ORIGINAL

Supreme Court Case No. 2014-0941

In the Supreme Court of Ohio

STATE OF OHIO,

Plaintiff-Appellant

V.

DERRELL SHABAZZ,

Defendant-Appellee.

On Discretionary Appeal from the Court of Appeals, Eighth District, Cuyahoga County, Ohio Case No.: 100021

MERIT BRIEF OF AMICUS CURIAE, THE OHIO ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS IN SUPPORT OF DEFENDANT-APPELLEE SHABAZZ

Christopher J. Pagan (0062751)
Repper, Pagan, Cook, Ltd.
15 01 First Avenue
Middletown, OH 45044
Tel. 513.424.1823
Fax 513.424.3135
E-Mail cpagan@cinci.rr.com
Counsel for Amicus OACDL

—and—

Reuben Sheperd
11510 Buckeye Road
Cleveland, OH 44104
Tel. 216.721.7700
Counsel for Derrell Shabazz

Timothy McGinty
Cuyahoga County Prosecutor
Christopher Schroeder (0089855)
Anna Faraglia (0067420)
Assistant Prosecutors
1200 Ontario Street
Cleveland, OH 44113
Tel. 216.443.7733
Counsel for State of Ohio

Repper, Pagan, & Cook, Ltd.
Attorneys at Law
1501 First Avenue
Middletown, OH 45044
Phone: 513.424.1823
FAX: 513.424.3135

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Repper, Pagan, & Cook, Ltd.
Attorneys at Law
1501 First Avenue
Middletown, OH 45044
Phone: 513.424.1823
FAX: 513.424.3135

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Repper, Pagan, & Cook, Ltd.
Attorneys at Law
1501 First Avenue
Middletown, OH 45044
Phone: 513.424.1823
FAX: 513.424.3135

STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Association of Criminal Defense Lawyers is filing an amicus brief in this case to address the important and recurring issue of the required culpable mental state for a complicity offense. A sub-issue is timing. At what point during the principal's offense must the complicitor form the required mens rea for complicity liability to attach?

These are important questions for three reasons.

First, a complicitor is punished for the acts of another, and not for committing the substantive offense himself. Here, the State seeks to convict Shabazz for aggravated or felony murder because his cohort, Walker, shot and killed Shannon during a sudden quarrel between two groups. This strains the principle of individual responsibility.

Second, the actus reus for complicity sets a very low bar. A complicitor can be liable for homicide without pulling the trigger or causing a death; and can be liable for an assault without throwing the punch. That is because the actus reus for complicity is satisfied by mere words that influence or encourage the principal, with no requirement that those words actually cause the principal to act. See, e.g, R.C. 2923.03(A)(1). Thus, the law requires only a slight act for complicity liability, as opposed to the stringent requirement that the principal commit all elements of the substantive offense.

Third, Ohio metes out equal punishment for the complicitor and principal. R.C. 2923.03(F). There lies the rub. If the punishment is equal, but the complicitor need do no more than encourage or influence the principal with words, the role of mens rea is enhanced. It must work in a muscular manner to

Repper, Pagan, & Cook, Ltd.
Attorneys at Law
1501 First Avenue
Middletown, OH 45044
Phone: 513.424.1823
FAX: 513.424.3135

justify the equal punishment for the complicitor and principal. After all, punishment must be made commensurate to personal culpability.

The instant case frames these issues well.

Shabazz was convicted by a jury of, inter alia, complicity to aggravated murder, felony murder, and felonious assault for Walker's act of shooting Shannon with a gun and causing his death. But Shabazz himself did not supply the weapon, fire it, or cause Shannon's death by gunshot.

Regarding actus reus, the State failed to elicit evidence that Shabazz aided Walker in killing Shannon; and it failed to prove that Shabazz abetted Walker with words to cause Shannon's death, or even influenced or encouraged Walker to kill Shannon. Instead, the State and the dissent posit that the actus reus occurred when Shabazz punched Shannon and Shannon's cohort or abetted assaults on these victims with champagne bottles. These assaults were unrelated to Walker's cause of death. But according to the State and dissent, that was immaterial. They believe that the actus reus for complicity to aggravated or felony murder arose from Shabazz's undifferentiated involvement in the sudden quarrel with Shannon and his group where Shannon died. State's brief, passim; Dissent, ¶74.

