

STATE OF OHIO : On Appeal from the
 : Cuyahoga County Court of
 Plaintiff-Appellee/Cross-Appellant : Appeals, Eighth Appellate
 : District
 -vs- :
 : Court of Appeals
 KEVIN WILLIAMS : Case No. 89726
 :
 Defendant-Appellant/Cross-Appellee:

**MEMORANDUM IN OPPOSITION OF JURISDICTION
OF CROSS-APPELLEE KEVIN WILLIAMS**

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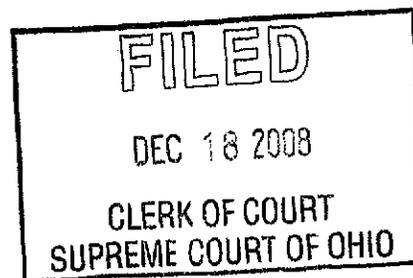


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The concept of allied offenses is not difficult: When a person's single act results in his having committed two or more crimes, he may be found guilty of all the crimes, but can be sentenced on only one of them. The other crimes must merge into the controlling offense as allied offenses. Despite the fact that the concept of allied offenses is basic, in trying to apply the rule this Court's holding in *State v. Rance* (1999) 85 Ohio St.3d 632, 1999-Ohio-291, lower courts had made a hopeless muddle out of the question of allied offenses of similar import.

The lower courts believed that *Rance* required a "strict textual analysis" of statutory elements in order to assess whether two crimes were allied offenses. As a result, the lower courts in implementing *Rance* turned the analysis of allied offenses into a morass that no one could understand. In response to what the lower courts had done, this Court clarified the *Rance* rule in *State v. Cabrales* (2008) 118 Ohio St.3d 54, 2008-Ohio-1625. In *Cabrales*, this Court held that allied offense analysis requires the elements of statutes be compared but did not require a "strict textual analysis."

In the case at bar, the Eighth District applied *Cabrales* and held that felonious assault is an allied offense of similar import to attempted murder. In a cross-appeal, the State of Ohio seeks this Court to undo the Eighth District's decision. In its Memorandum in Support of Jurisdiction the State of Ohio does not use the actual words "strict textual analysis," but it urges this Court to adopt an analysis that is, in reality, a strict textual analysis of the crimes of attempted murder and felonious assault and hold that felonious assault can never be an allied offense of similar import to attempted murder.

This Court must not accept the State's invitation to backtrack from *Cabrales* and return to *Rance*. Nor should this Court overturn the Eighth District's correct post-*Cabrales* of the case at bar and should not accept jurisdiction over the State's appeal.

The State of Ohio not only seeks to have this Court abandon *Cabrales*, it has presented an argument which conveniently omits one key fact which is essential to this Court's consideration

of the State's appeal. The State argues that felonious assault can never be an allied offense to attempted murder charged under R.C., 2903.03(A), purposefully attempting to cause the death of another man. The State forgot to include in its argument that in the case at bar, Mr. Williams was convicted of two counts of attempted murder, one under R.C., 2903.03(A) and one under R.C., 2903.03(B).

Mr. Williams's conviction under R.C., 2903.03(B), the so-called "super manslaughter" statute dooms the State's argument. R.C., 2903.03(B) contains as one of its essential elements the commission of a felony of violence which is also a felony of the first or second degree. In the case at bar, Mr. Williams was convicted of one count of attempted murder attempted murder under R.C. 2903.03(B) and two counts felonious assault—one for causing serious physical harm and one for causing physical harm with a deadly weapon—for shooting the same man, LayShawn McKinney. In the case at bar the underlying felonies of violence were the two felonious assaults. Thus, the felonious assault convictions became *essential elements* of the attempted murder charged under R.C., 2903.03(B). Therefore, Mr. Williams *could not* have committed this count of attempted murder without simultaneously committing the two felonious assault convictions, as they were essential elements of the attempted murder charge. Nothing in the Ohio Revised Code or Ohio case law precludes two lower felonies from both being allied offenses of similar import to the same underlying greater felony. Therefore, because both of Mr. Williams's felonious assault convictions were elements of the attempted murder count charged under R.C., 2903.03(B), they were allied offenses. The Eight District's ruling that the felonious assault charges were allied offenses to attempted murder was proper and should not be disturbed.

