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STATEMENT OF THE CASE

On September 20, 2005, a Cuyahoga County Grand Jury returned a single count indictment against defendant-appellant Vincent Colon, charging that he:

[D]id, in attempting or committing a theft offense, as defined in Section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense upon Samuel Woodie, inflict, attempt to inflict, or threaten to inflict physical harm on Samuel Woodie

This indictment purported to charge the offense of robbery, R.C. 2911.02(A)(2). Mr. Colon pled not guilty and proceeded to trial.

At the close of the evidence, the trial court instructed the jury on the elements of robbery, R.C. § 2911.02(A)(2), and summarized the elements as:

- (1) (a) Attempt or commit theft offense, or
- (b) Flee immediately after the attempt or offense
- (2) While inflicting, or attempting to inflict, or threatening to inflict, physical harm on another.

On November 18, 2005, a jury found Colon guilty as charged in the indictment. The trial court proceeded immediately to sentencing and imposed a seven-year term of imprisonment.

Mr. Colon filed a timely appeal with the Eighth District Court of Appeals. His fifth assignment of error stated as follows:¹

Appellant's state constitutional right to a grand jury indictment and state and federal constitutional rights to due process were violated when his indictment omitted an element of the offense.

¹ Colon's sixth and seventh assignments of error raised related issues regarding the trial court's failure to instruct the jury on all of the elements of aggravated robbery and trial counsel's ineffectiveness in failing to challenge the defective indictment and deficient jury instructions.

On October 12, 2006, the Eighth District affirmed Mr. Colon's conviction, vacated his sentence, and remanded the case for a new sentencing hearing on the authority of *State v. Foster* (2006), 109 Ohio St. 3d 1. *State v. Colon*, Cuyahoga App. No. 87499, 2006 Ohio 5335.

On October 20, 2006, Mr. Colon filed a motion to certify a conflict with the Eighth District based on its resolution of his fifth assignment of error. After the Eighth District granted the motion and certified the conflict, Mr. Colon filed a notice of certified conflict with this Court. *State v. Colon*, Case No. 2006-2139. While his notice of certified conflict was still pending with this Court, he also filed memorandum in support of jurisdiction, raising seven propositions of law. *State v. Colon*, Case No. 2006-2250.

On February 28, 2007, this Court determined that a conflict existed and ordered briefing on the following issue:

Where an indictment fails to charge the mens rea element of the crime, and the defendant fails to raise that issue in the trial court, has the defendant waived the defect in the indictment?

That same day, this Court also accepted Mr. Colon's discretionary appeal to address the following proposition of law raised by his jurisdictional memorandum:

Proposition of Law VI: An indictment which fails to include an essential element is fatally defective, is voidable for lack of subject matter jurisdiction or for the failure to charge an offense, and may be challenged for the first time on appeal.

Because the certified conflict and proposition of law are interrelated, this Court ordered consolidated briefing on the issue raised by each.²

Mr. Colon's consolidated merit brief follows.

² In his fifth and seventh propositions of law, Mr. Colon raised two related issues regarding the sufficiency of the jury instructions and the effectiveness of his counsel due to his failure to object to the defective indictment and the inaccurate jury instructions. This Court declined to accept Colon's appeal on those issues.

STATEMENT OF FACTS

Mr. Colon's conviction is based on his alleged attempt to take Samuel Woodie's wallet on September 8, 2005, an incident which involved Colon, Woodie, Colon's aunt Jenny Harris, and Ms. Harris' son Jeronn Powell. Although the witnesses offer varying and often directly competing versions of the events, it is not disputed that, when the police arrived on the scene, the defendant did *not* have Mr. Woodie's wallet and the defendant, and not the alleged victim, had been severely beaten.

Vincent Colon testified that, on September 8, 2005, he went to his aunt Jenny Harris's home to start a pre-arranged painting job.³ (Tr. at 326-30). Ms. Harris did not have the \$100 she had agreed to pay for the work, and so she told Colon to go to Mr. Woodie's house and ask to borrow \$100 for her.⁴ (Tr. at 330-31). Reluctantly, Colon did as his aunt suggested. (Tr. at 330-31). When Colon asked to borrow the money, Mr. Woodie responded: "Hold on. Let me come out and check with her and see what's going on." (Tr. at 331-32). The basis for the charge in this case turns on a five to seven minute time period after Woodie and Colon arrived at Ms. Harris' home. (Tr. at 228).

A. Testimony about the Incident

1. State's Witnesses

Ms. Harris testified that, *after* she opened the door and greeted Woodie and Colon, Colon

³ The previous evening Mr. Colon returned a table saw which his aunt had borrowed from her neighbor, Samuel Woodie. (Tr. at 328). Mr. Woodie claims that Colon also asked to borrow money for his aunt; Colon denies that claim. (Tr. at 163, 176, 328, and 336).

⁴ Ms. Harris denies borrowing money from Woodie. (Tr. at 214).

grabbed Mr. Woodie's pants pocket.⁵ (Tr. at 209 and 220). Mr. Woodie and Ms. Harris then reached for the same pocket as well. (Tr. at 210). With all three holding on to the same pocket, everyone "went down to the ground." (Tr. at 211). Although Mr. Woodie claimed at trial that Colon "threw [him] to the ground," (Tr. at 171), he did not include that allegation in his statement to the police and Ms. Harris directly contradicted that assertion, testifying that Colon did *not* throw Woodie to the ground, (Tr. at 221).

At some point, while Woodie was still on the ground, his pants ripped and his wallet fell to the ground. (Tr. at 173 and 213). According to Mr. Woodie, he picked his wallet up off the ground after he stood up and put it back in his pants. (Tr. at 174). Unlike Woodie, who claims that he never lost control of his wallet except for a brief time when it was on the ground, Ms. Harris testified that Colon, not Woodie, first picked up the wallet and had it in Colon's pants until she grabbed it back from him and gave it back to Woodie. (Tr. at 178, 213, 247, and 258).

In any case, while Harris, Colon, and Woodie were on the ground, Jeronn Powell, Ms. Harris's 17 year-old son, came out of the house and jumped on Colon's back. (Tr. at 213, 245-46, and 261). Jeronn Powell separated the others, after which Woodie and Harris stood up. (Tr. at 247 and 259). At this point, Jeronn Powell had Colon restrained on the ground and had the matter under control. (Tr. at 222-23).

2. Colon's Testimony

Although Mr. Colon acknowledges that a struggle ensued that morning, he testified that he never touched Mr. Woodie, never reached for or possessed Mr. Woodie's wallet, and did not

⁵ Contrary to Ms. Harris's testimony, Mr. Woodie claims that Colon grabbed his pocket *before* Ms. Harris opened the door. (Tr. at 165).

rip Mr. Woodie's pants.⁶ (Tr. at 335-37). According to Colon, when they reached Ms. Harris' home that morning, Mr. Woodie asked to have a moment alone with Ms. Harris, and Colon took a seat on the back porch. (Tr. at 332). Shortly thereafter, Colon heard Harris and Woodie arguing over money and he intervened. (Tr. at 332-33). Ms. Harris then grabbed Colon to prevent the situation from escalating. (Tr. at 333). When she did so, all three people lost their balance and fell to the ground. (Tr. at 333). As Colon started to get up, Ms. Harris' son, Jeronn, came out of the house and tackled him. (Tr. at 334).

B. Aftermath

With Colon restrained on the ground, Woodie walked about 30 feet away, picked up a brick, and walked back towards the restrained Colon. (Tr. at 214 and 224). Ignoring Colon's pleas, Mr. Woodie testified that he "took care" of Colon by "pound[ing] him on the head twice with [the brick]." (Tr. at 165 and 179). Both Ms. Harris and her son testified that Mr. Colon was "defenseless" both times Mr. Woodie hit him with the brick. (Tr. at 214, 230, and 256).

Cleveland police saw Woodie hit Colon twice with the brick and, concerned that the beating was going to continue, ordered Woodie at gunpoint to drop the brick. (Tr. at 173, 182, 191-93, 214, 227, 256, 263-64, 272-74, and 276). Because Mr. Colon had lost a significant amount of blood and was unconscious, he was transported to the hospital for medical treatment. (Tr. at 190-91, 264, and 276).

For his part, Mr. Woodie testified that his elbows and knees got "scarred up from scuffing on the concrete and asphalt" and that his hip was sore but not bruised. (Tr. at 167 and 171). Notwithstanding these claims, Mr. Woodie did not receive any medical treatment for the alleged injuries and the police report does not refer to any injuries suffered by Woodie. (Tr. at

⁶ Colon explained that when he first regained consciousness he could not remember anything, but

185 and 289). Moreover, only two pictures were taken of Mr. Woodie, both of his left elbow, and neither showed any blood. (Exs. 4 and 4A). These pictures only portrayed a dusty white substance on his elbow.

LAW AND ARGUMENT

Certified Question: Where an indictment fails to charge the mens rea element of the crime, and the defendant fails to raise that issue in the trial court, has the defendant waived the defect in the indictment?

Proposition of Law VI: An indictment which fails to include an essential element is fatally defective, is voidable for lack of subject matter jurisdiction or for the failure to charge an offense, and may be challenged for the first time on appeal.

Summary of Argument

The certified question before this Court and Mr. Colon's sixth proposition of law are intimately related as the proposition of law constitutes Colon's answer to the certified question. To resolve the issues presented by this case, this Court must determine the following: 1) Did Colon's indictment omit essential elements of robbery?; 2) Did those omissions render the indictment defective; and 3) Can Colon challenge the defect for the first time on appeal? For reasons discussed in detail below, this Court should answer "yes" to each question and reverse Colon's conviction.

