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**EXPLANATION OF WHY THIS IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

This Court should accept jurisdiction and hold this case for decision in *State v. Washington*, Case No. 2012-2117, currently pending before this Court. The issue in *Washington* pertaining to the State arguing a different theory of allied offenses on appeal than at trial resonates in this case. Here, the State charged Ms. Cochran with felony child endangering, as well as the lesser included misdemeanor child endangering, and attested to the fact during trial it was pleading these in the alternative. The State successfully achieved guilty verdicts on all counts. On appeal, the State changed its theory and argued that each charge, the felony and similar misdemeanor were now separate charges based on separate conduct. In a 2-1 decision with a strong dissent, the Tenth District Court of Appeals permitted the State to change its theory of the case to one specifically rejected in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314.

This holding violates Double Jeopardy, judicial estoppel and allied offense principles. The law on allied offenses calls into question issues of basic constitutional rights and is of great public importance that direction from this Court would be beneficial to guide the lower courts' analysis. This Court should accept jurisdiction and hold this case for decision in *State v. Washington*, Case No. 2012-2117, or in the alternative, accept jurisdiction on the merits to clarify the law on allied offenses.

STATEMENT OF THE CASE AND FACTS

On April 26, 2010, Gianna Cochran was indicted on 18 counts of Child Endangering in violation of R.C. 2919.22 involving 5 different children in 10 separate incidences. Ms. Cochran waived her right to a jury trial, and proceeded to try her case to the bench. The State's case relied primarily on a video recording taken in Ms. Cochran's home where she baby-sat for children. Prior to and during these proceedings, the media heavily covered this case.

Furthermore, during the trial, there were several outbursts from members of the audience that were taken into account. The following recounts the basis for each charge and this Court's findings:

1st Incident (Count 1 – 1st degree misdemeanor involving I.S.) – the court found the defendant guilty based on events that took place on 8/18/2009: “the Defendant is seen violently jerking a child back and forth on the floor while changing its diaper.”

2nd Incident (Counts 2, 3rd degree felony, and 3, 1st degree misdemeanor involving R.P.) – the court found the defendant guilty of both charges that took place on 8/19/2009 based on its finding that “the child was held to the chest with face against the chest, the Defendant making statements like, ‘I will make you stop. Are you done? Are you done?’ [...] she cruelly abused [R.P.] and also she physically restrained her in a cruel manner for a prolonged period [...] It was excessive under the circumstances and causes substantial risk of serious harm.”

3rd and 4th Incidents (Counts 4 through 7) – the court found the defendant not guilty of these charges.

5th Incident (Counts 8, 3rd degree felony, and 9, 1st degree misdemeanor involving J.P.) – the court found the defendant guilty of both charges that took place on 8/31/2009 based on its finding that “the child, [J.P.], was tossed on the couch, blanket was put over his face, the crying stopped. The Defendant was saying ‘You’re going to listen. You’re going to listen.’ And even though you can’t really see the child’s face, by listening to the audio and the way the crying stopped and started, I am able to conclude beyond a reasonable doubt on Count 8 that there was cruel abuse of [J.P.]. She physically restrained him in a cruel manner.”

6th Incident (Count 10, 1st degree misdemeanor involving L.B) – the court found the defendant guilty of this charge that took place on 9/1/2009 based on, “In this video is where she

smacks a child's butt, then held her upside down and started swinging her around like an airplane. She said it was because the child enjoyed it, but the way she says, 'Do you like that, you like that' in a very sarcastic manner, it seemed pretty obvious she wasn't doing it for the child's enjoyment. She did it in a reckless manner and created a substantial risk [t]o the health or safety of the child[.]

7th Incident (Counts 11, 3rd degree felony, and 12, 1st degree misdemeanor involving A.M.) – the court found the defendant guilty of both charges that took place on 9/9/2009 based on its finding that “you can actually hear the – the child first was being carried upside down by one foot, tossed onto the couch, crying on and off, and it's pretty obvious that she cruelly abused [A.M.] and restrained [A.M.] in a cruel manner, created a substantial risk of serious physical harm[.]”

