

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Nos. 2006-2139 & 2006-2250
Appellee, :
v. : On Appeal from the
VINCENT COLON, : Cuyahoga County Court of
Appellant. : Appeals, Eighth Appellate
District, Case No. 87499

BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS IN SUPPORT OF APPELLANT VINCENT COLON

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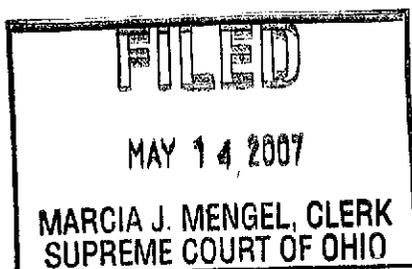


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 An indictment which fails to include an essential element is fatally
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STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Association of Criminal Defense Lawyers (OACDL) is a statewide association of over 600 public defenders and private attorneys who practice primarily in the field of criminal defense law. OACDL was formed for charitable, educational, legislative and scientific purposes with the goal of advancing the interests of society and protecting the rights of citizens and other persons accused of crimes under the laws of the State of Ohio and the United States. OACDL seeks to provide the judiciary and the legislature with insights from its members concerning the day-to-day operation of the criminal justice system and how it affects the citizens of this State. Over the past decade, OACDL has participated as a friend of the court in dozens of cases, including *Ohio v. Robinette* (1996), 519 U.S. 33; *State v. Murnahan* (1992), 63 Ohio St.3d 60; *State v. Shindler* (1994), 70 Ohio St.3d 54; *State v. Hochhausler* (1996), 76 Ohio St. 3d 455; *State v. Kinney* (1998), 83 Ohio St.3d 85; *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124; and *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

OACDL has an enduring interest in protecting the rights guaranteed to criminal defendants under the United States and Ohio Constitutions. As this case involves important issues related to the right to indictment by grand jury and criminal trial procedure, both OACDL's membership and the client base served by that membership will be affected by it.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae hereby adopts and incorporates the Statement of the Case and Facts contained in the Merit Brief of Appellant Vincent Colon.

ARGUMENT IN SUPPORT OF APPELLANT'S SIXTH PROPOSITION OF LAW AND
ON CERTIFIED CONFLICT QUESTION

Appellant's Sixth Proposition of Law:

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

Certified Conflict 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?

This case turns upon the Ohio Constitution's requirement of indictment by grand jury, and whether this Court is prepared to abandon the both historical and practical reasons in favor of that requirement. The lower court's opinion represents another misguided step in the metamorphosis of the Ohio grand jury from a substantive and important institution into an essentially powerless audience to a ritual that must be performed by the state's prosecutors. The appellate court's opinion is a misunderstanding of the Ohio Criminal Rules that trumps the plain language of the Ohio Constitution. Moreover, it disregards the rights of Ohio criminal defendants, and inflates the state's power to request amendment of indictments into a justification for ignoring the role of the grand jury. Given that the a proper understanding of the Criminal Rules reveals that they strike a careful balance between the functioning of the criminal system and the role of the grand jury, this Court should sustain the appellant's proposition of law, answer the certified question in the negative, and reverse the judgment of the appellate court.

In both the Ohio and federal systems a grand jury indictment has historically served as the essential foundation of a criminal prosecution. See, e.g. *Fouts v. State* (1857), 8 Ohio St. 98, 114 ("An indictment is the written accusation originating from the