Finally, regarding mens rea, the majority below held that Ohio complicity law includes two mens-rea components: the complictor's culpable mental state for his own act, and his second and separate mental state of intending to facilitate the principal's commission of the crime. Opinion, ¶25. Moreover, the majority adopted the U.S. Supreme Court's viewpoint regarding mens-rea timing—that the complicitor must possess foreknowledge of the principal's offense at a time where

Repper, Pagan, & Cook, Ltd.
Attorneys at Law
1501 First Avenue
Middletown, OH 45044
Phone: 513.424.1823
FAX: 513.424.3135

he has a realistic chance to abandon his involvement or prevent the crime. Id. at ¶29. In contrast, the State's merit brief fails to address the majority's two-components holding. Further, the State argues that the U.S. Supreme Court's foreknowledge decision is irrelevant in Shabazz's case. State's brief, pp. 28-30. In the State's view, the record supports Shabazz's foreknowledge of Walker's intent to use a gun to kill Shannon. Id. at 28-9. But even if he lacked foreknowledge, the State contends that Shabazz was guilty of felony murder for assaulting Shannon and his cohort with bottles, despite the undisputed fact that Shannon died from Walker's gunshot and not a champagne-bottle injury.[1] Id.

Accordingly, this is an unusually important case. It supplies this Court with the opportunity to address the required mens rea for a complicity offense, and whether the Supreme Court's foreknowledge requirement from federal accomplice-liability law applies in Ohio as well.

LAW AND ARGUMENT

PROPOSITION OF LAW I

The culpable mental state for a complicity offense requires proof that the complicitor possessed the mens rea from the underlying offense regarding his own act, and that he purposely facilitated or promoted the principal's commission of the offense.

The State fails to address the two-component mens-rea requirement for a complicity offense identified in the majority opinion. Opinion, ¶25. It likewise fails to consider this requirement's impact on the majority's decision regarding insufficient evidence for murder. State's brief, passim. This is the critical error in the State's analysis. The absence of direct evidence or reasonable, circumstantial

Repper, Pagan, & Cook, Ltd.
Attorneys at Law
1501 First Avenue
Middletown, OH 45044
Phone: 513.424.1823
FAX: 513.424.3135

[1] This brief is confined to mens rea. It will not address the State's argument that the bottle assault on Shannon and/or his friend was somehow the proximate cause of Shannon's gunshot-wound death, as understood in the felony-murder statute.

inferences to prove that Shabazz intended to facilitate or promote Walker's shooting of Shannon was a basis for the majority's insufficient-evidence decision on felony murder. Opinion, ¶39.

The two-component mens-rea rule was described by Professor Katz as follows:

> As for the mental element, the statute provides that the accomplice's conduct must be accompanied "with the kind of culpability required for the commission of the offense. *** However, complicity also requires a second mental element. In addition to acting "with the kind of culpability required for the commission of the offense," the accomplice must intend to aid, abet, solicit, procure, conspire, or cause the principal to commit the offense. All these statutory terms imply purpose.

Katz and Giannelli, *Ohio Criminal Law* (3rd Ed.), § 92:3.

Professor Katz's concluding point that Ohio law implies that a complicitor must purposely promote the principal's offense is both controversial and un- or at least underdeveloped in Ohio law. With respect to that controversy, the Model Penal Code commentaries note that its scholars were divided, with the majority finding that purposive promotion was an essential element for accomplice liability, while a minority found that knowing facilitation was sufficient. American Law Institute, Model Penal Code and Commentaries (1985 Ed.), § 2.06, pp. 314-19. The U.S. Supreme Court's decision from last term acknowledged the long running knowing-purpose dispute, but found it unnecessary to fully resolve. *Rosemond v. United States*, ____ U.S. ____, 134 S.Ct. 1240, 1249, 188 L.Ed.2d 248, Fns. 7 and 8 (2014). In an older common-law case, this Court reversed a murder conviction for a complicitor where he quarreled with a group, and the

