[Cite as *State v. Anthony*, 2015-Ohio-2267.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101847

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHARLES F. ANTHONY

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-576392-A

BEFORE: Boyle, P.J., S. Gallagher, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: June 11, 2015

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MARY J. BOYLE, P.J.:

{¶1} Defendant-appellant, Charles Anthony, appeals from a judgment convicting him of involuntary manslaughter and felonious assault. He raises four assignments of error for our review:

> 1. The trial court committed reversible error as a matter of law when it failed to follow Rule 11 of the Ohio Rules of Criminal Procedure during the plea hearing.
>
> 2. The trial court committed reversible error as a matter of law when it failed to merge the two counts for sentencing purposes.
>
> 3. Mr. Anthony suffered ineffective assistance of trial counsel in violation of the U.S. Constitution.
>
> 4. Mr. Anthony suffered ineffective assistance of trial counsel in violation of the Ohio Constitution.

{¶2} Finding merit to his second assignment of error, we vacate his sentence and remand for resentencing where the state should elect which allied offense on which to proceed for sentencing.

Procedural History and Factual Background

{¶3} In August 2013, Anthony was indicted on four counts: one count of aggravated murder and murder and two counts of felonious assault. All counts carried notice of prior conviction and repeat violent offender specifications. Anthony pleaded not guilty to all charges at his arraignment.

{¶4} In November 2013, Anthony withdrew his former plea of not guilty and entered a plea of guilty to an amended indictment of involuntary manslaughter with both

specifications and one count of felonious assault with the specifications. The remaining counts were nolled.

{¶5} The trial court sentenced Anthony to a total of 13 years in prison, 11 years for involuntary manslaughter and two years for felonious assault, to be served consecutive to one another. The trial court further notified Anthony that he would be subject to five years of mandatory postrelease control upon his release from prison. It is from this judgment that Anthony appeals.

Crim.R. 11

{¶6} In his first assignment of error, Anthony contends that the trial court erred when it failed to follow Crim.R. 11 when accepting his guilty plea. Specifically, Anthony argues that the trial court did not advise him, as it is required to do under Crim.R. 11(C)(2)(b), that upon acceptance of his plea, it could proceed with judgment and sentence.

{¶7} The underlying purpose of Crim.R. 11 is to insure that certain information is conveyed to the defendant that would allow him or her to make a voluntary, knowing, and intelligent decision regarding whether to plead guilty. *State v. Ballard*, 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115 (1981). In determining whether the trial court has satisfied its duties under Crim.R. 11 in taking a plea, reviewing courts have distinguished constitutional and nonconstitutional rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 18. With respect to constitutional rights, a trial court must strictly comply with the dictates of Crim.R. 11(C). *State v. Colbert*, 71 Ohio

App.3d 734, 737, 595 N.E.2d 401 (11th Dist.1991). For nonconstitutional rights, the trial court must substantially comply. *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977). "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990).

{¶8} Crim.R. 11(C)(2)(b) provides in relevant part that the court shall not accept a guilty plea without first "[i]nforming the defendant of and determining that the defendant understands * * * that the court, upon acceptance of the plea, may proceed with judgment and sentence."

{¶9} The mandate set forth in Crim.R. 11(C)(2)(b) does not involve a constitutional right, and therefore, substantial compliance with the rule is required. *State v. Mendez-Lopez*, 6th Dist. Huron No. H-06-034, 2007-Ohio-5745, ¶ 13. Additionally, a defendant who claims that his plea was not knowingly, intelligently, or voluntarily made must show a prejudicial effect. *Nero* at 108, citing *Stewart* at 93.

{¶10} Prior to accepting Anthony's guilty plea, the trial court did not inform him that it could proceed with judgment and sentence upon acceptance of the plea. The record reflects, however, that the trial court did not proceed directly to sentencing but rather referred the matter for a presentence investigation. The sentencing hearing took place approximately one month after Anthony entered into his plea.

{¶11} "Where a trial court does not proceed immediately to sentencing upon accepting a guilty plea, the defendant is not prejudiced by the court's failure to warn that it

could have done so." (Emphasis sic.) *State v. Boyd*, 8th Dist. Cuyahoga No. 98342, 2013-Ohio-30, ¶ 13, citing *State v. Johnson*, 11th Dist. Lake No. 2002-L-024, 2004-Ohio-331, ¶ 20; *see also State v. Woods*, 2d Dist. Clark No. 05CA0063, 2006-Ohio-2325, ¶ 7.

{¶12} Accordingly, Anthony's first assignment of error is not well taken.

Allied Offenses of Similar Import

{¶13} In his second assignment of error, Anthony argues that the trial court erred when it failed to merge his involuntary manslaughter and felonious assault convictions. At the plea hearing, after Anthony pleaded guilty to both counts and the trial court accepted his pleas, defense counsel stated, "Your Honor, just I would like the obvious to be on the record, if I could, namely, that the Counts 2 and 3 merge for the purposes of sentencing." The trial court replied, "They certainly appear to me to do so." The state then stated, "No, we have no agreement. The sentencing range will be applied through the RVO, Your Honor." At sentencing, the trial court found that the felonious assault was a "separate and distinct act, and it is not subject to merger" with the involuntary manslaughter.

{¶14} An appellate court should apply a de novo standard of review in reviewing whether two offenses are allied offenses of similar import. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28. Anthony failed to object to the imposition of multiple punishments. Nonetheless, the Ohio Supreme Court has held that the imposition of multiple sentences for allied offenses of similar import is plain error.

State v. Underwood, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 31, citing *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 96-102.

{¶15} The Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution, and the Ohio Constitution, Article I, Section 10, protect a defendant against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661, 780 N.E.2d 250, ¶ 7; *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). But the Double Jeopardy Clause "does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). Thus, the dispositive issue is "whether the General Assembly intended to permit multiple punishments for the offenses at issue." *State v. Childs*, 88 Ohio St.3d 558, 561, 728 N.E.2d 379 (2000).

{¶16} In Ohio, this constitutional protection is codified in R.C. 2941.25. "R.C. 2941.25 essentially codified the judicial merger doctrine." *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶ 23. The Ohio Supreme Court has explained that "[m]erger is 'the penal philosophy that a major crime often includes as inherent therein the component elements of other crimes and that these component elements, in legal effect, are merged in the major crime.'" *Id.*, quoting *Maumee v. Geiger*, 45 Ohio St.2d 238, 243-244, 344 N.E.2d 133 (1976).