ordeal of the grand inquest of the county, before any person can be put upon his trial for a high crime”) and *Ex Parte Bain* (1887), 121 U.S. 1, 12-3 (“[A]n indictment found by a grand jury was indispensable to the power of the court to try the petitioner for the crime with which he was charged”). Likewise, the grand jury itself was the primary means by which ordinary citizens exercised democratic control over the criminal justice system. See Richard D. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause* (2006), 91 Minn. L. Rev. 398, 408-12. Citizens exercised that control primarily through the jurisdictional nature of the grand jury indictment. In both the Ohio and federal systems, unless the jury returned a valid indictment, trial courts lacked the authority to convict a defendant of a felony offense. *Id.* at 413-18. And in those states that have maintained the indictment as a substantial predicate to felony prosecutions, the grand jury has continued to play both a prominent practical and democratic role. Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?* (2002), 82 B.U. L. Rev. 1, 45 (examining democratic functions of the grand jury and observing that “New York grand juries are active and engaged, and they critically evaluate the cases that come before them”). This “jurisdictional” understanding of the role of the grand jury is grounded in the common law, colonial history, and the text of the United States and Ohio Constitutions. Amendment V, United States Constitution (“No person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a Grand Jury”) and Section 10, Article I, Ohio Constitution (“[N]o person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury”). See also Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution: A Reference Guide*

(Praeger 2004) at 93 ("Prior to the adoption of the 1802 Constitution, grand juries had existed under the common law and were one of the most significant protections against malicious or untoward prosecutions"), and Richard D. Younger, *The Peoples Panel: The Grand Jury in the United States, 1634-1941* (Brown Uni. Press 1963), 1-55 (describing history and function of grand jury during colonial and revolutionary periods).

But in the twentieth century the jurisdictional view came under increasing attack, most notably from some of the leading figures of the legal realist movement. Fairfax, *supra* at 425-30. This criticism reached its apex with the 1946 adoption of the Federal Rules of Criminal Procedure, which for the first time permitted "the defendant, after he has been advised of the nature of the charge and of his rights [to waive indictment] in open court" See *id.* at 437-48 (discussing campaign for and adoption of Fed.R.Crim.P. 7(b)). Ohio adopted a similar provision in 1973. See generally Crim.R. 7(A) ("[A]fter 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"). Both the federal and Ohio rules codified the ability of criminal defendants to knowingly, voluntarily, and intelligently waive the constitutional right to grand jury indictment, a major goal of the legal realists who criticized the jurisdictional view of the indictment process. See Fairfax, *supra* at 448. The very enactment of each rule undermined the jurisdictional view, since "[t]he issue of a court's subject matter jurisdiction cannot be waived" by any express action of the parties. E.g. *State v. Wilson* (1995), 73 Ohio St.3d 40, 46. Likewise, subject matter jurisdiction cannot be forfeited by a defendant's failure to object, since lack of subject matter jurisdiction renders a court's judgment to be void. E.g. *Pratts v. Hurley*, 102 Ohio

St.3d 81, 83-4, 2004-Ohio-1980 at ¶¶11-13.

As a result, the modern view is that the grand jury indictment is not “jurisdictional” in the sense of conferring subject matter jurisdiction over a prosecution to a trial court. But neither is the function of the indictment merely to notify the accused of the charges, as a strict “notice” view ultimately neuters the grand jury. Cf. *Simmons*, *supra* at 75. See also *State v. O’Brien* (1987), 30 Ohio St.3d 122, 129 (Wright, J., dissenting). Rather, the indictment’s role is more akin to the doctrine described by this Court in *Pratts* as an “exercise” of jurisdiction; that is, an imperfection in the indictment does not preclude the common pleas court from hearing the felony case before it, but may create an error in the exercise of that jurisdiction. *Pratts*, 2004-Ohio-1980 at ¶¶11-13

Amicus does not mean to suggest that this Court must abandon this modern view of the grand jury’s role or hold that Crim.R. 7(B) is unconstitutional, despite the fact that the constitutional pedigree of both the modern view of indictments and the rule itself is somewhat suspect. *Fairfax*, *supra* at 423-25. See also *Ex Parte Stephens* (1960), 171 Ohio St. 323, 325 (Bell, J., dissenting). However, this Court must remain mindful of the jurisdictional roots of the grand jury indictment, so as not to strip the grand jury of its proper role in the criminal process.