The case at bar does not present any great constitutional question for this Court, because the Eight District decided the case correctly. Other courts can rely on the Eighth District's correct ruling when they are faced with the same question. This Court should, therefore not accept jurisdiction over the State of Ohio's cross-appeal in the case at bar.

STATEMENT OF THE CASE

Cross-Appellee Kevin Williams adopts and incorporates by reference the Statement of the Case contained in his original Memorandum in Support of Jurisdiction filed with this Court on October 20, 2008.

STATEMENT OF THE FACTS

Cross-Appellee Kevin Williams adopts and incorporates by reference the Statement of the Facts contained in his original Memorandum in Support of Jurisdiction filed with this Court on October 20, 2008.

ARGUMENT

PROPOSITION OF LAW I: WHEN THE ELEMENTS OF A CRIME CORRESPOND TO SUCH A DEGREE WITH THE ELEMENTS OF A SECOND CRIME THAT A PERSON CANNOT COMMIT THE FIRST CRIME WITHOUT ALSO COMMITTING THE SECOND CRIME, THE TWO CRIMES ARE ALLIED OFFENSES. WHEN BOTH ACTS ARE COMMITTED WITH THE SAME ANIMUS, THE CRIMES ARE OF ALLIED OFFENSES OF SIMILAR IMPORT. AS ONE CANNOT COMMIT THE CRIME OF ATTEMPTED MURDER WITHOUT ALSO COMMITTING THE CRIME OF FELONIOUS ASSAULT, WHEN THE CRIMES ARE COMMITTED WITH THE SAME ANIMUS, THEY ARE ALLIED OFFENSES OF SIMILAR IMPORT.

In the State of Ohio's cross-appeal, it argues that felonious assault under R.C. 2903.11(A)(1) or (2) is not an allied offense of similar import to attempted murder. In its argument, the State tries to draw too narrow a construction of the allied offense statute and this Court's ruling in *State v. Cabrales* (2008) 118 Ohio St.3d 54, 2008-Ohio-1625. The State's analysis is little more than another name for the strict textual analysis standard of *State v. Rance* (1999) 85 Ohio St.3d 632, 1999-Ohio-291 (incorporating the double jeopardy standard of *Blockburger v. United States* (1932) 284 U.S. 299), which this Court rejected in *Cabrales*. For this reason, the State's appeal should be rejected. As this Court noted in *State v. Baer* (1981) 67 Ohio St.3d 220,226, the Ohio General Assembly enacted R.C., 2941.25, Ohio's allied offense statute, to insure that multiple convictions do not occur in cases where the double jeopardy analysis of *Blockburger* does not apply,

If the General Assembly, by the enactment of R.C. 2941.24, had not intended to prohibit more than one conviction and sentences

other than where the offenses are the same for purposes of double jeopardy, there could be no purpose in the enactment of the statute.

Baer at 226.

The State's argument is that felonious assault cannot be an allied offense of similar import to attempted murder charged under R.C. 2903.03(A). There are two problems with the State's analysis. The first is that the State's analysis no longer lies after *Cabrales*. The second and more glaring problem with the State's argument is that it contains a glaring omission which dooms the argument and which will be addressed first.

The State argues that no felonious assault can ever be an allied offense to an attempted murder charged under R.C., 2903.03(A), purposefully attempting to cause the death of another. What the State's argument conveniently overlooks is the fact that Mr. Williams was charged under *both* R.C. 2903.03(A) *and* (B). The fact that Mr. Williams was charged under R.C. 2903.03(B) undoes the State's entire argument.

Under R.C. 2903.03(B), attempted murder occurs when a person purposefully attempts to cause another's death while committing a first- or second-degree felony of violence. Under R.C., 2903.03(B), if an actor commits a felonious assault which results in an attempt to cause death, the felonious assault is the underlying felony of violence in the attempted murder count. As a result, the felonious assault becomes an element of the attempted murder charge. Thus, it is clear that one could not commit attempted murder under R.C. 2903.03(B) without also committing the essential element of that attempted murder charge, the underlying felonious assault.

