

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2009-1481
Plaintiff-Appellee,	:	
	:	On Appeal from the Hamilton County
vs.	:	Court of Appeals, First Appellate
	:	District Case Nos. C-080156, C-080158
FRED T. JOHNSON,	:	
	:	
Defendant-Appellant.	:	

**MERIT BRIEF OF AMICUS CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLANT FRED T. JOHNSON**

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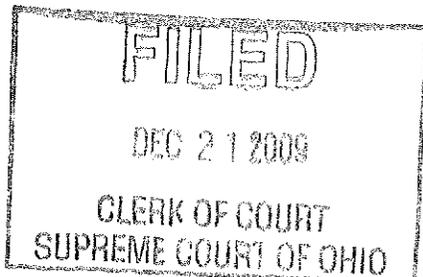


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STATEMENT OF THE CASE AND FACTS

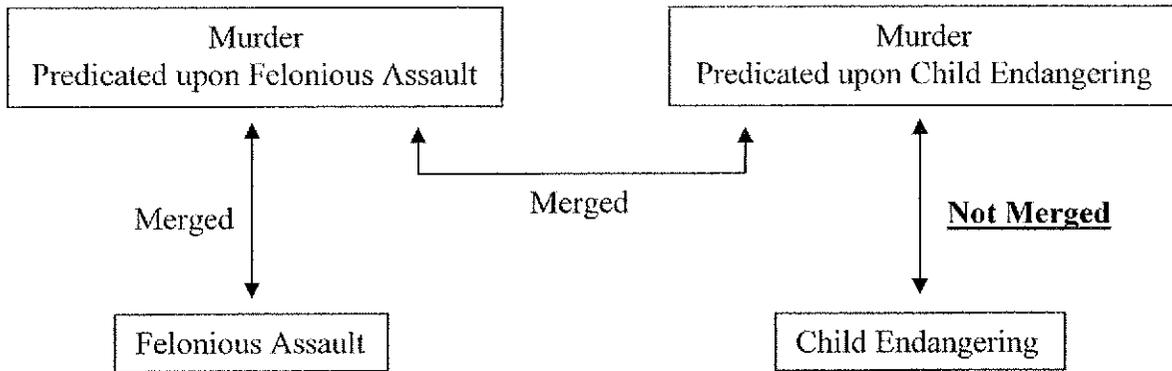
Fred Johnson was indicted for seven offenses in connection with the death of his live-in girlfriend's seven-year-old son. *State v. Johnson*, First Dist. Nos. C-080156, C-080158, 2009-Ohio-2568, ¶1. Those offenses included two counts of murder predicated upon underlying felony offenses. One count of murder was predicated upon a count of felonious assault, while the other involved a count of child endangering. *Johnson*, at ¶47.

A Hamilton County jury found Mr. Johnson guilty of all seven offenses, including murder predicated upon child endangering, a violation of R.C. 2903.02, and child endangering, a violation of R.C. 2919.22(B)(1). The State relied upon the same conduct to support those two counts. *Johnson*, at ¶93. While the trial court merged the additional count of murder predicated upon felonious assault and the underlying count of felonious assault, Mr. Johnson was separately sentenced to fifteen-year-to-life for the count of murder predicated upon child endangering and to eight years of incarceration for the predicate offense of child endangering. Those sentences were imposed consecutively. *Johnson*, at ¶47.

The court of appeals reversed the two counts of murder predicated upon underlying offenses, as both counts involved alternate theories for a single offense of murder, stating that the trial court should have merged those two counts into a single conviction for murder. *Johnson*, at ¶84. However, the court of appeals upheld Mr. Johnson's separate convictions for murder predicated upon child endangering and the underlying offense of child endangering. The court of appeals found that those offenses are not allied offenses of similar import. The court of appeals acknowledged that its holding was in conflict with another recent court of appeals decision addressing those same offenses, *State v. Mills*, Fifth Dist. No. 2007-AP-07-0039, 2009-

Ohio-1849. *Johnson*, at ¶84, 91-99. The court of appeals later certified that conflict to this Court for resolution.