{¶17} R.C. 2941.25 provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶18} In *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, the Ohio Supreme Court explained:

> The legislative history of R.C. 2941.25 demonstrates that "[t]he basic thrust of the section is to prevent 'shotgun' convictions." Legislative Service Commission Summary of Am.Sub.H.B. 511, The New Ohio Criminal Code (June 1973) 69. The summary states: "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. On the other hand, a thief who commits theft on three separate occasions or steals different property from three separate victims in the space, say, of 5 minutes, can be charged with and convicted of all three thefts." *Id.* Similarly, the final report of the Technical Committee 1 to Study Ohio Criminal Laws and Procedures reflects the committee's opinion that "where the same conduct by the defendant technically amounts to two or more related offenses, he should be guilty of only one offense. On the other hand, where his conduct amounts to two or more different offenses, or to two or more offenses of the same kind committed at different times or with a separate evil purpose as to each, then it should be possible to convict him of all such crimes. The proposed section [R.C. 2941.25] is designed to effect this policy." Ohio Legislative Service Commission, Proposed Ohio Criminal Code (Mar.1971) 308.

Id. at ¶ 16.

{¶19} The Ohio Supreme Court set forth a new test for determining when two or more offenses are allied offenses of similar import in *State v. Johnson*, 128 Ohio St.3d

153, 2010-Ohio-6314, 942 N.E.2d 1061, overruling the abstract-elements test in *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699 (1999). Pursuant to *Johnson*, "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Id*. at syllabus. The court explained the two-part *Johnson* test as follows:

> In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. [*State v. Blankenship*, 38 Ohio St.3d 116, 119, 526 N.E.2d 816 (1988)] (Whiteside, J., concurring) ("It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses *can be* committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses." [Emphasis sic]). If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.
>
> If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind." [*Brown* at ¶ 50] (Lanzinger, J., dissenting).
>
> If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.
>
> Conversely, if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge.

Johnson at ¶ 48-51.

{¶20} In *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, the Ohio Supreme Court explained that "although *Johnson* abandoned the abstract

comparison component of the first prong (similar import), it did not change the second prong (conduct)." *Washington* at ¶ 15. The Supreme Court further explained in *Washington* that:

> In a unanimous syllabus, we overruled *Rance* and held that "the conduct of the accused must be considered" when determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25. [*Johnson*] at syllabus. Beyond the syllabus, however, we were divided as to how to consider a defendant's conduct in the first prong's "similar import" analysis.

Id. at ¶ 15.

{¶21} Subsequent to *Washington*, the Supreme Court issued *State v. Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603. In *Miranda*, the Supreme Court held that "*Johnson* is not applicable to a RICO violation and that a RICO offense does not merge with its predicate offenses for purposes of sentencing." *Id.* at ¶ 3. The Supreme Court explained that although R.C. 2941.25 is the "primary legislative statement on the multiplicity issue," it "is not the sole legislative declaration in Ohio on the multiplicity of indictments." *Id.* at ¶ 7, 10.

{¶22} The Supreme Court found that a RICO offense is dependent upon a defendant committing two or more predicate offenses, but the statute also requires a defendant to be "employed by, or associated with" an "enterprise" and to "conduct or participate in" an "enterprise through a pattern of corrupt activity, as well as proof of the existence of the enterprise." *Id.* at ¶ 13, citing R.C. 2923.32(A)(1). The court explained that "the conduct required to commit a RICO violation is independent of the conduct required to commit [the underlying predicate offenses]." *Id.* The court concluded that

"[t]he intent of RICO is 'to criminalize the pattern of criminal activity, not the underlying predicate acts.'" *Id.*, quoting *State v. Thomas*, 3d Dist. Allen Nos. 1-11-25 and 1-11-26, 2012-Ohio-5577, ¶ 61.

{¶23} The *Miranda* court reasoned that one of the purposes of the RICO statute was to provide "'enhanced sanctions * * * to deal with the unlawful activities of those engaged in organized crime.'" *Id.* at ¶ 14, quoting *State v. Schlosser*, 79 Ohio St.3d 329, 681 N.E.2d 911 (1997). "'The RICO statute was designed to impose cumulative liability for the criminal enterprise.'" *Id.*, quoting *Schlosser* at 335. The court further reasoned that "[i]f the purpose of [RICO] is to provide enhanced sanctions, this purpose is furthered by not merging [the predicate offenses with the RICO offense]." *Id.* at ¶ 14, citing *Thomas* at ¶ 61.

{¶24} Justice Lanzinger wrote a concurring in judgment only opinion in *Miranda*, which two other justices joined. Justice Lanzinger stated that she would have held "simply that because a RICO offense and its underlying predicate offenses are offenses of dissimilar import, they do not merge." *Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603, at ¶ 21.

{¶25} In her concurring in judgment opinion, Justice Lanzinger explained that "[i]n reviewing whether multiple crimes constitute allied offenses that merge, the Supreme Court had mainly discussed the concept of offenses of the same or similar import that result in offenses committed separately or with a separate animus." *Id.* at ¶ 22. But she

pointed out that the court had "not often discussed situations in which offenses are of dissimilar import," despite the explicit language of R.C. 2941.25. *Id.*

{¶26} Justice Lanzinger went on to address the defendant's argument that his sentence for the same conduct in the two offenses violates the rule in *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. She explained:

> While it is true that the syllabus in *Johnson* says that "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered," this language does not offer the complete analysis necessary to determine whether offenses are subject to merger rather than multiple convictions and cumulative punishment. Consideration of the defendant's conduct is but the first step in determining whether multiple offenses are allied offenses of similar import pursuant to R.C. 2945.21(B). As a justice in *Johnson* succinctly stated about allied offenses of similar import: "In practice, allied offenses of similar import are simply multiple offenses that arise out of the same criminal conduct and are similar but not identical in the significance of the criminal wrongs committed and the resulting harm." (Emphasis added.) *Id*. at ¶ 64 (O'Connor, J., concurring in judgment). In other words, offenses are dissimilar if they are not alike in their significance and their resulting harm.

Id. at 25 (*Lanzinger*, J., concurring in judgment only).