The first two questions are preliminary in nature and can be resolved by reference to well-established precedent. The final question—whether a defendant can challenge, for the first time on appeal, an indictment that fails state all the essential elements of an offense—is the key issue before this Court. With respect to that question, this Court should hold that an indictment that fails to allege all the essential elements of an offense can be challenged for the first time on direct appeal because such an indictment fails to charge an offense and is voidable for lack of

that his memory returned completely over time. (Tr. at 335 and 343).

subject matter jurisdiction. Such a conclusion is consistent with this Court's precedent, adheres to Crim. R. 12(C)(2), and is necessary to adequately protect a criminal defendant's fundamental rights to face only those charges presented to and found by a grand jury and to receive notice of all the essential elements of the crime charged. When, as here, a defendant is not properly charged with an offense, any subsequent conviction based on that fundamentally flawed indictment requires reversal, even if the error is raised for the first time on direct appeal.

A. Colon's Indictment Omitted Two Essential Elements of Robbery.

Mr. Colon was purportedly charged with robbery in violation of R.C. 2911.02(A)(2).

R.C. 2911.02(A) provides, in pertinent part, that:

- (A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

* * *

- (2) Inflict, attempt to inflict, or threaten to inflict physical harm.

* * *

As noted by the Eighth District, this crime is comprised of four basic elements, consisting of two combinations of an *actus rea* and a *mens rea*. Opinion Below at ¶¶ 17 and 19-20. While the robbery statute "makes no mention of the degree of culpability required," courts have judicially interpreted requisite mental states for the crime of robbery. *State v. Crawford* (1983), 10 Ohio App. 3d 207, 208.

First, the State must prove, beyond a reasonable doubt, that the defendant *knowingly* committed or attempted to commit a theft offense. *State v. McSwain* (1992), 79 Ohio App. 3d 600, 606; *Crawford* (1983), 10 Ohio App. 3d 207, paragraph one of the syllabus. By requiring the commission (or attempt) of "a theft offense," the robbery statute implicitly "incorporates the 'knowingly' standard of culpability from the theft statute." *McSwain*, 79 Ohio App. 3d at 606.

Second, the State must prove, beyond a reasonable doubt, that the defendant *recklessly* inflicted, attempted to inflict, or threatened to inflict physical harm. *McSwain*, 79 Ohio App. 3d at 606; *Crawford*, 10 Ohio App. 3d at paragraph one of the syllabus and 209 (construing the requisite mental state in the context of aggravated robbery, R.C. 2911.01(A)). When, as here, a criminal offense does not specify a particular degree of culpability, recklessness is the requisite mental state *unless* the statute “plainly indicates a purpose to impose strict liability for the conduct described in the [statute].” R.C. 2901.21(B); *Accord State v. McGee* (1997), 79 Ohio St. 3d 193, 195-96. With respect to a robbery involving the infliction (or attempt/threat) of physical harm, the robbery statute does not “plainly” indicate a strict liability intent. *Crawford*, 10 Ohio App. 3d at 208. Accordingly, pursuant to R.C. 2901.21(B), “recklessness must be assumed to be the requisite mental state.” *Id.* at 208-209; *see also Robertson v. Morgan* (C.A.6 2000), 227 F.3d 589, 594.⁷

The indictment returned by the grand jury in this case omitted both *mens rea* elements. It charged only that Mr. Colon:

Did, in attempting or committing a theft offense, as defined in Section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense upon Samuel Woodie, inflict, attempt to inflict, or threaten to inflict physical harm on Samuel Woodie

⁷ In *State v. Wharf*, this Court concluded that “no specific mental state is necessary regarding the deadly weapon element of the offense of robbery.” (1999), 86 Ohio St. 3d 375, 380. However, it cited approvingly to *Crawford* and *McSwain* regarding culpable mental states in robberies involving physical harm and specifically distinguished such cases from violations of R.C. 2911.02(A)(1) in which the defendant has a deadly weapon. *Wharf*, 86 Ohio St. 3d at 379-80 (concluding that “the physical harm element of former R.C. 2911.01(A)(1) and the deadly weapon element of R.C. 2911.02(A)(1) are not analogous and cannot be compared in deciding the question, herein, certified to us for determination.”)

The indictment failed to charge that the theft was knowingly committed or that the physical harm was recklessly inflicted.⁸ As such, it omitted two essential elements of the crime of robbery.

B. The Omission of Two Essential Elements Rendered Colon's Indictment Defective.

By omitting two essential elements of robbery, the indictment in this case violated Ohio's rules of criminal procedure, state and federal due process, and Colon's state constitutional right to face only those criminal charges presented by a grand jury indictment.

The Ohio Constitution provides, in pertinent part, that "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury." Art. I, § 10. The right to a grand jury indictment requires that "[t]he material and essential facts constituting an offense are found by the presentment of the grand jury." *Harris v. State* (1932) 125 Ohio St. 2d 257, 264. An indictment that omits an essential element is fatally defective and insufficient to charge an offense. *Id.*; *State v. Cimpritz* (1953), 158 Ohio St. 490, 493; *State v. Wozniak* (1961), 172 Ohio St. 517, paragraphs one and two of the syllabus; *State v. Headley* (1983), 6 Ohio St. 3d 475, 478-79. Where an indictment does not charge an offense, it is voidable for lack of subject matter jurisdiction. *State v. Cimpritz* (1953), 158 Ohio St. 490, 494, *as modified and explained by State v. Wozniak*, 172 Ohio St. at 522-23 and *Middling v. Perrini* (1968), 14 Ohio St. 2d 106, 107.

Ohio's criminal rules similarly recognize the deficiencies of an indictment which fails to include all the essential elements of an offense.⁹ An indictment must include a statement "that

⁸ To be sufficient, the indictment should have charged that Mr. Colon:

Did, in *knowingly* attempting or committing a theft offense, as defined in Section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense upon Samuel Woodie, *recklessly* inflict, attempt to inflict, or threaten to inflict physical harm on Samuel Woodie

the defendant has committed a public offense specified in the indictment.” Crim. R. 7(B); *see also* R.C. 2941.05. That statement:

[M]ay be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of *all the elements of the offense* with which the defendant is charged.

Crim. R. 7(B) (emphasis added). This Court has previously made clear that an indictment charging an offense solely in the language of a statute is insufficient when, as here, a *mens rea* element has been judicially interpreted for that offense. *State v. O'Brien* (1987), 30 Ohio St. 3d 122, 124.

Because Colon’s indictment omitted two essential elements, it failed to charge a criminal offense and was thus fatally defective. In the opinion below, the Eighth District (and the State for that matter) did not disagree that the indictment was defective. Rather, the Eighth District concluded that such defects were waived because they were not raised before the trial court. It is this conclusion which constitutes the source of the conflict and which Mr. Colon is squarely challenging before this Court.

C. Colon Can Challenge His Fatally Flawed Indictment for the First Time on Direct Appeal.

This Court should reverse the Eighth District and conclude that Colon is not barred from challenging his fatally flawed indictment for the first time on direct appeal. Such a holding represents a correct application of Ohio’s Rules of Criminal Procedure, is consistent with this Court’s prior precedent, protects the integrity and purpose of a grand jury and Ohio citizens’ right to a grand jury indictment, and ensures that Ohio criminal proceedings comport with state and federal due process.

⁹ Pursuant to Ohio’s criminal rules, felonies must generally be prosecuted by indictment. Crim. R. 7(A).

1. Ohio's Rules of Criminal Procedure

Ohio's criminal rules provide guidance for when a criminal defendant may challenge a defective indictment. As a general rule, defense and objections "based on defects in the indictment" must be raised before trial. Crim. R. 12(C)(2). However, Rule 12(C)(2) provides two specific exceptions to that general rule. Defects in the indictment, which involve either the "failure to show jurisdiction in the court, or to charge an offense," do **not** need to be raised prior to trial and can be raised any time during the "pendency of the proceeding." Crim. R. 12(C)(2). It is well-established that an indictment which omits an essential element fails to charge an offense and is voidable for lack of jurisdiction, *See e.g. Wozniak*, 172 Ohio St. at paragraph one of the syllabus (explaining that an indictment which fails to charge the *mens rea* of a particular offense failed to charge a criminal offense) and *Cimpritz*, 158 Ohio St. at paragraph six of the syllabus *as modified and explained by Midling*, 14 Ohio St. 2d at 107. Accordingly, the defect in Mr. Colon's indictment falls under both of Rule 12(C)(2)'s exceptions and may be raised for the first time on direct appeal.

2. This Court's Prior Precedent Regarding the Timing for Challenging an Indictment Which Omits an Essential Element of the Offense.

This Court has long-recognized, both before and after the adoption of Ohio's rules of criminal procedure in 1973, a defendant's right to challenge an indictment which omits an essential element. This Court has sustained such challenges regardless of whether they were raised prior to trial, during trial, or after the jury verdict has been returned. *See e.g. Cimpritz*, 158 Ohio St. at 490 (indictment challenged prior to trial); *Wozniak*, 172 Ohio St. at paragraph three of the syllabus (indictment challenged during jury trial); *State v. Childs* (2000), 88 Ohio St. 3d 194 (indictment challenged after jury verdict returned); *Midling*, 14 Ohio St. 2d at 107

(explaining that an indictment missing an essential element cannot be collaterally attacked but can be challenged on direct appeal).