Result of trial court and court of appeals decisions on offenses at issue



**STATEMENT OF INTEREST
OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER**

The Office of the Ohio Public Defender (OPD) is a state agency, designed to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an interest in the present case insofar as this Court will determine whether murder predicated upon

child endangering, a violation of R.C. 2903.02, and child endangering, a violation of R.C. 2919.22(B)(1), are allied offenses of similar import. In so doing, the Court will determine whether a criminal defendant may always be punished separately for those offenses, or only when those offenses are determined to have been committed separately or with a separate animus.

In considering whether murder predicated upon child endangering and child endangering are allied offenses of similar import, the court of appeals improperly applied this Court's analysis contained in *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569 rather than the analysis contained in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625. As illustrated by the present case, those two analyses may produce disparate results when applied incorrectly. Clarification regarding the relationship between those analyses is necessary in order to prevent further conflict amongst the courts of appeal.

ARGUMENT

PROPOSITION OF LAW

Murder predicated upon child endangering, a violation of R.C. 2903.02, and child endangering, a violation of R.C. 2919.22(B)(1), are allied offenses of similar import under R.C. 2941.25.

A. Applying *Brown* and *Cabrales*.

When the General Assembly's intent to allow cumulative punishment for two offenses is not clear under *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, a court must compare those offenses under R.C. 2941.25 and *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625 in order to determine whether those offenses are allied offenses of similar import. In *Brown*, this Court examined whether a defendant charged with two counts of aggravated assault under different sections of the same statute, R.C. 2903.12(A)(1) and R.C. 2903.12(A)(2), premised

upon a single act, may be convicted of both counts. This Court held that Ms. Brown could not be convicted of both counts of aggravated assault, because those offenses were allied offenses of similar import. *Brown*, at ¶40.

This Court explained that the two-tiered test for allied offenses contained in R.C. 2941.25, which this Court had discussed in *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291 and *Cabrales*, was a means of determining legislative intent to allow or disallow cumulative punishment for multiple offenses. *Brown*, at ¶37. Eschewing that two-tiered analysis, this Court explained that when the legislative intent regarding cumulative punishment is clear, a court need not resort to R.C. 2941.25. This Court stated in *Brown* that one way in which the General Assembly's intent not to allow cumulative punishment may be determined is by comparing the societal interests protected by the offenses in question. *Brown*, at ¶36-37. If the interests are the same, a court may determine that the General Assembly's intent not to allow cumulative punishment is clear, and the court need not proceed to R.C. 2941.25. *Brown*, at ¶37-40.

In the present case, the court of appeals held that the societal interests protected by murder predicated upon child endangering and child endangering are not the same. In doing so, the court relied upon the Fifth Appellate District's analysis in *State v. Morin*, Fifth Dist. No. 2008-CA-10, 2008-Ohio-6707, a decision that did not discuss *Cabrales* and which was released before this Court's decision in *State v. Winn*, 121 Ohio St.3d 413, 2008-Ohio-1625. In doing so, the court of appeals acknowledged that its decision was in conflict with the Fifth Appellate District's more recent decision in *Mills*, in which that court did discuss R.C. 2941.25, *Brown*, *Cabrales*, and *Winn*. And the court of appeals' assertion regarding the societal interests protected by the offenses involved in the present case is questionable in light of the court's reasoning that the murder statute "protect[s] all human life," while the applicable child

endangering statute, prohibiting abuse of a child that results in serious physical harm, protects a dissimilar societal interest because it applies to children. *Johnson*, at ¶95-96. See R.C. 2919.22.