8th Incident (Counts 13, 3rd degree felony, and 14, 1st degree misdemeanor involving A.M.) – the court found the defendant guilty of both charges that took place on 9/11/2009 based on its finding that “the child was crying on the floor. She's then slammed onto the couch. She's leaning over the child. The crying gets loud and then muzzled and then loud again and then muzzled. And I find that she cruelly abused [A.M.] and physically restrained her in a cruel manner for a prolonged period.”

9th Incident (Counts 15 and 16) – the court found the defendant not guilty of both charges.

10th Incident (Counts 17, 3rd degree felony, and 18, 1st degree misdemeanor involving A.M.) – the court found the defendant guilty of both charges that took place on 9/25/2009 based on its finding that “child was slammed onto the couch, child – you could hear the child crying, choking, gasping. She's covering the face. The child would be quiet for a while and then start

crying again. The defendant was saying, 'Have you had enough? Are you done? Are you done?' At one point she pushed her own child away."

On April 1, 2011, the court sentenced Ms. Cochran to maximum consecutive sentences imposing a term of 25 years in prison. Ms. Cochran timely appealed.

On December 9, 2011, Ms. Cochran filed a postconviction petition. The State filed its opposition on December 16, 2011 and on January 25, 2012, the trial court denied the petition without an evidentiary hearing. Ms. Cochran timely appealed and the Tenth District affirmed. *State v. Cochran*, 10th Dist. No. 12-AP-73, 2012-Ohio-4077. She appealed to this Court in Case No. 2012-1772. This Court declined jurisdiction on January 23, 2013.

On December 13, 2012 the Tenth District affirmed in part and reversed in part Ms. Cochran's direct appeal. *State v. Cochran*, 10th Dist. No. 11-AP-408, 2012-Ohio-5899. Ms. Cochran filed a timely Motion to Reconsider or in the Alternative to Certify a Conflict on December 27, 2012. On February 5, 2013, the Tenth District denied her motion.

ARGUMENT

FIRST PROPOSITION OF LAW

When the State aggregates a defendant's actions to prove the elements of two convictions for the same acts, the State may not later argue on appeal that part of the acts constituted one crime, and another part constituted the other crime. U.S. Const. amend. V and XIV, OH Const. art. I, § 10.

In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, this Court held that when a defendant has been found guilty of felony murder with the predicate felony being child endangerment, and child endangerment, the two charges must merge. If the evidence used to prove one charge is the same as the evidence used to prove another, the defendant can be found guilty of both counts, but only convicted and sentenced on one. Here, the trial court used the

same evidence to establish guilt on both the felony charge of child endangering, as well as the misdemeanor charge of child endangering; therefore it was error for Ms. Cochran to be convicted and sentenced on both and she is entitled to a new sentencing hearing. R.C. 2941.25.

Despite the argument of the State that a defendant *could* be convicted and sentenced on both, that is not what happened here. The trial court clearly stated its factual findings based on each incident and uses the same facts to support both convictions and sentences. The prosecutor also stated that the felonies and misdemeanors were being charged *in the alternative*. These charges are allied offense of similar import and must merge. Further, the fact that counsel did not object does not waive this error as it is well-established that the imposition of multiple sentences for allied offense of similar import amounts to plain error. *State v. Houston*, 10th Dist. 1997, 122 Ohio App. 3d 334.

SECOND PROPOSITION OF LAW

A trial court violates a defendant's rights to due process and a fair trial when, in the absence of sufficient evidence, the trial court finds a defendant guilty. U.S. Const. amend. V and XIV, OH Const. art. I, § 10, 16.

