

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 14-1278
Plaintiff-Appellee,	:	
v.	:	On Appeal from the Cuyahoga
	:	County Court of Appeals Eighth
ANTONIA EARLEY,	:	Appellate District
	:	
Defendant-Appellant.	:	C.A. Case No. 100482

---

**BRIEF OF AMICUS CURIAE  
MOTHERS AGAINST DRUNK DRIVING (MADD)**

---

TIMOTHY J. MCGINTY (0024626)  
Cuyahoga County Prosecutor

OFFICE OF THE  
OHIO PUBLIC DEFENDER

T. ALAN REGAS (0067336)  
Cuyahoga County Assistant Prosecutor  
COUNSEL OF RECORD

NIKKI T. BASZYNSKI (0091085)  
Assistant State Public Defender  
COUNSEL OF RECORD

BRETT HAMMOND (0091757)  
Cuyahoga County Assistant Prosecutor

250 E. Broad St., Ste. 1400  
Columbus, Ohio 43215  
(614) 446-5394  
(614) 752-5167 – Fax  
nikki.baszynski@opd.ohio.gov

Cuyahoga County Prosecutor's Office  
Justice Center, 9<sup>th</sup> Floor  
1200 Ontario St.  
Cleveland, Ohio 44113  
(216) 443-7800  
(216) 698-2270 – Fax

COUNSEL FOR ANTONIA EARLEY

---

COUNSEL FOR STATE OF OHIO

MARK KITRICK (0000021)  
ELIZABETH MOTE (0086379)  
Kitrick, Lewis & Harris Co., LPA  
445 Hutchinson Ave., Ste. 100  
Columbus, OH 43235  
(614) 224-7711  
(614) 224-8985 – Fax  
mkitrick@klhlaw.com  
liz@klhlaw.com

COUNSEL FOR AMICUS CURIAE  
MOTHERS AGAINST DRUNK DRIVING  
(MADD) IN SUPPORT OF APPELLEE

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES	ii
STATEMENT OF MADD’S AMICUS INTEREST	1
STATEMENT OF THE CASE AND FACTS	1
MADD’S PROPOSITION OF LAW	1
Aggravated Vehicular Assault and OMVI are not allied offenses of similar import and thus merger does not apply.	
LAW AND ARGUMENT	1
A. Introduction	1
B. Argument	2
CONCLUSION	6
CERTIFICATE OF SERVICE	8

## TABLE OF AUTHORITIES

### Cases

<i>State v. Bayer</i> , Franklin App. No. 11AP-733, 2012-Ohio-5469 (10th Dist. Nov. 27, 2012).	3, 4
<i>State v. Demirci</i> , Lake App. No. 2011-L-142, 2013-Ohio-2399 (11th Dist. Jun. 10, 2013).	3, 4
<i>State v. Earley</i> , 2014-Ohio-2643, 15 N.E.3d 357 (8th Dist. 2014).	3, 4
<i>State v. Heiney</i> , Portage App. No. 2006-P-0073, 2007-Ohio-1199 (11th Dist. Mar. 14, 2007).	3
<i>State v. Jacot</i> , 97 Ohio App.3d 415, 646 N.E.2d 1128 (9th Dist. 1993).	3
<i>State v. Johnson</i> , 128 Ohio St. 3d 153, 2010-Ohio-6314, 924 N.E.2d 1061 (2010).	1, 2, 3
<i>State v. Kraft</i> , Delaware App. No. 13CAA 03 0013, 2013-Ohio-4658 (5th Dist. Oct. 21, 2013).	2, 4
<i>State v. Miller</i> , Stark App. No. 2007CA00142, 2007-Ohio-6272 (5th Dist. Nov. 19, 2007).	2
<i>State v. Mitchell</i> , 6 Ohio St. 3d 416 (1983).	5
<i>State v. O'Neil</i> , Cuyahoga App. No. 82717, 2005-Ohio-4999, (8th Dist. Sept. 22, 2005).	2
<i>State v. Roberts</i> , Butler App. No. CA97-10-186, 1998 Ohio App. LEXIS 2947 (12th Dist. Jul. 29, 1998).	2
<i>City of Columbus v. Rodriguez</i> , Franklin App. No. 96APC05-601, 1996 Ohio App. LEXIS 4872 (10th Dist. Nov. 6, 1996).	3
<i>State v. Volpe</i> , Franklin App. No. 06AP-1153, 2008-Ohio-1678 (10th Dist. Apr. 8, 2008).	2, 4
<i>State v. Wilcox</i> , 10 Ohio App.3d 11, 460 N.E.2d 323 (5th Dist. 1983).	3
<i>State v. Washington</i> , 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661 (2013).	3

