

NO. 2006-2250 & 2006-2139

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 87499

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STATE OF OHIO,

Plaintiff-Appellee

-vs-

VINCENT COLON,

Defendant-Appellant

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**MERIT BRIEF OF APPELLEE**

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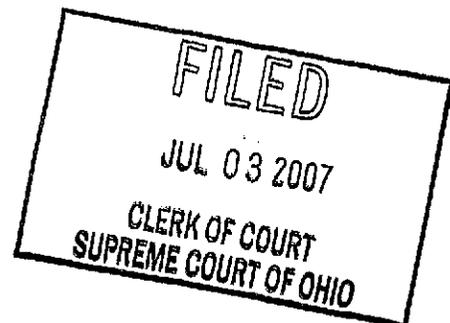
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STATE OF OHIO,

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-vs-

VINCENT COLON,

Defendant-Appellant

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**MERIT BRIEF OF APPELLEE**

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**STATEMENT OF THE CASE AND FACTS**

Defendant-appellant, Vincent Colon, ("Colon") robbed Samuel Woodie, a 75-year-old man, of his wallet. He was subsequently indicted on September 20, 2005 by the Cuyahoga County Grand Jury and charged with Robbery in violation of R.C. 2911.02. The indictment stated in pertinent part as follows:

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.

The case was extensively pre-tried and full discovery was provided by the plaintiff-appellee, State of Ohio (the "State"), to defense counsel. The case proceeded to jury trial on November 16, 2005.

In reviewing this case on direct appeal, the Eighth District described the facts and history of this case as follows:

{¶ 2} 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 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.

{¶ 3} 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.

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

\*2 {¶ 5} 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.

{¶ 6} 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.

{¶ 7} 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 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.

{¶ 8} 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.

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

*State v. Colon*, Cuyahoga App. No. 87499, 2006 -Ohio- 5335 at {¶2- 9}

The Eight District affirmed in part and reversed in part. In resolving the issue over which this Court has exercised jurisdiction, this Court stated as follows:

{¶ 19} 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.

{¶ 20} 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.

*Id* at ¶ 19-20. Thereafter, this Court accepted jurisdiction over both a certified conflict question and a proposition of law which raise the same issue: whether a defect in the indictment is waived if it is not raised at the trial court.

### **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.

In both the certified conflict question and the proposition accepted by this Court, the issue is the same: whether a material omission from an indictment is waived for purposes of appeal if not raised at the trial court level.

This case presents a straightforward set of facts. Colon was charged with robbery and the indictment did not contain the mens rea for theft (knowingly) or the judicially determined mens rea for inflicting or attempting to inflict harm (recklessly). At the trial court level, Colon did not object to this omission in the indictment.

Before this Court, Colon phrases the issue as whether a criminal defendant can raise this issue for the first time on appeal. The State, however, posits that a more accurate description of the issue is what standard of review should be applied when a defendant, for the first time on direct appeal, raises a claim that that the indictment contained a material omission. As explained below, the State believes that the standard of review that should be applied is that the defendant has waived the issue by

not raising it at the trial court level and that the defendant can succeed on appeal only by establishing plain error.

As explained below, the State contends that an application of a heightened waiver/plain error standard of review is sound judicial policy that will protect the interests of both the State and criminal defendants.

In a situation where a criminal defendant has not objected to an indictment at the trial level, application of a waiver/plain error standard of review will allow criminal defendant to present the issue to the appellate court and obtain relief for those rare cases where the alleged defect in the indictment truly prejudiced the defendant. Application of this waiver/plain error standard of review will also serve the State's interest in encouraging criminal defendants to raise this issue at the trial level when it can be remedied. The position advanced by the State reflects the prevailing view across the as courts apply a plain error standard of review as a means to encourage criminal defendants to object at the earliest possible time. *United States v. Cotton* (2002), 535 U.S. 625, 122 S.Ct. 178; *United States v. Vonn* (2002), 535 U.S. 55, 122 S.Ct. 1043, 152 L.Ed.2d 90. It also encourages the State to properly indict criminal defendants and it provides an incentive criminal defendants to raise the issue at the trial level when it can be remedied.