In the present case, the court of appeals failed to proceed to R.C. 2941.25 after determining that the offenses at issue do not protect the same societal interest:

[I]n *Brown*, the Ohio Supreme Court developed a preemptive exception to the two-tiered test in *Rance*. The court held that resort to the two-tiered test is “not necessary when the legislature’s intent is clear from the language of the statute.” In determining legislative intent, the court compared the societal interests protected by the two statutes. It held that if the societal interests are similar, then the crimes are allied offenses of similar import. If, however, the societal interests are different, then the crimes are not offenses of similar import, and the court’s analysis ends.

In *State v. Morin*, the Fifth Appellate District utilized the Ohio Supreme Court’s analysis in *Brown* to conclude that the offenses of felonious assault and child endangering are offenses of dissimilar import because they protect different societal interests. Central to its analysis was the recognition that the legislature intended to “bestow special protection upon children” when “crafting” the offense of child endangering.

In comparing the unique societal interest protected by the child-endangering statute to the societal interest protected by the felony-murder statute, which is to protect all human life, we likewise conclude that the General Assembly intended to distinguish these offenses and to permit separate punishments for the commission of these two crimes. As a result, we hold that the offense of felony murder and the offense of endangering children are not allied offenses of similar import. *Johnson*, at ¶94-96 (internal citations omitted).

The court of appeals in the present case, as well as the court of appeals in *Morin*, misinterpreted this Court’s decision in *Brown*. Nothing in *Brown* requires that if a court finds that the societal interests protected by two criminal offenses are not similar then the court’s allied offense analysis must end without consideration of R.C. 2941.25. To the contrary, *Brown* indicates that if the General Assembly’s intent is not clear from the language of the statute, such

as when two offenses protect different societal interests, then a court must utilize R.C. 2941.25 and this Court's decisions applying that statute. "While 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." *Brown*, at ¶37.

In the present case, the court of appeals failed to reconcile its claim that an allied offense analysis ends when two offenses protect differing societal interests with this Court's decisions in *State v. Logan* (1979), 60 Ohio St.2d 126, *Cabrales*, and *Winn*. Those cases involved pairs of offenses that arguably protect differing societal interests. Nevertheless, in *Logan* this Court held that kidnapping, a violation of R.C. 2905.01, and rape, a violation of R.C. 2907.02(A)(1), are allied offenses. In *Cabrales*, this Court held that trafficking in drugs, a violation of R.C. 2925.03(A)(2) and possession of the same quantity of drugs, a violation of R.C. 2925.11(A), are allied offenses. And in *Winn*, this Court held that kidnapping, a violation of R.C. 2905.01(A)(2), and aggravated robbery, a violation of R.C. 2911.01(A)(1), are also allied offenses. This Court did so without discussing the societal interests protected by those offenses. Rather, this Court looked to the two-tiered test provided by R.C. 2941.25 and elaborated upon its previous opinions regarding the application of that statute.

After the court of appeals rendered its decision in the present case, this Court again utilized the two-tiered analysis of R.C. 2941.25 and *Cabrales*, rather than the societal interest approach discussed in *Brown*. *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323. In *Harris*, this Court found that robbery, a violation of R.C. 2911.02(A)(2), and aggravated robbery, a violation of R.C. 2911.01(A)(1), are allied offenses of similar import. *Harris*, at ¶17. This Court's analysis in *Harris* further demonstrates the court of appeals' error in misapplying *Brown*

in this case so as to truncate the appropriate allied offense analysis under R.C. 2941.25 and *Cabrales*.

The court of appeals in the present case failed to recognize that if the General Assembly's intent to allow cumulative punishment is not clear from the statutory text, such as when the offenses at issue may protect differing societal interests or are not different forms of the same offense, then a court may not simply end its analysis and declare that the offenses are not allied offenses of similar import. Rather, when the General Assembly's intent is not clear, a court must proceed with the two-tiered analysis contained in R.C. 2941.25.

