County Common Pleas Court (available with author); see also *State v. Parker*, No. 21599, 2007 WL 949483, at *5 (Ohio Ct. App. Mar. 30, 2007) (noting that “[s]everal appellate courts have acknowledged that ‘some debate exists as to whether [*Fears*] implicitly overruled the *Rance* decision”).

¹⁷⁰ *State v. Grant*, No. C-971001, 2001 Ohio App. LEXIS 1388, at *16–17 (Ohio Ct. App. Mar. 23, 2001).

with respect to the merger of kidnapping and robbery.¹⁷¹ The court limited its holding, though, stating that *Fears* controlled only in relation to the merger of kidnapping and robbery.¹⁷² Thus, the lower courts viewed *Rance* in two ways: (1) as a deviation from a consistent line of precedent from the Ohio Supreme Court, i.e., that a court could choose either to engage in abstract or fact-based elemental analysis to determine whether offense are allied; or (2) as still good law as to merger questions, except for the crime of kidnapping, for which a fact-based elemental comparison was to be used.

Contrastingly, other courts implicitly found that *Fears* was the spurious case, not *Rance*, and that therefore *Rance* was to be followed in all questions of merger under section 2941.25. For example, the *State v. Robinson*¹⁷³ court found that kidnapping and aggravated robbery were not allied offenses of similar import.¹⁷⁴ In arriving at this result, the court analyzed the elements of the two offenses in the abstract:

The conduct creating culpability for kidnapping . . . must be for the purpose of facilitating the commission of a felony. The conduct creating culpability for aggravated robbery, however, includes the committing of a theft offense

Aggravated robbery also does not require that the offender have the intent to terrorize or cause serious physical harm to the victim as required for kidnapping

. . . Kidnapping, however, does not require the presence of a deadly weapon.¹⁷⁵

¹⁷¹ *McKittrick v. Jeffries*, No. 3:05 CV 637, 2006 U.S. Dist. LEXIS 29472, at *26–29 (N.D. Ohio May 10, 2006). The case dealt with a habeas petition, but arrived at the section 2941.25 issue as the court found that the Ohio Supreme Court had necessarily determined that section 2941.25 was part of a federal double jeopardy inquiry. *Id.* at *7–10. The district court’s analysis is convincing as the Ohio Supreme Court “framed the [*Albernaz*] double jeopardy inquiry in terms of” section 2941.25. *Id.* at *10.

¹⁷² *Id.* at *26.

¹⁷³ No. 80718, 2003 WL 125021 (Ohio Ct. App. Jan. 16, 2003).

¹⁷⁴ *Id.* at *4–5; *accord* *State v. Pack*, No. 2-2000-20, 2000 WL 1695123, at *4 (Ohio Ct. App. Nov. 14, 2000) (holding that aggravated robbery and kidnapping are not allied offenses of similar import).

¹⁷⁵ *Robinson*, 2003 WL 125021, at *4 (citations omitted).

Given the wording of Ohio's kidnapping statute, under the *Rance* test, kidnapping will never merge with the attendant substantive crime. Indeed, the Ohio Supreme Court must have realized this given the language it quoted in *Rance*: “[i]f one applies the test in the abstract by looking solely to the wording of [the statutes], *Blockburger* would always permit the imposition of cumulative sentences.”¹⁷⁶

In fact, the First District shied away from its previously holding that *Fears* implicitly overruled *Rance*.¹⁷⁷ In *State v. Palmer*, that court noted that the Ohio Supreme Court had yet to “explicitly” overrule *Rance*.¹⁷⁸ While the First District criticized the effect of the *Rance* test because it “fails to consider the individual facts of a case,” it nevertheless felt bound to follow *Rance* in holding that aggravated robbery and robbery were not allied offenses.¹⁷⁹ Other districts followed *Rance* without question, failing to discuss the conflict in Ohio Supreme precedent.¹⁸⁰

Unfortunately, Ohio Supreme Court opinions subsequent to *Fears*, rather than ameliorating the discord among the appellate districts, made matters even more confusing. In *State v. Adams*,¹⁸¹ the court once again

¹⁷⁶ *State v. Rance*, 710 N.E.2d 699, 703 (Ohio 1999) (quoting *Whalen v. United States*, 445 U.S. 684, 709–11 (1980) (Rehnquist, J., dissenting)).

¹⁷⁷ *State v. Palmer*, 772 N.E.2d 726, 728–29 (Ohio Ct. App. 2002).

¹⁷⁸ *Id.* at 729.

¹⁷⁹ *Id.* The court found the offenses were not allied based on its prior precedent which held that:

[A]ggravated robbery requires proof that while committing a theft offense, the offender had a deadly weapon and brandished it. Robbery . . . requires proof that while committing a theft offense, the offender threatened or attempted to inflict physical harm on another. After aligning the statutory elements of each offense in the abstract, we are convinced that each offense requires proof of an element that the other does not. Robbery requires proof of the threat of physical harm; aggravated robbery requires proof of brandishing a deadly weapon. An element of aggravated robbery, brandishing the weapon, is not required to prove the commission of robbery; conversely, a threat of physical harm is not required to prove aggravated robbery.