**A. *The indictment in this case is deficient***

Although not the primary issue before this Court, as a predicate matter, it must be determined whether the indictment in this case is deficient for failing to include the *mens rea* of knowingly and recklessly. Herein, Colon was charged with the crime of robbery. The crime of robbery contains two distinct *mens rea*. In order to be convicted

of robbery, the State must prove that the defendant "knowingly" committed a theft offense and, while doing so, "recklessly" did inflict, attempt to inflict, or threaten to inflict physical harm. In his brief to this Court, Colon argues, even though the robbery statute "makes no mention of the degree of culpability required," courts have interpreted the required mental states to be knowingly committed a theft offense, and recklessly inflicted, attempted to inflict, or threatened to inflict physical harm. Colon's merit brief at 7-8. The State agrees with Colon's statement of the law.

The indictment, which charged Colon with robbery, stated in pertinent part as follows:

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.

As pointed out by Colon, this indictment did not contain the mental states of "knowingly" and "recklessly." Colon argues that the lack of the knowingly and reckless *mens rea* renders this indictment deficient to which, the State agrees in part and disagrees in part with Colon. The lack of a judicially-determined *mens rea* of reckless in the indictment is error. *State v. O'Brien* (1987), 30 Ohio St. 3d 122, 124. The issue before the court, however, is whether, this error could amount to plain error or structural error because defendant did not object at the trial court level.

The State posits that the failure of the indictment to contain the *mens rea* of "knowingly" regarding the theft offense is not erroneous because the indictment referred to the crime of "theft" and the revised code section for theft, R.C. §2913.01 which contained the *mens rea* of knowingly in the statutory definition. Courts throughout this state have held that, the failure to include the *mens rea* for the theft component of a

robbery charge is not fatal if the indictment for robbery refers to the crime of theft and the revised code section for theft. *State v. Saunders* (Dec. 1, 1993), Fourth Dist. App. No. 1896, 1993 WL 524968; *State v. Akers* (March 30, 1995) Seventh Dist. App. No. 93 C.A. 248, 1995 WL 152492, see also, *State v. Bumphus* (1976), 53 Ohio App.3d 2d 171, *State v. McSwain* (1992), 79 Ohio App.3d 600. Thus, the indictment in this case was not fatally deficient because it did not contain the *mens rea* of knowingly regarding the theft offense.

The Sixth Circuit Court of Appeals came to the same conclusion in *Mira v. Marshall* (C.A.6, 1986), 806 F.2d 636, stated that an indictment for aggravated robbery which omits an allegation that the act is done knowingly is sufficient so long as it gives sufficient information to a defendant to defend himself and adequately prepare for trial. The Sixth Circuit held that the indictment charging appellant with aggravated robbery contained all of the elements of the offense as set forth in R.C. §2911.01(A)(1) and therefore adequately informed appellant of the charge against him.

Even though defendant now complains of this deficiency, he did not raise the issue at the trial court level. Colon waited until his direct appeal to raise this issue. Thus, the question for which this Honorable Court has accepted jurisdiction is what standard of review to apply to this issue when it is not raised until direct appeal. This is the issue over which this Court accepted jurisdiction. As explained below, the State's position is that Colon has waived this issue and that, because of this waiver, Colon can succeed on appeal only by establishing plain error. Applying a waiver/plain error analysis to the indictment in this case, it cannot be said that the indictment amounts to reversible error.

**B. General Rule in Ohio, Failure to object to an allegedly defective indictment constitutes a waiver**

It is well-settled that defects in an indictment must be raised prior to trial or be subject to waiver. R.C. §2941.29 states as follows:

No indictment or information shall be quashed, set aside, or dismissed, or motion to quash be sustained, or any motion for delay of sentence for the purpose of review be granted, nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment or information, unless the objection to such indictment or information, specifically stating the defect claimed, is made prior to the commencement of the trial, or at such time thereafter as the court permits.

