

ORIGINAL

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. :

**REPLY BRIEF OF AMICUS CURIAE
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IN SUPPORT OF APPELLANT FRED T. JOHNSON**

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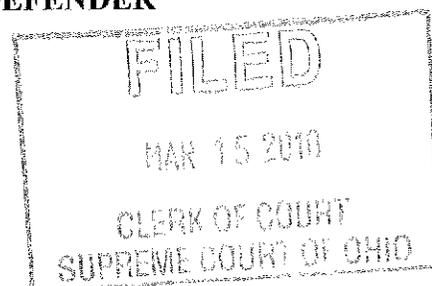


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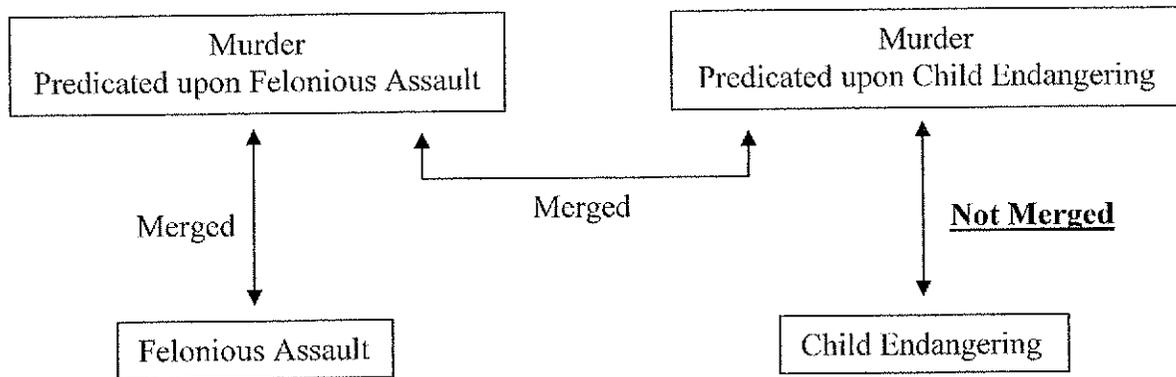
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STATEMENT OF THE CASE AND OF THE FACTS

The Office of the Ohio Public Defender relies upon the statement of the case and of the facts contained in its merit brief, in addition to reproducing the chart below for this Court's convenience.

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



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.

The State and its supporting Amicus have made several arguments in their briefs. Those arguments will be separately addressed below.

The State's Argument: *Brown* and R.C. 2941.25.

The State's argument based upon this Court's opinion in *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569 represents a misunderstanding of this Court's analysis in that case. This Court stated in *Brown* that one way in which the General Assembly's intent not to allow cumulative punishment for two offenses 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 State has mistakenly assumed that because this Court expressly held that offenses that protect the same societal interest may be recognized as allied offenses of similar import without considering R.C. 2941.25, this Court also impliedly held that offenses that protect differing societal interests are not allied offenses of similar import. (February 23, 2010 State's Brief, p. 6). The State's interpretation of *Brown* is incorrect.

In *Brown*, this Court did not hold that unless two offenses protect the same societal interest the General Assembly intended to permit cumulative punishment for those offenses. This Court merely explained that if two offenses do protect the same societal interest, a court may determine that those offenses are allied offenses of similar import without resorting to R.C. 2941.25. If that determination cannot be made, then R.C. 2941.25 should be used to determine whether the offenses in question are allied offenses of similar import. *Brown*, at ¶37-40.

The State's interpretation of *Brown* is further undermined by this Court's decisions, including a decision issued after *Brown*, in which offenses that protect differing societal interests were held to be allied offenses under R.C. 2941.25. In *State v. Logan* (1979), 60 Ohio St.2d 126, this Court held that rape and kidnapping are allied offenses of similar import under R.C. 2941.25. In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, this Court held that possession of drugs and trafficking in drugs are allied offenses of similar import under R.C. 2941.25. And in *State v. Winn*, 121 Ohio St.3d 413, 2008-Ohio-1625, this Court held that robbery and kidnapping are allied of similar import under R.C. 2941.25. The State is incorrect in suggesting that a court's allied-offense inquiry should end with a determination that two offenses

do not protect the same societal interest, without then proceeding to the two-step test contained in R.C. 2941.25 and applied by this Court in *Logan, Cabrales, and Winn*.

