

IN THE SUPREME COURT OF OHIO

2006-2250 & 2006-2139

STATE OF OHIO :  
Appellee :  
-vs- :  
VINCENT COLON :  
Appellant :

On Appeal and Notice of  
Certified Conflict from  
the Cuyahoga County  
Court of Appeals, Eighth  
Appellate District, Case  
No. 87499

---

**APPELLANT'S REPLY BRIEF**

---

ROBERT L. TOBIK, ESQ.  
Cuyahoga County Public Defender  
BY: CULLEN SWEENEY, ESQ. (COUNSEL  
OF RECORD), #0077187  
Assistant Public Defender  
310 Lakeside Avenue  
Suite 200  
Cleveland, OH 44113  
(216) 443-7583  
(216) 443-3632 FAX

COUNSEL FOR APPELLANT, VINCENT  
COLON

JASON A. MACKE, ESQ.  
55 w. 12<sup>TH</sup> Street, Rm. 255F  
Columbus, Ohio 43210  
(614) 247-4236  
(614) 292-5511 FAX

COUNSEL FOR AMICUS CURIAE, OHIO  
ASSOCIATION OF CRIMINAL DEFENSE  
LAWYERS

WILLIAM MASON, ESQ.  
Cuyahoga County Prosecutor  
BY: JON W. OEBKER, ESQ. (COUNSEL  
OF RECORD), #0064255  
Assistant Prosecuting Attorney  
The Justice Center – 9<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, OH 44113  
(216) 443-7800

COUNSEL FOR APPELLEE, THE STATE  
OF OHIO

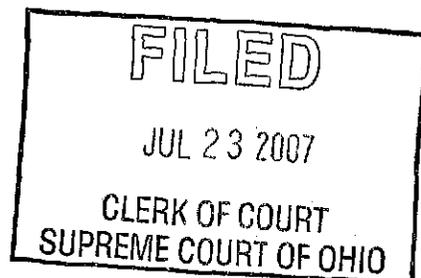


TABLE OF CONTENTS

PAGES

TABLE OF AUTHORITIES ..... ii

INTRODUCTION.....1

LAW AND ARGUMENT.....2

***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.*

CONCLUSION .....16

CERTIFICATE OF SERVICE .....16

## TABLE OF AUTHORITIES

### CASES

<i>Arizona v. Fulminante</i> (1991), 499 U.S. 279 .....	2
<i>Batson v. Kentucky</i> (1986), 476 U.S. 254 .....	3
<i>Gideon v. Wainwright</i> (1963), 372 U.S. 335 .....	3
<i>Harris v. State</i> (1932), 125 Ohio St. 2d 257 .....	3, 6
<i>Joseph v. Coyle</i> (6 <sup>th</sup> Cir. 2006), 469 F.3d 441 .....	8, 12
<i>McKaskle v. Wiggins</i> (1984), 465 U.S. 168 .....	3
<i>Mira v. Marshall</i> (6 <sup>th</sup> Cir. 1986), 806 F.2d 636 .....	13
<i>State v. Biros</i> (1997), 78 Ohio St. 3d 426 .....	11, 12
<i>State v. Buehner</i> (2006), 110 Ohio St. 3d 403 .....	1
<i>State v. Carter</i> (2000), 89 Ohio St. 3d 593 .....	12, 15
<i>State v. Childs</i> (2000), 88 Ohio St. 3d 194 .....	3
<i>State v. Childs</i> (2000), 88 Ohio St. 3d 558 .....	3, 4, 6, 13
<i>State v. Cimpritz</i> (1953), 158 Ohio St. 490 .....	3
<i>State v. Joseph</i> (1995), 73 Ohio St. 3d 450 .....	8, 11, 12, 15
<i>State v. Martin</i> (2004), 103 Ohio St. 3d 385 .....	2, 3, 14
<i>State v. Mills</i> (1992), 62 Ohio St.3d 357 .....	12
<i>State v. Pelfrey</i> (2007), 112 Ohio St. 3d 422 .....	5, 6
<i>State v. Reinhart</i> , Van Wert App. No. 15-06-07, 2007 Ohio 2284 .....	1
<i>State v. Shugars</i> (2006), 165 Ohio App. 3d 379 .....	11
<i>State v. Waddell</i> (1996), 75 Ohio St. 3d 163 .....	14
<i>State v. Wozniak</i> (1961), 172 Ohio St. 517 .....	3
<i>Sullivan v. Louisiana</i> (1993), 508 U.S. 275 .....	3
<i>Tumey v. Ohio</i> (1927), 273 U.S. 510 .....	3
<i>United States v. Calandra</i> (1974), 414 U.S. 338 .....	7
<i>United States v. Cotton</i> (2002), 535 U.S. 625 .....	13
<i>United States v. McFerron</i> (C.A. 6, 1998), 163 F.3d 952 .....	3
<i>United States v. Olano</i> (1993), 507 U.S. 725 .....	10, 14
<i>United States v. Resendiz-Ponce</i> (2007), __ U.S. __, 127 S.Ct. 782 .....	6
<i>United States v. Vitillo</i> (3 <sup>rd</sup> Cir. 2007), __ F.3d __, 2007 WL 1805332 .....	7
<i>United States v. Wabaunsee</i> (7 <sup>th</sup> Cir. 1975), 528 F.2d 1 .....	7
<i>Vazquez v. Hillery</i> (1986), 474 U.S. 254 .....	3, 6-8
<i>Walker v. Georgia</i> (1984), 467 U.S. 39 .....	3

### CONSTITUTIONAL PROVISIONS

Article I, §10 of the Ohio Constitution .....	3
---	---

### RULES

Crim.R. 7 .....	10, 11
Crim.R. 52 .....	10, 11

## INTRODUCTION

Appellant Vincent Colon is serving a seven-year sentence for robbery despite the fact that neither a grand nor petit jury ever found all the elements of the crime beyond a reasonable doubt. This Court accepted this case as both a certified conflict and a discretionary appeal to determine whether the omission of an essential element from an indictment requires reversal of conviction when the issue is raised for the first time on direct appeal.