Repper, Pagan, & Cook, Ltd.
Attorneys at Law
1501 First Avenue
Middletown, OH 45044
Phone: 513.424.1823
FAX: 513.424.3135

complicitor's son unexpectedly shot and killed the victim. It reversed, inter alia, because there was insufficient evidence that the complicitor purposely facilitated the homicide—an endorsement of Professor Katz and the Model Penal Code majority's view on purposive facilitation. *Woolweaver v. State*, 50 Ohio St. 277, 34 N.E. 352 (1893). Nevertheless, recent Ohio appellate decisions applying the two-component mens-rea rule have borrowed the mens-rea element from the underlying offense as the required mens rea for both components. Thus, if the offense was murder, the complicitor must purposely aid or abet the principal, and purposely facilitate his murder. But if the offense was felony murder based on felonious assault, the complicitor must only knowingly aid or abet the principal, and knowingly facilitate a foreseeable murder. See, e.g., *State v. Mendoza*, 137 Ohio App.3d 336, 2000-Ohio-1689; and, State v. *Burrus*, 2nd Dist. App. No. 22960, 2009-Ohio-7037, ¶11-19.

This Court should resolve the uncertainty surrounding the second mens-rea component. The better rule is purposive facilitation. This would reject (*i*) knowing facilitation and (*ii*) borrowing from the underlying offense for both mens-rea components, addressed below.

i/ a mens rea of purpose to facilitate the principal's offense is preferred to knowing facilitation because it more fairly allocates liability and equal punishment.

Purposive facilitation is preferred by Professor Katz and the Model Penal Code scholars because a lesser culpable mental state is over-inclusive for liability. American Law Institute, Model Penal Code and Commentaries (1985 Ed.), § 2.06, pp. 314-19. For example, a store owner might sell yeast and sugar to a bootlegger

Repper, Pagan, & Cook, Ltd.
Attorneys at Law
1501 First Avenue
Middletown, OH 45044
Phone: 513.424.1823
FAX: 513.424.3135

knowing those ingredients would be used to make moonshine, but not intending for that result. Or a cell-phone company might supply a texting application to a known gambler, but not intend for the texts to be used by the gambler for illicit betting. Or a Good Samaritan might gift money to a beggar knowing he would buy heroin with it, but hoping he would instead buy food. In each example, the knowing-facilitation standard would allow for complicity liability, but not if purposive-facilitation was the standard. These hypothetical's highlight the unfairness in holding the accomplice and principal to equal punishment when their respective acts are disparate. Yet, in the wide sweep of a knowing-facilitation requirement, the store owner, the cell-phone company, and the Good Samaritan would be convicted and punished as equals to the principals.

ii/ **the State failed to elicit sufficient evidence that Shabazz purposely facilitated Walker's murder of Shannon; and it likewise failed in its proofs that Shabazz knowingly facilitated that murder.**

In the instant case, Shabazz was correctly acquitted of complicity to aggravated and felony murder because, inter alia, there was no evidence that he aided or abetted Walker with a purpose to facilitate Shannon's death. Shabazz did not know Shannon prior that evening; no witness testified to a conspiracy between Shabazz and Walker to kill Shannon; Shabazz did not confess to such a purpose; he did not supply Walker's weapon; he did not restrain Shannon so Walker could shoot him; and he did not utter words that encouraged or influenced Walker to kill Shannon. Opinion, ¶27, 28, 39. Instead, the State's argument is that Shabazz participated in the melee, creating the environment where Shannon was vulnerable to Walker's gunshot. This strains complicity

Repper, Pagan, & Cook, Ltd.
Attorneys at Law
1501 First Avenue
Middletown, OH 45044
Phone: 513.424.1823
FAX: 513.424.3135

liability beyond any reasonable measure. Participating in a melee that creates an opportunity for another's criminal act is vastly different than acting on purpose to facilitate that act. Indeed, this Court has previously rejected this specific theory of complicity liability. *Woolweaver v. State*, 50 Ohio St. 277, 288-9, 34 N.E. 352 (1893).