State v. Norman, 738 N.E.2d 403, 416 (Ohio Ct. App. 1999) (citations omitted).

¹⁸⁰ *See, e.g., State v. Walters*, No. 06AP-693, 2007 WL 3026956, *19–20 (Ohio Ct. App. Oct. 18, 2007) (holding that felony murder and felonious assault do not merge).

¹⁸¹ 817 N.E.2d 29 (Ohio 2004).

held that kidnapping merges with rape under section 2941.25.¹⁸² However, the court did not cite to *Rance* in its analysis of the issue and did not engage in the abstract elemental comparison adopted in *Rance*.¹⁸³ Similarly, in *State v. Foust*,¹⁸⁴ the court stated that kidnapping and rape could be allied offenses and that gross sexual imposition and rape could be allied offenses when the counts arise out of the same conduct.¹⁸⁵ Again, the court failed to cite to *Rance* when it compared the elements of the two sets of offenses.¹⁸⁶ Instead, the court announced that the test for kidnapping and rape is “whether the restraint or movement of the victim is *merely incidental* to a separate underlying crime”¹⁸⁷ Regarding the gross sexual imposition and rape charges, the court cited to pre-*Rance* precedent to support the proposition that they could be allied offenses, without engaging in any elemental analysis.¹⁸⁸ The court also cited to pre-*Rance* law without an abstract elemental analysis in *State v. Elmore*¹⁸⁹ to conclude that aggravated robbery and theft may be allied offenses of similar import.¹⁹⁰

State v. Yarbrough,¹⁹¹ however, cited to *Rance* when determining whether receiving stolen property and theft were allied offenses under section 2941.25.¹⁹² The court did not engage in an explicit *Rance* analysis, but stated only that “when the elements of each crime are aligned, the offenses ‘correspond to such a degree that the commission of one crime’ resulted ‘in the commission of the other.’”¹⁹³ Oddly, though, the court appeared to also use a same conduct test to determine whether the two

¹⁸² *Id.* at 49–51; *see also* *State v. Greathouse*, No. 21536, 2007 WL 1297181, at *7 (Ohio Ct. App. May 4, 2007) (noting that court was bound to follow the “fact-specific analysis used in *Adams*” because “*Adams* is the most recent Supreme Court decision on this [rape and kidnapping merger] point”).

¹⁸³ *Adams*, 817 N.E.2d at 49–51.

¹⁸⁴ 823 N.E.2d 836 (Ohio 2004); *see also* *State v. Castleberry*, No. 23644, 2007 WL 3171355, at *4–5 (Ohio Ct. App. Oct. 31, 2007) (following *Foust* without citation to *Rance*).

¹⁸⁵ *Foust*, 823 N.E.2d at 864.

¹⁸⁶ *See id.* at 864–65.

¹⁸⁷ *Id.* at 864 (quoting *State v. Logan*, 397 N.E.2d 1345 (Ohio 1979)).

¹⁸⁸ *Id.* at 864–65.

¹⁸⁹ 857 N.E.2d 547 (Ohio 2006).

¹⁹⁰ *Id.* at 560.

¹⁹¹ 817 N.E.2d 845 (Ohio 2004).

¹⁹² *Id.* at 861.

¹⁹³ *Id.* (quoting *State v. Rance*, 710 N.E.2d 699 (Ohio 1999)).

offenses should merge under the facts of the particular case.¹⁹⁴ Just prior to quoting from *Rance*, the court stated that “[t]he same facts were used to convict Yarbrough of stealing the Blazer and of receiving the Blazer as stolen property.”¹⁹⁵ On the other hand, this phrase could be reasonably read to support the court’s separate/same animus analysis.¹⁹⁶

Still, this conclusion would be inconsistent with a *Rance* analysis because, in the abstract, the offenses of theft and receiving stolen property are not allied. More specifically, receiving stolen property requires proof that the defendant received the property through a theft offense.¹⁹⁷ The theft offense statute, however, provides for five different manners in which a theft may be proven.¹⁹⁸ For example, a defendant might be convicted of theft by proof that he obtained control of the property by intimidation *or* by deception.¹⁹⁹ Thus, in the abstract, the receiving statute only requires proof of *some* theft, not necessarily the theft of which the defendant was convicted. On the other hand, the theft of which Yarbrough was convicted required proof of threat,²⁰⁰ which the receiving statute, in the abstract, did not. Therefore, if the court truly meant to apply *Rance* in this case, it got the analysis wrong, and the offenses should not have been merged under the abstract approach to section 2941.25.

¹⁹⁴ *See id.*

¹⁹⁵ *Id.*

¹⁹⁶ *See id.*

¹⁹⁷ Ohio’s receiving stolen property statute provides, “[n]o person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense.” OHIO REV. CODE ANN. § 2913.51(A) (LexisNexis 2006).

¹⁹⁸ Ohio’s theft statute provides:

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways: (1) Without the consent of the owner or person authorized to give consent; (2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent; (3) By deception; (4) By threat; (5) By intimidation.