### Statutes

R.C. 2903.08	3, 4
R.C. 2929.11	6
R.C. 2929.41	2
R.C. 4511.19	3, 4

## STATEMENT OF MADD'S *AMICUS* INTEREST

MADD offers this *Amicus* Brief in support of Appellee. MADD was incorporated in 1980 as a non profit organization and its mission “is to stop drunk driving, support the victims of this violent crime and prevent underage drinking.” To date, MADD’s work has saved 300,000 lives ... and counting.

## STATEMENT OF THE CASE AND FACTS

MADD’s *Amicus* accepts and incorporates the statement of the case and facts as set forth in the Merit Brief of Appellee-State of Ohio.

## MADD’S PROPOSITION OF LAW

Aggravated Vehicular Assault and OMVI are not allied offenses of similar import and thus merger does not apply.

## LAW AND ARGUMENT

### A. Introduction

There is significant conflict in Ohio’s courts as to whether Aggravated Vehicular Assault (“AVA”) and OMVI are allied offenses of similar import, and whether the legislature intended an exception to merger and Double Jeopardy even if the two offenses were interpreted as allied offenses. Case rulings have focused on statutory language and what tests Ohio courts should apply.

The most recent touchstone test regarding allied offenses is set out in *State v. Johnson*, 128 Ohio St. 3d 153, 2010-Ohio-6314, 924 N.E.2d 1061 (2010). In *Johnson*, the lead opinion states that if the following two questions are answered “yes,” then the offenses are of similar import and merger applies: (1) is it possible to commit one offense and commit the other with the

same conduct; and (2) were the offenses committed by the same conduct, i.e. a single act, committed with a single state of mind. *Johnson, supra*, 128 Ohio St. 3d 153, 2010-Ohio-6314 at ¶¶ 48-49, 924 N.E.2d 1061. Although the *Johnson* case did not involve AVA and OMVI, but felony murder and child endangerment, presumably this crucible test must be given to the facts of this case. *Johnson* at ¶ 3. The *Johnson* Court further opined the obverse, that if the one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, according to R.C. 2941.25(B) merger is inapplicable. *Id.* at ¶ 51.

### **B. Argument**

Despite the assumption by many Ohio appellate courts that AVA and OMVI merge under *Johnson*, it is MADD's position that those courts supporting the proposition that AVA and OMVI are *not* allied offenses are indeed correct. See e.g. *State v. Volpe*, Franklin App. No. 06AP-1153, 2008-Ohio-1678, ¶ 72 (10th Dist. Apr. 8, 2008) (AVA and OMVI not allied offenses of similar import); *State v. O'Neil*, Cuyahoga App. No. 82717, 2005-Ohio-4999, ¶ 18 (8th Dist. Sept. 22, 2005) (AVA and OMVI not allied offenses). See also the following regarding similar offenses and OMVI: *State v. Miller*, Stark App. No. 2007CA00142, 2007-Ohio-6272, ¶ 18 (5th Dist. Nov. 19, 2007) (aggravated vehicular homicide and OMVI are not allied offenses); *State v. Roberts*, Butler App. No. CA97-10-186, 1998 Ohio App. LEXIS 2947 (12th Dist. Jul. 29, 1998) (vehicular homicide and OMVI are not allied offenses).

Even the Fifth, Eighth, Tenth and Eleventh Districts that hold R.C. 2929.41(B)(3) creates an exception that allows the trial court to impose a sentence for both AVA and OMVI assume *arguendo* AVA and OMVI are allied offenses. See *State v. Kraft*, Delaware App. No. 13CAA 03 0013, 2013-Ohio-4658 (5th Dist. Oct. 21, 2013), appeal not accepted, 138 Ohio St.3d 1451,

2014-Ohio-1182, 5 N.E.3d 668; *State v. Earley*, 2014-Ohio-2643, 15 N.E.3d 357 (8th Dist. 2014); *State v. Bayer*, Franklin App. No. 11AP-733, 2012-Ohio-5469, ¶ 22 (10th Dist. Nov. 27, 2012), appeal not accepted, 136 Ohio St.3d 1453, 2013-Ohio-3210, 991 N.E.2d 258; *State v. Demirci*, Lake App. No. 2011-L-142, 2013-Ohio-2399 (11th Dist. Jun. 10, 2013). As the *Amicus* Brief filed by the Franklin County Prosecuting Attorney’s Office points out, *Johnson*’s lead opinion is not a majority opinion and this Court has unanimously recognized its narrow holding, limited to the syllabus, in *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661 (2013). As set forth more fully herein, even post-*Johnson*, this Court need not assume AVA and OMVI are allied offenses.