This Court's decision in *Childs* makes clear that Colon did not waive his challenge to the defective indictment by not raising it prior to trial. In *Childs*, the defendant was indicted with, among other things, conspiracy to commit aggravated drug trafficking. 88 Ohio St. 3d at 197. Although the indictment did allege the commission of a "substantial, overt act," it did not "specifically detail any overt act done in furtherance of the conspiracy." *Id.* The defendant did not challenge the sufficiency of the indictment *prior to* or *during* his jury trial and was ultimately convicted of the charge. *Id.* at 194-97. On appeal, the defendant argued that the indictment was fatally defective because it failed to allege "at least one specific, substantial, overt act in furtherance of the conspiracy." *Id.* at 197. A majority of this Court agreed that the absence of a specific, overt act alleged in the indictment rendered it fatally defective and affirmed the reversal of the defendant's conviction. *Id.* at 199. The defendant's conviction was reversed despite his failure to challenge the defect in a pre-trial motion and notwithstanding a bill of particulars which set forth the specific conduct constituting the charge. *Id.* at 198 (dismissing the State's reliance on the bill of particulars because it "is not signed by the grand jury foreman, and there is no evidence that the material contained in the bill of particulars was ever presented to the grand jury.")

Although *Childs* was a 6-1 decision, this Court was unanimous in its conclusion that the omission of an essential element from an indictment could be raised for the first time after trial. The sole dissenting justice explicitly recognized that an indictment, which omits an essential element, "fails to charge an offense" and can be challenged for the first time after trial. *Id.* at

200. She merely disagreed with the majority's conclusion that the indictment in this case omitted an essential element of conspiracy. *Id.*

Several districts have followed this Court's precedent and considered challenges, raised for the first time on appeal, that the omission of an essential element from the indictment (or information) rendered it invalid and required reversal. *See e.g. State v. Keplinger*, Madison App. No. CA2002-07-013, 2003 Ohio 3447, ¶¶ 7-13 (Twelfth District); *State v. Daniels*, Putnam App. NO. 12-03-12, 2004 Ohio 2063, ¶ 3 (Third District); *State v. Osborne*, Hamilton App. No. C-970710, 1998 Ohio App. LEXIS 6223, syllabus and *2-5 (First District).

This Court's jurisprudence is also consistent with federal practice, as Federal Circuit Courts of Appeals have permitted such challenges to be raised for the first time on appeal. *See e.g. United States v. Mojica-Baez* (1st Cir. 2000), 229 F.3d 292, 309; *United States v. Foley* (2nd Cir. 1996), 73 F.3d 484, 488; *United States v. Beard* (3rd Cir. 1969), 414 F.2d 1014, 1016-17; *United States v. Morales-Rosales* (5th Cir. 1988), 838 F.2d 1359, 1362; *United States v. Harrod* (6th Cir. 1999), 168 F.3d 887, 890; *United States v. Wabaunsee* (7th Cir. 1975), 528 F.2d 1, 2-3; *United States v. Olson* (8th Cir. 2001), 262 F.3d 795, 799; *United States v. Leos-Maldonado* (9th Cir. 2002), 302 F.3d 1061, 1064; *Williams v. District of Columbia* (D.C. Cir. 1969), 419 F.2d 638, 648. Some of the circuits review a challenge to the indictment, raised for the first time on appeal, under a "stricter" standard." *See e.g. Wabaunsee*, 528 F.2d at 3; *Olson*, 262 F.3d at 799. However, even under that standard, an indictment is fatally defective if it "fails *both* to allege an essential element of the offense *and* to contain language that can reasonably construed to supply the missing element." *Wabaunsee*, 528 F.2d at 4; *see also Olson*, 262 F.3d at 799. Because Mr. Colon's indictment cannot be reasonably construed to supply the missing *mens rea* element of recklessness, his indictment is fatally defective even under the stricter standard of review.

3. State Constitutional Right to a Grand Jury Indictment

By considering challenges, raised both prior to and after trial, to an indictment which omits an essential element, this Court protects an individual's right to a grand jury indictment and respects the grand jury's unique and significant role in criminal proceedings. The right to have a grand jury consider each and every element of the crime charged is a distinct constitutional right that is independent from the due process right to notice of the crime charged. *See State v. Vitale* (1994), 96 Ohio App. 3d 695, 699-701.

As noted above, the Ohio Constitution provides, in pertinent part, that "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury." Art. I, § 10. "Rooted in long centuries of Anglo-American history," the grand jury is a "constitutional fixture in its own right" that is functionally independent of both the prosecutor and the judiciary. *United States v. Williams* (1992), 504 U.S. 36, 47-48.¹⁰ As such, it plays a special role in "insuring fair and effective law enforcement." *United States v. Calandra* (1974), 414 U.S. 338, 343. A grand jury's responsibilities include "both the determination of whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded prosecutions." *United States v. Calandra* (1974), 414 U.S. 338, 343; *see also Harris v. United States* (2002), 536 U.S. 545, 564 (explaining that the grand and petit juries thus form a "strong and two-fold barrier . . . between the liberties of the people and the prerogative of the government"). The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting

¹⁰ Although the grand jury provision of the federal constitution does not apply to the States, *see Hurtado v. California* (1884), 110 U.S. 516, 538, it is essentially identical to the grand jury right under the Ohio Constitution. Accordingly, federal case law describing the origins, purpose, and import of a grand jury is useful in understanding its Ohio counterpart.

independently of either prosecuting attorney or judge. *Stirone v. United States* (1960), 361 U.S. 212, 216.

Given the important role of the grand jury, this Court has made clear that an indictment is constitutionally sufficient only if it:

[F]irst, contains the elements of the offense and fairly informs a defendant of the charge against which he must defend, *and*, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.

State v. Childs (2000), 88 Ohio St. 3d 558, 565 (quoting *Hamling v. United States* (1974), 418 U.S. 87, 117-18) (emphasis added). As a core requirement of the grand jury right, an indictment is only constitutionally sufficient if it “alleg[es] all the elements of the crime.” *Harris*, 536 U.S. at 549; *Almendarez-Torres* (1998), 523 U.S. 224, 228. If any one of the elements of the crime is absent from the indictment, the indictment is constitutionally defective. *Childs*, 88 Ohio St. 3d at 198 (quoting *Wozniak*, 172 Ohio St. at 521). Such a fundamental defect in the charging instrument cannot be cured by the court “as such a procedure would not only violate the constitutional rights of the accused, but would allow the court to convict him on an indictment essentially different from that found by the grand jury.”¹¹ *Id.*

For the right to a grand jury indictment to have any meaning, a criminal defendant may not be convicted based on a fundamentally defective indictment that fails to charge an offense by alleging all of the essential elements. *Cf. Stirone*, 361 U.S. at 216 (quoting *Ex Parte Bain* (1887), 121 U.S. 1) (explaining that “[I]f it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes,

¹¹ This is *not* a case where an indictment was actually or constructively amended to supply both of the missing elements of the offense. As discussed in Mr. Colon’s seventh proposition of law,

the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed.")

4. State and Federal Due Process Right to Notice of the Essential Elements of the Charge

Aside from protecting the venerable institution of the grand jury and the constitutional right to a grand jury indictment, this Court should permit challenges to fatally flawed indictments on direct appeal as a matter of the fundamental due process right to notice of the specific charge. *Cole v. Arkansas* (1948), 333 U.S. 196, 201; OHIO CONST. art. I, § 16; U.S. CONST. amend. XIV. As a matter of state and federal due process, a charging instrument must, among other things, "contain the elements of the charged offense" and give the defendant "adequate notice of the charges" so he or she can prepare a defense. *Valentine v. Konteh* (6th Cir. 2005), 395 F.3d 626, 631.

Due process requires that the defendant have notice of all the essential elements of the charged offense. Because of the flawed indictment, Mr. Colon did not have notice that the State must demonstrate, among other things, that he recklessly inflicted physical harm upon Mr. Woodie. The lack of notice regarding the essential element of recklessness is particularly problematic because it is a judicially interpreted element which is not included in the robbery statute. Indeed, it appears that all of the participants labored under the misplaced assumption that the State did not have to prove any *mens rea* associated with the infliction of physical harm. The trial court did not instruct the jury that the State had to prove, as one of the essential elements of robbery, that Colon recklessly inflicted physical harm. Mr. Colon's counsel did not

the trial jury (like the grand jury) was not instructed on the *mens rea* element of recklessness connected to the *actus rea* element of physical harm.

object to this incomplete, and thus patently erroneous, instruction on the elements of robbery. In closing argument, the prosecutor treated the physical-harm portion of the statute as a strict liability offense:

About those elements. Attempt or commit [a] theft offense. The defendant was going for his wallet, got his wallet. Second, while inflicting or attempting to inflict physical harm. The defendant threw to the ground or pushed him over. Mr. Woodie's elbows, his knees and he said his hip was sore for several days. That's enough.

* * *

You heard everybody up there say that but for this man grabbing that man's wallet, nobody would have been hurt. It's because that man tried to steal from Mr. Woodie. He tried to steal his wallet. Keep it simple. Nobody would have been on the ground but for that man.

* * *

What's happening here is Vincent Colon robbed Samuel Woodie. He attempted to commit a theft offense, and he inflicted harm. It's simple. I ask you to keep it that simple and find him guilty.

(Tr. at 352 and 359-61). The lack of notice provided by the indictment clearly infected Mr. Colon's entire criminal proceeding. "Even were it possible to waive an element of an offense—a strange proposition of law at best—something not mentioned [in the charging instrument or at trial] cannot be waived." *State v. Shugars* (2006), 165 Ohio App. 3d 379, 382-83.