Finally, the reasoning of the court of appeals and the State, that murder predicated upon child endangering, a violation of R.C. 2903.02, and child endangering, a violation of R.C. 2919.22(B)(1), protect different societal interests is tenuous. A statute that prohibits the causing of another person's death during the commission of another felony protects people from harm. Likewise, a statute that prohibits child abuse which results in serious physical harm protects people from harm. That the latter offense protects young people from harm does not mean that it protects a wholly different societal interest than the former offense.

And as explained in the Office of the Ohio Public Defender's Amicus Brief, the State's position is further undercut by the court of appeals' acknowledgment 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. *State v. Johnson*, First Dist. Nos. C-080156, C-080158, 2009-Ohio-2568, at ¶47. The felonious assault statute extends its protection to "another's unborn," while the murder statute only protects "another." R.C. 2903.02; R.C. 2903.11(A)(1). 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, it is also inconsistent. While felonious assault bestows protection upon "another's unborn" that is not contained within the protection afforded by the murder statute, neither the court of appeals nor the State have debated whether those offenses are allied offenses of similar import.

The State’s Argument: Separate Animus.

The State has also argued that Mr. Johnson acted with separate animus with regard to the offenses of murder predicated upon child endangering and the predicate offense of child endangering. However, the court of appeals explained that the State had relied upon the same conduct to support both of those offenses. *Johnson*, at ¶93. Nevertheless, the court of appeals relied upon *Brown* to hold that those offenses were not allied offenses of similar import. But 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 same conduct constituted both offenses in the present case. 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.

The State’s Argument: Internally Inconsistent.

This Court defined the certified conflict in the present case as:

Are the elements of child endangering [set forth in R.C. 2919.22(B)(1)] 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 the commission of child endangering? (September 30, 2009 Entry).

The State’s brief initially answered that question succinctly with one word, “yes.” (February 23, 2010 State’s Merit Brief, p. 5). The State then argued that despite its affirmative answer to the certified question, this Court’s decision in *Brown* preempts the application of R.C. 2941.25 to the offenses at issue. (February 23, 2010 State’s Merit Brief, p. 5-7). However, the State then argued that in addition to its argument based upon *Brown*, “[a] comparison of the

elements of R.C. 2903.02(B) Felony Murder, and R.C. 2919.22(B)(1) Child Endangering in the abstract reveal that the two offenses are not allied offenses because the commission of one will not automatically result in the commission of the other.” (February 23, 2010 State’s Merit Brief, p. 8-9). The State did not reconcile its conflicting statements regarding the nature of the offenses at issue in the present case and the application of R.C. 2941.25(A) to those offenses. But as the State initially conceded, the correct answer to the certified question is “yes.”

The Amicus, Franklin County Prosecutor’s Argument: Murder and its Predicate as Allied Offenses.

The Franklin County Prosecutor has argued that murder and its predicate offense will never merge as allied offenses of similar import. However, the Franklin County Prosecutor has failed to address three issues that undercut that argument.

The Present Case.

The Franklin County Prosecutor has failed to reconcile its argument that murder predicated upon another felony should not merge with that predicate offense with the fact that such a merger took place in the present case. In addition to the offenses at issue, Mr. Johnson was also found guilty of an additional count of murder predicated upon felonious assault as well as the predicate offense of felonious assault. The trial court merged those offenses as allied offenses of similar import. *Johnson*, at ¶47. And that merger has not been challenged.

The Relied-Upon Cases.

Each case upon which the Franklin County Prosecutor has relied in support of the proposition that murder under R.C. 2903.02(B) does not merge with its predicate offense is distinguishable from the present case. None of those cases involve a predicate offense that is also the logical and necessary result of having caused the death of another person. *State v. Moss* (1982), 69 Ohio St.2d 515; *State v. Bickerstaff* (1984), 10 Ohio St.3d 62; *State v. Smith*, 80 Ohio