This Court’s opinion in *State v. Childs* (2000), 88 Ohio St.3d 194 demonstrates the tension between the “jurisdictional” and “notice” views of the grand jury indictment, as well as the seriousness with which this Court has wrestled with that tension. In *Childs*, the Court first cites and describes previous Ohio case law enunciating the “notice” view of the indictment. *Id.* at 198 (citing *State v. Sellards* (1985), 17 Ohio St.3d 169, and noting that “by identifying and defining the offenses . . . the indictment serves

to protect the individual from future prosecutions for the same offense” and further that by requiring the indictment to include the material facts and essential elements, the accused is given full notice and opportunity to defend). However, the Court then approvingly quotes prior cases demonstrating the “jurisdictional” view, and states that “if one of the vital and material elements identifying and characterizing the crime has been omitted from the indictment such defective indictment is insufficient to charge an offense, and cannot be cured by the court” *Childs*, 88 Ohio St.3d at 198, quoting *State v. Wozniak* (1961), 172 Ohio St. 517, 521. This same tension between the “notice” and “jurisdictional” views of the grand jury indictment is also evident in recent United States Supreme Court case law. See generally *United States v. Resendiz-Ponce* (2007), 127 S.Ct. 782, 793 (Scalia, J., dissenting).

Amicus curiae respectfully suggest that the Court can resolve this tension and provide a clear rule for lower courts to follow by referring to the Ohio Criminal Rules. Specifically, there is a middle ground between the “notice” and “jurisdictional” views embodied in the text of the Rules. The appellate court’s decision in this case, by contrast, rests on a misunderstanding of the rules that abandons the role of the grand jury altogether.

The challenge to the indictment in this case was based upon the failure to include a required element of the offense. *State v. Colon*, Cuyahoga App. No. 87499, 2006-Ohio-5355 at ¶19. Under both the strict jurisdictional view described in *Wozniak* and the less rigid rule of *Childs*, this defect “cannot be cured by the court” *Wozniak*, 172 Ohio St. at 521. The court of appeals, however, concluded that failure to include all required elements in an indictment may be “waived” (presumably the court meant that it

could be “forfeited”) under Crim.R. 12(C)(2) by the defendant’s failure to object at trial. *Colon*, 2006-Ohio-5355 at ¶20. The court cited as support for this proposition Crim.R. 7(D), which it claimed would have allowed the prosecutor to seek amendment of the indictment to include the required mens rea elements. *Id.*

This analysis clearly rests on a strict “notice” view of the grand jury indictment. Under the appellate court’s rule, the fact that the grand jury never passed on the mens rea elements of the offense and the indictment thereby failed to charge an offense at all is irrelevant, since the indictment could have been cured by the court at trial if the defendant objected to this defect. This view utterly nullifies the role of the grand jury in determining probable cause as to each and every element of an alleged offense.

Moreover, it rests on a misunderstanding of the Ohio Rules of Criminal Procedure. It should be noted that the appellate court completely overlooked the language of Crim.R. 7(A), which provides that “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.*” Crim.R. 7(A)(emphasis added). This language indicates that grand jury indictments are different than misdemeanor complaints, and that strict standards for waiver should be applied to indictments. “Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the ‘intentional abandonment or relinquishment of a known right.’” also *State v. McKee* (2001), 91 Ohio St.3d 292, 299 fn. 3 (Cook, J., dissenting), quoting *United States v. Olano* (1993), 507 U.S. 725, 733. The appellate court applied a forfeiture analysis, rather than the waiver analysis contemplated by the rule.

The appellate court also misread Crim.R. 12(C)(2). That rule specifically states that “objections based on defects in the indictment [based upon] failure . . . to charge an offense . . . shall be noticed by the court at any time during the pendency of the proceeding.” This broad language reflects an intent to remain faithful to the jurisdictional heritage of the grand jury indictment, but it allows courts to easily correct technical defects in an indictment that do not reflect a failure on the part of the grand jury and do not affect the defendant’s substantial rights. The appellate court concluded that the defendant was required to object to the grand jury’s failure to include a finding of all the required elements of the offense prior to trial, but this Court has rejected that position, most notably in *State v. Childs*. Cf. *Childs*, 88 Ohio St.3d at 200 (Cook, J., dissenting) (describing operation of rule and disagreeing with majority’s refusal to find waiver).