Similarly, Crim. R. 12(C)(2) states as follows:

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: ... 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)

Indeed, this Court has consistently held that the failure to timely object to the allegedly defective indictment constitutes a waiver of the issues involved. *State v. Joseph* (1995), 73 Ohio St.3d 450, 455; *State v. Mills* (1992), 62 Ohio St.3d 357, 363, ("Under Crim.R. 12 [B] and 12[G], alleged defects in an indictment must be asserted before trial or they are waived."); *State v. Carter* (2000), 89 Ohio St.3d 593, 598, (this Court applied a waiver/plain error analysis where indictment for rape was missing an element.) *State v. Joseph* (1995), 73 Ohio St.3d 450, 455 (this Court applied waiver/plain error analysis when capital indictment failed to allege that the offender was the principal offenders in the commission of the aggravated murder); *State v. Biros*, 78 Ohio St.3d 426, 431, 1997-Ohio-204 (this Court applied waiver/plain error analysis to claim that that capital specification contained a material omission).

**C. Standard of Review: When a criminal defendant fails, at the trial court level, to raise a claim based on the indictment, such an issue is reviewed at the appellate level under a waiver/plain error standard of review.**

**1. Standard of Review**

The State's position in this case is that the failure of Colon to object to the indictment subjects his claim to a waiver/plain error standard of review on direct appeal. As explained below, when a defendant fails to object to a material omission in an indictment, a waiver/plain error standard of review should be applied. This is the position of this Court, *State v. Carter, supra*; the United States Supreme Court, *United States v. Cotton* (2002), 535 U.S. 625, 122 S.Ct. 1781; and the Sixth Circuit, *Mira v. Marshall* (C.A.6, 1986), 806 F.2d 636.

**2. Standard of Review applied by the Eighth District**

While the Eighth District was correct in determining that Colon had waived the issue regarding the deficiency of the indictment, the State respectfully submits that the appellate court's waiver analysis was incomplete. The Eighth District merely stated that Colon had waived the issue and thus overruled the assignment of error. Left out by the Eighth District was the second prong of the waiver analysis: whether the alleged error amounted to plain error under Crim.R. 52(B). Indeed, in cases from this Court where it was determined that a criminal defendant waived challenge to an indictment, this Honorable Court noted the waiver and then analyzed the issue under a plain error standard of review. See, e.g., *State v. Joseph, supra*. Under the proper standard of review, plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise. *Id* at 455; *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus. Further, only errors affecting substantial rights

constitute plain error. Crim.R. 52(B). "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long* at paragraph three of the syllabus.

Thus, the Eighth District's waiver analysis was incomplete as the court below did not determine whether the outcome of Colon's trial would have clearly been otherwise had the indictment contained the mental states of knowingly and recklessly. The Eighth District also should have analyzed whether it was necessary to notice this error in order prevent a manifest miscarriage of justice.

**3. *The indictment in this case does not amount to plain error.***

Notwithstanding the incomplete analysis by the Eighth District, reversal is not required because the deficiency in this indictment does not amount to plain error. The outcome of this trial would not "clearly have been otherwise" had the indictment contained the mental states of knowingly and recklessly. Colon was charged with the crime of robbery. The indictment tracked the language of the statute and provided sufficient notice to Colon as to what crime he had been charged with. Importantly, Colon has never argued any prejudice as a result of this indictment. He has never claimed how the indictment in this case affected his trial defense to the charge of robbery. Surely, the lack of the mental states in the indictment did not result in a manifest miscarriage of justice. Crim. R. 52.

In his brief, Colon argues waiver does not apply because 1) the failure to list the court-determined *mens rea* is a "jurisdictional defect" and that 2) the indictment in this case failed to "charge an offense." The State respectfully disagrees with both of these arguments.

**D. Defect of failing to specify the mens rea is not a jurisdictional defect**

As stated above, the State agrees that the indictment was deficient for failing to list the judicially-determined mental state of reckless. The State, however, disagrees with Colon's argument that this deficiency is a *jurisdictional* defect. Ohio's criminal jurisdictional statute R.C.2901.11 provides that "[a] person is subject to criminal prosecution and punishment in this state if \* \* \* [h]e commits an offense under the laws of this state, any element of which takes place in this state[.]" The trial court had subject matter jurisdiction over this case because the Grand Jury charged Colon with committing the crime of robbery in the State of Ohio.