The trial court's finding that Ms. Cochran was guilty was not supported by sufficient evidence. When a verdict is not supported by sufficient evidence, the reviewing court must vacate the verdict and dismiss the charges. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541. Every defendant has a constitutional right to a fair trial. U.S. Const. Amend. V and XIV; *Tumey v. Ohio* (1927), 273 U.S. 510, 523. Before the state may obtain a conviction for any offense, it must prove every element of that offense beyond a reasonable doubt. *Sullivan v. Louisiana* (1993), 508 U.S. 275, 277-78; *Jackson v. Virginia* (1979), 443 U.S. 307, 316; *In re Winship* (1970), 397 U.S. 358, 361-64. A conviction based upon insufficient evidence must be overturned. *Jackson* at 315-18.

The standard for review of a sufficiency-of-the-evidence claim is whether, “after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson* at 319. Moreover, the sufficiency-of-the-evidence standard is used to determine “whether the evidence is legally sufficient to support [a...] verdict as a matter of law.” *Thompkins* at 386. If the “conviction [is] based on legally insufficient evidence [it] constitutes a denial of due process.” *Thompkins* at 386, citing *Tibbs v. Florida* (1982), 457 U.S. 31, and *Jackson*.

Each incident and accompanying charge must be analyzed separately.

1. *First Incident:* The appellant was charged with creating a substantial risk to the health or safety of [I.S.] by violating a duty of care, in violation of R.C. 2919.22(A). A “substantial risk” is more than a remote or significant possibility, but rather a strong possibility that a certain result may occur. R.C. 2901.01(A)(8). The video shows the appellant changing I.S.’s diaper, then pulling him back and forth along the carpet. The evidence does not demonstrate that I.S.’s health was ever in jeopardy. The State failed to present evidence of what could have happened to I.S., i.e. the risk he was facing, or that Ms. Cochran knew that conduct was putting I.S.’s health and safety at risk. The State failed to prove two essential elements: (1) the defendant’s *mens rea* – that she acted recklessly and (2) that her conduct created a substantial risk to the health and safety of I.S.

2. *Second incident:* the appellant was charged with torturing and/or cruelly abusing R.P. when she was holding R.P. close to her chest and at one point held her by just her head and shoulders, in violation of R.C. 2919.22(B)(2). A review of the video demonstrates that the appellant was not trying to inflict pain on R.P., she was trying to calm her down and put her in a carrier. Furthermore, the “prolonged” period of restraint referred to by the trial court, constituted

less than thirty seconds and R.P. was not injured and there was no evidence presented that the appellant knew of any risk involved with her conduct.

3. *Fifth incident:* the appellant was charged with physically restraining J.L. in for a prolonged period, which restraint is excessive under the circumstances and creates a substantial risk of serious physical harm in violation of R.C. 2919.22(B)(3). The evidence presented does not demonstrate that J.L. was excessively restrained or that he was placed in a substantial risk of serious harm. She was not punishing him nor attempting to inflict pain.

4. *Sixth incident:* The appellant was charged with creating a substantial risk to the health or safety of her daughter [L.B.] by violating a duty of care, in violation of R.C. 2919.22(A). She grabbed her daughter by the ankle and flipped her upside down and swung her around. This is common play between adults and small children. While the trial court indicated that it did not like her tone of voice, common sense dictates that some adults play with children even when they don't want to, but they do because it's their job. The appellant stopped swinging her when she heard L.B. crying. This conduct did not violate a duty of care. While her conduct may have been negligent or imprudent, it did not "perversely disregard a known risk" as required by the statute. *See State v. Martin* (1st Dist. 1999), 134 Ohio App. 3d 41, 43 ("We, as a society, cannot punish parents for every error in judgment, even if a child is injured, under a theory of strict liability. The law in Ohio specifically requires a mental state of recklessness[.]")(internal citations omitted.)

5. *Seventh incident:* the trial court found the appellant guilty of both charges, Counts 11 and 12, that took place on 9/9/2009. However, this was not the crime Ms. Cochran was charged with. The indictment specifically states that the offense date for Counts 11 and 12

was August 9, 2009. The indictment was never amended.¹ No evidence was presented of any conduct that occurred on August 9, 2009.