B. The Offenses at Issue: Murder and Child Endangering.

Murder predicated upon child endangering, a violation of R.C. 2903.02, and child endangering, a violation of R.C. 2919.22(B)(1), are allied offenses of similar import. Holding that the offenses at issue in the present case are not allied offenses of similar import, the court of appeals relied upon the Fifth Appellate District's analysis in *Morin*, rather than that appellate district's more recent decision in *Mills*. That reliance was misplaced for two reasons. First, *Morin* did not involve the same offenses at issue in the present case, but rather felonious assault, a violation of R.C. 2903.11(A)(2), and child endangering, a violation of R.C. 2919.22(B)(2).¹ Those offenses involved causing or attempting to cause physical harm by means of a deadly weapon and the torture or cruel abuse of a child, respectively. *Morin*, at ¶50. In comparison, *Mills* involved the precise offenses at issue in the present case, murder predicated upon child endangering under R.C. 2903.02 and child endangering under R.C. 2919.22(B)(1).

¹ While the *Morin* opinion initially stated that the count of felonious assault involved R.C. 2903.11(A)(1), the court later stated that that count involved R.C. 2903.11(A)(2), which it applied to the facts of the case and its allied offense analysis. *Morin*, at ¶1, 50-53.

Second, the court of appeals incorrectly relied upon the Fifth Appellate District's *Morin* decision, rather than *Mills*, because *Morin* failed to consider this Court's opinion in *Cabrales* and predated this Court's decision in *Winn*. *Mills*, the controlling case in the Fifth Appellate District, addressed this Court's decision in *Brown*, as well as R.C. 2941.25, *Cabrales*, and *Winn*. The court of appeals in the present case stated that *Mills* failed to consider *Brown*'s societal interest analysis. *Johnson*, at ¶98. The court of appeals is incorrect, as the *Mills* court did address *Brown*:

The Ohio Supreme Court revisited the issue of allied offenses of similar import in *State v. Brown*, 119 Ohio St.3d 447, 895 N.E. 2d 149, 2008-Ohio-4569. The court first found that aggravated assault in violation of R.C. 2903.12(A)(1) and (A)(2) are not allied offenses of similar import when comparing the elements under *Cabrales*, but did not end the analysis there. The court went on to note that the tests for allied offenses of similar import are rules of statutory construction designed to determine legislative intent. *Id.* at 454. The court concluded that while the 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 intent of the legislature is clear from the language of the statute. *Id.* In the past, the court had looked to the societal interests protected by the relevant statutes in determining whether two offenses constitute allied offenses. *Id.*, citing *State v. Mitchell* (1983), 6 Ohio St.3d 416, 6 Ohio B. 463, 453 N.E.2d 593. The court concluded in *Brown* that the subdivisions of the aggravated assault statute set forth two different forms of the same offense, in each of which the legislature manifested its intent to serve the same interest of preventing physical harm to persons, and were therefore allied offenses. *Id.* at 455. *Mills*, at ¶210.

The court of appeals in *Mills* also discussed *Brown* in the context of this Court's recent opinion in *Winn*:

Having found the offenses to be of similar import under the *Cabrales* test, the Ohio Supreme Court in *Winn* did not consider the societal interests underlying the statutes to determine legislative intent, and determined legislative intent solely by applying R.C. 2941.25. The *Winn* court stated that, in Ohio, we

discern legislative intent on this issue by applying R.C. 2941.25, as the statute is a “clear indication of the General Assembly’s intent to permit cumulative sentencing for the commission of certain offenses.” *Id.* at P 6. This court noted in *Varney*, *supra*, that the Ohio Supreme Court in *Brown* expanded the first step of the allied offense analysis by adding the additional factor of societal interests protected by the statutes. *Varney*, at P 16, citing *State v. Boldin*, Geauga App. No. 2007-G-2808, 2008 Ohio 6408. In light of the Supreme Court’s analysis in *Winn*, we now conclude that societal interest may be a tool to be used in some circumstances in determining if the intent of the legislature is clear from the criminal statutes being compared. *Mills*, at ¶212.