**1. The United States Supreme Court has specifically held that a material omission in an indictment is not a jurisdictional defect and that the failure to complain at the trial court level subject the defect to a waiver/plain error standard of review on appeal.**

Colon's first argument to avoid the application of the waiver/plain error standard of review is that the defect in this indictment is a jurisdictional defect. The United States Supreme Court has rejected Colon's argument. In *United States v. Cotton* (2002), 535 U.S. 625, 122 S.Ct. 1781 the United States Supreme Court addressed the issue of whether a material omission in an indictment is a "jurisdictional defect." The Court made two specific holdings that are relevant to the case at bar. First, the Court explained that such a defect is **not** a jurisdictional defect. Second, the Court went on to explain that a material omission in an indictment that was not objected-to at the trial court level is waived and, therefore, subject to a plain error review on appeal. See also, *United States v. Vonn* (2002), 535 U.S. 55, 122 S.Ct. 1043, 152 L.Ed.2d 90 (Applying plain error review to claims of a deficient guilty plea where the defendant did not object at trial.)

**2. Other states and jurisdictions have held that a material omission in an indictment is not a jurisdictional defect and that the failure to complain at the trial court level subject the defect to a waiver/plain error standard of review on appeal**

In addition to the United States Supreme Court, other Courts that have addressed this issue have held that a material omission in an indictment is not a jurisdictional defect. Recently, the Alabama Supreme Court came to this conclusion. *Ex parte Seymour v. State* (Ala. 2006), 946 So.2d 536. The Seymour Court listed other States that held that a defect in the indictment is non-jurisdictional and stated as follows:

Jurisdiction is "[a] court's power to decide a case or issue a decree." *Black's Law Dictionary* 867 (8th ed.2004). Subject-matter jurisdiction concerns a court's power to decide certain types of cases. *Woolf v. McGaugh*, 175 Ala. 299, 303, 57 So. 754, 755 (1911) (" 'By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought.' " (quoting *Cooper v. Reynolds*, 77 U.S. (10 Wall.) 308, 316, 19 L.Ed. 931 (1870))). That power is derived from the Alabama Constitution and the Alabama Code. See *United States v. Cotton*, 535 U.S. 625, 630-31, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)( subject-matter jurisdiction refers to a court's "statutory or constitutional power" to adjudicate a case). In deciding whether Seymour's claim properly challenges the trial court's subject-matter jurisdiction, we ask only whether the trial court had the constitutional and statutory authority to try the offense with which Seymour was charged and as to which he has filed his petition for certiorari review.

Under the Alabama Constitution, a circuit court "shall exercise general jurisdiction in all cases except as may be otherwise provided by law." Amend. No. 328, § 6.04(b), Ala. Const.1901. The Alabama Code provides that "[t]he circuit court shall have exclusive original jurisdiction of all felony prosecutions ...." § 12-11-30, Ala.Code 1975. The offense of shooting into an occupied dwelling is a Class B felony. § 13A-11-61(b), Ala.Code 1975. **As a result, the State's prosecution of Seymour for that offense was within the circuit court's subject-matter jurisdiction, and a defect in the indictment could not divest the circuit court of its power to hear the case.**

The United States Supreme Court has long held that "defects in an indictment do not deprive a court of its power to adjudicate a case." *Cotton*, 535 U.S. at 630, 122 S.Ct. 1781. As Justice Holmes stated in *Lamar v. United States*, 240 U.S. 60, 64, 36 S.Ct. 255, 60 L.Ed. 526 (1916), "[t]he objection that the indictment does not charge a crime ... goes only to the merits of the case."