{¶27} In *State v. Velez*, 8th Dist. Cuyahoga No. 101303, 2015-Ohio-105 (released after *Miranda*, but before *State v. Ruff*, Slip Opinion No. 2015-Ohio-995, the Supreme Court's most recent pronouncement on allied offenses), this court addressed the question of whether involuntary manslaughter and aggravated robbery were allied offenses of similar import. This court explained in *Velez*:

> For many years the Supreme Court held that "felony-murder under R.C. 2903.01(B) is not an allied offense of similar import to the underlying felony." *State v. Keene*, 81 Ohio St.3d 646, 669, 1998- Ohio-342, 693 N.E.2d 246 (1998). *See also State v. Campbell*, 90 Ohio St.3d 320, 347,

> 2000-Ohio-183, 738 N.E.2d 1178 (2000); *State v. Logan*, 60 Ohio St.2d 126, 135, 397 N.E.2d 1345 (1979). Felony murder and involuntary manslaughter are very similar crimes — they differ only in respect to the degree of the predicate offense. For this reason, courts likewise considered that involuntary manslaughter and its predicate offense were not allied offenses. *See, e.g., State v. Noble*, 1st Dist. Hamilton No. C-100049, 2010-Ohio-5493.

Velez at ¶ 5.

{¶28} But as we pointed out in *Velez*, the rationale for these cases holding that felony murder and its predicate offense were not allied offenses "rested on a comparison of the statutory elements." *Id.* at ¶ 6. This rationale, however, which was set forth in *Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699, was overruled by *Johnson*. *See Johnson* at syllabus.

{¶29} In *Velez*, this court further stated that

> [a]n argument could be made that for purposes of involuntary manslaughter under R.C. 2903.04(B), the General Assembly intended to punish the death proximately caused during the commission of a felony separately from the predicate felony itself. The plain language of the statute suggests as much — with the death having to occur as a proximate result of committing the predicate offense, the offenses are thus committed with the same conduct. To say that the predicate offense is an allied offense of similar import to the death would seem to render a separate charge on the predicate offense meaningless.

Id. at ¶ 7.

{¶30} We explained in *Velez* that the Supreme Court acknowledged this reasoning in *Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603, "by finding a legislative intent to separately punish predicate crimes under Ohio's RICO statute." This court then pondered the following in *Velez*:

> It is unclear whether *Miranda* signals the Supreme Court's intention to apply this line of reasoning, noting that it did not do so in *Johnson* where it held that felony murder and the predicate offense of child endangering merged based upon the defendant's same conduct — the beating of a child.

Velez, 8th Dist. Cuyahoga No. 101303, 2015-Ohio-105, at ¶ 8.

{¶31} Despite discussing *Miranda* and contemplating whether the Supreme Court would apply this line of reasoning, we acknowledged in *Velez* that *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, was more closely on point than *Miranda*, because *Johnson* dealt with felony murder, which is more analogous to involuntary manslaughter. We concluded in *Velez* that the involuntary manslaughter and aggravated robbery were not allied offenses of similar import because "the force used to effectuate the murder [was] far in excess of that required to complete the robbery." *Id.* at ¶ 10. We further concluded that "[n]ot only do we find that the stabbing was an additional act of such excessive force that it went beyond being the same conduct necessary to rob the victim, it was an act of harm that had a separate animus and was unnecessary to the commission of the robbery." *Id.* at ¶ 11. Thus, despite this court's discussion of *Miranda* in *Velez*, we decided the allied-offense issue based upon the relevant allied-offense test *at that time — Johnson* (not *Miranda*). Essentially, this court determined in *Velez* that the defendant committed the acts with separate conduct and a separate animus. *Id.*

{¶32} Recently, the Ohio Supreme Court revisited the issue of allied offenses once again in *Ruff*, Slip Opinion No. 2015-Ohio-995. Although the Supreme Court did not explicitly overrule *Johnson*, it stated that the "decision in *Johnson* was incomplete." *Ruff*

at ¶ 16. Notably, the opinion in *Ruff* looks strikingly similar to Justice Lanzinger's concurring in judgment only opinion in *Miranda*. Not surprisingly, Justice Lanzinger authored *Ruff*. Somewhat surprising, however, is that a majority of justices joined in Justice Lanzinger's opinion, considering that they did not do so in *Miranda*. This appears to answer the question that this court pondered in *Velez*, namely, whether *Miranda* signaled the Supreme Court's intention to apply "this line of reasoning" when examining allied offenses (that is, focusing on the legislative intent of the criminal statutes at issue, without looking at the defendant's conduct). *Ruff* seemingly answers that question; it appears to be no. Thus, *Miranda* appears to be limited to its holding (which only addressed the RICO statute and the predicate offenses supporting it). To illustrate this point, an in-depth review of *Ruff* is necessary.

{¶33} In *Ruff*, the defendant was convicted, among other things, of rape and aggravated burglary involving three women at different times and in different homes. At sentencing, Ruff argued that the three rape counts for each victim should merge with the corresponding aggravated burglary counts. The trial court denied his request. Ruff appealed, arguing that the trial court erred by not merging the relevant counts. The First District agreed with Ruff, concluding that based on *Johnson* and considering Ruff's conduct:

> each aggravated burglary was not completed until Mr. Ruff raped his victims, and the state necessarily relied upon evidence of the rapes to establish the elements of the aggravated-burglary offenses. The conduct relied upon to establish rape — sex compelled by force — was the same as the conduct relied upon by the state to establish the "physical harm" component in R.C. 2911.11(A)(1).

State v. Ruff, 1st Dist. Hamilton Nos. C-120533 and C-120534, 2013-Ohio-3234, ¶ 33.

{¶34} The state appealed. The Ohio Supreme Court accepted jurisdiction on the state's sole proposition of law: "The import of rape and aggravated burglary are inherently different." *Ruff* at ¶ 9. The Supreme Court explained, "[i]n other words, we were asked to determine what 'import' means within the meaning of R.C. 2941.25." *Id*.

{¶35} The state argued in *Ruff* that "rape and aggravated burglary can never be allied offenses because rape is not merely incident to aggravated burglary." *Id.* at ¶ 17. According to the state's position, rape is classified "as a crime against a person, whereas aggravated burglary is a crime against property," and thus, "they will always have different imports." *Id.*

{¶36} Ruff argued, on the other hand, that "aggravated burglary, by requiring an element related to physical harm, must always merge with a violent offense such as rape" because "[a]n offender does not commit aggravated burglary until the offender inflicts or attempts to or threatens to inflict physical harm on another." *Id.* at ¶ 18.