First, undoubtedly an offender can cause serious physical harm to another without being drunk, as R.C. 2903.08(A)(1)(a) sets out. Ohio cases sadly provide numerous supporting examples, including that one can speed, be reckless, lose control of a vehicle, or endanger a child and not be under the influence of alcohol or drugs. See e.g. *Johnson, supra* at ¶¶ 3-6 (felony-murder and child endangering, alcohol and drug use not at issue). Conversely, citing the OMVI law, R.C. 4511.19(A)(1)(a), numerous cases provide illustrations when someone is driving drunk but (fortunately) does not cause any specific harm to a victim. See e.g. *City of Columbus v. Rodriguez*, Franklin App. No. 96APC05-601, 1996 Ohio App. LEXIS 4872 (10th Dist. Nov. 6, 1996) (acquittal on OMVI-impaired charge does not exempt defendant from prosecution on OMVI per se charge, which requires proof of prohibited blood alcohol concentration “it is immaterial whether [defendant] was, in fact, under the influence of alcohol”) (citing *State v. Wilcox*, 10 Ohio App.3d 11, 460 N.E.2d 323 (5th Dist. 1983); *State v. Jacot*, 97 Ohio App.3d 415, 646 N.E.2d 1128 (9th Dist. 1993), discretionary appeal dismissed as improvidently allowed, 71 Ohio St.3d 1217, 644 N.E.2d 1383 (1995)); *State v. Heiney*, Portage App. No. 2006-P-0073,

2007-Ohio-1199 (11th Dist. Mar. 14, 2007) (defendant convicted of OMVI after single-vehicle crash in which she was injured, no occupants in the vehicle and no victims found nearby). As the Tenth District stated in *State v. Volpe*:

It is obvious that one could drive under the influence of alcohol, a drug of abuse, or a combination of them in violation of R.C. 4511.19 and not cause the death of another in violation of R.C. 2903.06. Additionally, one could drive recklessly or negligently in violation of R.C. 2903.06 and not drive under the influence of alcohol, a drug of abuse or a combination of them in violation of R.C. 4511.19.

*Volpe, supra*, Franklin App. No. 06AP-1153, 2008-Ohio-1678 at ¶ 71. Of course, as discussed in more detail below, an offender can violate both statutes.

It is critical to emphasize that different states of mind and harm both to society generally and victims pertain to these two statutes, and therefore they are separate and not allied offenses. Compare R.C. 4511.19(A)(1)(a) and R.C. 2903.08(A)(1)(a). Likewise, our society's position that the combined conduct of drinking and then driving creates serious dangers to society and should not and cannot be tolerated is of preeminent consideration. This writ large social standard if violated demands serious, strict and consistent punishment – ultimately with a major goal of deterring anyone who considers drinking, getting drunk and then entering a vehicle and deciding to drive.

That many courts have concluded by assuming AVA and OMVI are allied offenses that Ohio's legislative history allows for an exception to merger, which does not violate our Double Jeopardy prohibition, supports the conclusion that consecutive (not concurrent) punishments should be the norm and routinely enforced. See e.g. *Bayer, supra*, 2012-Ohio-5469 at ¶¶ 19-22; *Kraft, supra*, 2013-Ohio-4658 at ¶¶ 33-34 (citing *Bayer* at ¶¶ 19-22 and noting this Court did not accept it for review); *Demirci, supra*, 2013-Ohio-2399 at ¶¶ 46-48 (citing *Bayer*); *Earley, supra*, 2014-Ohio-2643, ¶¶ 14-18, 15 N.E.3d 357 (citing and agreeing with *Bayer, Kraft* and *Demirci*).

This is all the more true starting with the presumption that the offenses are not so similar to be considered as one act with one state of mind.