A number of states agree. See *Sawyer v. State*, 327 Ark. 421, 938 S.W.2d 843 (1997); *Howell v. State*, 421 A.2d 892, 895 (Del.1980); *Ford v. State*, 330 Md. 682, 625 A.2d 984 (1993); *Roth v. State*, 714 P.2d 216 (Okla.Crim.App.1986); *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *Studer v. State*, 799 S.W.2d 263 (Tex.Crim.App.1990); but see *State v. Byington*, 135 Idaho 621, 21 P.3d 943 (2001). The Supreme Court of Missouri, addressing this precise issue, framed the issue succinctly: **"Subject matter jurisdiction of the circuit court and the sufficiency of the information or indictment are two distinct concepts. The blending of these concepts serves only to confuse the issue to be determined."** *State v. Parkhurst*, 845 S.W.2d 31, 34-35 (Mo.1992). We find this approach persuasive and consistent with both the Alabama Constitution and the Alabama Code.

*Ex parte Seymour*, *supra* at 538-539 (emphasis added).

Similarly, in *United States v. Hernandez* (C.A.7. 2003), 330 F.3d 964, the

Seventh Circuit stated as follows:

Defendant Stevenson argues that his conviction on Count 3 must be overturned because the indictment did not allege any *mens rea* and thus fails to charge an offense. [FN7] Stevenson failed to raise this argument below; therefore, we review it here only for plain error. Stevenson attempts to avoid the plain error standard of review by arguing that an indictment that negates an element of the offense fails to confer subject-matter jurisdiction on the district court; thus, we should consider the question of jurisdiction *de novo*. Stevenson's argument fails, however, because 18 U.S.C. § 3231 confers jurisdiction on district courts to try charges framed by federal indictments, and, as we have repeatedly held, **"district judges always have subject-matter jurisdiction based on any indictment purporting to charge a violation of federal criminal law ... so errors in a non-frivolous indictment do not strip the district court of jurisdiction under § 3231."** *United States v. Bjorkman*, 270 F.3d 482, 490 (7th Cir.2001) **Consequently, the issue is not jurisdictional and plain error applies.** Plain-error review of the sufficiency of an indictment is an extremely difficult standard to overcome because we will reverse only if the indictment "is so obviously defective as not to charge the offense by any reasonable construction." *United States v. Wabaunsee*, 528 F.2d 1, 2 (7th Cir.1975) (quotations omitted).

FN7. Count 3 of the indictment charged Stevenson with violation of § 861, alleging that he "employed, hired, used, induced and enticed" minors to assist in avoiding detection of violations of the drugs laws. Section 861, however, contains the *mens rea* "knowingly and intentionally," which was omitted from the indictment.

*Hernandez, supra* at 978.

Both *Seymour* and *Hernandez* stand for the propositions that a) courts have jurisdiction over any indictment that purports to charge a statutory criminal offense regardless of any technical error in the charging instrument and b) plain error applies to indictment errors raised for the first time on appeal.

***E. The indictment in this case, was still sufficient to “charge an offense.”***

Colon’s next argument to avoid the application of waiver to this case is his argument that the indictment was insufficient to “charge an offense.” This argument fails. Colon was indicted with the crime of robbery. Robbery is a criminal offense. Whether it has been defectively charged is different question. Colon was specifically notified of the crime, the victim, and the date of the offense. Importantly, Colon has not argued that the crime of robbery does not exist. Indeed the indictment in this case was not “so obviously defective as not to charge the offense by any reasonable construction.” *Hernandez, supra*, citing *United States v. Wabaunsee*. Nor has Colon argued how the indictment affected his trial defense to the charge of robbery.

***F. Colon’s description of the issue is misleading.***

The central issue in this case is whether the failure to challenge an indictment at the trial court waives the issue on appeal. Colon phrases this issues as follows: “Can Colon challenge the defect for the first time on appeal?” Colon’s merit brief at 6. This description of the issue is misleading. The State submits that the question is not *whether* Colon can challenge the defect for the first time on appeal; but rather, **what is the standard of review** for a defendant who challenges the issue for the first time on appeal.

Herein Colon is free to challenge the issue for the first time on appeal. However, because he has waived the issue by not raising the issue at the trial court level, Colon is subject to a waiver/plain error standard of review for this issue.