By failing to advise the defendant that a charge of robbery, pursuant to R.C. 2911.02(A)(2), required proof of recklessness in inflicting physical harm, Colon's indictment violated his due process right to notice of all the essential elements of the charge lodged against him. When a flawed indictment leads to a misunderstanding of a particular offense or specification, a defendant's due process right to notice of the charges is violated and such violation can be raised for the first time on appeal. *Joseph v. Coyle* (6th Cir. 2006), 469 F.3d 441, 445 and 463-464 (concluding that a writ of habeas corpus should be granted when

“everyone at trial proceeded under the mistaken view that the [death penalty] specification required Joseph to be the principal offender in the commission of the *kidnapping*.”) This fundamental deficiency of the indictment permeates the entire proceeding and requires reversal.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Mr. Vincent Colon respectfully asks this Court to answer the certified question in the negative, adopt Colon’s sixth proposition of law, reverse the decision of the Eighth District Court of Appeals, and vacate his conviction.

Respectfully Submitted,



CULLEN SWEENEY, ESQ.
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Appellant's Merit Brief was hand delivered upon WILLIAM D. MASON, ESQ., Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 14 day of May, 2007.


CULLEN SWEENEY, ESQ.
Counsel for Appellant

APPENDIX

IN THE SUPREME COURT OF OHIO

06-2250

STATE OF OHIO :

Plaintiff-Appellee :

vs :

VINCENT COLON :

Defendant-Appellant :

06-2250

On Appeal from the
Cuyahoga County Court of
Appeals, Eighth Appellate
District 87499

NOTICE OF APPEAL OF APPELLANT VINCENT COLON

COUNSEL FOR APPELLEE:

WILLIAM D. MASON, ESQ.
Cuyahoga County Prosecutor
Justice Center - 9th Floor
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Cleveland, OH 44113
(216) 443-7730

COUNSEL FOR APPELLANT:

ROBERT L. TOBIK, ESQ.
Cuyahoga County Public Defender

BY: CULLEN SWEENEY, ESQ.
0077187
Assistant Public Defender
1200 West Third Street
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(216) 443-7583

FILED
DEC 07 2006
MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT

Appellant, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals case No. 87499 on October 12, 2006 journalized October 23, 2006.

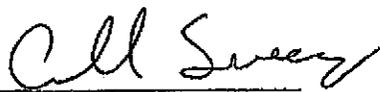
This case involves a felony, raises a substantial constitutional question, and is one of public or great general interest.

Respectfully submitted,


CULLEN SWEENEY, ESQ.
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was served upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, OH 44113 on this 6 day of December, 2006.


CULLEN SWEENEY, ESQ.
Counsel for Appellant

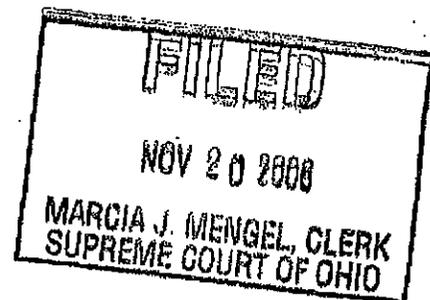
IN THE SUPREME COURT OF OHIO

STATE OF OHIO : Case No. **06-2139**
 Plaintiff-Appellee : On Appeal from the Cuyahoga
 County Court of Appeals, Eighth
 -vs- : District
 VINCENT COLON : Court of Appeals Case No. 87499
 Defendant-Appellant :

**NOTICE OF CERTIFIED CONFLICT
 FILED ON BEHALF OF APPELLANT VINCENT COLON**

ROBERT L. TOBIK, ESQ.
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WILLIAM MASON, ESQ.
 Cuyahoga County Prosecutor
 BY: JENNIFER DRISCOLL, ESQ. (0073472)
 WILLIAM LELAND, ESQ. (0076317)
 Assistant Prosecuting Attorneys
 Justice Center, 9th Floor
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 Cleveland, OH 44113
 (216) 443-7800
 COUNSEL FOR APPELLEE STATE OF OHIO



Notice of Certified Conflict

Appellant Vincent Colon hereby gives notice of certified conflict to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. 87499 (2006-Ohio-5335) on October 12, 2006. The Eighth District Court of Appeals has certified the following question to the Ohio Supreme Court:

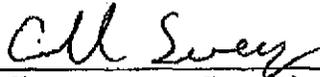
Where an indictment fails to charge the mens rea element of the crime, and the defendant fails to raise that issue in the trial court, has the defendant waived the defect in the indictment?

In so certifying the conflict, the Eighth District Court of Appeals has determined that its decision in this matter is in conflict with the following decisions of the First and Third Appellate Districts: *State v. Shugars* (2006), 165 Ohio App. 3d 379 (First District) and *State v. Daniels*, Putnam App. No. 12-03-12, 2004-Ohio-2063 (Third District).

Pursuant to S.Ct.R.IV, Section 1, copies of the Eighth District Court of Appeals' order certifying the conflict and copies of all decisions determined to be in conflict have been attached hereto in the Appendix following the certificate of service.

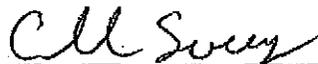
Respectfully Submitted,

ROBERT L. TOBIK, ESQ.
Cuyahoga County Public Defender


Cullen Sweeney, Counsel of Record
Assistant Public Defender
Counsel for Appellant Vincent Colon

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Certified Conflict was served upon William D. Mason, Esq., Cuyahoga County Prosecutor and/or upon a member of his staff, on this 6 day of November 2006.



Cullen Sweeney
Assistant Public Defender
Counsel of Record for Appellant

APPENDIX

Order of the Eighth District Court of Appeals certifying a conflict in *State v. Colon*, Cuyahoga App. No. 87499 (November 2, 2006)

Decision of the Eighth District Court of Appeals in *State v. Colon*, Cuyahoga App. No. 87499, 2006 Ohio 5335 (journalized October 23, 2006)

Conflicting Cases:

State v. Shugars (2006), 165 Ohio App. 3d 379

State v. Daniels, Putnam App. No. 12-03-12, 2004-Ohio-2063

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
87499

LOWER COURT NO.
CP CR-470439

-vs-

COMMON PLEAS COURT

VINCENT COLON

Appellant

MOTION NO. 389812

Date 11/02/2006

Journal Entry

MOTION BY APPELLANT TO CERTIFY A CONFLICT IS GRANTED. SEE JOURNAL ENTRY OF SAME DATE.

RECEIVED FOR FILING

NOV - 2 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *[Signature]* DEP.

Adm. Judge, ANN DYKE, Concur

Judge MICHAEL J. CORRIGAN, Concur

[Signature]
Judge KENNETH A. ROCCO

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES - COSTS TAXES

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87499

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

VINCENT COLON

DEFENDANT-APPELLANT

**ORDER CERTIFYING A
CONFLICT WITH THE FIRST AND
THIRD CIRCUIT COURTS OF APPEALS**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-470439

BEFORE: Rocco, J., Dyke, A.J., and Corrigan, J.

RELEASED: November 2, 2006

JOURNALIZED: NOV - 2 2006

KENNETH A. ROCCO, J.:

Article IV, Section 3(B)(4) of the Ohio Constitution states:

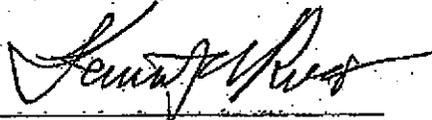
"Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination."

In the opinion in this case released October 12, 2006, we held that appellant had waived his challenge to the sufficiency of the indictment because appellant did not raise this issue in the trial court. Specifically, we held that the failure to charge the mens rea element of robbery could have been corrected by amendment pursuant to Crim.R. 7(D), so appellant's failure to raise the issue constituted a waiver under Crim.R. 12(C)(2). We find that this holding is in conflict with the decisions of the First Appellate District in *State v. Shugars*, 165 Ohio App.3d 379, 2006-Ohio-718 and the Third Appellate District in *State v. Daniels*, Putnam App. No. 12-03-12, 2004-Ohio-2063.

Given this actual conflict between our district and the First and Third Appellate Districts, we hereby certify the record of this case to the Supreme Court of Ohio for review and final determination on the following question: Where an indictment fails to charge the mens rea element of the crime, and the

defendant fails to raise that issue in the trial court, has the defendant waived the defect in the indictment?

The parties are directed to S. Ct. Prac. R. IV for guidance in how to proceed.

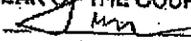


KENNETH A. ROCCO, JUDGE

ANN DYKE, A.J., and
MICHAEL J. CORRIGAN, J., CONCUR

RECEIVED FOR FILING

NOV - 2 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY  DEP.

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

OCT 23 2006

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Court of Appeals of Ohio

CULLEN SWEENEY
ASSISTANT PUBLIC DEFENDER
1200 WEST THIRD ST., NW
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CLEVELAND, OH 44113

CA 87499

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87499

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

VINCENT COLON

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTION AFFIRMED;
SENTENCE VACATED AND REMANDED.

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-470439

BEFORE: Rocco, J., Dyke, A.J., and Corrigan, J.

RELEASED: October 12, 2006

JOURNALIZED: OCT 23 2006

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Cleveland, Ohio 44113

**FILED AND JOURNALIZED
PER APP. R. 22(E)**

OCT 23 2006

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY CLY DEP.**

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

OCT 12 2006

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY CLY DEP.**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

**NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED**

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-1-

KENNETH A. ROCCO, J.:

Defendant-appellant, Vincent Colon, appeals from his conviction and sentence for robbery. He urges that (1) the court deprived him of his right to self-representation; (2) the court restricted his access to counsel; (3) the evidence was insufficient to support his conviction; (4) his conviction contravened the manifest weight of the evidence; (5) the indictment was insufficient; (6) the court erred by failing to instruct the jury about an element of the charge; (7) he did not have the effective assistance of counsel; and (8) the court erred by imposing a sentence that exceeded the statutory minimum term. We find no error in the proceedings below and affirm the trial court's judgment. However, we vacate the sentence pursuant to the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, and remand for resentencing.