The appellate court’s reliance on Crim.R. 7(D) is similarly misplaced. That rule permits the court to amend an indictment “at any time before, during, or after a trial . . . 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.*” Crim. R. 7(D) (emphasis added). This Court’s opinion in *State v. O’Brien* notwithstanding, amending an indictment to “cure” the failure to include a required element, thus adding a new offense not previously passed upon by the grand jury, is undoubtedly a “change in the name or identity of the crime charged.” *O’Brien*, 30 Ohio St.3d at 129 (Wright, J., dissenting), quoting Crim.R. 7(D). Cf. also *Childs*, 88 Ohio St.3d at 198-99. In short, the appellate court’s analysis, in service of the modern notice view of the indictment, turns the grand jury into a practical irrelevancy that serves no purpose but to occasionally annoy prosecutors.

Fortunately, the Ohio Criminal Rules themselves seem to embody the modern “notice” view of the indictment, but are deferential to the historic “jurisdictional” role of the grand jury. By referring to the plain text of those rules, a relatively simple test emerges: if the error in an indictment is technical and does not demonstrate that the grand jury failed to consider each and every required element of an offense, the under Crim.R. 7 and Crim.R. 12 the state may seek an amendment of the indictment to correct the error, and the defendant forfeits a normal challenge to the error or amendment by failing to object. Cf. *State v. Perry*, 101 Ohio St.3d 118, 120, 2004-Ohio-297 at ¶14 (citing Crim.R. 52(B) and *Olano*, 507 U.S. at 734). If, however, the defect in the indictment demonstrates that the grand jury failed to consider an element or that the indictment otherwise fails to charge an offense, that defect can only be remedied by the defendant’s waiver of the right to indictment “in writing and in open court.” Crim.R. 7(A). Cf. *State v. Headley* (1983), 6 Ohio St.3d 475, 478-79. Notwithstanding this limitation on the ability to remedy an indictment, the defendant may still stand convicted of an offense if the record of the trial proceedings clearly demonstrates that the defect in the indictment was harmless. Cf. *Perry*, 2004-Ohio-297 at ¶15 (citing Crim.R. 52(A) and *Olano*, 507 U.S. at 741). This reading of the Ohio Criminal Rules is essentially a “middle position” regarding the jurisdictional and notice views of the grand jury indictment.

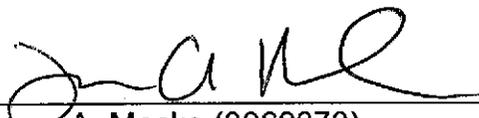
Amicus curiae, respectfully suggest that this “middle position” establishes a clear rule for Ohio trial courts to follow, as well as resolving the tension between the jurisdictional and notice views of the grand jury indictment in a way that is faithful to both the jurisdictional heritage of the grand jury indictment and the Ohio Constitution and Criminal Rules. For these reasons, this Court should reject the view of the appellate

court below. The mere fact that the state has the authority to request amendment of an indictment does not relieve the state of the burden of ensuring it has presented all of the required elements of an offense to the grand jury. See *Childs*, 88 Ohio St.3d at 198. Cf. R.C. 2941.08 (list describing types of defects that do not render an indictment invalid, but not including elements of offense from that list). Moreover, failure to object at trial cannot constitute a forfeiture of the ability to challenge an indictment that fails to include a necessary element and thereby fails to state an offense, since Crim.R. 7(A) specifies that a waiver of indictment rights must be made in writing and in open court. See also *Childs*, 88 Ohio St.3d at 198, and *Headley*, 6 Ohio St.3d 475, paragraph two of the syllabus.

CONCLUSION

Amicus curiae respectfully requests this Court to adopt the appellant's sixth proposition of law, to answer the certified question in the negative, and to reverse the judgment of the Cuyahoga County Court of Appeals.

Respectfully submitted,


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CERTIFICATE OF SERVICE

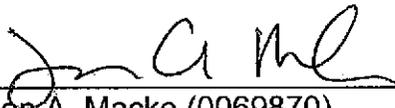
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