**1. Application of a waiver/plain error standard of review is sound policy to protect all interests**

Finally, the State submits that an application of a waiver/plain error standard of review is sound judicial policy that will protect the interests of both the State and criminal defendants.

In a situation where a criminal defendant has not objected to an indictment at the trial level, application of a waiver/plain error standard of review will allow criminal defendant to present the issue to the appellate court and obtain relief for those rare cases where the alleged defect in the indictment truly prejudiced the defendant.

Application of this waiver/plain error standard of review will also serve the State's interest in encouraging criminal defendants to raise this issue at the trial level when it can be remedied quickly and efficiently. Indeed, commentators have noted the problem that results if defendant is permitted to raise an issue for the first time on appeal and a heightened standard of review is not applied. See 4 Wayne R. LaFare et al., *Criminal Procedure* § 19.1(d), at 741 n. 50 (2d ed. 1999) ("The facts of various cases indicate that the practice of sandbagging, by deliberately postponing the objection, continues as to these defects, particularly the failure to charge an offense."). Applying this principle, the Third Circuit recently allowed a defendant to raise an indictment challenge for the first time on appeal, but subjected the claim to a heightened standard of review. *United States v. Vitillo* (3<sup>rd</sup> Cir. 2007), \_\_\_ F.3d \_\_\_, 2007 WL 1805332. The Third Circuit stated:

That is because " 'indictments which are tardily challenged are liberally constructed in favor of validity.' " *United States v. Wander*, 601 F.2d 1251, 1259 (3d Cir.1979) (citing *United States v. Pheaster*, 544 F.2d 353, 361 (9th Cir.1976)); see also *United States v. Watkins*, 709 F.2d 475, 478 n. 2 (7th Cir.1983). Although the failure of an indictment to state an offense is "a fundamental defect which can be raised at any time," judicial interests "require that such challenges be made at the earliest possible moment." *Pheaster*, 544 F.2d at 361. One interest is in avoiding the needless waste of limited judicial resources. *Id.*; see also *United States v. Panarella*, 277 F.3d 678, 686 (3d Cir.2002) (criticizing the rule permitting a defendant who enters an unconditional guilty plea to challenge on appeal the charging instrument's failure to allege facts sufficient to state an offense). Another important interest is in discouraging tactical delays by defendants seeking "a convenient ground of appeal" in the event of a guilty verdict.

The Third Circuit went on to uphold the indictment "unless it is so defective that it does not, by any reasonable construction, charge an offense." *Id.*

This standard of review has been established as a means to encourage criminal defendants to object at the earliest possible time. *United States v. Cotton* (2002), 535 U.S. 625, 122 S.Ct. 178; *United States v. Vonn* (2002), 535 U.S. 55, 122 S.Ct. 1043, 152 L.Ed.2d 90. If this Court chooses lower the threshold and not employ a heightened waiver/plain error standard of review for unobjected-to indictment claims, there will be no incentive for a criminal defendant to object to an indictment at trial. The result will be a lack of finality in criminal trial, where lawyers will resort to technical trial gamesmanship to secure later appellate reversals. If there is a defect in the indictment, the issue should be raised and remedied at the earliest possible time, before the trial court. Such potential defects should not to be stored away to be used as a trap on appeal.

Accordingly, the position advocated by the State is sound judicial policy. It encourages the State to properly indict criminal defendants and it encourages criminal defendants to raise the issue at the trial level when it can be remedied.

**CONCLUSION**

For the foregoing reasons, the State of Ohio respectfully asks that this Court affirm the judgment of the court below and, in so doing, hold that a criminal defendant who fails to challenge a defective indictment has waived the issue and, therefore, must overcome a plain error standard of review. Applying this standard to the facts of this case, Colon waived his challenge to the indictment and has not established that, but for any error in the indictment, the outcome of the trial would clearly have been otherwise.

Respectfully submitted,

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**SERVICE**

A copy of the foregoing Merit Brief of Appellee has been mailed this 3<sup>rd</sup> day of July, 2007, to Cullen Sweeney, Assistant Public Defender, 310 Lakeside Avenue, Suite 200, Cleveland, OH 44113.

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