Let us examine a few scenarios: a person decides to drink when not at home. At some point, the person becomes drunk. Then, that person must get home or someplace else. The drinker at that moment decides to get into a car and turn on the ignition. Further, the drinker continues to make various decisions to maneuver the car down a road. Those many acts include ascertaining and evaluating the car's speed, operating car controls, evaluating road conditions and outside lighting issues, observing traffic, reading road signals, ascertaining the weather, and so on, all encompassing an ongoing series of separate mental and physical decisions, each with its own set of consequences. Eventually, the drunk driver either gets home or maybe gets arrested for drunk driving, perhaps for weaving in and out of the lane or running a red light, but without hurting or killing anyone. This is not the result of one decision or one animus, but a combination of many acts, even if done without full mental clarity and in violation of common sense.

Regardless, this conduct violates laws that we, through our legislature and history, hold as crucial to maintaining and preserving a safe society. See generally *State v. Mitchell*, 6 Ohio St. 3d 416 (1983). There are consequences for these acts that the offender must pay.

Let us assume that the above offender puts a child in the front seat, runs a light and then speeds and/or is reckless, causing a collision. When this occurs, the offender has now engaged in conduct that is different from just getting into the car and driving drunk, i.e. choosing not to put the child in the back seat, taking the time to put a child in the front seat, choosing whether to seatbelt the child or not. These are differentiating behaviors, not similar states of mind, that now

victimize someone, the child (if injured or killed) or someone in another car who is maimed or murdered.

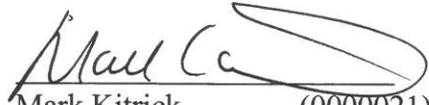
MADD must emphasize that the ramifications to the victims and society are tragic and profound – ruined limbs and lives, massive medical bills, lost jobs, lost income, government paying bills and damages, horrible deaths, and unspeakable pain, suffering and misery to victims, families and loved ones. This is to name only a few of the multitude of sins inflicted on so many as a result of the crimes committed in this case, and tragically, too many like it. All these points the Court must consider in reflecting on convictions, sentencing and merger of AVA and OMVI.

These statutory acts and the attendant punishments are intended to protect not just society but the victims. Victims' rights must be carefully and fully safeguarded. Merging the crimes or sentences for violations of these two statutes in effect would wipe out important protections we provide victims. To a significant degree, if merger occurs we not only ignore obvious differences in the statutes, but detract and diminish the importance of our goals – to punish the offenders, protect the victims, protect our society, and deter such behaviors. Said another way, treating these two acts, OMVI and AVA, as of similar import, merging the convictions and sentences undermines crucial and fundamental protective and deterrent mechanisms that exist for victims and for society. See R.C. 2929.11(A), the felony sentencing statute.

### **CONCLUSION**

To best protect victims and society, to deter and punish the conduct outlined herein, and to appropriately implement Ohio's legislative intent in the least complicated manner possible without violating our constitutional principles of Double Jeopardy, MADD supports the proposition that AVA and OMVI are not of similar import and thus merger does not apply.

Respectfully submitted,



Mark Kitrick (0000021)  
Kitrick, Lewis & Harris Co., LPA  
445 Hutchinson Ave., Ste. 100  
Columbus, OH 43235  
(614) 224-7711  
(614) 224-8985 – Fax  
mkitrick@klhlaw.com



Elizabeth Mote (0086379)  
Kitrick, Lewis & Harris Co., LPA  
445 Hutchinson Ave., Ste. 100  
Columbus, OH 43235  
(614) 224-7711  
(614) 224-8985 – Fax  
liz@klhlaw.com

COUNSEL FOR AMICUS CURIAE  
MOTHERS AGAINST DRUNK  
DRIVING (MADD)

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Brief of Amicus Curiae Mothers Against Drunk Driving (MADD) was sent by regular mail on January 14, 2015, to the following:

Timothy J. McGinty  
T. Alan Regas  
Brett Hammond  
Cuyahoga County Prosecutor's Office  
The Justice Center, Courts Tower  
1200 Ontario St., 9<sup>th</sup> Fl.  
Cleveland, OH 44113

COUNSEL FOR APPELLEE, STATE OF OHIO

Nikki Trautman Baszynski  
Assistant State Public Defender  
250 E. Broad St., Ste. 1400  
Columbus, OH 43215

COUNSEL FOR APPELLANT, ANTONIA EARLEY

  
Mark Kitrick (0000021)

COUNSEL FOR AMICUS CURIAE  
MOTHERS AGAINST DRUNK  
DRIVING (MADD)