IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	**:**	
APPELLEE	**:**	**S.C. CASE NO 2024-0669**
VS	**:**	**ON APPEAL FROM THE LORAIN COUNTY COURT**
EDWARD BALMERT,	**:**	**OF APPEALS, NINTH DISTRICT**
APPELLANT	**:**	**9TH DIST. CASE NO. 22CA011908**

MERIT BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT EDWARD BALMERT

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STATEMENT OF THE CASE AND FACTS

For purposes of this appeal, Amicus OACDL accepts the Appellant's recitation of the procedural history and facts of the case.

ARGUMENT

I. Interest of *Amicus Curiae* Ohio Association of Criminal Defense Lawyers

In this case, the Ohio Association of Criminal Defense Lawyers (OACDL) is significantly concerned by a recent trend of courts and prosecutors misreading the vehicular assault and vehicular homicide statutes and in essence completely eliminating a critical element. Specifically, in serious injury and death cases where it is alleged that the at-fault driver was guilty of OVI, the element that the injury must be the "proximate result" of the OVI offense is being completely overlooked and ignored. Rather, courts, like the trial court in this case, are automatically assuming that a person who is guilty of **any** OVI offense, such as the *per se* marijuana metabolite, are automatically guilty of the separate, serious crime of aggravated vehicular assault (or homicide), without proof of the pharmacological effect the alcohol or drug is actually having on the person's ability to operate the vehicle. *See also State v. Naylor*, 2024-Ohio-1648 (11th Dist.)(holding that proof of a *per se* metabolite conviction is sufficient to support a finding of guilt for aggravated vehicular homicide without any evidence of impairment of effect on a person's ability to safely operate a vehicle).

The plain and unambiguous language of the statute at issue shows the General Assembly's carefully crafted scheme to restrict application of extremely serious felony charges (which carry with them mandatory prison time, one of the most serious sentences provided for in Ohio) to situations where the State can prove that the OVI offense was a cause of the crash. There are two separate and distinct causation elements in the aggravated vehicular assault

context. The first is that the person must be the at-fault driver and cause the injury. The second is that the injury must be the proximate result of the OVI offense. The plain language of the statute clearly demands more than the mere fact that the person was merely guilty of OVI at the time of the crash; otherwise, the "proximate result" language would be completely superfluous.

To be clear, the interest of the OACDL is in ensuring that this Court, in considering the first proposition of law, clearly and unambiguously interprets the "proximate result" language as a distinct element of the offense of vehicular assault, which requires that the State prove, not just that the person was guilty of OVI, but that the OVI had an actual and appreciable effect on the person. In other words, a person is not guilty of the far more serious felony charge of aggravated vehicular assault based solely upon a toxicology result of the presence of drug metabolite in a person's system without further proof of its pharmacological effect on the body. Otherwise, the statute and balance that the General Assembly so carefully crafted will be upended based upon an atextual reading of the statute at hand.

II. Argument in Support of First Proposition of Law

The plain and unambiguous reading of the statute requires the State to prove not just that the person was guilty of OVI, but that the injury to another person was the *proximate result* of the OVI offense for which they were found guilty. The First Proposition of Law asks this Court to make clear that the proximate result element is separate and distinct and requires the State to prove the effect the drug or alcohol had on the person such that the injury can fairly be said to be the proximate result of the OVI offense itself. The statute requires nothing less.

It is a fundamental rule of statutory interpretation that legislative intent is expressed only though the plain and unambiguous language of the statute; only ambiguous statutes require an atextual divination of legislative intent. See RC 1.49. As this Court has previously stated:

> The only mode in which the will of a legislature is spoken is the statute itself. Hence, in the construction of statutes, it is the legislative intent manifested in the statute that is of importance, and such intent must be determined primarily from the language of the statute, which affords the best means of the exposition of the intent. Indeed, it is the duty of the courts to give a statute the interpretation its language calls for where this can reasonably be done, and the general rule is that no intent may be imputed to the Legislature in the enactment of a law, other than such as is supported by the language of the law itself. The courts may not speculate, apart from the words, as to the probable intent of the Legislature. *Wachendorf v. Shaver*, 149 Ohio St. 231, 235 (1948).