OHIO REV. CODE ANN. § 2913.02(A) (LexisNexis 2006).

¹⁹⁹ *Id.*

²⁰⁰ While the court never specifically parsed out under which section of the theft offense Yarbrough was convicted, based on a reading of the facts it seems most likely that “by threat” was the relevant provision. *See Yarbrough*, 817 N.E.2d at 849.

In the recent case of *State v. Cabrales*, the court attempted to quell the state of confusion that was evidenced in precedent subsequent to *Rance*.²⁰¹ Cabrales had been convicted of two counts of trafficking of narcotics (sections 2925.03(A)(1)²⁰² and 2925.03(A)(2)²⁰³) and one count of possession of narcotics (section 2925.11(A)²⁰⁴) based on his arranging for the transport of a quantity of marijuana into Ohio.²⁰⁵ The court of appeals held that the possession count (section 2925.11(A)) should not merge with the trafficking count (section 2925.03(A)(1)) “because a person can possess a controlled substance without selling or offering to sell it and, conversely, a person can sell or offer to sell a controlled substance without possessing it by selling it through a middleman.”²⁰⁶ On the other hand, the court held that the possession count did merge with the second trafficking count because “[f]or a person to prepare for shipment or transport drugs, that person would necessarily have to possess the drugs.”²⁰⁷

The Ohio Supreme Court affirmed the court of appeals’ holding, but found it appropriate to clarify the *Rance* test because of the confusion and unreasonable results it had caused in Ohio’s appellate courts.²⁰⁸ First, the court noted that *Rance* was the proper multiple counts analysis under section 2941.25. In the court’s view, though, many lower courts had misinterpreted the *Rance* holding.²⁰⁹ While *Rance* clearly required a comparison of the elements of the offenses in the abstract, it did not “require[] a strict textual comparison of the elements”²¹⁰ Thus, *Rance* did not “mandate that the elements of compared offenses must exactly align for the offenses to be allied offenses of similar import under R.C. 2941.25.”²¹¹ Instead:

²⁰¹ 886 N.E.2d 181, 186 (Ohio 2008).

²⁰² OHIO REV. CODE ANN. § 2925.03(A)(1) (LexisNexis 2006) (providing that “[n]o person shall knowingly . . . [s]ell or offer to sell a controlled substance”).

²⁰³ OHIO REV. CODE ANN. § 2925.03(A)(2) (LexisNexis 2006) (providing that “[n]o person shall knowingly . . . [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance”).

²⁰⁴ OHIO REV. CODE ANN. § 2925.11(A) (LexisNexis 2006) (providing that “[n]o person shall knowingly obtain possess, or use a controlled substance”).

²⁰⁵ *Cabrales*, 886 N.E.2d at 183.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 184.

²⁰⁹ *Id.* at 186.

²¹⁰ *Id.*

²¹¹ *Id.*

In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import.²¹²

Under this clarified *Rance* test, crimes such as trafficking and possession or theft and receiving stolen goods merge because “when the elements of each crime are aligned, the offenses correspond to such a degree that the commission of one crime result[s] in the commission of the other”²¹³

Cabrales’ holding, simply put, is unsatisfying. The court “clarified” *Rance* by merely restating the rule from it had initially announced in 1979 in *State v. Logan*—that is, that two offenses merge if their “elements correspond to such a degree that commission of the one offense will result in the commission of the other.”²¹⁴ In effect, the court adopted a “I know it when I see it” approach to determining when two offenses are allied. Thus, while *Cabrales* purported to clear the muddied waters of *Rance*, it is clear that courts and defendants still have no clear means of deciphering when two crimes will merge. Indeed, at least one court has already divided on the issue of whether felonious assault convictions (section 2903.11(A)(1)²¹⁵ and section 2903.11(A)(2)²¹⁶) merge after *Cabrales*.²¹⁷ In that case, a strong dissent chided the majority for citing to *Cabrales* to support its decision not to merge the two offenses, while nevertheless adhering to the strict textual comparison of the offenses.²¹⁸ This case

²¹² *Id.* at syllabus, para. 1.

²¹³ *Id.* at 187 (internal quotations omitted).

²¹⁴ 397 N.E.2d 1345, 1348 (Ohio 1979).

²¹⁵ OHIO REV. CODE ANN. § 2903.11(A) (LexisNexis 2006) (providing that “[n]o person shall knowingly . . . [c]ause serious physical harm to another”).

²¹⁶ OHIO REV. CODE ANN. § 2903.11(A)(2) (LexisNexis 2006) (providing that “[n]o person shall knowingly . . . [c]ause or attempt to cause physical harm to another . . . by means of a deadly weapon or dangerous ordnance”).

²¹⁷ *State v. Carter*, No. CR-497663, 2008 WL 3522302 (Ohio Ct. App. Aug. 14, 2008).

²¹⁸ *Id.* at *4 (McMonagle, J., dissenting).

exemplifies how courts are still left to wonder after *Cabrales* just when two offenses should merge.