St.3d 89, 1997-Ohio-355; *State v. Dennis*, 79 Ohio St.3d 421, 1997-Ohio-372 (aggravated murder predicated upon aggravated robbery); *State v. Keene*, 81 Ohio St.3d 646, 1998-Ohio-342; *State v. Reynolds*, 80 Ohio St.3d 670, 1998-Ohio-171 (aggravated murder predicated upon aggravated robbery and aggravated burglary); *State v. Coley*, 93 Ohio St.3d 253, 2001-Ohio-1340 (aggravated murder predicated upon aggravated robbery and kidnapping); *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207; *State v. Keenan*, 81 Ohio St.3d 133, 1998-Ohio-459 (aggravated murder predicated upon kidnapping); *State v. Richey*, 64 Ohio St.3d 353, 1992-Ohio-44 (aggravated murder predicated upon aggravated arson and child endangering under R.C. 2919.22(A), different offenses than murder and child endangering under R.C. 2919.22(B)(1), the offenses at issue in the present case).

None of the cases cited by the Franklin County Prosecutor involve murder and the predicate offense of child endangering involving abuse that results in serious physical harm. And as the court of appeals in *State v. Mills*, 5th Dist. No. 2007 AP-07-0039, 2009-Ohio-1849, ¶229 explained “[w]e 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.”

Smith and Evans.

The Franklin County Prosecutor has also argued that the offenses in the present case, murder predicated upon child endangering involving the abuse of a child that results in serious physical harm, and the predicate offense of child endangering, do not merge because the count of murder could have been predicated upon a wide range of felonies, not only the offense of child endangering involved in the present case. In other words, because murder can be predicated upon many alternate offenses, it cannot merge with the offense that it actually is predicated upon in a particular case. (February 22, 2010 Brief of Amicus Curiae, p. 5). But that argument fails to

consider this Court's recent decisions in *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260 and *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974.

In *Smith*, this Court addressed the three-part test for lesser-included offenses. An offense may be a lesser-included offense of another if (1) the offense carries a lesser penalty than the other; (2) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (3) some element of the greater offense is not required to prove the commission of the lesser offense. *Smith*, at ¶9. This Court addressed the second prong of that test with regard to statutes that provide alternative means of committing an offense. This Court held that when examining offenses that allow alternative means of committing the offense, each alternative should be construed as constituting a separate offense and be analyzed accordingly. *Smith*, at ¶27-28. In other words, when an offense may be committed by different means, a court must look to the means by which the State has alleged that offense to have been committed for purposes of the second prong of the lesser-included-offense test. *Smith*, at ¶27-28.

In *Evans*, this Court clarified the second prong of the lesser-included-offense test to remove the term "ever." *Evans*, at ¶25. This Court did so in order to eliminate the implausible scenarios advanced by parties to suggest the remote possibility that one offense could conceivably be committed without the other also being committed. *Evans*, at ¶25. This Court also explained that the second prong of the lesser-included-offense test is the test for allied offenses contained in R.C. 2941.25(A):

In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, paragraph one of the syllabus, we explained that there need not be an "exact alignment" of the elements for two offenses to be allied offenses but that "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.” This allied offenses test corresponds to step two of the [lesser-included offense] test which, as clarified, states “whether the greater offense as statutorily defined cannot be committed without the lesser offense also being committed.” *Evans*, at ¶31 (internal citation omitted).

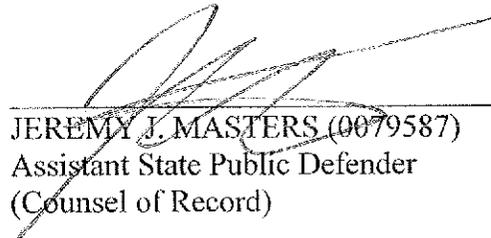
Taken together, *Smith* and *Evans* require that when an offense such as murder under R.C. 2901.02(B) may be predicated upon many alternative offenses, a court must look to the actual predicate offense involved in a given case in order to determine whether those offenses are allied offenses of similar import. As a result, this Court should reject the Franklin County Prosecutor’s argument that murder and its predicate offense may never merge because of the availability of alternative predicate offenses.

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. An individual cannot 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. Accordingly, the Office of the Ohio Public Defender, as Amicus Curiae, urges this Court to reverse the judgment of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply 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; Steven L. Taylor, Assistant Prosecuting Attorney, addressed to his office at 373 South High Street, 13th Floor, Columbus, Ohio 43215; 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 15th day of March, 2010.



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