IN THE SUPREME COURT

OF THE

STATE OF OHIO

STATE OF OHIO	:	CASE NO. 08-0234
	:	
Defendant-Appellant	:	
	:	
vs.	:	On Appeal from the Twelfth District Court of Appeals
LIZ CARROLL	:	For Clermont County
	:	
Plaintiff-Appellee	:	District Court of Appeals Case No. CA2007-02-030

MOTION FOR RECONSIDERATION

ON BEHALF OF DEFENDANT-APPELLANT

LIZ CARROLL

HAMILTON COUNTY PROSECUTOR
230 East 9th Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3050

Counsel for Plaintiff-Appellee
State of Ohio

ELIZABETH E. AGAR
Supreme Court # 0002766
1208 Sycamore Street
Olde Sycamore Square
Cincinnati, Ohio 45210
(513) 241-5670 fax 241-5680
elizabethagar@fuse.net

Counsel for Defendant-Appellant
Liz Carroll

FILED
MAY 18 2008
CLERK OF COURT
SUPREME COURT OF OHIO

MOTION FOR RECONSIDERATION OF REFUSAL TO GRANT JURISDICTION

Defendant-Appellant, by and through counsel, moves for reconsideration of the judgment of the Court denying leave to appeal and dismissing her discretionary appeal. For cause, counsel states that this Court has recently issued an opinion in *State v. Cabrales*, Slip Opinion No. 2008-Ohio-1625, which is directly on point with her First Assignment of Error. *Cabrales* makes it clear that the trial court and the Court of Appeals erred when it applied a strict textual comparison of the various crimes charged in her indictment and concluded that none of these offenses were allied under R.C. 2941.25(A).

Defendant was charged with murder, involuntary manslaughter, kidnaping, felonious assault, and three counts of child endangering, all alleging that she left a foster child restrained in a closet overnight, resulting in his death. She was convicted as charged, and the trial court imposed consecutive sentences for all offenses except the involuntary manslaughter, even though only one victim, and only one act of abuse against a single victim was alleged or proven. Many of these charges clearly describe allied offenses of similar import, or alternative ways of charging the same offense. Imposition of separate and consecutive penalties for all these offenses violates R.C. 2941.25(A) as this Court has interpreted it.

The Court of Appeals applied an incorrect "strict textual comparison" test to affirm all convictions and sentences except for the involuntary manslaughter charge, which it merged with the murder conviction. Without benefit of the *Cabrales* decision, the Court of Appeals found that murder and felonious assault, for example, are not allied, even though it is impossible to cause the death of another without also causing serious physical harm. Furthermore, felonious assault was one of the underlying felonies used to establish felony

murder. In addition, the Court found that defendant could also be convicted of felonious assault and child endangering under R.C. 2919.22(B)(2), even though Defendant could not have committed felonious assault against her foster child without also committing the offense of child endangering. Knowingly causing serious physical harm to a child necessarily includes recklessly abusing the child resulting in serious physical harm. When the serious physical harm which results is death, all these offenses are allied.

This argument applies with equal force to the crimes of kidnaping and child endangering under R.C. 2919.22(B)(3). Child endangering under this subsection, says, in relevant part, that no person in charge of a child shall "...physically restrain the child in a cruel manner or for a prolonged period, which...restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child." Additionally, the degree of offense charged required a finding that serious physical harm actually occurred. Kidnaping as charged in Defendant's case provides that no person shall knowingly restrain a person of his liberty under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim. This count also required the jury to find that actual serious physical harm occurred. It is clear from a comparison of the statutes that Defendant could not physically restrain her foster child in a manner which both threatened and caused serious physical harm without committing kidnaping.

Because this Court's decision in *Cabrales* clearly dictates a different legal standard than that applied by the Court of Appeals, and mandates a different result, this case can and should be resolved under S. Ct. Prac. R. XII by a summary reversal and remand for reconsideration by the Court of Appeals in light of that decision.

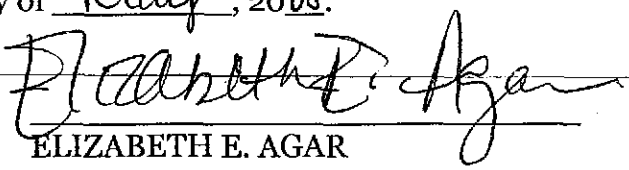
WHEREFORE, Counsel respectfully requests that the Court reconsider its judgment and issue an order summarily reversing the judgment of the Court of Appeals, with direction to reconsider Appellant's allied offenses argument in light of *Cabrales*.

ELIZABETH E. AGAR
Supreme Court # 0002766
1208 Sycamore Street
Olde Sycamore Square
Cincinnati, Ohio 45210
(513) 241-5670 fax 241-5680

Counsel for Defendant-Appellant
Liz Carroll

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing motion has been personally served upon the office of the Prosecuting Attorney this 16th day of May, 2008.



ELIZABETH E. AGAR