Recently, the Ohio Supreme Court yet again revisited *Rance* in *State v. Brown*,²¹⁹ where it analyzed whether aggravated assault convictions (section 2903.12(A)(1)²²⁰ and section 2903.12(A)(2)²²¹) arising from the same stabbing incident should merge.²²² The court found that even under *Cabrales*, the two offenses did not merge.²²³ The court, however, added an apparently new step to the merger inquiry. It announced that after failure of the *Rance/Cabrales* test, a court should look to the legislative intent in enacting the offenses themselves to determine whether the legislature intended them to merge.²²⁴ The court therefore looked to the statutory construction of the assault offenses and found that because the aggravated assault “subdivisions set forth two different forms of the same offense,” the legislature had “manifested its intent to serve the same interest-preventing physical harm to persons.”²²⁵ Therefore, the legislature did not intend the two aggravated assault subdivisions to be separately punishable, and they were merged under section 2941.25.²²⁶

What *Brown* has done, then, is to make clear that the court must continually jerry rig *Rance* to avoid unreasonable results. Thus, it is apparent that neither *Cabrales* nor *Brown* has done much to clarify section 2945.41 for the lower courts. Even more important than their failure to truly clarify *Rance* is *Cabrales* and *Brown*'s failure to effectuate the legislative intent behind the enactment of section 2941.25, as discussed in greater detail below. Therefore, it is still incumbent upon the court to revisit and modify *Rance*, even after its decisions in *Cabrales* and *Brown*.

²¹⁹ No. 07-0184, 2008 WL 4274495 (Ohio Sept. 17, 2008).

²²⁰ OHIO REV. CODE ANN. § 2903.12(A)(1) (LexisNexis 2006) (providing that “[n]o person, while under the influence of sudden passion or in a sudden fit of rage, . . . shall knowingly . . . [c]ause serious physical harm to another”).

²²¹ OHIO REV. CODE ANN. § 2903.12(A)(2) (LexisNexis 2006) (providing that “[n]o person, while under the influence of sudden passion or in a sudden fit of rage, . . . shall knowingly . . . [c]ause or attempt to cause physical harm to another . . . by means of a deadly weapon or dangerous ordnance”).

²²² *Brown*, 2008 WL 4274495, at *5, 7.

²²³ *Id.* at *6.

²²⁴ *Id.*

²²⁵ *Id.* at *7.

²²⁶ *Id.*

III. THE POLICY BEHIND OHIO'S MULTIPLE COUNTS STATUTE.

Given the sparse availability of legislative history in Ohio, it is often difficult to determine what goals the General Assembly envisaged when it enacted a particular law. However, the Ohio Supreme Court is not want for any guidance in determining what the legislative ambitions prompted the enactment of section 2941.25.

Indeed, the Ohio Supreme Court has, on occasion, stated what it believes to be the policy behind section 2941.25. For example, in *Logan* the court noted that “[i]t is apparent that [section 2941.25] has attempted to codify the judicial doctrine sometimes referred to as the doctrine of merger, and other times as the doctrine of divisibility of offenses”²²⁷ That doctrine provides 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.”²²⁸ Thus, the court recognized the basic import of the multiple counts statute is to at least prevent punishment for lesser-included offenses when a defendant was already being punished for the relevant greater offense. This evaluation of the multiple counts statute appears correct, as it is certainly disproportional to punish an individual for both a greater crime and its relevant lesser included crimes. However, the federal Double Jeopardy Clause’s *Blockburger* test already bars punishment for both the greater and lesser included crime within the context of a single trial, regardless of section 2941.25’s operation.²²⁹ It seems odd that the General Assembly would codify a protection already guaranteed defendants by the federal Double Jeopardy Clause. Indeed, one Ohio Supreme Court Justice recognized as much in *State v. Baer*.²³⁰

²²⁷ *State v. Logan*, 397 N.E.2d 1345, 1349 (Ohio 1979).

²²⁸ *State v. Botta*, 271 N.E.2d 776, 780 (Ohio 1971).

²²⁹ *See, e.g., Brown v. Ohio*, 432 U.S. 161, 167 n.6 (1977). Section 2941.25 of the Ohio Revised Code, though, should operate to *always* preclude multiple punishment for greater and lesser included offenses because section 2941.25 is the manifestation of the legislature’s intent regarding multiple punishments, and the Ohio Supreme Court has ruled that the equivalent of the *Blockburger* test is the relevant section 2941.25 inquiry. *See State v. Rance*, 710 N.E.2d 699, 703 (Ohio 1999). Theoretically, then, the Ohio General Assembly could never manifest an intent contrary to the result of the *Blockburger* test, even though, under *Albernaz*, it would be permissible for it to punish twice for both a greater and lesser included offense. *Albernaz v. United States*, 450 U.S. 333, 340 (1981). Still, the Ohio Supreme Court has never been presented with a situation where it was required to apply section 2941.25 to two statutes that clearly indicated they were not to be merged.

²³⁰ 423 N.E.2d 432 (Ohio 1981).