"When the statutory language is plain and unambiguous, and conveys a clear and definite meaning, we must rely on what the General Assembly has said." *State v. Reed*, 2020-Ohio-4255. ¶13. Further, general principles of statutory interpretation require that this Court give meaning to every portion of the statute. "[T]he court should avoid that construction which renders a provision meaningless or inoperative." *State v. Polus*, 2016-Ohio-0655, ¶12, quoting *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.*, 95 Ohio St. 367, 373 (1917).

RC 2903.08 provides:

> (A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause serious physical harm to another person or another's unborn in any of the following ways:
>
> (1)(a) As the *proximate result* of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance;
>
> (b) As the *proximate result* of committing a violation of division (A) of section 1547.11 of the Revised Code or of a substantially equivalent municipal ordinance;
>
> (c) As the *proximate result* of committing a violation of division (A)(3) of section 4561.15 of the Revised Code or of a substantially equivalent municipal ordinance.

(2) In one of the following ways:

(a) As the *proximate result* of committing, while operating or participating in the operation of a motor vehicle or motorcycle in a construction zone, a reckless operation offense, provided that this division applies only if the person to whom the serious physical harm is caused or to whose unborn the serious physical harm is caused is in the construction zone at the time of the offender's commission of the reckless operation offense in the construction zone and does not apply as described in division (E) of this section;

(b) Recklessly.

(3) As the *proximate result* of committing, while operating or participating in the operation of a motor vehicle or motorcycle in a construction zone, a speeding offense, provided that this division applies only if the person to whom the serious physical harm is caused or to whose unborn the serious physical harm is caused is in the construction zone at the time of the offender's commission of the speeding offense in the construction zone and does not apply as described in division (E) of this section.

(Emphasis Added)

Analyzing the structure of the statute, we can clearly see that critical nature the proximate result language has on the language. The statute assigns criminal liability in two ways. First is when the statute criminalizes causing serious physical harm as a result of a specific mens rea, like recklessness in section (A)(2)(b). When a specific mens rea applies, there is no need to assign a separate element relating to the proximate result; mere proof that the person's mental state is of a certain nature under RC 2901.22 is sufficient. However, when the criminal liability is derived not from a mental state but from a commission of a separate criminal or traffic offense, the statute requires more than the mere commission of that other act. It requires the injury to be the *proximate result* of that other offense. The specific language chosen by the General Assembly is clear and unambiguous on that point.

If the statute were to be interpreted in a manner that mere commission of the offense, without a specific showing of proximate causation, were sufficient to provide criminal liability under this statute, then the Court would be rendering the "proximate result" language inoperable

and meaningless, in violation of all the principles of statutory interpretation this Court appropriately guards and enforces against judicial encroachment. Simply put, without a forceful pronouncement from this Court that the proximate result language is a separate element of the offense that must be proven, the statute the General Assembly created would be legislated away from the bench – a danger this Court has repeatedly warned about. "We are not authorized to ignore statutory language." *Elliot v. Durrani*, 2022-Ohio-4190, ¶19.

III. Proving that an Injury Was the "Proximate Result" of an OVI Offense Requires the State to Prove the Specific OVI Offense Had an Appreciable Effect on the Person.

Once it is clear that the State must prove the injury was the proximate result of the OVI offense, the next logical question is what proof is required to satisfy that element. This is where the distinction between an OVI "under the influence" offense [RC 4511.19(A)(1)(a)] and an OVI offense based upon a prohibited concentration of frugs or alcohol [OVI *per se* offense under RC 4511.19(A)(1)(b) through (j)] is incredibly important.

The easy application of the aggravated vehicular assault statute is when a person is found guilty of being "under the influence" of drugs or alcohol under RC 4511.19(A)(1)(a). In that case, satisfying the proximate result language will be simple, straightforward, and fairly automatic. For a person to be found guilty of an OVI "under the influence" offense, that necessarily entails a finding that the drug or alcohol had an appreciable effect on the person's mental faculties such that the person's ability to operate the vehicle in a safe manner was impaired. [1] Given the accepted definition of "under the influence" in the jury instructions, proof

[1] "Under the influence" means that the accused consumed some alcohol, drug of abuse, or combination of alcohol and a drug of abuse, whether mild or potent, in such a quantity, whether small or great, that it **adversely affected**

of impairment sufficient to satisfy that standard would, absent truly exceptional or unusual circumstances, satisfy the proof necessary to show that the injury was the proximate result of the OVI offense.