Mr. Williams was convicted of two felonious assault counts for an alleged shooting incident involving one victim, LayShawn McKinney. One conviction lay under the theory that he purposefully caused serious physical harm by shooting McKinney and was indicted under R.C. 2903.11(A)(1). The other was that he purposefully caused physical harm to the same LayShawn McKinney at the same time with a deadly weapon by shooting him. This count was indicted under R.C., 2902.11(A)(2). Both of the felonious assault counts, which were alternate theories of prosecution for the same act, were allied offenses of similar import to the attempted murder count charged in count four, the count charged under R.C., 2903.03(B). Nothing precludes both

theories of felonious assault from being allied offenses of similar import to the attempted murder charged under R.C. 2903.03(B). There is no statutory or case law requirement that forbids two crimes from both being allied offenses to the same greater offense. The allied offense statute is intended to prevent shotgun convictions, a philosophy which would require finding that two lesser offenses can both be allied offenses of similar import to the same greater offense, if their elements all align properly.

The Eighth District did not err in ruling that both felonious assault counts were allied offenses of similar import to the attempted murder in count four which was charged under R.C., 2903.03(B). This Court should not accept jurisdiction over the State's cross-appeal.

As noted, the State argued that felonious assault cannot be an allied offense to attempted murder, when the attempted murder is charged under R.C. 2903.03(A), purposefully attempting to cause another's death. The State asks this Court to return to an overly narrow reading of the allied offense statute and *Cabrales* which this Court should reject.

In *Cabrales* at ¶¶ 16-20, this Court noted that the strict application of its decision in *Rance* which many courts were using was wreaking havoc. This Court noted that a strict textual comparison of the elements of the two crimes was "overly narrow." *Cabrales* at ¶22. *Cabrales* also noted that the proper test is whether the elements are so aligned that one cannot commit the first crime without simultaneously committing the second. *Id.* at ¶¶ 26-27.

Under *Cabrales*, the starting point of the reviewing whether two crimes are allied offenses is to understand that the jury found the defendant guilty of both crimes. Then the court must determine whether the two crimes, which the jury confirmed has occurred, are so similar in their elements that a person cannot commit the first crime without simultaneously committing the second crime.

In the case at bar, the jury found Mr. Williams guilty of attempted murder under R.C., 2903.03(A). The jury, therefore, found that Mr. Williams purposefully attempted to kill LayShawn McKinney by shooting him. The jury also found that Mr. Williams was guilty of two counts of felonious assault for shooting the same LayShawn McKinney. In one count, the jury

found under R.C. 2903.11(A)(1) that Mr. Williams caused serious physical harm to McKinney by shooting him. In the second, the jury found under R.C., 2903.11(A)(2) that Williams caused LayShawn McKinney physical harm with a deadly weapon by shooting him. Thus Mr. Williams's act of shooting McKinney resulted in three convictions: one attempted murder under R.C. 2903.03(A) and two different felonious assaults. One simply cannot shoot another person intending to kill him without committing first an attempted murder and also two counts of felonious assault for the one act of shooting.

Under *Cabrales*, the felonious assault convictions are allied offenses to the attempted murder, because no one can attempt to kill another man by shooting him without also, and simultaneously, committing two different felonious assault convictions on the same victim. Moreover, there could only be one animus in all the acts, to kill the other man. As no one can kill another man multiple times, there cannot be multiple animi in the act of shooting another man to kill him. So, even though that one act results in three crimes, there is only one animus involved. The crimes are, therefore, allied offenses of similar import and only one conviction may lie.

The State of Ohio seeks to have this court narrow its ruling in *Cabrales*. This Court should reject the State's invitation and not accept jurisdiction over the State's appeal. Moreover, even if the State's narrow analysis of *Cabrales* is the correct one, which Mr. Williams maintains is not the case, the State's appeal in the case at bar must still fall. It does not matter whether felonious assault can never be an allied offense of similar import to attempted murder charged under R.C., 2903.03(A), as it is clear, after *Cabrales*, that felonious is *always* an allied offense of attempted murder under R.C., 2903.03(B). The State's appeal conveniently overlooks the fact that Mr. Williams was convicted of attempted murder under both R.C., 2903.03(A) and (B) and also overlooks what affect Mr. William's conviction under (B) has to his felonious assault convictions. As the Eighth District properly found that the felonious assaults were properly allied offenses of similar import to the attempted murder charged under R.C., 2903.03(B), this Court should not disturb its correct ruling.

CONCLUSION

WHEREFORE, for the foregoing reasons, Mr. Williams prays this Court to deny the State's request that this Court accept jurisdiction over its cross-appeal.

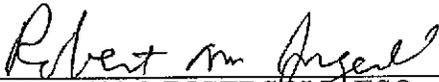
Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Appellant's Brief and Assignment of Error was served by ordinary mail upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 17th day of December, 2008.



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