If the General Assembly, by the enactment of [section] 2941.25, had not intended to prohibit more than one conviction and sentences 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 jeopardy²³¹

It is difficult to find fault in Justice Rutherford's logic. However, the actual holding of *Baer* (wherein the crimes of tampering with a coin machine with purpose to commit theft and theft were determined to be allied offenses)²³² has been questioned by some courts of appeals in light of subsequent Ohio Supreme Court precedent.²³³

Still, the case of *City of Maumee v. Geiger*²³⁴ provides further support for the view that section 2941.25's protections are intended to be greater than those afforded by the federal Double Jeopardy Clause. In that case, the Ohio Supreme Court held that the crimes of theft and receiving stolen property were allied offenses.²³⁵ The court noted that under a traditional sort of *Blockburger* analysis, the crimes would not constitute one offense.²³⁶ However, the court felt that under the common law doctrine of merger, which it believed the General Assembly had codified in section 2941.25,²³⁷ the two offenses should be merged notwithstanding their failure of a *Blockburger*-type test.²³⁸ Thus, early multiple counts opinions of the court recognized that the policy behind section 2941.25 was to provide greater protections than does the federal Double Jeopardy Clause.

If Ohio's multiple counts statute was not merely intended to codify federal double jeopardy protections, what was its intent? The legislative commentary to section 2941.25 provides some direction. That commentary states:

²³¹ *Id.* at 436.

²³² *Id.* at 437.

²³³ *See, e.g.*, *State v. Metcalf*, No. 97 CA 937, 1998 WL 131517, at *4-5 (Ohio Ct. App. Mar. 25, 1998); *see also* *State v. Humphrey*, No. 87AP-1137, 1989 WL 107571, at *9-10 (Ohio Ct. App. Sept. 19, 1989).

²³⁴ 344 N.E.2d 133 (Ohio 1976).

²³⁵ *Id.* at 137.

²³⁶ *See id.* at 136-37.

²³⁷ *Id.* at 137.

²³⁸ *Id.*

The basic thrust of the section is to prevent “shotgun” convictions. For example, a thief theoretically is guilty not only of theft but of receiving stolen goods, insofar as he receives, retains, or disposes of the property he steals. Under this section, he may be charged with both offenses but he may be convicted of only one, and the prosecution sooner or later must elect as to which offense it wishes to pursue.²³⁹

The commentary, through its disapproval of “shotgun convictions,” espouses the view that section 2941.25 is meant to curtail the prosecutor’s power to select punishment by manipulating the charging instrument.²⁴⁰ Moreover, by providing the example that receipt of stolen goods and theft are merged, the General Assembly necessarily adopted the position that section 2941.25’s protections were intended to be broader than those provided by the *Blockburger* test. If not, as discussed above, theft and receipt of stolen goods would not merge under section 2941.25 because each requires proof of a fact that the other does not, although under *Cabrales* the offenses would merge, essentially because they should.²⁴¹ Therefore, the multiple counts statute was at least meant to provide greater protection than does the *Blockburger* test. Indeed, even *Cabrales* seemed to recognize as much.²⁴² Unfortunately, the General Assembly did not say precisely what that greater protection was meant to be. An early opinion interpreting section 2941.25 provides some insight.

In *State v. Ikner*,²⁴³ Justice Brown advocated the view that “the General Assembly has determined that an accused cannot be convicted for multiple counts arising out of the *same transaction*—a standard not embraced by the state or federal double jeopardy clauses”²⁴⁴ Under this view, the intent of section 2941.25 was just as Justice Brown described it—to prohibit multiple punishments for crimes that were derived from the same

²³⁹ OHIO REV. CODE ANN. § 2941.25 (LexisNexis 2006) (1974 Committee Comment to H. 511).

²⁴⁰ *See id.*

²⁴¹ *See State v. Cabrales*, 886 N.E.2d 181, 187 (Ohio 2008); *see also supra* notes 197–200 and accompanying text.

²⁴² *Cabrales*, 866 N.E.2d at 187 n.2.

²⁴³ 339 N.E.2d 633 (Ohio 1975).

²⁴⁴ *Id.* at 636–37 (Brown, J., concurring) (emphasis in original).

transaction.²⁴⁵ This is obviously a much broader standard than the *Blockburger* test. Indeed, if Justice Brown was referring to something like transactional immunity, then a defendant could only be convicted for one offense that arose out of a discrete unit of conduct, as exemplified by the *Roberts* case where possession and sale of narcotics merge even though those offenses would not merge under either a fact-based or abstract elemental approach.²⁴⁶ Similarly, one, such as our hypothetical defendant from the introductory example, could only be convicted of either involuntary manslaughter or child endangering, not both, assuming it was the act of child endangering which was the cause in fact of the child's death.

In any event, regardless of whether the Ohio legislature intended to provide transactional protection to defendants, it is clear that it at least meant to provide greater protections than does the *Blockburger* test.

