IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Plaintiff-Appellee/Cross-Appellant,	:	
-vs-	:	Case No. 08-1348
CHRISTOPHER SMITH,	:	1st Dist. No. C-060991
Defendant-Appellant/Cross-Appellee.	:	

MEMORANDUM IN RESPONSE TO MEMORANDUM IN SUPPORT OF JURISDICTION FOR CROSS APPEAL

FOR APPELLANT/CROSS-APPELLEE:

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FILED
AUG 22 2008
CLERK OF COURT
SUPREME COURT OF OHIO

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STATEMENT AGAINST JURISDICTION FOR CROSS-APPEAL

The prosecutor seeks a reversal of the lower court's determination that the multiple punishments for the singular conduct that constituted the offenses of robbery and aggravated robbery, and two disjunctive counts of felonious assault, each committed as a single act, against a single victim, with a single animus, were prohibited by the double jeopardy clause as allied offenses of similar import.

The prosecutor argues that, even under the clarified test of an abstract analysis of the elements, neither pair of offenses qualifies as allied offenses.

The prosecutor's arguments, however, are devoid of a crucial infredient of the relevant analysis, which was clearly properly factored by the court of appeals, that being the concept of a single animus. When the "single animus" element is factored in, the prosecutor's arguments against allied offense determination must fail.

The questions presented by the prosecutor in the cross-appeal are not of substantial constitutional import and are not of great general or public interest, and rpesent no novel questions of law for this Court to determine. Jurisdiction should not be granted on the issues presented in the cross-appeal.

STATEMENT OF THE CASE AND FACTS

Appellant/Cross-Appellee would refer back and incorporate by reference the Statements of the Case and Facts set forth in his initial Memorandum in Support of Jurisdiction in this case to any extent that it differes with that presented by the appellee/Cross-Appellant.

ARGUMENT AGAINST PROPOSITIONS OF LAW IN CROSS APPEAL

The initial appellee herein has filed a Cross-Appeal challenging the lower court's partial sustaining of an assignment of error incorporating the **State v Cabrales** 2008-Ohio-1625 clarifiction for an analysis of whether multiple convictions constitute allied offenses of similar import on two grounds. Appellant/Cross-Appellee opposes the acceptance of jurisdiction for the reasons set forth below.

CROSS-APPELLANT'S PROPOSITION OF LAW NO. I:

WHEN A SINGLE ACT WITH A SINGLE ANIMUS CAN BE SAID TO VIOLATE TWO DISTINCT STATUTES, DOUBLE JEOPARDY PROHIBITS MULTIPLE PUNISHMENT ABSENT EXPRESS LEGISLATIVE INTENT TO AUTHORIZE SUCH CUMULATIVE PUNISHMENT.

LAW AND ARGUMENT

The prosecutor argues that the offenses of Robbery under R.C. §2911.02(A)(2) and Aggravated Robbery under R.C. §2911.01(A)(1) are not allied offenses of similar import even under abstract elemental analysis, arguing specifically that, generally, the elements of "inflict or attempt to inflict..physical harm" in the robbery statute and "have a deadly weapon" in the aggravated robbery statute render any determination that a single animus resulting in the commission of both of these offenses against one victim prohibits multiple punishment incorrect under the **Cabrales** analysis.

The prosecutor, however, overlooked the necessary ingredient of a determination as to whether a single act committed with a single animus that happens to violate two disjunctive statutes, may result in multiple punishment therefor. The prosecutor fails to include the determination that a single act with a single animus resulted in the prosecutor's determination to include both offenses in the shotgun indictment. When considering the single animus element, the lower court was proper in sustaining the issue with regard to robbery and aggravated robbery, and the prosecutor has pointed to no authorities suggesting otherwise.

Jurisdiction should be declined on this argument.

CROSS-APPELLANT'S PROPOSITION OF LAW NO. II:

THERE IS NO MENIFESTLY CLEAR LEGISLATIVE INTENT TO PERMIT MULTIPLE PUNISHMENT FOR A SINGLE ACT THAT VIOLATES TWO DISJUNCTIVE FELONIOUS ASSAULT CHARGES, WHEN COMMITTED WITH A SINGLE ANIMUS.

LAW AND ARGUMENT

The prosecutor attempts to rely upon **Albernaz v U.S.** (1981) 450 U.S. 333 for the proposition that multiple punishments for two disjunctive charges of felonious assault are proper. However, the prosecutor overlooks the fact that in **Albernaz**, the two different offenses, importation of marijuana, and distribution thereof, require a separate animus and separate mens rea for each offense. Conversely, in this case, it is uncontested that there was a single act, against a single victim, with a single animus. The mere fact that the prosecutor elected to "throw in the kitchen sink" in the indictment in no way alleviates the state from its restriction against violating double jeopardy by inflicting multiple punishment.

The prosecutor attempts to argue that it should be inferred that the legislature intended to permit multiple punishment in cases where the prosecutor is able to charge both disjunctives of felonious assault, but points to no authority to support the argument.

In **State v Torres** (1986) 31 Ohio App. 3d 118, the Court presented a succinct discussion of this issue, and, citing the relevant authorities from this Court, stated that criminal statutes will be construed not to authorize cumulative punishment, in the absence of manifestly clear legislative intent to authorize such cumulative punishment.

The prosecutor can point to no statutory provisions or committee notes that even so much as suggest, much less prove, any legislative intent to authorize multiple [illegible] for a single act, with a single animus and a single victim in a [illegible] against.

As the statutes themselves, as well as **State v Cabrales**, supra dispose of this question, jurisdiction should be declined on this argument.

CONCLUSION

For the foregoing reasons, this Court should decline jurisdiction on the prosecutor's arguments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent to the office of the Hamilton County Prosecutor, 230 E. 9th St., Cincinnati, Ohio 45202, via regular U.S. Mail, on this 19th day of August, 2008.

Christopher Smith

Christopher Smith, in pro se