Furthermore, the conduct of carrying a toddler by her foot is not torture. The state presented no evidence of any risk of serious physical harm. The child was not far off the ground and only for a few moments. After that, it is unclear what happens, but certainly not proof beyond a reasonable doubt that the defendant tortured or cruelly abused A.M.

6. *Eighth incident:* the appellant was found guilty of physically restraining [A.M.] for a prolonged period of time and cruelly abusing her. The video tape does not support this finding. There is no question that the defendant did not gently place the child on the couch, but that does not rise to the level of cruel abuse.

7. *Tenth incident:* again, the appellant was found guilty of physically restraining [A.M.] for a prolonged period of time and cruelly abusing her. The video tape does not support this finding. First, the trial court referenced "slamming a child on the couch." The appellant was not charged with that conduct toward that child. The appellant was charged with cruelly abusing [A.M.], the child on the floor in the video. The appellant has her back to the video and the child is not visible when the appellant sits down on the floor. This evidence is insufficient to support a finding that the appellant committed cruel abuse against [A.M.]

In conclusion, the evidence presented by the State was insufficient to support the convictions for child endangering both by failing to demonstrate that the appellant possessed the requisite state of mind, and by failing to demonstrate the substantial risk.

¹ The State was aware of Criminal Rule 7 which allows them to amend the indictment as they took advantage of this to amend counts 13 and 14 to change the name of the victims from J.L. to A.M.

THIRD PROPOSITION OF LAW

A trial court errs when it imposes a sentence that is clearly and convincingly contrary to law, an abuse of discretion and disproportionate.

The trial court abused its discretion when it imposed maximum consecutive sentences on a first-time offender who did not commit the worst form of the offense. The trial court imposed a twenty five year sentence on Gianna Cochran despite the fact that no physical injury occurred, and she was a first time offender. This sentence demonstrates that the trial court failed to reasonably consider the concepts of rehabilitation and the factors enumerated in R.C. 2929. See *State v. Nichols* (2nd Dist. 2011), 2011-Ohio-4671 (reversing a maximum consecutive sentence of 20 years for a first time offender convicted of GSI against first and second graders), *State v. Parker* (2nd Dist. 2011), 193 Ohio App.3d 506, 2011-Ohio-1418 (reversing consecutive sentences totaling 15 years for a first time offender with no prior record).

The trial court was required to consider the factors set forth in R.C. 2929.12 to determine the seriousness of the crime. Here, none of the factors enumerated in R.C. 2929.12(B) exist that indicate that the crime is more serious (e.g., no physical harm, not motivated by race, etc.). Furthermore, at least two factors exist from R.C. 2929.12(C) making the crime *less* serious: (1) the defendant did not cause or expect to cause physical harm to any person and (2) there were substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense – the defendant was admittedly suffering from depression at the time, was having problems with her medication, was part of an unhealthy relationship and was seeking counseling. The trial court actually used the fact that there were no injuries against the defendant, “Just because you didn't leave any marks doesn't mean there wasn't any injuries. I don't know how long the families will worry about whether something will manifest itself later.

But since the State, of course, couldn't prove physical harm, we have third-degree felonies." (Tr. 252.) The trial court even inserted its own outrage when it sentenced her, "[i]f it weren't for an adequate number of deputies in the courtroom, you may not have walked out of this courtroom." Id.

Furthermore, the trial court is required to consider that consecutive sentences should be reserved for the *worst* offenses and offenders. R.C. 2929.14. This record simply does not support that finding. The Second District Court of Appeals noted the inappropriateness of a 15 year sentence of a 36 year old first time offender when it stated,

Compared to this fifteen year sentence, we note that **many types of homicide offenses carry a lesser maximum penalty**, and that a murder conviction would result in an indefinite sentence of only fifteen years to life. Simply put, **there is no justification** in this record for consecutive sentences on all of the counts, resulting in a fifteen year sentence that is unreasonable and an abuse of the trial court's discretion.