Procedural History

Appellant was charged with robbery in a one count indictment filed September 20, 2005. The case proceeded to a jury trial on November 14, 2005. At trial, the state presented the testimony of the victim, Samuel Woodie; Jennie Harris, Woodie's neighbor; Jerron Powell, Harris's son; and Patrolman Henry Steel, who intervened in the disturbance. Woodie testified that he is a 76 year old man living on East 114th Street in the City of Cleveland. On September 7, 2005 at approximately 9:00 p.m., the appellant returned a bench saw to Woodie

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which Woodie had loaned to his neighbor, Ms. Harris. Appellant asked to borrow \$40 for Ms. Harris. Woodie gave him the money. Woodie testified that appellant returned at approximately 1:30 a.m. and said Ms. Harris wanted \$40 more, which Woodie also gave to him.

The following morning, appellant rang Woodie's doorbell at approximately 9:30 a.m. and said Ms. Harris needed \$20 more. He and appellant walked next door to Harris's house. As they approached her side door, appellant grabbed Woodie's left rear pants pocket, in which Woodie kept his wallet. Woodie and appellant struggled in the driveway. Harris came out and yelled at appellant to stop; she joined in the fight as well. Harris's son also joined. Woodie testified that they were all rolling around on the driveway. They rolled off of him and he got up. He went to the garage and got a brick, which he used to strike appellant in the head twice, rendering him unconscious. Police then arrived. In the course of the struggle, Woodie's wallet ended up on the ground, and he picked it up. Woodie said his knees and elbows were scraped and his hip hurt afterward, but he refused medical attention.

Jenny Harris testified that the appellant is her nephew. On the morning of September 8, 2005, she heard Woodie's voice outside her side door, so she opened it. Appellant and Woodie were standing there. Appellant then grabbed Woodie's left rear pants pocket. Woodie also grabbed the pocket, and Harris did

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-3-

as well. Harris yelled at appellant to let Woodie go. Woodie fell down; Harris and appellant fell down with him.

Harris said she got her arm around appellant's neck, but he pushed her away. Harris's son then came out and joined the fracas. Woodie's pocket ripped and his wallet fell out. Appellant grabbed it and put it in the front of his pants "in the crotch area." Harris reached into appellant's pants and got the wallet and returned it to Woodie. Woodie went and got a brick and hit appellant twice on the head with it. Police arrived and instructed Woodie to put the brick down.

Harris's son, Jerron Powell, testified that he went to the side door of his mother's home when he heard her screams. He saw appellant, Woodie and Harris "tussling on the ground." He then jumped on appellant's back and pulled him off. Woodie got up. In the course of the affray, appellant grabbed Woodie's wallet, which was lying on the ground, and put it in his shorts. Harris retrieved the wallet and gave it back to Woodie. As Powell "bear-hugged" appellant on the ground, Woodie went to the garage and got a brick which he used to hit appellant twice.

Patrolman Steel testified that he and his partner were patrolling on East 114th Street when he saw a disturbance and went to investigate. He saw an older man take a brick and hit another man on the head twice. Patrolman Steel instructed the older man to drop the brick and he did. All three persons at the

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scene said that appellant was trying to rob Woodie, so Steel handcuffed appellant, who was unconscious, and called EMS, who transported appellant to a hospital.

At the conclusion of the state's case, appellant moved for dismissal pursuant to Criminal Rule 29. The court denied the motion. Appellant then presented the testimony of Patrolman Steel's partner, Patrolman Leon Goodlow, and appellant.

At the conclusion of the trial, the jury returned a verdict finding appellant guilty of robbery. The court sentenced appellant to seven years' imprisonment.

Law and Analysis

In his first assignment of error, appellant argues that the court deprived him of his right to represent himself. During voir dire, appellant asked if he could appear as co-counsel and represent himself. The court instructed him to "write up a motion and put out your reasons and what you want to do. Okay?" Appellant did not submit a written motion to the court.

At the conclusion of Ms. Harris's testimony, appellant again asked to be designated as "co-counsel" so that he could ask questions his attorney had not asked. The court advised appellant that he could not act as co-counsel, that he could either have an attorney represent him or he could represent himself. Appellant reiterated that he wanted his attorney to continue to represent him. The court allowed appellant a ten-minute recess to think about what he wanted.

When proceedings resumed, counsel was still representing appellant.

To assert the right to self-representation, the defendant must clearly and unequivocally invoke his right to self-representation and must knowingly, intelligently and voluntarily waive the concomitant right to the assistance of counsel. *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, ¶38; *Godinez v. Moran* (1993), 509 U.S. 389, 400-02. In this case, the appellant did not clearly and unequivocally inform the court that he wished to waive his right to counsel. Rather, he repeatedly asked to act as co-counsel, a role which the court correctly informed him he could not assume. *State v. Martin*, 103 Ohio St.3d 385, 390, 2004-Ohio-5471, ¶32. Therefore, appellant did not invoke his right to self-representation.

Appellant claims the court erred by failing to inform him of his right to stand-by counsel. Once a defendant chooses to represent himself, “[a] trial court may – but is not required to – appoint stand-by counsel to aid a defendant if and when the defendant requests assistance ***.” *State v. Watson* (1998), 132 Ohio App.3d 57, 65. Contrary to appellant’s suggestion, *Martin* does not create a right to stand-by counsel, but rather recognizes that stand-by counsel may be appointed by the court at its discretion to assist a pro se defendant, “even over objection by the accused.” *Martin*, at ¶28, quoting *Faretta v. California* (1975), 422 U.S. 806, 834 n. 46. Therefore, we reject this argument.

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The first assignment of error is overruled.

Second, appellant contends that the court impermissibly restricted his access to counsel. During the direct examination of the first defense witness, the court called a recess, excused the jury and stated: "Now, the defendant, Mr. Colon, is going to have to remember, I told you a couple of times I don't want any temper tantrums. I had to bring in a second deputy. If you act up any more - I heard you screaming and yelling at your attorney in there. I am not allowing your attorney to be anywhere with you from now, as [sic] that's a court order, except here in this courtroom discussing privately here." At the conclusion of the day's proceedings, the court reiterated: "**** [Defense counsel] is not to go in with the defendant any further on this trial whether he wants to or not. He has to be out here and have the conference in front of the deputies in open court, privately, but out here."

Contrary to appellant's arguments, these orders did not restrict appellant's access to his attorney, but only affected the manner in which he could consult with counsel. Appellant could consult with counsel in person in the courtroom with deputies present. There were no restrictions on the length of any consultation. There were also no restrictions on appellant's ability to consult telephonically with his attorney. Therefore, this case is not analogous to *Geders v. United States* (1976), 425 U.S. 80, where the defendant was completely

-7-

prohibited from consulting with counsel overnight. The limitations the court imposed here did not interfere with appellant's right to access to his counsel, so we overrule the second assignment of error.

Third, appellant contends that the evidence was insufficient to sustain his conviction. Appellant asserts that the crime of robbery consists of four basic elements, that the defendant (a) knowingly (b) committed or attempted to commit a theft offense, and (c) recklessly (d) inflicted, attempted to inflict, or threatened to inflict physical harm. *State v. Crawford* (1983), 10 Ohio App.3d 207. Appellant asserts that there is insufficient evidence that he recklessly caused physical harm to Mr. Woodie. We disagree. Mr. Woodie testified that appellant threw him to the ground and struggled with him. Pursuant to R.C. 2901.22(C), "[a] person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." A reasonable jury could find that, by throwing Mr. Woodie to the ground and struggling with him, appellant perversely disregarded a known risk that the septuagenarian victim would be injured. Therefore, we overrule the third assignment of error.

Appellant next contends that the manifest weight of the evidence does not support his conviction. Ms. Harris contradicted Mr. Woodie when she testified that appellant did not throw Woodie to the ground. The mere fact of a conflict in

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-8-

the testimony does not demonstrate that the jury lost its way, however. It was for the jury to decide which witness's testimony was more believable. Therefore, we overrule the fourth assignment of error.

Fifth, appellant urges that the indictment was insufficient because it did not charge the mens rea elements of robbery. He asserts that the indictment therefore failed to charge an offense. "[A]n indictment charging an offense solely in the language of a statute is insufficient when a specific intent element has been judicially interpreted for that offense." *State v. O'Brien* (1987), 30 Ohio St.3d 122, 124.

Under Crim.R. 12(C)(2), defects in an indictment are waived if not raised before trial, except failure to show jurisdiction in the court or to charge an offense, which may be raised at any time during the pendency of the proceeding. Appellant here did not raise this issue at any time during the pendency of the proceedings before the trial court. Had he raised the issue in the trial court, the state could have amended the indictment to include the mens rea elements. Crim.R. 7(D); *O'Brien*, 32 Ohio St.3d at 125-26. Therefore, he has waived this argument on appeal. *State v. Davis*, Ashland App. No. 03COA016, 2004-Ohio-2255, ¶48.

Sixth, appellant claims the court erred by failing to instruct the jury that the state was required to prove, beyond a reasonable doubt, that appellant

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recklessly inflicted, attempted to inflict, or threatened to inflict, physical harm. Because appellant's counsel did not object to the court's instructions, we must evaluate this assignment of error under a plain error analysis. See, e.g., *State v. Williford* (1990), 49 Ohio St.3d 247, 251. "[A]n erroneous jury instruction 'does not constitute a plain error or defect under Crim. R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise.'" *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 227 (quoting *State v. Long* (1978), 53 Ohio St.2d 91, 97). As noted above, there was ample evidence that appellant recklessly caused physical harm to Woodie. Therefore, we cannot say that the outcome of the trial would have been different if the jury had been instructed on this issue. The sixth assignment of error is overruled.