IV. OHIO MULTIPLE COUNTS JURISPRUDENCE VS. MULTIPLE COUNTS POLICY.

Given that it is likely the General Assembly intended to provide greater protections than does the federal Double Jeopardy Clause, and, perhaps, provide transactional protection, has the Ohio Supreme Court's interpretation of the statute met that legislative intent? While the fact-based elemental inquiry comes close to achieving these goals, it still falls short in some areas. The *Rance* approach, however, completely fails to implement the policy behind section 2941.25 of the Ohio Revised Code, as its effect is to provide only the same floor protection to defendants that does the current state of federal double jeopardy jurisprudence. Even *Rance* as modified by *Cabrales* and *Brown* does not reach all situations it should.

²⁴⁵ See *id.* In *Ikner*, the offenses of operating a motor vehicle without the owner's consent and receiving stolen property were found not to violate federal double jeopardy protections. *Id.* at 635 (majority opinion). The defendant could not enjoy the protections of section 2941.25 because that statute was not in force when he was convicted. See *id.* at 635–36. Justice Brown's comment regarding section 2941.25 was used to show that, if section 2941.25 had been in effect when *Ikner* was convicted, it would have precluded punishment for both crimes. See *id.* at 636–37 (Brown, J., concurring).

²⁴⁶ See, e.g., *Kastigar v. United States*, 406 U.S. 441, 449–50 (1972) (discussing the scope of transactional immunity).

A. *Does Rance's Abstract Elemental Approach Fulfill the Policy Goals of Section 2941.25 of the Ohio Revised Code?*

In *Rance*, the Ohio Supreme Court emphasized that a court is not confined by the *Blockburger* test in determining whether multiple punishments for the same conduct are proscribed by double jeopardy considerations.²⁴⁷ Nevertheless, the *Rance* court maintained that the appropriate inquiry for section 2941.25 was the *Blockburger* inquiry.²⁴⁸ *Rance*, therefore, does not fulfill the legislative intent behind section 2941.25 because that intent was to provide protections to defendants greater than the federal Double Jeopardy Clause,²⁴⁹ and *Rance*, in the end, goes no further than to provide the same floor protections as the federal Double Jeopardy Clause.

Instead, *Rance's* holding demonstrates that the Ohio Supreme Court has been unduly influenced by the United States Supreme Court's double jeopardy jurisprudence. First, *Rance* adopts the *Dixon* view of double jeopardy analysis—that the specific facts of a case should not be considered when determining whether two offenses should merge.²⁵⁰ *Dixon* was decided a mere six years before *Rance*, suggesting that the Ohio Supreme Court had *Dixon* on its mind when it decided *Rance*.²⁵¹ Moreover, the Ohio Supreme Court explicitly adopted such an approach, using the words of Justice Rehnquist to support its position.²⁵² It is clear that, for some reason, the Ohio Supreme Court felt driven to accept the United States Supreme Court's approach to double jeopardy *in toto* as Ohio's approach to multiple counts. If the court had taken the time to review its own precedent, as well as the commentary to section 2941.25, it would have realized that the General Assembly envisioned more than a mere codification of federal double jeopardy jurisprudence when it enacted section 2941.25.

In *Cabrales* and *Brown*, the court did take the time to consider the legislative intent behind section 2941.25.²⁵³ However, *Cabrales* and

²⁴⁷ See *supra* notes 155–63 and accompanying text.

²⁴⁸ See *supra* notes 155–63 and accompanying text.

²⁴⁹ See *supra* Section III.

²⁵⁰ See *United States v. Dixon*, 509 U.S. 688, 705 (1993).

²⁵¹ *Dixon* was decided in 1993 while *Rance* was decided in 1999. See *Dixon*, 509 U.S. at 688; *State v. Rance*, 710 N.E.2d 699 (Ohio 1999).

²⁵² *Rance*, 710 N.E.2d at 703–04.

²⁵³ See *State v. Cabrales*, 886 N.E.2d 181, 187 (Ohio 2008); *State v. Brown*, No. 07-0184, 2008 WL 4274495, at *6–7 (Ohio Sept. 17, 2008).

Brown's approach to more closely achieve compliance with the legislature's intent behind section 2941.25 is haphazard, employing the "I know it when I see it approach," buttressed by a legislative intent inquiry to be used when the *Cabrales* result does not seem just. It is commendable that the court has recently broadened the scope of section 2941.25 to bring it more in line with what the General Assembly originally intended it to accomplish. However, it seems unlikely that even under *Cabrales* and *Brown* would the *Rance* test merge offenses such as involuntary manslaughter and child endangering. Thus, a slightly broader, but at the same time a less confusing and nebulous approach to section 2941.25 is needed.

B. Does the Fact-Specific Approach of City of Newark Fulfill the Policy Goals of Section 2941.25 of the Ohio Revised Code?