What is more, Shabazz would be acquitted under the knowing-facilitation requirement. There was no evidence that Shabazz aided or abetted Walker knowing that Walker was likely to shoot and kill Shannon. As pointed out in the majority opinion, no witness testified that Shabazz knew that Walker was even armed, and, because the night club screened for weapons at the door, it is reasonable to infer that Shabazz believed Walker was unarmed. Id. at ¶4. Also, the gun was not recovered. Id. at ¶16. So no forensic evidence was available to connect Shabazz to the gun to show his knowledge. Finally, as described by the majority, Shabazz's behavior during the melee was, at very best, ambiguous as an indicator for knowing about Walker's gun and his intent to use it. Id. at ¶39.

iii/ **plain language from the complicity statute precludes the view that the underlying offense supplies the mens rea for both mens-rea components—and this reading is corroborated by the common law.**

This Court should reject the rule used by some appellate courts that borrows the mens-rea element from the underlying offense as the required mens rea for both mens-rea components. *State v. Mendoza*, 137 Ohio App.3d 336, 2000-Ohio-1689; and, *State v. Burrus*, 2nd Dist. App. No. 22960, 2009-Ohio-7037, ¶11-19. This interpretation of the complicity statute ignores its careful structure and the common-law principles behind its enactment.

Repper, Pagan, & Cook, Ltd.
Attorneys at Law
1501 First Avenue
Middletown, OH 45044
Phone: 513.424.1823
FAX: 513.424.3135

Regarding structure, the statute's plain language precludes the view that the underlying offense supplies the mens rea for the second mens-rea component. That is because the only express mention of mens rea is directed to the first component: viz., the accomplice's own act. Thus, "No person, acting with the kind of culpability required for the commission of an offense, shall ... solicit .... procure ... aid ... abet [or] conspire with another to commit the offense." R.C. 2923.03(A). In this regard, 'person' means the complicitor, and it his own 'act' that must be accompanied by the mens rea from the underlying offense.

In addition, the statute is structured to provide for an affirmative defense if, prior to the realization of the offense, the complicitor "*** terminated his complicity, under circumstances manifesting a complete and voluntary renunciation **of his criminal purpose**." R.C. 2923.03(E)(emphasis added). This strongly indicates that the General Assembly intended for a complicitor to purposely facilitate the principal's offense. The complicitor must first possess a purpose in order to then renounce it. And it is impossible to renounce the lesser mens-rea standards. For example, a complicitor could not renounce a knowing facilitation because it is impossible to renounce (or disown or cast off) an offense he already knew about.

The affirmative defense would make no sense if the second-mens rea component was anything other than purposeful facilitation. That is because where the borrowed mens-rea element from the underlying offense was knowing, reckless, or negligent facilitation, the affirmative defense would not apply. Only the "*** complete and voluntary renunciation [of the complictor's] **criminal purpose**" defeats liability. Id. It is unlikely that the General Assembly meant to

Repper, Pagan, & Cook, Ltd.
Attorneys at Law
1501 First Avenue
Middletown, OH 45044
Phone: 513.424.1823
FAX: 513.424.3135

confine the affirmative defense to purposeful offenses, but deny it for all others. It follows that the General Assembly intended for complicity liability to require purposive facilitation, and to remove that liability when this purpose was renounced.

iv/ **the common-law cases predating the complicity statute support a purposive-facilitation requirement.**

The statutory-construction argument, supra at iii, is supported by the common law that existed before its 1974 enactment. According to the Committee Comment (1974), the complicity "*** section codifies existing case law with respect to 'aiding and abetting.'

In *Goins v. State*, 46 Ohio St. 457, 21 N.E. 476 (1889), a complicitor was tried for aiding and abetting a homicide during a sudden race riot in Lima. Specifically, the Lima saloons were full of men awaiting election results. Id. at 458-9. A small group of African Americans presented themselves, which excited the animosity of the crowd. Id. A fight ensued between an African American and a white, which was broken up by the complicitor. Id. After a Lima police officer ordered the small group of African Americans home, a white mob formed, gathered stones, and encircled and overran the African-American group, which included the complicitor. Id. A second fight ensued where Harrison killed Hughes—a white who had joined the mob just prior to the melee. Id. At trial, the complicitor requested a jury instruction that, inter alia, the State had to prove that he acted with a purpose to facilitate Harrison's killing of Hughes. Id. The trial court refused. Id. But this Court reversed the judgment of conviction, holding at syllabus eight that:

Repper, Pagan, & Cook, Ltd.
Attorneys at Law
1501 First Avenue
Middletown, OH 45044
Phone: 513.424.1823
FAX: 513.424.3135

> In the absence of proof of a conspiracy, one, who is present when a homicide is committed by another upon a sudden quarrel or in the heat of passion, is not guilty of aiding and abetting the homicide, although he may become involved in an independent fight with others of the party of the deceased, **unless he does some overt act with a view to produce that result, or purposely incites or encourages the pincipal [sic] to do the act**. (Emphasis added.)