Seventh, appellant urges that his attorney did not provide him with effective assistance. "To win a reversal on the basis of ineffective assistance of counsel, the defendant must show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693. Accord *State v. Bradley* (1989), 42 Ohio St. 3d 136, 538 N.E.2d 373, paragraph two of the syllabus. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were

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it not for counsel's errors, the result of the trial would have been different.' *Id.*, paragraph three of the syllabus." *State v. Jones*, 91 Ohio St.3d 335, 354, 2001-Ohio-57.

In this case, appellant claims his attorney's performance was deficient because he failed to object to the indictment and failed to request a jury instruction regarding recklessness. Assuming that these alleged deficiencies fell outside the "wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, we cannot say that, but for counsel's errors the result of the trial would have been different. If counsel had objected to the indictment, the state would have had the opportunity to amend it to correct the alleged deficiency; there is no reasonable probability that the indictment would have been dismissed on that basis. Likewise, if counsel had objected to the jury instructions, the court would have included an instruction on recklessness. The outcome of the trial would not likely have been affected because there was ample evidence that appellant recklessly caused physical harm to Woodie. Therefore, we overrule the seventh assignment of error.

Finally, appellant challenges the sentence the court imposed upon him. He claims that the court's imposition of a sentence in excess of the minimum statutory term was based on judge-found facts and therefore was unconstitutional pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

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He further asserts that the *Foster* remedy of severing the unconstitutional provisions of the sentencing statutes, thus allowing the court to impose any sentence within the appropriate felony range, is an ex post facto law, and that the court is limited to imposition of the minimum term of two years' imprisonment in this case.

Appellant was found guilty of robbery, a second degree felony. R.C. 2911.02(A)(2) and (B). The range of sentences available for a second degree felony is two to eight years. Thus, appellant's sentence of seven years' imprisonment was more than the minimum term.

Prior to the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, "Ohio ha[d] a presumptive minimum prison term that [had to] be overcome by at least one of two judicial findings." *Foster*, at ¶60. For someone who was never to prison before, the trial court was required to find that the shortest term would "demean the seriousness" of the crime or would inadequately protect the public in order to impose a sentence in excess of the statutory minimum. Otherwise, the court was required to find that the offender had already been to prison to impose more than a minimum term. R.C. 2929.14(B)(2).

In *State v. Foster*, 109 Ohio St.3d 1, 2006 Ohio 856, the Ohio Supreme Court found that several provisions of S.B. 2 (including R.C. 2929.14(B)(2))

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offended the constitutional principles set forth in *Blakely v. Washington* (2004), 542 U.S. 296, that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Foster*, supra, at ¶82 (citing *United States v. Booker* (2005), 543 U.S. 220, 224).

The *Foster* court severed R.C. 2929.14(B) and other sentencing provisions, and rendered them unconstitutional. As a result, the trial court is no longer obligated to follow these mandatory guidelines when sentencing a felony offender. "Where sentencing is left to the unguided discretion of the judge, there is no judicial impingement upon the traditional role of the jury." *Foster*, supra, at ¶90. The court further held that cases pending on direct review involving these statutes should be remanded for resentencing. *Id.* at ¶104. Thus, in accordance with *Foster*, we sustain this assignment of error, vacate appellant's sentence and remand for a new sentencing hearing.

Appellant's argument that application of *Foster* constitutes an ex post facto law is not yet ripe for our review. *State v. Jones*, Cuyahoga App. No. 87262 & 87263, 2006-Ohio-4100, ¶¶10 & 11.

In resentencing appellant, the trial court may want to keep in mind the Ohio Supreme Court's holding in *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-

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855, at ¶38: "Although after *Foster*, the trial court is no longer compelled to make findings and give reasons at the sentencing hearing, *** nevertheless, in exercising its discretion the court must carefully consider the statutes that apply to every felony case. Those include R.C. 2929.11, which specifies the purpose of sentencing, and R.C. 2929.12, which provides guidance in considering the factors relating to the seriousness of the offense and recidivism of the offender. In addition, the sentencing court must be guided by the statutes that are specific to the case itself."

Appellant's conviction is affirmed, his sentence is vacated, and this cause is remanded for resentencing.

It is ordered that appellee recover from appellant its costs herein taxed.

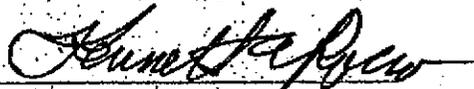
The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

00622 00908

A certified copy of this entry shall constitute the mandate pursuant to Rule

27 of the Rules of Appellate Procedure.



KENNETH A. ROCCO, JUDGE

ANN DYKE, A.J., and
MICHAEL J. CORRIGAN, J., CONCUR

LEXSEE 165 OHIO APP3D 379

STATE OF OHIO, Plaintiff-Appellee, vs. JAMES O. SHUGARS, Defendant-Appellant.

APPEAL NO. C-050380

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

165 Ohio App. 3d 379; 2006 Ohio 718; 846 N.E.2d 592; 2006 Ohio App. LEXIS 652

February 17, 2006, Date of Judgment Entry on Appeal

NOTICE: THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

SUBSEQUENT HISTORY: Discretionary appeal not allowed by *State v. Shugars, 109 Ohio St. 3d 1508, 2006 Ohio 2998, 849 N.E.2d 1029, 2006 Ohio LEXIS 1886 (Ohio, June 21, 2006)*

PRIOR HISTORY: Criminal Appeal From: Hamilton County Municipal Court. TRIAL NO. 04CRB-48939.

DISPOSITION: Judgment vacated and complaint dismissed.

HEADNOTES: INDICTMENT/COMPLAINT - PROCEDURE/RULES - CONSTITUTIONAL LAW/CRIM.

SYLLABUS: [*380] [***593] A conviction for violating Cincinnati's home-improvement ordinance was contrary to law when the trial court had no jurisdiction to hear the case due to the complaint's failure to allege recklessness as an essential element of the offense; even though the ordinance does not specifically refer to a culpable mental state, recklessness is an element of the offense under Cincinnati Municipal Code 902-11(b) because the plain language of the ordinance does not indicate an intention to impose strict liability.

When a complaint fails to state an offense under Ohio law by omitting an essential element, any resulting conviction must be vacated, and the complaint itself must be dismissed, but the defendant may be tried again without violating the *Double Jeopardy Clause* because jeopardy

has never attached due to the lack of jurisdiction resulting from the defective complaint.

COUNSEL: Julia L. McNeil, City Solicitor, Ernest F. McAdams, Jr., City Prosecutor, and Keith C. Forman, Assistant Prosecutor, for Appellee.

Jon R. Sinclair, for Appellant.

JUDGES: MARK P. PAINTER, Judge. HILDEBRANDT, P.J., and DOAN, J., concur.

OPINION BY: MARK P. PAINTER

OPINION:

DECISION.

MARK P. PAINTER, Judge.

[**P1] In a case of first impression, we interpret Cincinnati's home-improvement ordinance as requiring proof of recklessness. Because neither the complaint nor the facts statement upon which the conviction was based included that element, the conviction was improper.

[**P2] Defendant-appellant James O. Shugars appeals his conviction for violating Cincinnati's home-improvement ordinance, a second-degree misdemeanor. n1 Shugars pleaded no contest and was sentenced to 90 days in jail and a \$ 750 fine, with 80 days and \$ 650 suspended, plus one year of probation. Shugars now claims that the state failed to assert that he "recklessly" violated the ordinance, and that, therefore, his conviction cannot be sustained. He is more right than he alleges.

n1 Cincinnati Municipal Code 891-3.

165 Ohio App. 3d 379, *; 2006 Ohio 718, **;
846 N.E.2d 592, ***; 2006 Ohio App. LEXIS 652

[*381] [***594] *I. A Bad Deal*

[**P3] Julia Blanco hired Shugars to build a carport and a deck at her house. Blanco paid Shugars over \$ 9,000, but all Shugars did was excavate and remove some debris from the area.

[**P4] After Blanco contacted the prosecutor's office, Shugars was charged with failing to provide Blanco with a contract containing certain mandatory provisions. For example, Shugars's contract with Blanco did not include, among other things, a complete description of the work, the dates for beginning and ending the work, language concerning applicable permits, or language limiting the down payment on the contract to ten percent.

[**P5] Shugars pleaded no contest and the trial court found him guilty. In mitigation, Shugars's attorney stated, "Certainly there is no question that Mr. Shugars has violated the City Municipal Code 891, all of the sections that [the prosecutor] has pointed out." Later, his attorney said, "We certainly are not disputing, as I said, Judge, the violations of 891."

II. Essential Element Missing

[**P6] In his single assignment of error, Shugars now claims that the state failed to prove the culpable mental state of recklessness.

[**P7] Cincinnati Municipal Code 891-3 does not mention a specific culpable mental state. It merely states that a contractor "shall" provide a written contract to the home owner and discusses in detail what the contract must contain.

[**P8] The Cincinnati Municipal Code mirrors the Ohio Revised Code concerning the culpable mental state for an offense when an ordinance is silent on the issue. "When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." n2

n2 Cincinnati Municipal Code 902-11(b);
R.C. 2901.21(B).