{¶37} The Ohio Supreme Court rejected both "absolute" positions, stating that "neither party's position completely follows the language of the statute." *Ruff*, Slip Opinion No. 2015-Ohio-995, at ¶ 19. It explained that "[n]o bright-line rule can govern every situation." *Id.* at ¶ 30.

{¶38} The Supreme Court went on to define the meaning of "similar import." It explained that even if two offenses are committed with "identical conduct and the same evidence," that "R.C. 2941.25(B) states that the *same conduct* can be separately punished

if that conduct constitutes offenses of *dissimilar* import." (Emphasis sic.) *Ruff* at ¶ 20. In interpreting R.C. 2941.25(B), the court stated that there are in fact "three categories in which there can be multiple punishments: (1) offenses that are dissimilar in import, (2) offenses similar in import but committed separately, and (3) offenses similar in import but committed with separate animus." *Id.* at ¶ 20. Thus, under R.C. 2941.25(B), "the inquiry should not be limited to whether there is separate animus or whether there is separate conduct. Courts must also consider whether the offenses have similar import." *Id.* at ¶ 22, citing *State v. Baer*, 67 Ohio St.2d 220, 226, 423 N.E.2d 432 (1981).

{¶39} In further defining what "import" means, the Supreme Court reviewed cases where it had previously "illustrated when offenses are of dissimilar import." *Id.* at ¶ 23.[1] From these cases, the court concluded that "two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *Id.*

{¶40} In setting forth the new test for merger of multiple offenses, the Supreme Court stated that "[a] trial court and the reviewing court on appeal when considering

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[1]The three cases were: *State v. Jones*, 18 Ohio St.3d 116, 118, 480 N.E.2d 408 (1985) (although there was only one car accident, the court viewed "appellant's conduct as representing two offenses of dissimilar import — the 'import' under R.C. 2903.06 being each person killed"); *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 726 N.E.2d 26, ¶ 48 (even though the defendant set only one fire, his conduct caused six offenses of dissimilar import due to risk of serious harm or injury to each person); *State v. Moss*, 69 Ohio St.2d 515, 520, 433 N.E.2d 181 (1982) (aggravated burglary was not an allied offense of aggravated murder, because it was not incident to and an element of aggravated murder).

whether there are allied offenses that merge into a single conviction under R.C. 2941.25(A) must first take into account the conduct of the defendant." *Ruff*, Slip Opinion No. 2015-Ohio-995, at ¶ 25. The court explained that courts must ask, "how were the offenses committed?" In doing so, if a court finds that "(1) the offenses are dissimilar in import or significance — in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, [or] (3) the offenses were committed with separate animus or motivation[,]" then "the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses." *Id.* at ¶ 25.

{¶41} The Supreme Court further explained:

> At its heart, the allied-offense analysis is dependent upon the facts of a case because R.C. 2941.25 focuses on the defendant's conduct. The evidence at trial or during a plea or sentencing hearing will reveal whether the offenses have similar import. When a defendant's conduct victimizes more than one person, the harm for each person is separate and distinct, and therefore, the defendant can be convicted of multiple counts. Also, a defendant's conduct that constitutes two or more offenses against a single victim can support multiple convictions if the *harm that results* from each offense is separate and identifiable from the harm of the other offense. We therefore hold that two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.

(Emphasis added.) *Id.* at ¶ 26.

{¶42} The Supreme Court made clear that "*[r]ather than compare the elements of two offenses* to determine whether they are allied offenses of similar import," courts must "focus on the defendant's conduct to determine whether one or more convictions may result because an offense may be committed in a variety of ways and the offenses

committed may have different import." (Emphasis added.) *Id.* at ¶ 30. Thus, although the Supreme Court stated that it was merely clarifying *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, it is clear that the first prong of the two-part *Johnson* inquiry (where courts had to review the elements of the offenses to determine if it was "possible to commit one offense and commit the other with the same conduct") is no longer necessary. The second prong of *Johnson*, however — dealing with animus and conduct — remains the same, just as it always has no matter what test is employed.

{¶43} The Supreme Court noted, as it had in *Johnson*, that "'this analysis may be sometimes difficult to perform and may result in varying results for the same set of offenses in different cases. But different results are permissible, given that the statute instructs courts to examine a defendant's conduct — an inherently subjective determination.'" *Ruff*, Slip Opinion No. 2015-Ohio-995, at ¶ 32, quoting *Johnson* at ¶ 52 (plurality opinion per Brown, C.J.).

{¶44} It would have been helpful had the Supreme Court illustrated how the newly articulated test for merger applied in *Ruff*. But after setting forth the three-part test, the Supreme Court did not apply it to determine whether aggravated burglary and rape were allied offenses of similar import under the facts of the case. Instead, the court remanded the case to the First District to conduct the analysis because the First District "did not consider the import of the offenses." *Id*. at ¶ 29. The Supreme Court noted that "even if Ruff committed the aggravated burglary and the corresponding rape of each victim with

the same conduct, he could still be convicted of both offenses if the offenses are of dissimilar significance and have separate and identifiable harm." *Id.*

{¶45} In determining whether two offenses have dissimilar import, such that the defendant can be punished for both, one thing is clear: it is not a matter of simply looking at the statute to determine legislative intent. We know this because the Supreme Court rejected the state's proposition that rape and aggravated burglary have a dissimilar import as a matter of law because rape "is a crime against a person," and aggravated burglary "is a crime against property." *Id.* at ¶ 17. Likewise, the Supreme Court rejected Ruff's "absolute" approach, namely, that because aggravated burglary required an element related to physical harm, it must always merge with a violent offense such as rape. Both the state's and Ruff's positions amounted to merely looking to the statute, without taking into account the defendant's conduct.

{¶46} In this case, we must determine if Anthony's involuntary manslaughter and felonious assault convictions are allied offenses of similar import. Relying on *Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603, the dissent asserts that involuntary manslaughter and felonious assault are offenses of dissimilar import because

> involuntary manslaughter is meant to punish for the resulting death of a victim, a crime legislatively deemed separate and distinct from that of felonious assault, which punishes the offender for the immediate harm resulting from his conduct in assaulting the victim (and not the resulting injuries).