Goins was followed by *Woolweaver v. State*, 50 Ohio St. 277, 34 N.E. 352 (1893). There, a complicitor was likewise tried for aiding and abetting a homicide upon a sudden quarrel. Id. at 286. Specifically, the complicitor and the railroad worker argued, and, ultimately, two mobs formed. Id. at 286-7. In the complicitor's group was his son, who unexpectedly drew a weapon and killed the victim from the railroader's group. Id. The complicitor requested the *Goins* instruction, set forth above. Id. at 287-8. But the trial court modified it to remove purposive facilitation, and to only require that the father's quarrelsome act tended to result in the victim's death. Id. at 288. According to this Court, that was error because "*** he ought not to be held to have a guilty connection therewith, unless he did some overt act "with a view,"—**that is for the purpose**—to produce the result he is charged with aiding and abetting ..." Id. at 288. Indeed, the Court specifically rejected what the State and dissent urge herein, a theory of complicity liability "*** without proof of a guilty purpose, and when [the complicitor] had a casual connection only with the homicide." Id. In rejecting the State's and the dissent's current theory, this Court explained that a fight involving a father would tend to incite a son, but that the father's liability should not turn on the "*** the quality of the [son's] temper, the strength of his affection, and the notion, often mistaken, that [the son] may hastily gather under

Repper, Pagan, & Cook, Ltd.
Attorneys at Law
1501 First Avenue
Middletown, OH 45044
Phone: 513.424.1823
FAX: 513.424.3135

the excitement of the moment ..." Id. at 289. According to this Court, the son's characteristics were "*** not enough to show a criminal intention" in the father. Id.

Consequently, in cases like Shabbaz's—a sudden melee between groups resulting in a death—the common law of this State, adopted by the General Assembly through R.C. 2923.03, was to require the complicitor to purposely facilitate the principal's homicide.[2]

PROPOSITION OF LAW II
A complicitor must possess foreknowledge of the principal's offense at a time where he could realistically abandon his support of the offense or prevent it.

In *Rosemond v. United States*, ____ U.S. ____, 134 S.Ct. 1240, 1249, 188 L.Ed.2d 248 (2014), the Supreme Court addressed when a complicitor must form the second mens-rea component for accomplice liability to attach.

There, the defendant participated in a drug transaction, but claimed not to know that a co-defendant possessed (and ultimately used) a weapon. The federal code prohibits using or carrying a weapon during a drug trafficking offense. Id. at 1243. At trial, the government proceeded, inter alia, under a complicity theory. Id. at 1244. It argued that the complicitor satisfied the statute because he participated in the drug transaction and learned about the co-defendant's gun when it was brandished and fired, at a point before the drug offense concluded.

Repper, Pagan, & Cook, Ltd.
Attorneys at Law
1501 First Avenue
Middletown, OH 45044
Phone: 513.424.1823
FAX: 513.424.3135

[2] An important and limiting distinction exists between sudden-quarrel cases, like this one and *Goins* and *Woolweaver*, and cases where the State alleges that the complicitor acted in a conspiracy with others under R.C. 2923.03(A)(3). In the latter circumstance, the second mens-rea component is reduced to permit liability for the foreseeable consequences that arise from the conspiracy. Examples of this conspiracy example are found in *State v. Lockett*, 49 Ohio St.2d 48, 358 N.E.2d 1062 (1976) and *State v. Johnson*, 93 Ohio St. 240, 754 N.E.2d 796 (2001). Of course, the State failed to elicit any evidence of a conspiracy in the within case, and it is indubitably a sudden-quarrel case.

Id. at 1250. The defense contended that there was no liability because the defendant lacked foreknowledge that the co-defendant would carry or use a weapon. The trial court declined to instruct the jury on advance knowledge. Id. at 1244. And the jury convicted. Id.