The fact-specific comparison of elements²⁵⁴ approach from *City of Newark* came closer to fulfilling the legislative intent behind Ohio's multiple counts statute than did the *Rance* test. As noted above, this approach prohibits multiple punishments for situations such as our hypothetical defendant's because, in his case, the same conduct that would be used to prove the predicate offense of child endangering would also be used to prove the "misdemeanor" element of the involuntary manslaughter.²⁵⁵ Indeed, *City of Newark's* approach is very similar, if not the same, as *Grady's* approach, as both look to the specific conduct that will be used to prove the elements of the relevant offenses, rather than simply comparing the elements of the offenses in the abstract. However, *City of Newark's* approach would not prevent multiple punishments for inchoate crimes and their related substantive offenses. The lack of this protection is fatal to the fact-based approach's utility in effectuating the legislative intent behind section 2941.25, considering that section 2941.25 was drafted based on the MPC's multiple counts section, as described below. While one could conceivably add *Cabrales* and *Brown's* "tweaks" of the *Rance* test to fix the shortcomings of the *City of Newark* approach, as noted above, the tweaks laid out in those cases leave much to be desired.²⁵⁶

²⁵⁴ This approach has been described as the "necessary element" test by some commentators. See, e.g., George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323, 335 (1986).

²⁵⁵ See *supra* notes 136–38 and accompanying text.

²⁵⁶ See *supra* notes 201–14, 219–26 and accompanying text.

V. HOW TO GET OUT OF THIS MESS—THE SAME TRANSACTION TEST.

Given the above analysis, what test should the Ohio Supreme Court adhere to if it decides to attempt to clear the muddied waters around section 2941.25 of the Ohio Revised Code? Because both the abstract elemental and fact-based approach to section 2941.25 do not fulfill the legislative intent behind the enactment of the multiple counts statute, the court is left with only one viable alternative: the same transaction test.²⁵⁷

Using a same transaction test to determine whether two offenses are allied under section 2941.25(A) would properly effectuate the legislative intent behind Ohio's multiple counts statute. This approach, as noted above, prohibits multiple punishments for crimes that were derived from the same transaction.²⁵⁸ However, because of the language of section 2941.25(B), a transactional approach would not lead to under-punishment. That is, even if two crimes occurred contemporaneously, if each had a separate animus, each would be punished separately under section 2941.25(B). For example, if our hypothetical defendant happened to be robbing a bank with his son and, in the middle of that event, decided to recklessly rough-house with him resulting in his son's death, the defendant could be convicted of both involuntary manslaughter and robbery because, although both crimes occurred contemporaneously, each event was a discrete transaction. This result is mandated under section 2941.25(B) because the defendant would have had a separate "animus" in committing each crime; that is, intent to rob a bank and intent to commit child endangering (that resulted in the unintended death of his son).²⁵⁹ Therefore, a "transactional" approach to section 2941.25 of the Ohio Revised Code would not lead to the unwanted result of a defendant getting off scot-free for a discrete crime committed during the course of another crime, even in the event the two crimes were effectuated to achieve the same criminal object.

Additional support for a "transactional" approach to section 2941.25 is found in the American Law Institute's Model Penal Code ("MPC") section on multiple punishment.²⁶⁰ The MPC can be used as a tool to interpret Ohio's statutory scheme as "Ohio's statutory definitions of criminal

²⁵⁷ Thomas, *supra* note 254, at 330–35.

²⁵⁸ See *supra* note 245 and accompanying text.

²⁵⁹ See OHIO REV. CODE ANN. § 2941.25(B) (LexisNexis 2006).

²⁶⁰ MODEL PENAL CODE § 1.07 (1985).

offenses in the Revised Code are based largely upon the American Law Institute's Model Penal Code²⁶¹

The MPC's treatment of multiple punishments, section 1.07(1), provides that

[w]hen the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if: (a) one offense is included in the other . . . ; or (b) one offense consists only of a conspiracy or other form of preparation to commit the other²⁶²

Section 1.07(4) further provides:

An offense is . . . included when: (a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; (b) it consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or (c) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.²⁶³

Thus, sections 1.07(1)(a) and 1.07(4)(a) of the MPC, which together disallow multiple punishments for greater and lesser included offenses, provide the same minimum protections as does *Blockburger*.²⁶⁴ However, the MPC's multiple counts section goes further than *Blockburger* and, therefore, the current interpretation of section 2941.25 of the Ohio Revised Code.

First, section 1.07(4) of the MPC follows a same-conduct, *Grady*-like approach to analyzing offenses, rather than a *Blockburger* abstract

²⁶¹ *State v. Woods*, 357 N.E.2d 1059, 1063 (Ohio 1976); *see also* Fritz Rauschenberg, *Sentencing Reform Proposals in Ohio*, 6 FED. SENT'G REP. 166 (1993) (noting "[t]he last major rewrite of Ohio's criminal code was in 1974, based on the Model Penal Code").

²⁶² MODEL PENAL CODE § 1.07(1) (1985).

²⁶³ MODEL PENAL CODE § 1.07(4) (1985); *see also* MODEL PENAL CODE § 1.07 cmt. 2(a) (1985).