But this is exactly the rationale set forth by the state in *Ruff* that was rejected by the Supreme Court. *See Ruff*, Slip Opinion No. 2015-Ohio-995, at ¶ 17-19. Thus, we disagree with the dissent that *Miranda* is the applicable test.

{¶47} Instead, in determining whether involuntary manslaughter and felonious assault are allied offenses under the facts of this case, we must apply the new merger test set forth in *Ruff*, as this case was pending on appeal when the Supreme Court announced its decision. *State v. Parson*, 2d Dist. Montgomery No. 24641, 2012-Ohio-730, citing *State v. Ali*, 104 Ohio St.3d 328, 2004-Ohio-6592, 819 N.E.2d 687, ¶ 6. *Ruff* directs that "[r]ather than compare the elements of two offenses to determine whether they are allied offenses of similar import,"

we must "focus on [Anthony's] conduct." *Ruff* at ¶ 30. Even though we do not have to compare the elements, it helps to know what offenses we are addressing. Anthony was convicted of involuntary manslaughter and felonious assault. Involuntary manslaughter under R.C. 2903.04(A) provides that "[n]o person shall cause the death of another * * * as a proximate result of the offender's committing or attempting to commit a felony." Felonious assault under R.C. 2903.11(A)(1) provides that "no person shall knowingly * * * cause serious physical harm to another[.]"

{¶48} The state presented the facts at the sentencing hearing. Anthony and the victim were friends. They had been drinking and doing drugs on the night of the incident. At some point, they started arguing. And then Anthony stabbed the victim four times "on the victim's backside."

{¶49} First, there is nothing in the record to establish that the offenses **r**esulted in separate and identifiable harm to establish that the offenses have a dissimilar import. After arguing with the victim, Anthony stabbed the victim four times, and the victim died. The state argues that Anthony's "conduct in this case could be broken down between fatal and non-fatal stab wounds, thus allowing the trial court to make appropriate findings." But there is nothing in the record, at the plea or sentencing hearing, to establish there were fatal and nonfatal stab wounds.

{¶50} Next, there is nothing in the record to establish that the offenses were committed separately or with a separate animus. The evidence presented was simply that Anthony and the victim were doing drugs together, after which at some point they began arguing, and Anthony stabbed the victim four times in the back, and the victim died. There are no other details to establish that there was a break in a "'temporal continuum'" between the initial stabbing and the final stabbing such that we could find that there were separate acts or a separate animus. *State v. Roberts*, 180 Ohio App.3d 666, 2009-Ohio-298, 906 N.E.2d 1177, ¶ 14 (3d Dist.), quoting *State v. Williams*, 8th Dist. Cuyahoga No. 89726, 2008-Ohio-5286, ¶ 37; *State v. Hines*, 8th Dist. Cuyahoga No. 90125, 2008-Ohio-4236, ¶ 48. Alternatively, there were no facts in the record to "'distinguish the circumstances or draw a line of distinction that enables a trier of fact to reasonably conclude separate and distinct crimes were committed * * *.'" *Roberts*, quoting *Williams* (noting facts also may support a separate animus where the defendant's conduct "created a 'substantial independent risk of harm'").

{¶51} Moreover, just because there were multiple stabbings does not make it separate and distinct for purposes of our analysis. Indeed, in *Johnson*, the Supreme Court declined to find that the defendant's multiple "blows" to a child supported multiple convictions for felony murder and the predicate offense of child endangering. *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶ 56. The court determined that the beating "was a discrete act that resulted in the simultaneous commission of allied offenses, child abuse and felony murder." *Id.* We note that *Johnson* is still good law on this point regarding what constitutes a separate act and a separate animus.

{¶52} Interestingly, in *Johnson*, the Supreme Court rejected the First District's reasoning that felony murder and its predicate offense, child endangering, were not allied offenses of similar import because they protected "unique societal interest[s]." *See State v. Johnson*, 1st Dist. Hamilton Nos. C-080156 and C-080158, 2009-Ohio-2568, ¶ 28-33. The First District acknowledged that the offenses of felony murder and child endangering were committed with the same conduct, but reasoned that when enacting the child endangering statute, the legislature "intended to 'bestow special protection upon children' when 'crafting' the offense of child endangering." *Id.* at ¶ 95, quoting *State v. Morin*, 5th Dist. Fairfield No. 2008-CA-10, 2008-Ohio-6707. But the First District explained that felony murder protected a different societal interest, that of "protect[ing] human life." *Id.* at ¶ 96. The First District concluded that "the General Assembly intended to distinguish these offenses and to permit separate punishments for the commission of these two crimes." *Id.* The Supreme Court, however, rejected this reasoning outright — holding

that felony murder and its predicate offense (child endangering) were allied offenses of similar import, committed with the same conduct. *See Johnson.*

{¶53} Thus, it is irrelevant in this case that the purpose of involuntary manslaughter is to protect human life, and the purpose of felonious assault is to prevent physical harm to persons. Instead, courts must look at the defendant's conduct to determine whether (1) the offenses caused separate, identifiable harm, (2) the offenses were committed separately, or (3) the offenses were committed with separate animus. *Ruff*, Slip Opinion No. 2015-Ohio-995, at ¶ 25. If any of the three are true, then "the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses." *Id.*

{¶54} Essentially, when analyzing whether two offenses are allied offenses of similar import, as the statute directs, it is the defendant's conduct that is at the heart of the question. In determining whether two offenses are allied offenses of similar import, courts should not lose sight of "common sense." *See Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, at ¶ 24 ("common sense and logic tell us that in order to prepare a controlled substance for shipping, ship it, transport it, deliver it, prepare it for distribution, or distribute it, one must necessarily also possess it").