After discussing R.C. 2941.25, *Brown*, *Cabrales*, and *Winn*, the *Mills* court discussed the offenses of murder predicated upon child endangering under R.C. 2903.02 and child endangering under R.C. 2919.22(B)(1) when those offenses are based upon the same conduct:

Similarly, the elements of child endangering are sufficiently similar to the elements of felony murder with child endangering as the predicate offense that the commission of the murder logically and necessarily also results in commission of child endangering. We fail to see how a person could cause the death of a child without at the same time abusing the child in such a manner that the abuse resulted in serious physical harm. In addition, as noted above in our discussion of felonious assault, no evidence in the record demonstrates that the two crimes were committed as separate acts or with a separate animus. *Mills*, at ¶229 (emphasis added).

In the present case, the court of appeals’ reasoning is further undercut by inconsistency within its opinion regarding murder and its underlying offense as allied offenses of similar import. The court of appeals acknowledged that Mr. Johnson’s conviction for a separate count of murder predicated upon felonious assault, and the underlying felonious assault, merged in the trial court. *Johnson*, at ¶47. The *Mills* court also recognized those offenses as allied offenses of similar import. *Mills*, at ¶226-228. However, R.C. 2903.02 states that “[n]o person shall cause the death of another as a proximate result of the offender’s committing an offense of violence....” While R.C. 2903.11(A)(1) states that “[n]o person shall knowingly . . . [c]ause serious physical

harm to another or another's unborn." Therefore, the felonious assault statute extends its protection to "another's unborn," while the murder statute only protects "another."

In the present case, the court of appeals relied upon the fact that child endangering "bestow[ed] special protection upon children" in holding that that offense addressed a different societal interest than the murder statute. In addition to the court of appeals' interpretation of *Brown* and *Cabrales* being incorrect, as discussed above, it is also inconsistent. Felonious assault bestows protection upon "another's unborn" that is not contained within the protection afforded by the murder statute, R.C. 2903.02. But the court of appeals did not debate whether those offenses are allied offenses of similar import.

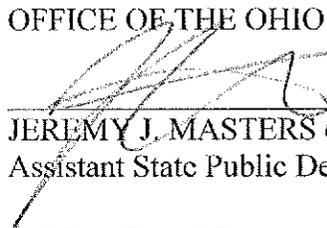
When an individual causes the death of a child, he or she also abuses the child in such a manner that the abuse results in serious physical harm. As a result, murder predicated upon child endangering and child endangering are allied offenses of similar import. The court of appeals in the present case acknowledged that the same conduct was used to support both of those offenses. *Johnson*, at ¶93. Those offenses were not committed separately or with separate animus. Therefore, those offenses should have merged as allied offenses of similar import, committed with a single animus.

CONCLUSION

Under the appropriate analysis, murder predicated upon child endangering, a violation of R.C. 2903.02, and child endangering, a violation of R.C. 2919.22(B)(1), are allied offenses of similar import. Accordingly, the Office of the Ohio Public Defender, as amicus curiae, urges this Court to reverse the judgment of the court below.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



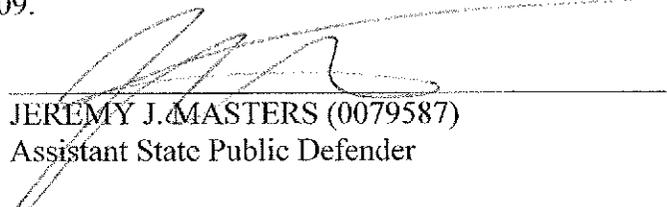
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Amicus Curiae Office of the Ohio Public Defender in Support of Appellant Fred T. Johnson was forwarded by regular U.S. Mail, postage prepaid to Joseph T. Deters, Hamilton County Prosecutor, addressed to his office at 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202; and Lindsey Gutierrez, addressed to her office at The Law Offices of Ravert J. Clark, 114 East Eighth Street, Suite 400, Cincinnati, Ohio 45202, , on this 21 day of December, 2009.



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