[**P9] The state argues that the offense is one of strict liability. But the Ohio Supreme Court has repeatedly held that the drafter of a statute or ordinance must plainly indicate in the language an intent to impose strict liability. n3 Public-policy arguments or the fact that the statute or ordinance [*382] contains mandatory lan-

guage do not factor into the determination whether strict liability is imposed. n4 It is not enough that the legislative body may have intended to enact a strict-liability law--it must "plainly indicate that intention in the language of the [law]." n5

n3 See *State v. Collins*, 89 Ohio St.3d 524, 530, 2000 Ohio 231, 733 N.E.2d 1118; *State v. Moody*, 104 Ohio St. 3d 244, 2004 Ohio 6395, 819 N.E.2d 268, P12.

n4 See *Collins*, *supra*, at 530; *Moody*, *supra*, at PP16-17.

n5 *Collins*, *supra*, at 530.

[**P10] The plain language of Cincinnati Municipal Code 891-3 does not indicate an intention to impose strict liability. If the city had so intended, it could easily have made the offense one of strict liability; it did not. Therefore, the state must both charge and prove recklessness as an element of the offense. Furthermore, if the state fails to prove recklessness, there is insufficient evidence to convict a person charged with the offense.

[***595] *III. Analogy*

[**P11] As an analogy, we look to Ohio's statute concerning child endangering. n6 The Ohio Supreme Court has held that because the child-endangering statute does not specify a culpable mental state, the default mental state of recklessness is an essential element of the crime. n7 In addition, the court has held that "an indictment charging an offense solely in the language of a statute is insufficient when a specific intent element has been judicially interpreted for that offense." n8

n6 *R.C. 2919.22*.

n7 See *State v. McGee*, 79 Ohio St.3d 193, 195, 1997 Ohio 156, 680 N.E.2d 975; *State v. O'Brien* (1987), 30 Ohio St.3d 122, 30 Ohio B. 436, 508 N.E.2d 144, paragraph one of the syllabus.

n8 See *State v. O'Brien*, *supra*, at 124.

[**P12] In this case, the complaint against Shugars did not state any culpable mental state. Likewise, in its explanation of the circumstances of the offense, the state did not assert that Shugars had recklessly failed to pro-

165 Ohio App. 3d 379, *; 2006 Ohio 718, **;
846 N.E.2d 592, ***; 2006 Ohio App. LEXIS 652

vide Blanco with the required contractual provisions. In fact, the state did not assert or discuss Shugars's mental state at any time in the trial court.

[**P13] Therefore, because the state failed to allege an essential element of the offense, Shugars's conviction cannot be sustained.

IV. No Waiver

[**P14] The state argues that because Shugars pleaded no contest, it is now too late for Shugars to challenge the state's evidence regarding the element [*383] of a culpable mental state. But Shugars's plea of no contest only admitted the truth of the facts alleged by the state. n9 The state did not allege that Shugars had acted recklessly. A conviction in which an essential element was not proved cannot stand.

n9 See *Crim.R. 11(B)(2)*; *State ex rel. Stern v. Mascio*, 75 Ohio St.3d 422, 423, 1996 Ohio 93, 662 N.E.2d 370.

[**P15] Furthermore, the complaint did not even allege the culpable mental state of recklessness, and a valid complaint is a jurisdictional prerequisite to a conviction. n10 A defendant cannot waive the right to challenge a charging document that fails to state an essential element, even if the defendant pleads guilty to the charged offense. n11 Therefore, the issue has not been mooted because Shugars pleaded no contest.

n10 See *Crim.R. 12(C)(2)*; *State v. Byrd*, 7th Dist. No. 04 BE 40, 2005 Ohio 2720, at P16; *State v. Daniels*, 3rd Dist. No. 12-03-12, 2004 Ohio 2063, at P3.

n11 Id.

[**P16] While we are aware that the Ohio Supreme Court, in a death-penalty case, allowed a rape conviction to stand when an element was never charged in the indictment on the grounds of waiver (!), at least in that case the element was proved at trial. n12 But here, the element was neither alleged or proved. Even were it possible to waive an element of an offense--a strange proposition of law at best--something not mentioned cannot be waived.

n12 See *State v. Carter*, 89 Ohio St. 3d 593, 598, 2000 Ohio 172, 734 N.E.2d 345.

V. Conviction Vacated

[**P17] By omitting an essential element, the complaint against Shugars failed to state an offense under Ohio law. This defect has affected Shugars's substantial rights, and we must vacate Shugars's conviction [***596] and dismiss the complaint against him. But because the charging instrument did not charge an offense, the trial court had no jurisdiction to try Shugars, n13 so Shugars has not been placed in jeopardy. Therefore, another prosecution is not barred. n14

n13 See *State v. Cimpritz (1953)*, 158 Ohio St. 490, 110 N.E.2d 416, paragraph six of the syllabus.

n14 See *State v. Keplinger*, 12th Dist. No. CA2002-07-013, 2003 Ohio 3447.

[*384] [**P18] Accordingly, we sustain Shugars' assignment of error, vacate his conviction, and dismiss the complaint against him.

Judgment vacated and complaint dismissed.

HILDEBRANDT, P.J., and DOAN, J., concur.

LEXSEE 2004 OHIO 2063

STATE OF OHIO, PLAINTIFF-APPELLEE v. RICKY DANIELS, DEFENDANT-
APPELLANT

CASE NUMBER 12-03-12

COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, PUTNAM
COUNTY

2004 Ohio 2063; 2004 Ohio App. LEXIS 1785

April 26, 2004, Date of Judgment Entry

SUBSEQUENT HISTORY: Appeal after remand at *State v. Daniels*, 2005 Ohio 1920, 2005 Ohio App. LEXIS 1832 (Ohio Ct. App., Putnam County, Apr. 25, 2005)

PRIOR HISTORY: **[**1]** Criminal Appeal from Common Pleas Court.

DISPOSITION: Judgment reversed.

COUNSEL: MARIA SANTO, Attorney at Law, Lima, OH, For Appellant.

KURT W. SAHLOFF, Prosecuting Attorney, Ottawa, OH, For Appellee.

JUDGES: BRYANT, J. SHAW, P.J., and CUPP, J., concur.

OPINION BY: BRYANT

OPINION:

BRYANT, J.

[*P1] Defendant-appellant Ricky Daniels ("Daniels") brings this appeal from the judgment of the Court of Common Pleas of Putnam County finding him guilty of child endangerment and involuntary manslaughter.

[*P2] On April 11, 2003, Daniels was indicted on one count of endangering children, one count of felonious assault, and one count of murder. Daniels was arraigned on April 14, 2003, and entered a plea of not guilty and not guilty by reason of insanity. Daniels was examined and found competent to stand trial. It was also determined that Daniels did not meet the criteria to be found not guilty by reason of insanity. On June 19, 2003, Daniels entered a guilty plea to a bill of information to one count of endangering children and one count of in-

voluntary manslaughter. The State dismissed the charges in the indictment pursuant to the plea agreement. On July 23, 2003, the trial court sentenced Daniels to **[**2]** eight years in prison on the endangering children charge and ten years in prison on the involuntary manslaughter charge, to be served consecutively. It is from this judgment that Daniels appeals and raises the following assignments of error.

The bill of information was insufficient under *Crim.R. 7(B)* for it failed to state an essential element of endangering children.

The trial court committed an error of law by imposing maximum consecutive sentences.

[*P3] In the first assignment of error, Daniels claims that the bill of information must allege the mental state of recklessness. *Crim.R. 7(B)* requires that a bill of information contain sufficient statements to provide the defendant with notice of all of the elements of the offense for which the defendant is charged. The element of recklessness is an essential element of the offense of child endangerment and the charging instrument must include it. *State v. McGee (1998)*, 128 Ohio App. 3d 541, 715 N.E.2d 1175. The State claims that Daniel's failure to object prior to a guilty finding waives the issue on appeal. However, by pleading guilty to an offense, a defendant does not waive the right to challenge a **[**3]** charging document that fails to state an essential element. *State v. Keplinger, 12th Dist. No. CA2002-07-013, 2003 Ohio 3447*.

Generally, an indictment or, in this case, an information must allege all elements of the crime intended to be charged. * * * If an essential and material element identifying the offense is omitted from the information, it is insufficient to charge an offense. * * * The omission of a material element of the crime from an indictment renders the indictment invalid.

Id. at P7.

In this case, the bill of information used the statutory language. The statutory language does not include the mens rea of recklessness.

[An] indictment charging endangering children solely in the language of that statute necessarily omits an essential element of the offense, i.e., recklessness. As such, the indictment does not give the accused notice of all the elements of the offense with which he is charged. Therefore, the indictment in its original form was insufficient under *Crim.R. 7(B)*.

McGee, supra at 544 (citing *State v. O'Brien [1987]*, 30 Ohio St.3d 122, 30 Ohio B. 436, 508 N.E.2d 144). Since recklessness is an [**4] essential element of the offense of child endangerment, it must be included in the bill of

information for it to be a satisfactory charging document. The failure to include this element is substantial and amounts to plain error. Thus, the first assignment of error is sustained.

[*P4] The second assignment of error alleges that the trial court erred by imposing maximum, consecutive sentences. Since we sustained the first assignment of error and reversed the conviction, an assignment of error concerning the sentence imposed is moot.

[*P5] The judgment of the Court of Common Pleas of Putnam County is reversed.

Judgment reversed.

SHAW, P.J., and CUPP, J., concur.

Article I § 1.10 Ohio Constitution Trial for crimes; witness (1851; amended 1912)

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

(As amended September 3, 1912.)

Ohio Constitution Article § 1.16 Redress in courts (1851, amended 1912)

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

(As amended September 3, 1912.)

Fourteenth Amendment - Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

2911.01 Aggravated robbery.

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

- (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
- (2) Have a dangerous ordnance on or about the offender's person or under the offender's control;
- (3) Inflict, or attempt to inflict, serious physical harm on another.