The Supreme Court reversed. It identified two problems with a theory of complicity liability that excluded foreknowledge. Id. at 1249-50. First, it would endorse a form of strict liability regarding the second mens-rea component. For example, a complicitor's act of assistance towards the crime might be fully completed at the point he learned about the gun. Id. Thus, at the time of his culpable act, he neither intended nor knew that his co-defendant would use a weapon in the drug transaction. This means liability would attach regardless of purpose or knowledge of the charged offense. Second, it would deny the complicitor the opportunity to quit or prevent that offense. Id. The reasoning here is that the complicitor must possess foreknowledge of the offense to quit or prevent it.

The majority below was right to find that *Rosemond* applies in Ohio, as it fits Ohio's complicity statute in two regards.

Recall that R.C. 2923.03(E) provides for an affirmative defense where the complicitor terminates his complicity by renouncing his criminal purpose. A prerequisite to termination and renouncement is advance knowledge, because a complicitor cannot terminate or renounce an offense he is oblivious about. Returning to our hypotheticals, the store owner's intentional sale of yeast and sugar to the bootlegger must include foreknowledge of the moonshine operation in order for him to have a realistic opportunity to quit his involvement with it.

Repper, Pagan, & Cook, Ltd.
Attorneys at Law
1501 First Avenue
Middletown, OH 45044
Phone: 513.424.1823
FAX: 513.424.3135

And the Good Samaritan's intentional gift to the beggar must include foreknowledge of the beggar's heroin scheme in order for him to have a realistic opportunity to terminate his funding of it.

Second, eliminating a foreknowledge requirement would permit strict liability for the second mens-rea component, conflicting with the complicity statute and the common law it incorporated. The store owner's sale was a purposeful act, yet complicity liability should not obtain unless that owner possessed foreknowledge of the moonshiner's plans for the yeast and sugar. And the Good Samaritan's gift was a purposeful act, yet his liability should likewise not obtain without foreknowledge of the beggar's plans for a heroin transaction.

Consequently, *Rosemond* applies to Ohio complicity law to implement (*i*) the affirmative defense under R.C. 2923.03(E) and (*ii*) the second mens-rea component for purposive facilitation of the principal's offense.

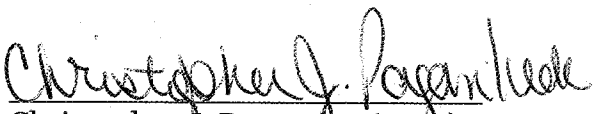
CONCLUSION

The General Assembly chose to criminalize a slight actus reus, but only coupled with a muscular, two component mens-rea requirement. This combination was chosen to justify an equal punishment for the complicitor and principal. Implicit in this construction is the notion that the complicitor possess advance knowledge of the principal's offense, so as to afford the complicitor with a realistic opportunity to terminate his involvement and to ensure that the complicitor is not held strictly liable. Because the majority below identified and applied this law correctly, its judgment must be affirmed.

To the Court, the instant Amicus Brief is

Repper, Pagan, & Cook, Ltd.
Attorneys at Law
1501 First Avenue
Middletown, OH 45044
Phone: 513.424.1823
FAX: 513.424.3135

Respectfully submitted,



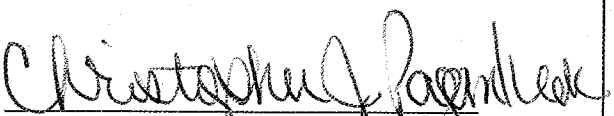
Christopher J. Pagan (0062751)
Counsel for OACDL

CERTIFICATE OF SERVICE

This hereby certifies that the undersigned has served the following counsel by regular United States mail, this 2January 2015:

Christopher Schroeder (0089855)
Anna Faraglia (0067420)
Assistant Prosecutors
1200 Ontario Street
Cleveland, OH 44113
Tel. 216.443.7733
Counsel for State of Ohio

Reuben Sheperd
11510 Buckeye Road
Cleveland, OH 44104
Tel. 216.721.7700
Counsel for Derrell Shabazz



Christopher J. Pagan (0062751)
Counsel for OACDL

Repper, Pagan, & Cook, Ltd.
Attorneys at Law
1501 First Avenue
Middletown, OH 45044
Phone: 513.424.1823
FAX: 513.424.3135