Parker at ¶63 (emphasis added). Here, Gianna Cochran was sentenced to a longer sentence than one convicted of a homicide offense. While the State cites to this Court's decision in *State v. Braxton*, 2005-Ohio-2198, for the proposition that "a rote recitation by the trial court that it has considered applicable factors under R.C. 2929.12 is sufficient for the trial court to satisfy its duty[.]" (State's Brief at 12), simply saying that it is following the rules, does not make it so.

While it is prudent to a trial court to mimic the language of a sentencing statute *** the exact language of the sentencing statute is not 'talismanic,' and, therefore, the trial court need not recite the exact language *** as if it amounted to the 'magic words' necessary to impose a prison term on an offender. But the converse is true as well, merely mimicking the 'magic words' does not by itself make a sentence lawful or not subject to an abuse of discretion analysis. The list of factors a court 'shall consider' is not a facade of meaningless words, and the Supreme Court's *Foster* jurisprudence does not contemplate unbridled discretion or converting a sentencing hearing into a peremptory proceeding.

Nichols at ¶38. The trial court failed to reasonably consider the record and the sentencing purposes and policies in R.C. 2929 and this sentence should be reversed.

FOURTH PROPOSITION OF LAW

A trial court errs when it finds a defendant guilty based on facts not in the indictment presented to the grand jury. U.S. Const. amend. V and XIV, OH Const. art. I, § 10.

The State indicted Ms. Cochran for Counts 11 and 12 based on the following language, “on or about the 9th day of August in the year of our Lord, 2009...”. The State never presented in the indictment that they were charging Ms. Cochran based on events that took place on September 9, 2009. The State submitted video recordings to support those counts and stipulated to the time stamp of September 9, 2009. The trial court found Ms. Cochran guilty of endangering children based on the September 9, 2009 video recording. The Tenth District Court of Appeals attempted to remedy this by remanding to formally amend the indictment, *after* the completion of trial and appeal. This is not an appropriate remedy to this violation.

Essentially, the courts have *sua sponte* amended the indictment to change the date of the offense from August 9, 2009 to September 9, 2009. This action violates Ms. Cochran’s right to be tried according to the evidence presented to the grand jury and resulting indictment. While it is true the Ohio’s rules governing indictment amendment are liberal, they are not self-executing. This conviction must be vacated. *State v. Plaster*, 164 Ohio App. 3d 750, 2005-Ohio-6770, 843 N.E.2d 1261 (reversed when original indictment did not specify course of conduct but subsequent amendment changed identity of crime to course of conduct), *State v. Vitale*, 96 Ohio App.3d 695, 645 N.E.2d 1277 (reversed when the trial court permitted the state to amend the indictment at the conclusion of the state’s case from identifying the time frame in the indictment from June 14, 1991, to “June 14, 1991 through June 21, 1991 inclusive.”) See also, Crim. R. 7, *Russell v. U.S.* (1962), 369 U.S. 749, 82 S.Ct. 1038, *State v. Headley* (1983), 6 Ohio St.3d 475, 478-79, 453 N.E.2d 716.

FIFTH PROPOSITION OF LAW

A trial court imposes an illegal sentence when it violates the Sentencing-Package doctrine. U.S. Const. amend. V and XIV, OH Const. art. I, § 10.

The trial court improperly considered the Ms. Cochran's multiple offenses as a group in order to impose a particular overall lengthy sentence to achieve a particular purpose. The trial court indicated that it was imposing maximum consecutive sentences because, "[t]here were five victims. Each one of them deserves to have the full measure of the law brought to bear for the offenses committed against him or her." Tr. 252. However, two of the victims were the result of misdemeanors convictions, L.B. and I.S., therefore imposing five years, when only six months was available, was an attempt by the trial court to package all of the offenses into one overall 25 year sentence. This violates the doctrine set forth in *State v. Saxon*, 109 Ohio Sat.3d 176, 2006-Ohio-1245. *Parker* at ¶76-96. This sentence was contrary to law and must be reversed.