{¶55} In *Cabrales*, which is the case that began the evolution of overruling *Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699, the Supreme Court discussed how *Rance* produced "inconsistent, unreasonable, and at times, absurd or unreasonable results." *Cabrales* at ¶ 20. To illustrate the absurdity of these results, the Supreme Court gave examples of cases from the Second, Eleventh, and Fourth Appellate Districts (as well as others). *Cabrales*

at ¶ 16-19, citing *State v. Hendrickson*, 2d Dist. Montgomery No. 19045, 2003-Ohio-611 (found involuntary manslaughter and aggravated vehicular homicide were not allied offenses of similar import when there was only one victim); *State v. Waldron*, 11th Dist. Ashtabula No. 99-A-0031, 2000 Ohio App. LEXIS 3984 (Sept. 1, 2000) (Christley, J., concurring) (by holding that involuntary manslaughter and aggravated vehicular homicide were not allied offenses of similar import when there was only one victim, the court said: "we have not only said that appellant was guilty of killing two people, we are saying that he was guilty of killing each victim two times"); and *State v. Cox*, 4th Dist. Adams No. 02CA751, 2003-Ohio-1935 (held involuntary manslaughter and aggravated arson were not allied offenses of similar import, but noting that "we are aware of the practical result of our conclusion: Cox stands convicted of both creating a substantial risk of physical harm and causing the death of [the victim] based on one occurrence"). These examples of absurd results in the allied offenses analysis illustrate what the court meant by applying "common sense" — a principle that still applies in all cases.

{¶56} The Supreme Court explained in *Cabrales* that *Rance* produced absurd results because courts interpreted it as "requiring a strict textual comparison," where allied offenses of similar import could only be found if "all the elements of the compared offenses coincide exactly." *Cabrales* at ¶ 22. The Supreme Court explained that "[o]ther than identical offenses, we cannot envision any two offenses whose elements align exactly." *Id.* The court further reasoned that such an interpretation was "incongruous because the state is already prohibited from punishing a defendant for

identical, duplicate offenses pursuant to the Double Jeopardy Clause." *Id.*, citing *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, 806 N.E.2d 542, ¶ 16 ("The Fifth Amendment to the United States Constitution provides that '[n]o person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb.' Similarly, Section 10, Article I, of the Ohio Constitution provides, 'No person shall be twice put in jeopardy for the same offense.'").

{¶57} What the dissent is suggesting here would produce results just as absurd as *Rance* did. The dissent, after discussing the legislative intent of the offenses in *Ruff* (rape and aggravated burglary), asserts that "[t]he legislature must have intended [rape and aggravated burglary to be separately punishable], or burglary would not be a separately delineated crime." But if that were true, two or more offenses — all separately delineated by the legislature — would never merge. Each criminal offense is, by definition, separately delineated by the legislature. Indeed, other than identical offenses, we cannot envision any two offenses that have the exact same legislative intent. For example, one could argue that rape was enacted to protect persons from sexual assault and that kidnapping was enacted to protect persons from restraint of their liberty. But it has long been settled that implicit with every rape is a kidnapping, and thus, the two offenses are allied offenses of similar import (whether they were committed with a separate animus or conduct is another issue).[2]

[2]Even under the test set forth in *Ruff*, Slip Opinion No. 2015-Ohio-995, rape and kidnapping (if committed with the same conduct, and without any facts indicating that the kidnapping was committed with a separate animus) would have a similar import under the first prong of the *Ruff* test

{¶58} The legislature enacted R.C. 2941.25 because it recognized this exact problem, i.e., "that in many cases a single criminal act could constitute two or more similar crimes[.]" *Logan*, 60 Ohio St.2d at 130, 397 N.E.2d 1345. R.C. 2941.25 was the legislature's attempt to remedy this problem. *Id.* Simply because the legislature enacts separately delineated offenses does not mean that one can be punished for multiple offenses if they have a similar import, and are committed with the same animus and conduct.

{¶59} Accordingly, we conclude that under the facts of this case, felonious assault and involuntary manslaughter are allied offenses of similar import and should have merged. Thus, the trial court erred when it sentenced Anthony on both offenses.

{¶60} We further note that, contrary to the dissent's assertion, Anthony's sentence is subject to review under R.C. 2953.08(D)(1). *See Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923.

{¶61} Anthony's second assignment of error is sustained.

Ineffective Assistance of Counsel

{¶62} In his third and fourth assignments of error, Anthony argues that his trial counsel was ineffective and violated his due process rights under the United States and Ohio Constitutions. He claims that his trial counsel was ineffective for (1) failing to raise a Castle Doctrine defense, (2) repeatedly misstating Anthony's criminal history, (3) failing

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because the harm caused by the two offenses would be the same.

to raise a similar acts defense, (4) misstating Anthony's age, and (5) failing to follow up on Anthony's request for a defense investigator.

{¶63} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of the appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Brooks*, 25 Ohio St.3d 144, 495 N.E.2d 407 (1986). Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland* at 689. A strong presumption exists that a licensed attorney is competent and that the challenged action is the product of sound trial strategy and falls within the wide range of professional assistance. *Id*. at 689. Generally, debatable trial tactics and strategies do not constitute ineffective assistance of counsel. *State v. Phillips*, 74 Ohio St.3d 72, 85, 656 N.E.2d 643 (1995); *State v. Clayton*, 62 Ohio St.2d 45, 49, 402 N.E.2d 1189 (1980).

{¶64} As for Anthony's arguments that his trial counsel failed to raise a Castle Doctrine defense and failed to follow up on Anthony's request for a defense investigator, based on the record before us, there is nothing to suggest that the defense counsel did anything improper. Anthony claims that another attorney he spoke with (who he attempted to hire, but then did not have the money to do so) told him that he had a defense based upon the Castle Doctrine. But we can only presume from the record before us that

Anthony's assigned counsel investigated all possible defenses before the plea negotiations occurred and determined that Anthony did not have a defense under the Castle Doctrine.

{¶65} Regarding Anthony's request for a defense investigator, it is true that defense counsel moved for funds to be appropriated for a defense investigator on September 13, 2013. Anthony had just been indicted one month previously. He was charged with aggravated murder, i.e., murdering someone purposely and with prior calculation and design. Presumably, defense counsel moved for a defense investigator prior to obtaining all of the discovery in the case. But after receiving discovery, defense counsel likely realized that a defense investigator was not necessary. Accordingly, we find no deficient performance on the part of defense counsel.

{¶66} Regarding Anthony's claims that his trial counsel was ineffective at his sentencing hearing for misstating Anthony's criminal history, failing to raise a similar acts defense, and misstating Anthony's age, we find that even if true, these actions or lack of actions did not prejudice Anthony in any way. As part of his plea agreement, the state and Anthony agreed that Anthony would be sentenced somewhere in the range of 11 and 17 years. Anthony received 13 years (although upon remand and resentencing, he can only receive 11 years because involuntary manslaughter and felonious assault are allied offenses of similar import). Further, the trial court had access to the presentence investigation report that included Anthony's prior criminal history and age. Accordingly, we find that even if defense counsel's actions or lack of actions amounted to deficient

performance, defense counsel's actions did not prejudice Anthony in any way because Anthony's sentence would have been the same regardless.

