

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. 2007-1842  
: :  
Appellant, : On Appeal from the Montgomery County  
: Court of Appeals,  
v. : Second Appellate District  
: Case No. 21710  
DAVON WINN, :  
: :  
Appellee. :

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**MOTION OF APPELLANT/CROSS-APPELLEE DAVON WINN  
TO DISMISS APPEAL AS HAVING BEEN IMPROVIDENTLY ALLOWED**

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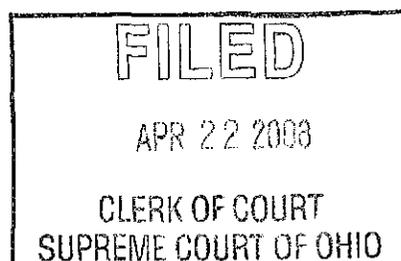
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**INTRODUCTION**

This Court should dismiss this appeal as having been improvidently allowed because the issue raised is no longer a question of public or great general interest. Sup. Ct. Prac.R. II, §1(A)(3), Sup. Ct. Prac.R. XII. This Court's recent decision in *State v. Cabrales*, Slip Opinion No. 2008-Ohio-1625, along with its earlier decisions in *State v. Rance* (1999), 85 Ohio St.3d 632 and *State v. Fears* (1999), 86 Ohio St.3d 329, resolved the questions raised by the State's Proposition of Law I and Proposition of Law II. Therefore, this case no longer requires this Court's time and resources necessary for briefing and oral argument.

Mr. Winn was convicted of one count of aggravated robbery, one count of aggravated burglary, and one count of kidnapping. The trial court imposed a seven-year sentence for each of those counts, to be served concurrently. A three-year firearm specification was also included in Mr. Winn's sentence for a total of ten years of incarceration. On appeal, the court of appeals held that aggravated robbery and kidnapping are allied offenses of similar import, and that Mr. Winn should only have been convicted of one of those offenses. Mr. Winn filed a Memorandum in Support of Jurisdiction with this Court, and the State filed a Memorandum in Opposition along with a cross-appeal. This Court accepted Propositions of Law I and II contained within the State's cross-appeal for review. The State filed its merit brief and the Ohio Attorney General filed an amicus brief in support of the State. Mr. Winn's merit brief is currently due to be filed with this Court on May 15, 2008.

## DISCUSSION

This case involves the question of whether aggravated robbery, a violation of R.C. 2911.01(A)(1), and kidnapping, a violation of R.C. 2905.01(A)(2), are allied offenses of similar import under R.C. 2941.25. This Court set forth the test for determining whether two offenses are allied offenses of similar import in *Rance*. This Court's recent decision in *Cabrales* clarified confusion that had developed among the appellate districts regarding how to apply the test set forth in *Rance*. In *Cabrales*, this Court held:

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. (*State v. Rance* (1999), 85 Ohio St.3d 632, 1999 Ohio 291, 710 N.E.2d 699, clarified.) *Cabrales*, at paragraph one of the syllabus.

Both the State's and the Attorney General's arguments in the present case rely on the assertion that this Court's statement in *State v. Logan* (1979), 60 Ohio St.2d 126, that aggravated robbery and kidnapping are allied offenses of similar import, is no longer valid after this Court's decisions in *Rance* and *Cabrales*. However, that position is not tenable, as this Court's decisions in *Fears* and *Cabrales* both reaffirmed this Court's statement in *Logan* regarding those offenses. After this Court's decision in *Cabrales*, the current case no longer presents a question of public or great general interest.

The State's position overlooks this Court's statement in *Fears*, an opinion issued after *Rance*, that "a kidnapping specification merges with an aggravated robbery specification unless the offenses were committed with a separate animus. R.C. 2941.25(B). Thus, when a kidnapping is committed during another crime, there exists no separate animus where the restraint or

movement of the victim is merely incidental to the underlying crime.” *Fears*, at 334, citing *State v. Logan*, syllabus.

This Court recently reaffirmed its earlier holdings that aggravated robbery and kidnapping are allied offenses of similar import in *Cabrales*. Clarifying the test set forth in *Rance*, this Court expressly stated:

Even after *Rance*, this court has recognized that certain offenses are allied offenses of similar import even though their elements do not align exactly. See . . . *State v. Fears*, 86 Ohio St.3d at 344, 715 N.E.2d 136 (aggravated robbery and kidnapping are allied offenses). In these cases, we did not overrule or modify *Rance*, but we did not apply a strict textual comparison in determining whether the offenses were allied under R.C. 2941.25(A). *Cabrales*, at ¶25 (emphasis added).

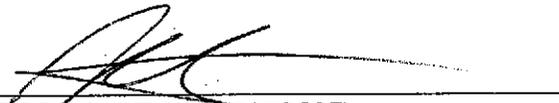
This Court should dismiss this appeal as having been improvidently allowed because this case no longer presents a question of public or great general interest. Sup. Ct. Prac.R. II, §1(A)(3), Sup. Ct. Prac.R. XII. Twice since its decision in *Rance*, this Court has stated that aggravated robbery and kidnapping are allied offenses of similar import. As that is the very subject at issue in the present case, this Court should dismiss the State’s appeal as improvidently allowed in order to conserve this Court’s limited resources.

## CONCLUSION

After this Court's decision in *State v. Cabrales*, this case no longer presents a question of public or great general interest. Sup. Ct. Prac.R. II, §1(A)(3). Therefore, Mr. Winn respectfully requests that this Court dismiss the State's cross-appeal. Sup. Ct. Prac.R. XII.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Motion of Appellant/Cross-Appellee Davon Winn to Dismiss Appeal as Having Been Improvidently Allowed** was forwarded by regular U.S. Mail to Jill R. Sink, Assistant Prosecuting Attorney, postage prepaid, to her office at the Montgomery County Prosecutor's Office, 5<sup>th</sup> Floor, Courts Building, 301 West Third Street, Dayton, Ohio, 45422, this 22<sup>nd</sup> day of April, 2008.

  
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