CONCLUSION

This Court should accept jurisdiction and either hold this case for decision in *State v. Washington*, Case No. 2012-1070, or proceed to a merits determination to address the constitutional violations committed and public interests at issue.

Respectfully submitted,



SARAH M. SCHREGARDUS #0080932
Kura, Wilford & Schregardus Co., L.P.A.
492 City Park Ave.
Columbus, Ohio 43215
(614) 628-0100
(614) 628-0103 (Fax)

COUNSEL FOR GIANNA COCHRAN

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was forwarded by regular U.S. Mail to Barbara Farnbacher, Assistant Prosecuting Attorney, 373 S. High Street, Columbus, Ohio 43215, this 19th day of October, 2012.


SARAH M. SCHREGARDUS #0080932

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 11AP-408
 : (C.P.C. No. 10CR-03-1333)
 :
 Gianna Y. Cochran, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

MEMORANDUM DECISION

Rendered on February 5, 2013

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Sarah M. Schregardus, for appellant.

ON MOTIONS

SADLER, J.

{¶ 1} On December 27, 2012, defendant-appellant, Gianna Y. Cochran, filed a motion seeking reconsideration of our December 13, 2012 decision in *State v. Cochran*, 10th Dist. No. 11AP-408, 2012-Ohio-5899, pursuant to App.R. 26(A), or, in the alternative, seeking to certify a conflict pursuant to App.R. 25. Finding neither "obvious error" warranting reconsideration nor an inter-district conflict warranting certification, we deny both requests for the following reasons.

I. BACKGROUND

{¶ 2} Following a bench trial, appellant was convicted of seven counts of misdemeanor child endangering and five counts of felony child endangering. This court unanimously affirmed the findings of guilt supporting each count; however, we were

divided, 2-1, in our decision to affirm the concurrent sentences imposed for Counts 8, 9, 11, 12, 13, 14, 17, and 18. The majority determined that appellant failed to demonstrate that each pair of offenses constituted allied offenses of similar import under R.C. 2941.25, and that the trial court's decision to impose separate sentences for those offenses did not amount to error, much less plain error. *Id.* at ¶ 77.

II. DISCUSSION

A. Application for Reconsideration

¶ 3 When presented with an application for reconsideration filed pursuant to App.R. 26(A)(1), an appellate court must consider whether the application "calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been." *Matthews v. Matthews*, 5 Ohio App.3d 140 (10th Dist.1981), paragraph two of the syllabus. An appellate court will not grant an application for reconsideration merely because a party disagrees with the logic or conclusions of the underlying decision. *State v. Stewart*, 10th Dist. No. 11AP-787, 2013-Ohio-78, ¶ 3. "The purpose of reconsideration is not to reargue one's appeal based on dissatisfaction with the logic used and conclusions reached by an appellate court." *In re I.T.A.*, 7th Dist. No. 11 BE 27, 2012-Ohio-2438, ¶ 5, citing *Victory White Metal Co. v. N.P. Motel Sys., Inc.*, 7th Dist. No. 04 MA 245, 2005-Ohio-3828, ¶ 2.

¶ 4 In her application for reconsideration, appellant challenges our determination that she failed to demonstrate an entitlement to merger under R.C. 2941.25. Specifically, she argues that our reliance on *State v. Overton*, 10th Dist. No. 09AP-858, 2011-Ohio-4204, was misplaced and that *Overton* is distinguishable. According to appellant, unlike *Overton*, the prosecutor and the trial court in the present case expressed an understanding that the offenses were charged in the alternative and were based on the same conduct. However, appellant presented the same interpretation of the prosecutor and trial court's remarks in her supplemental brief, and we rejected her argument in our December 13, 2012 decision. *Cochran* at ¶ 77. Because appellant merely reargues her appeal and expresses nothing more than dissatisfaction with our analysis, we find that she has failed to demonstrate "obvious error" in our decision or that we failed to

consider an issue that we should have. *See Matthews* at paragraph two of the syllabus. Accordingly, appellant's application for reconsideration is denied.