{¶67} Accordingly, Anthony's third and fourth assignments of error are overruled.

{¶68} Judgment reversed. Sentence vacated. Case remanded for resentencing where the state should elect which allied offense to proceed on before the trial court imposes the sentence.

It is ordered that appellant recover from appellee the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, PRESIDING JUDGE

ANITA LASTER MAYS, J., CONCURS;
SEAN C. GALLAGHER, J., DISSENTS (WITH SEPARATE OPINION)

SEAN C. GALLAGHER, J., DISSENTING:

{¶69} This case exemplifies the distinction between what will be referred to as predicate-offense type or result-based crimes,[3] such as felony murder, involuntary

[3]As confusing as this terminology may seem, any reference to "result-based crimes" is a

manslaughter, and vehicular homicide, and conduct-based crimes when considering merger. This distinction is often overlooked, and as a result, I respectfully dissent from the majority's resolution of the second assigned error. Anthony agreed to consecutive service of his sentences by pleading guilty and specifically agreeing to a sentence range of 11 to 17 years. R.C. 2953.08(D)(1) expressly provides that a "sentence imposed upon a defendant is not subject to review under this section if the sentence is *authorized by law*, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." (Emphasis added.) All the criteria were met in this case. Anthony agreed to serve an 11- to 17-year sentence of imprisonment. Anthony's sentence is not subject to review by this court. *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, is not applicable to the current case because Anthony's conviction was authorized by law (the *Underwood* decision is limited to appellate review of sentences not authorized by law).

{¶70} The majority's analysis misses the point. Any double jeopardy concerns involving the conviction of involuntary manslaughter and felonious assault are not analyzed through the lens of R.C. 2941.25 alone; those two crimes are offenses of dissimilar import, and thus inherently authorized by law. *Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603.

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reference to crimes such as felony murder and involuntary manslaughter that are defined in terms of a resulting harm (death) being inflicted as a proximate result of the commission, or attempted commission, of any criminal offense (the predicate offense).

{¶71} The majority's resolution of the allied offense issue highlights the continuing problems of applying the vaguely defined principles espoused in R.C. 2941.25. Involuntary manslaughter is meant to punish for the resulting death of a victim, a crime legislatively deemed separate and distinct from that of felonious assault, which punishes the offender for the immediate harm resulting from his conduct in assaulting the victim (and not the resulting injuries). Both crimes are separately punishable, and Anthony's convictions should be affirmed.

{¶72} In an effort to explain why I am compelled to dissent in this case, a more detailed look back at *Ruff*, Slip Opinion No. 2015-Ohio-995, is in order. In *Ruff*, the Ohio Supreme Court held that "[t]wo or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *Id.* at paragraph two of the syllabus. It cannot be overlooked that the crimes at issue in *Ruff* were aggravated burglary, in violation of R.C. 2911.11(A)(1), and rape, in violation of R.C. 2907.02(A)(2), both of which are conduct-based crimes. Aggravated burglary is committed if the offender trespasses into an occupied structure when another is present *with the purpose of committing any criminal offense* inside the structure and a harm (attempted or threatened) is inflicted. It is the intent to commit any criminal offense, coupled with a resulting harm and the conduct constituting the trespass, that signifies the commission of the burglary, although the real harm of which could be described as the invasion into the sanctity of the home. The crime of rape is meant to

punish for the invasion of the sanctity of one's own body. In merging the offenses, the appellate court in *Ruff* failed to consider the dissimilar import of the two crimes and the Ohio Supreme Court reversed. *Id.* at ¶ 28.

{¶73} It is of little consequence that the harm is actually inflicted through the commission of the offense that the offender intended to commit upon entering the structure. One way to look at this is that if one offense is completed before the other begins, two offenses have been committed. *State v. Fields*, 12th Dist. Clermont No. CA2014-03-025, 2015-Ohio-1345, ¶ 18. That analysis does not work in all situations because, as in *Ruff*, the aggravated burglary is not "complete" until a harm is actually caused. This likely led to the rejection of the all-or-nothing approach the state offered in *Ruff*. When looking at the situation posed in *Ruff*, however, a rape occurring in the sanctity of one's home should be separately punishable. To hold otherwise would treat a rape occurring outside the home (which is bad enough) the same as if it occurred in the presumed safety of the victim's home. Aggravated burglary and rape are both felonies of the first degree, and the merger results in the conviction of one offense. The legislature must have intended otherwise, or burglary would not be a separately delineated crime. If the *Ruff* syllabus is to be believed, separate and identifiable harms are indeed separately punishable.

{¶74} Unlike the crimes at issue in *Ruff*, involuntary manslaughter is not a conduct-based crime. Involuntary manslaughter is a result-based crime solely dependent on the commission of a separate predicate offense. Therefore, involuntary manslaughter is

a separately punishable offense. It should be noted that this comports with Ohio case law. As a panel previously noted, a line of cases was not overruled in which

> [f]or many years the Supreme Court held that "felony-murder under R.C. 2903.01(B) is not an allied offense of similar import to the underlying felony." *State v. Keene*, 81 Ohio St.3d 646, 669, 1998- Ohio-342, 693 N.E.2d 246 (1998). *See also State v. Campbell*, 90 Ohio St.3d 320, 347, 2000-Ohio-183, 738 N.E.2d 1178 (2000); *State v. Logan*, 60 Ohio St.2d 126, 135, 397 N.E.2d 1345 (1979). Felony murder and involuntary manslaughter are very similar crimes — they differ only in respect to the degree of the predicate offense. For this reason, courts likewise considered that involuntary manslaughter and its predicate offense were not allied offenses. *See, e.g., State v. Noble*, 1st Dist. Hamilton No. C-100049, 2010-Ohio-5493.

Velez, 8th Dist. Cuyahoga No. 101303, 2015-Ohio-105, at ¶ 5; *State v. Carter*, 8th Dist. Cuyahoga No. 101810, 2015-Ohio-1834.