(B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:

- (1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;
- (2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

(D) As used in this section:

- (1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.
- (2) "Law enforcement officer" has the same meaning as in section 2901.01 of the Revised Code and also includes employees of the department of rehabilitation and correction who are authorized to carry weapons within the course and scope of their duties.

Effective Date: 09-16-1997

2911.02 Robbery.

(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

- (1) Have a deadly weapon on or about the offender's person or under the offender's control;
- (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;
- (3) Use or threaten the immediate use of force against another.

(B) Whoever violates this section is guilty of robbery. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree.

(C) As used in this section:

- (1) "Deadly weapon" has the same meaning as in section 2923.11 of the Revised Code.
- (2) "Theft offense" has the same meaning as in section 2913.01 of the Revised Code.

Effective Date: 07-01-1996

2941.05 Statement that accused has committed some public offense.

In an indictment or information charging an offense, each count shall contain, and is sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations not essential to be proved. It may be in the words of the section of the Revised Code describing the offense or declaring the matter charged to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is charged.

Effective Date: 03-17-1955

RULE 7. The Indictment and the Information

(A) Use of indictment or information. A felony that may be punished by death or life imprisonment shall be prosecuted by indictment. All other felonies shall be prosecuted by indictment, except that after a defendant has been advised by the court of the nature of the charge against the defendant and of the defendant's right to indictment, the defendant may waive that right in writing and in open court.

Where an indictment is waived, the offense may be prosecuted by information, unless an indictment is filed within fourteen days after the date of waiver. If an information or indictment is not filed within fourteen days after the date of waiver, the defendant shall be discharged and the complaint dismissed. This division shall not prevent subsequent prosecution by information or indictment for the same offense.

A misdemeanor may be prosecuted by indictment or information in the court of common pleas, or by complaint in the juvenile court, as defined in the Rules of Juvenile Procedure, and in courts inferior to the court of common pleas. An information may be filed without leave of court.

(B) Nature and contents. The indictment shall be signed in accordance with Crim. R. 6(C) and (F) and contain a statement that the defendant has committed a public offense specified in the indictment. The information shall be signed by the prosecuting attorney or in the name of the prosecuting attorney by an assistant prosecuting attorney and shall contain a statement that the defendant has committed a public offense specified in the information. The statement may be made in ordinary and concise language without technical averments or allegations not essential to be proved. The statement may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. Each count of the indictment or information shall state the numerical designation of the statute that the defendant is alleged to have violated. Error in the numerical designation or omission of the numerical designation shall not be ground for dismissal of the indictment or information, or for reversal of a conviction, if the error or omission did not prejudicially mislead the defendant.

(C) Surplusage. The court on motion of the defendant or the prosecuting attorney may strike surplusage from the indictment or information.

(D) Amendment of indictment, information, or complaint. The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impaneled, and to a reasonable continuance, unless it clearly appears from the whole

proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. Where a jury is discharged under this division, jeopardy shall not attach to the offense charged in the amended indictment, information, or complaint. No action of the court in refusing a continuance or postponement under this division is reviewable except after motion to grant a new trial therefor is refused by the trial court, and no appeal based upon such action of the court shall be sustained nor reversal had unless, from consideration of the whole proceedings, the reviewing court finds that a failure of justice resulted.

(E) Bill of particulars. When the defendant makes a written request within twenty-one days after arraignment but not later than seven days before trial, or upon court order, the prosecuting attorney shall furnish the defendant with a bill of particulars setting up specifically the nature of the offense charge and of the conduct of the defendant alleged to constitute the offense. A bill of particulars may be amended at any time subject to such conditions as justice requires.

[Effective: July 1, 1973; amended effective July 1, 1993; July 1, 2000.]

Staff Note (July 1, 2000 Amendment)

Rule 7(A) Use of Indictment or Information

The July 1, 2000 amendment permits the prosecution of misdemeanor charges by complaint in the juvenile division of a common pleas court. Prior to this amendment, a misdemeanor could only be prosecuted in the common pleas court by an indictment or information.

The impetus for the amendment was statutes holding parents criminally accountable for their children's chronic truancy. Since these charges are misdemeanors, prior to the amendment of this rule a parent could be prosecuted only by a grand jury indictment or an information. Obtaining a grand jury indictment is costly and time consuming, and a defendant must first waive indictment before an information can be used. This amendment, which limits the use of complaints to proceedings in juvenile court, is intended to help prosecutors and juvenile authorities handle truancy and other misdemeanor charges in a more expeditious and less costly manner than under the prior rule.

RULE 12. Pleadings and Motions Before Trial: Defenses and Objections

(A) **Pleadings and motions.** Pleadings in criminal proceedings shall be the complaint, and the indictment or information, and the pleas of not guilty, not guilty by reason of insanity, guilty, and no contest. All other pleas, demurrers, and motions to quash, are abolished. Defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(B) **Filing with the court defined.** The filing of documents with the court, as required by these rules, shall be made by filing them with the clerk of court, except that the judge may permit the documents to be filed with the judge, in which event the judge shall note the filing date on the documents and transmit them to the clerk. A court may provide, by local rules adopted pursuant to the Rules of Superintendence, for the filing of documents by electronic means. If the court adopts such local rules, they shall include all of the following:

(1) The complaint, if permitted by local rules to be filed electronically, shall comply with Crim. R. 3.

(2) Any signature on electronically transmitted documents shall be considered that of the attorney or party it purports to be for all purposes. If it is established that the documents were transmitted without authority, the court shall order the filing stricken.

(3) A provision shall specify the days and hours during which electronically transmitted documents will be received by the court, and a provision shall specify when documents received electronically will be considered to have been filed.

(4) Any document filed electronically that requires a filing fee may be rejected by the clerk of court unless the filer has complied with the mechanism established by the court for the payment of filing fees.

(C) **Pretrial motions.** Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue. The following must be raised before trial:

(1) Defenses and objections based on defects in the institution of the prosecution;

(2) Defenses and objections based on defects in the indictment, information, or complaint (other than failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding);

(3) Motions to suppress evidence, including but not limited to statements and identification testimony, on the ground that it was illegally obtained. Such motions shall be filed in the trial court only.

(4) Requests for discovery under Crim. R. 16;

(5) Requests for severance of charges or defendants under Crim. R. 14.

(D) Motion date. All pretrial motions except as provided in Crim. R. 7(E) and 16(F) shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier. The court in the interest of justice may extend the time for making pretrial motions.

(E) Notice by the prosecuting attorney of the intention to use evidence.

(1) At the discretion of the prosecuting attorney. At the arraignment or as soon thereafter as is practicable, the prosecuting attorney may give notice to the defendant of the prosecuting attorney's intention to use specified evidence at trial, in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under division (C)(3) of this rule.

(2) At the request of the defendant. At the arraignment or as soon thereafter as is practicable, the defendant, in order to raise objections prior to trial under division (C)(3) of this rule, may request notice of the prosecuting attorney's intention to use evidence in chief at trial, which evidence the defendant is entitled to discover under Crim. R. 16.

(F) Ruling on motion. The court may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means.

A motion made pursuant to divisions (C)(1) to (C)(5) of this rule shall be determined before trial. Any other motion made pursuant to division (C) of this rule shall be determined before trial whenever possible. Where the court defers ruling on any motion made by the prosecuting attorney before trial and makes a ruling adverse to the prosecuting attorney after the commencement of trial, and the ruling is appealed pursuant to law with the certification required by division (K) of this rule, the court shall stay the proceedings without discharging the jury or dismissing the charges.

Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(G) Return of tangible evidence. Where a motion to suppress tangible evidence is granted, the court upon request of the defendant shall order the property returned to the defendant if the defendant is entitled to possession of the property. The order shall be stayed pending appeal by the state pursuant to division (K) of this rule.

(H) Effect of failure to raise defenses or objections. Failure by the defendant to raise defenses or objections or to make requests that must be made prior to trial, at the time set by the court pursuant to division (D) of this rule, or prior to any extension of time made by the court, shall constitute waiver of the defenses or objections, but the court for good cause shown may grant relief from the waiver.

(I) Effect of plea of no contest. The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence.

(J) Effect of determination. If the court grants a motion to dismiss based on a defect in the institution of the prosecution or in the indictment, information, or complaint, it may also order that the defendant be held in custody or that the defendant's bail be continued for a specified time not exceeding fourteen days, pending the filing of a new indictment, information, or complaint. Nothing in this rule shall affect any statute relating to periods of limitations. Nothing in this rule shall affect the state's right to appeal an adverse ruling on a motion under divisions (C)(1) or (2) of this rule, when the motion raises issues that were formerly raised pursuant to a motion to quash, a plea in abatement, a demurrer, or a motion in arrest of judgment.

(K) Appeal by state. When the state takes an appeal as provided by law from an order suppressing or excluding evidence, the prosecuting attorney shall certify that both of the following apply:

- (1) the appeal is not taken for the purpose of delay;
- (2) the ruling on the motion or motions has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.

The appeal from an order suppressing or excluding evidence shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be prosecuted diligently.

If the defendant previously has not been released, the defendant shall, except in capital cases, be released from custody on his or her own recognizance pending appeal when the prosecuting attorney files the notice of appeal and certification.

This appeal shall take precedence over all other appeals.

If an appeal pursuant to this division results in an affirmance of the trial court, the state shall be barred from prosecuting the defendant for the same offense or offenses except upon a showing of newly discovered evidence that the state could not, with reasonable diligence, have discovered before filing of the notice of appeal.

[Effective: July 1, 1973; amended effective July 1, 1975; July 1, 1980; July 1, 1995; July 1, 1998; July 1, 2001.]