B. Application to Certify a Conflict

{¶ 5} Ohio Constitution, Article IV, Section 3(B)(4) provides that a court of appeals shall certify a conflict when its judgment "is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state." For certification of a case to the Supreme Court of Ohio, "there must be an actual conflict between appellate judicial districts on a rule of law." *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594 (1993), paragraph one of the syllabus. Conflict certification requires "at least three" conditions. *Id.* at 596. First, the conflict must arise from conflicting *judgments*: "the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be 'upon the same question.'" (Emphasis added.) *Id.* Second, the alleged conflict must be on a rule of law—not facts. *Id.* Third, "the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals." *Id.*

{¶ 6} Importantly, "it is not enough that the *reasoning* expressed in the opinions of the two courts of appeals be inconsistent; the *judgments* of the two courts must be in conflict." (Emphasis added.) *State v. Hankerson*, 52 Ohio App.3d 73 (2d Dist.1989), paragraph two of the syllabus. *See also Semenchuk v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-19, 2010-Ohio-6394, ¶ 4. "*Factual* distinctions between cases do not serve as a basis for conflict certification." (Emphasis sic.) *Whitelock* at 599.

{¶ 7} Appellant asks this court to certify a conflict between our December 13, 2012 decision and the Ninth District's decision in *State v. Washington*, 9th Dist. No. 11CA010015, 2012-Ohio-2117. Specifically, she claims that our allied-offense analysis conflicts with the following passage in *Washington*: "[a]lternative theories that the State might have pursued, but did not, cannot form the basis for the State's argument at resentencing. Instead, the allied offense analysis must derive from the evidence introduced at trial, the record, and the legal arguments actually raised." *Id.* at ¶ 16, citing *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 56, 69-70 (O'Connor, J., concurring).

{¶ 8} We find no certifiable conflict between our decision and *Washington* as both decisions applied the Supreme Court of Ohio's decision in *Johnson* to highly fact-specific challenges involving different offenses. The court in *Washington* concluded that the trial court erred by imposing separate sentences for failure to comply and obstructing official business, *see Washington* at ¶ 18, whereas this court found that appellant failed to demonstrate *plain error*, i.e., an "obvious defect," in the trial court's decision to impose separate sentences for counts of felony and misdemeanor child endangering. *Cochran* at ¶ 77. Additionally, our holding does not conflict with the statement in *Washington* relied on by appellant because this court did not rely on "alternative theories" that the state failed to pursue at trial. Instead, we found that appellant failed to establish that the state relied on a *single* theory to support each pair of offenses. *Cochran* at ¶ 65, 68, 73, 74, 76, and 77. We expressly refused to "speculate or assume that the state relied on a singular smothering theory to support both counts, especially when the record shows that the state presented evidence of separate crimes and differentiated the acts of smothering from the act of carrying and throwing A.M. by the ankle." *Id.* at ¶ 73. Because appellant failed to prove that the state relied on a singular theory to support each pair of offenses, we found that she failed to satisfy her burden of proving plain error under R.C. 2941.25 and Crim.R. 52. Given the differing facts, statutes, and analyses at issue, we find no certifiable conflict between our December 13, 2012 decision and the Ninth District's decision in *Washington*. Accordingly, appellant's motion to certify a conflict is denied.

III. CONCLUSION

{¶ 9} For the above reasons, we find that appellant has failed to satisfy the grounds for reconsideration in App.R. 26(A)(1) and the grounds for conflict certification in App.R. 25. Accordingly, both motions are denied.

Motions denied.

CONNOR and DORRIAN, JJ., concur.