{¶75} Although *Velez* and *Carter* recognized the difference in result-based, predicate offense defined crimes, they nevertheless erroneously use a conduct-based analysis in resolving the merger issue. In both cases, the panels concluded that the offender used more force than was necessary to commit the predicate offense, and therefore, the associated involuntary manslaughter conviction did not merge with the underlying predicate offense. *Carter* at ¶ 36. Under that analysis, the predicate

offense would never merge because causing the death of the victim is always "more force than is necessary" to commit the predicate offense. Although a correct result, the analysis is more problematic because, for merger purposes, it is comparing apples to oranges: conduct-based crimes to result-based ones.

{¶76} *Johnson* did not overrule that long line of cases holding that crimes dependent on the commission of a predicate offense do not merge with the predicate offense itself. Accordingly, and contrary to the suggestion in the majority's opinion, *Johnson* should not be used to drastically alter the legal landscape.[4] *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. Crimes, such as aggravated murder, involuntary manslaughter, or aggravated burglary, punish an offender for the harm separate and identifiable from that caused by the underlying offense, just as felony murder punishes for the death of the victim over and above the harm resulting from the underlying crime. Analyzing the merger of those crimes based solely on conduct effectively nullifies statutory provisions. *Id.* at ¶ 7.

{¶77} The majority's position is steeped in the belief that using a conduct-based analysis will lead to different results on a case-by-case approach. The conduct-based inquiry, however, will always lead to the merger of involuntary manslaughter and the underlying felony, and it is for this reason that courts cannot strictly apply *Ruff*, Slip

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[4]The lead opinion in *Johnson* only garnered three votes. The majority simply concurred in judgment and with the syllabus, which provides that "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." R.C. 2941.25 is not the sole analysis used to resolve the merger of predicate-offense crimes. *Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603.

Opinion No. 2015-Ohio-995, to the predicate-offense defined crimes at issue in *Miranda*. Under the majority's conduct-based analysis, involuntary manslaughter and the underlying felony would always merge. There is no conduct underlying the commission of involuntary manslaughter except for the conduct constituting the commission of the predicate felony offense. In other words, involuntary manslaughter is not a conduct-based crime, the conduct is dependent on the commission of an underlying felony in all circumstances. The majority's reliance on a conduct-only inquiry is all or nothing when addressing the merger of involuntary manslaughter with the underlying felony and, incidentally, may lead to the same "absurd results" of *Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699, the majority shuns.

{¶78} The simple fact is that predicate-offense type crimes, such as involuntary manslaughter, which punish the death of a victim based on the commission of an underlying offense, must either always merge or always be separate and distinct from the predicate offense itself. There is no middle ground.

{¶79} Anthony was convicted of involuntary manslaughter and felonious assault. R.C. 2903.04(A) provides that "[n]o person shall cause the death of another * * * as a proximate result of the offender's committing or attempting to commit a felony." This demonstrates the legislative intent to punish for the ultimate harm befalling the victim, not the offender's conduct in achieving that harm. Punishment for the conduct is a separate issue. For felonious assault, an offender need only "cause serious physical harm to another" or attempt to cause physical harm with a deadly weapon. R.C. 2903.11. Thus,

the legislative intent behind R.C. 2903.11 is to punish the offender for the conduct of attacking the victim, not the resulting death. Merging the two offenses nullifies the legislative intent, behind the involuntary manslaughter statute, to punish the resulting death separately from the assault.

{¶80} As the Ohio Supreme Court clarified, R.C. 2941.25 "is not the sole legislative declaration in Ohio on the multiplicity of indictments." *Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603, ¶ 10, citing *Childs*, 88 Ohio St.3d at 561, 728 N.E.2d 379. Further, "'[w]hile our two-tiered test for determining whether offenses constitute allied offenses of similar import is helpful in construing legislative intent, it is not necessary to resort to that test when the legislature's intent is clear from the language of the statute.'"[5] *Id.*, quoting *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶ 37. As the court noted, a RICO offense is dependent on the commission of two or more underlying offenses with an additional "enterprise" component. Thus, the purpose of the statute is to punish the pattern of corrupt activity, not the underlying acts. *Id.* at ¶ 13. Further, the statute provides enhanced sanctions, a purpose wholly subverted by merging the RICO violations with the underlying felony. This comports with the principles espoused in the Double Jeopardy Clause of the Fifth Amendment. *Hunter*, 459

[5]Arguably, the Ohio Supreme Court created a three-part inquiry in *Ruff*, largely a distinction without a difference. Whether application of R.C. 2941.25 is a two- or three-part inquiry is irrelevant to the fact that the legislature may draft legislation to separately punish offenders for conduct that constitutes the commission of several offenses. As the United States Supreme Court noted, the Double Jeopardy Clause only prevents courts from imposing a greater punishment than the legislature intended. *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

U.S. at 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (the Double Jeopardy Clause simply prevents the sentencing court from imposing greater punishment than the legislature intended).

{¶81} The Ohio Supreme Court's *Miranda* analysis applies to the current case. *State v. Schidecker*, 2d Dist. Montgomery No. 26334, 2015-Ohio-1400, ¶ 39 (applying *Miranda* to OVI and aggravated vehicular manslaughter and assault charges); *State v. Hill*, 9th Dist. Summit No. 27263, 2015-Ohio-1122, ¶ 11-16 (the same); *State v. Bates*, 1st Dist. Hamilton No. C-140033, 2015-Ohio-116, ¶ 29 (weapons under disability, aggravated robbery with a firearm, and carrying a concealed weapon charges); *State v. Greer*, 4th Dist. Jackson No. 13CA2, 2014-Ohio-2174, ¶ 15 (child endangerment and manufacturing drugs in the vicinity of a child); *State v. Washington*, 8th Dist. Cuyahoga No. 100994, 2014-Ohio-4578, ¶ 29 (noting that *Miranda* could be applied to burglary and theft charges).

{¶82} Involuntary manslaughter, as with the RICO violation, is dependent on the commission of underlying felony offenses with an additional "resulting death" component. Thus, the legislature intended to punish for the harm, the death of the victim, separate from the conduct underlying the felony offense that caused the harm. The purpose of the involuntary manslaughter statute is to punish the offender for the death of the victim, not the underlying crime. By codifying an enhanced sanction for the death of the victim stemming from the commission of the underlying felony, merger must be deemed inapplicable. Accordingly, I would affirm Anthony's conviction.