However, things get significantly more complicated when a person is **not** found guilty of being impaired, and the person is only guilty of a prohibited concentration *per se* offense. In those cases, as this Court has repeatedly stressed, the affect the drugs or alcohol has on the person is strictly irrelevant, and the only thing that matters is the accuracy of the test. *State v. Boyd,* 18 Ohio St. 3d 30, 31 (1985); *accord Defiance v. Kretz*, 60 Ohio St.3d 1, 3 (1991)("[t]he accuracy of the test results is a critical issue in determining a defendant's guilt or innocence"); *see also State v. Turney*, 2020-Ohio-4148, ¶33 (2nd Dist.). Therefore, the straightforward conclusion from that understanding of *per se* offenses is that, standing alone, the chemical test result or number, without expert testimony, is insufficient to establish that the injury is the proximate result of the OVI offense. That conclusion is the logical outcome of application of the *Boyd* and *Kretz* standard.

However, that is not to say that the result of a blood, urine, or breath test would never be relevant to establishing the necessary evident to satisfy the proximate result language. It simply follows that there would need to be some expert testimony to relate the result of the test to the pharmacological effect the substance would have on the person. This is straightforward

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and noticeably impaired the accused's actions, reaction, or mental processes under the circumstances then existing and deprived the accused of that **clearness of intellect and control of hirself** which he would otherwise have possessed. The question is not how much alcohol, drug of abuse, or alcohol and a drug of abuse would affect an ordinary person. The question is what **effect** did any alcohol, drug of abuse, or alcohol and a drug of abuse, consumed by the accused, have on her at the time and place involved. If the consumption of alcohol, drug of abuse, alcohol and a drug of abuse so **affected the nervous system, brain, or muscles of the accused so as to impair, to a noticeable degree**, his ability to operate the vehicle, then the accused was under the influence. (emphasis added) *Ohio Jury Instructions*

application of this Court's precedent. In *State v. French*, 72 Ohio St.3d 446 (1995), this Court analyzed the relationship between a breath test and its relationship to prove impairment of a person. Quoting *City of Newark v. Lucas*, 40 Ohio St.3d 100, 105 (1988):

> [t]his court has previously held that when introducing the results of a legally obtained breathalyzer test into evidence in prosecutions under R.C. 4511.19(A)(1)[(a), the "under the influence statute], the state must present expert testimony 'to relate the numerical figure representing a percentage of alcohol by weight in the bodily substance, as shown by the results of the chemical test, to the common understanding of what it is to be under the influence of alcohol.' *French* at 452

That holding applies with equal force in prosecutions for aggravated vehicular assault and/or homicide. When the State wishes to rely upon a chemical test result and an OVI *per se* offense to establish that an injury was the proximate result of an OVI, the State must present expert testimony to relate the chemical test result to the pharmacological effect that substance would have on the person. Anything less would not satisfy the legislatively mandated causation between the injury and the OVI offense.

CONCLUSION

Proper application of the Aggravated Vehicular Assault/Homicide statutes is of utmost importance for the State of Ohio and its citizens. These cases are, rightfully, understood to be some of the most serious criminal offenses in the State. Victims and their families have suffered unimaginable injuries or death, and the criminal defendants who stand accused are facing life-altering consequences for such behavior. In light of the stakes, it is critically important for this Court to set forth the straightforward, common-sense application of the statutory language governing these cases. All parties deserve the clarity to understand what nature of proof must be shown for criminal liability to be established.

The plain and unambiguous language of the statute provides the answer. An essential element of the case is that the injury (or death) to a person must be the proximate result of the OVI offense. In cases of impairment, that element will be easily satisfied by proof that the person is "under the influence" of drugs or alcohol. But when there is no proof of impairment, and the State is instead relying solely upon a *per se* violation to prove their case, there must be additional evidence provided to relate that numerical result to an appreciable effect on the person that would create the causal relationship between the OVI and injury that the General Assembly demands. Anything less would be antithetic to the language and structure of the legislatively-approved statute.

As such, *Amicus* OACDL respectfully requests that this Court clarify the appropriate standard of proof required in an Aggravated Vehicular Homicide case to establish the *proximate result* language as suggested herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing BRIEF OF *AMICUS CURIAE* OACDL was served upon the following parties via EMAIL on 10/15/2024

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