²⁶⁴ MODEL PENAL CODE §§ 1.07(1)(a), (4)(a); *see also* MODEL PENAL CODE § 1.07 cmt. 2(a) (illustrating the greater/lesser included offense multiple punishments prohibition using the facts of *Brown v. Ohio*, 432 U.S. 161 (1977)).

elemental approach.²⁶⁵ Under this approach, it is the underlying conduct, not the elements of the offenses, that drives the multiple counts inquiry.²⁶⁶ Therefore, under our hypothetical, the defendant could only be convicted of either the child endangering charge or involuntary manslaughter charge because to prove the “misdemeanor” element of the involuntary manslaughter charge, the prosecution would have to rely on the same conduct as it did to prove the child endangering charge.²⁶⁷ Thus, not only does the MPC use a same-conduct rather than a same elements test to determine if an offense is a lesser included offense, but it also takes *Grady* one step further by disallowing multiple punishments for “included offenses” in a single trial, rather than only in a subsequent prosecution.²⁶⁸

Second, the MPC multiple counts sections disallow multiple punishments for solicitation or conspiracy and the substantive offenses underlying the solicitation or conspiracy.²⁶⁹ This approach would be consistent with a transactional approach to multiple punishments protection. More specifically, if one had solicited the murder of another and the murder was actually effected, both crimes arise out of the same transaction, that is, the murder of another. Under *Blockburger* (and *Rance’s* interpretation of section 2941.25), though, a defendant could be punished for both the inchoate and substantive offenses because each requires proof of a fact the other does not: the solicitation requires proof of solicitation, which murder does not, while murder requires proof of death, which solicitation does not.²⁷⁰ The MPC disallows such multiple punishments because “[i]t would be a perversion of the legislative intent to use these [offenses] to pyramid convictions and punishment.”²⁷¹

²⁶⁵ See MODEL PENAL CODE § 1.07 cmt. 1 n.1 (1985) (providing that “[m]odern criminal codes often proscribe as distinct offenses, with slightly different elements, what in essence is a single crime. While this practice may be necessary in order to reach certain types of criminal activity, it opens the way for unfair multiple prosecutions and convictions. To deal with these, the Code shifts the focus from the elements of the offenses to the underlying conduct”).

²⁶⁶ See *id.*

²⁶⁷ See *id.*

²⁶⁸ Cf. *id.*; see also *Grady v. Corbin*, 495 U.S. 508, 521 (1990), *overruled by* *United States v. Dixon*, 509 U.S. 688 (1993).

²⁶⁹ MODEL PENAL CODE §§ 1.07(1)(b), (4)(b).

²⁷⁰ See, e.g., OHIO REV. CODE ANN. § 2923.03(A)(1) (LexisNexis 2006) (defining the elements of “solicitation”); and OHIO REV. CODE ANN. § 2903.01(A) (LexisNexis 2006) (defining the elements of aggravated murder).

²⁷¹ MODEL PENAL CODE § 1.07 cmt. 2(a) (1985).

For this reason, the fact-based approach of *City of Newark* fails to fulfill the legislative intent behind section 2941.25 of the Ohio Revised Code. To convict for solicitation of aggravated homicide, for example, the state would not need to use any of the conduct associated with an the actual murder because solicitation statutes do not require that the offense contemplated have actually been completed.²⁷² Similarly, the state would not need to put on any of the facts required to prove solicitation before the jury to prove the aggravated homicide because that offense does not require proof of solicitation to convict.²⁷³ Therefore, while *City of Newark* provides greater protection to defendants than does the federal Double Jeopardy Clause, it does not provide precisely the same protections as does the MPC's multiple counts section—only a transactional approach to multiple counts affords that level of protection.

Given that Ohio's multiple counts statute was based, at least in part, on the MPC's multiple counts section, that the General Assembly intended to provide greater protection to defendants than does the *Blockburger* test and that early multiple counts opinions of the Ohio Supreme Court advocated a transactional approach to section 2941.25, the court should hold that multiple punishments for conduct arising out of the same transaction (as limited by section 2941.25(B)) are prohibited within a single trial.

VI. CONCLUSION.

Proportionality in punishment is critical goal of the criminal justice system.²⁷⁴ The legislative intent behind the enactment of section 2941.25 of the Ohio Revised Code was meant to effectuate this goal by limiting the power of prosecutors to decide on punishment via the charging instrument.²⁷⁵ However, the current state of Ohio's multiple counts jurisprudence does not comply with the legislative intent behind section 2941.25 and provides no clear test to determine merger. Therefore, if the Ohio Supreme Court wishes avoiding "shotgun" prosecutions, thereby effectuating the true policy underlying Ohio's multiple counts statute, it must adopt a more liberal approach to determining when two offenses are

²⁷² See, e.g., OHIO REV. CODE ANN. § 2923.03(C) (LexisNexis 2006) (the statute requires only that "an offense is actually committed," not the one contemplated).

²⁷³ OHIO REV. CODE ANN. § 2903.01(A).

²⁷⁴ See MODEL PENAL CODE § 1.02(2)(c) (1985). Retribution, rehabilitation and deterrence are additional oft cited goals of criminal law. See MODEL PENAL CODE § 1.02(2)(a)–(b) (1985).

²⁷⁵ See OHIO REV. CODE ANN. § 2941.25 (LexisNexis 2006) (1974 Committee Comment to H. 511).

“allied.” A same transaction test comes the closest to properly effectuating this legislative intent, while providing a much clearer test for Ohio’s courts than does *Rance* as clarified by *Cabrales* and *Brown*.