In Colon's initial brief, he argued that his indictment omitted essential mens rea elements, that such omissions rendered his indictment deficient, and that such deficiencies could be challenged for the first time on appeal. In its response, the State agrees that robbery contains two judicially interpreted mens rea elements (State's Br. at 4-6), that the omission of the mens rea element of recklessness rendered Colon's indictment defective (State's Br. at 6),<sup>1</sup> and that Colon could raise the issue for the first time on appeal (State's Br. at 7-9 and 15). That State also agrees with Mr. Colon that the Eighth District erred in reviewing his claim. (State's Br. at 9).

The sole issue disputed by the parties is how the Eighth District should have handled Colon's defective indictment claim. The State contends that the Eighth District should have reviewed Colon's claim for plain error and only reversed his conviction if an indictment including all the essential elements of the offense would clearly have changed the outcome of his

---

<sup>1</sup> The State maintains that the indictment's reference to "a theft offense" was sufficient to implicitly incorporate the mens rea for the associated theft offense. (State's Br. at 6-7). Colon does not contest that point and focuses his discussion on the omission of the mens rea element associated with the infliction, attempted infliction, or threatened infliction of physical harm. He does note, however, that the indictment is flawed in another respect; namely, the robbery count failed to identify the *specific* predicate theft offense charged by the State. *Cf. State v. Buehner* (2006), 110 Ohio St. 3d 403, 406 (noting that the indictment of an offense which contains, as an element, a predicate offense is sufficient as long as it "specifically identified" the predicate offense); *see also State v. Reinhart*, Van Wert App. No. 15-06-07, 2007 Ohio 2284, ¶¶ 11-19 (reversing a conviction because the indictment failed to properly charge a predicate offense for

trial. With this reply brief, Colon demonstrates why the State's "plain error" review is inconsistent with a criminal defendant's constitutional right to a grand jury indictment, with this Court's precedent, with federal law, and with sound public policy.

### 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.*

Both appellant and the State agree that, when, as here, an indictment fails to state an essential element of the offense, that flaw may be challenged for the first time on direct appeal. The parties differ, however, on when the omission of an essential element from an indictment requires reversal. It is Colon's position that the complete omission of an essential element renders an indictment fatally defective such that reversal is required absent an express waiver of a defendant's right to indictment. After first outlining his position, Colon addresses the flaws of the State's "plain error" argument.

**A. The Omission of an Essential Element from the Grand Jury Indictment Constitutes a Structural Error That Requires Reversal If Raised on Direct Appeal.**

The omission of an essential element from a grand jury indictment is structural error which does not require a showing of prejudice and which leads to automatic reversal. Structural errors are "defect[s] affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante* (1991), 499 U.S. 279, 309-10. Such errors "permeate 'the entire conduct of the trial from beginning to end' so that the trial cannot 'reliably serve its function as a vehicle for determining guilt or innocence.'" *State v. Martin*

---

vehicular manslaughter). This flaw is not before this Court.

(2004), 103 Ohio St. 3d 385, 396-97 (citations omitted). Structural errors call into doubt the fundamental fairness of the criminal proceeding such that prejudice is presumed. *See e.g. Sullivan v. Louisiana* (1993), 508 U.S. 275 (erroneous reasonable doubt instruction); *Vazquez v. Hillery* (1986), 474 U.S. 254 (racial discrimination in the selection of grand jurors); *Batson v. Kentucky* (1986), 476 U.S. 79 (racial discrimination in the selection of a petit jury); *Walker v. Georgia* (1984), 467 U.S. 39 (right to a public trial); *McKaskle v. Wiggins* (1984), 465 U.S. 168 (right to self-representation); *Gideon v. Wainwright* (1963), 372 U.S. 335 (right to counsel); *Tumey v. Ohio* (1927), 273 U.S. 510 (biased trial judge); *United States v. McFerron* (C.A. 6, 1998), 163 F.3d 952 (denial of right to exercise peremptory challenges).

As a core requirement of a defendant's right to a grand jury indictment under Article I, Section 10 of the Ohio Constitution, an indictment is only constitutionally sufficient if it contains all the elements of the offense. *State v. Childs* (2000), 88 Ohio St. 3d 558, 565. Although the State steadfastly maintains that Colon's indictment charged the offense of robbery, (State's Br. at 14), it only does so by ignoring well-established precedent from this Court.<sup>2</sup> To indict Colon with robbery, the grand jury must find probable cause to support *each* of the essential elements of robbery. *Harris v. State* (1932), 125 Ohio St. 2d 257, 264. When, as here, it does not find an essential element of the offense, no criminal offense is charged. *Id.*; see also *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. Childs* (2000), 88 Ohio St. 3d 194, 199. The State does not argue that *Harris*, *Cimpritz*, *Wozniak*, and *Childs* should be overruled or that they do not apply to this case. Rather, it fails, quite inexplicably, to make even a passing reference to these cases.

---

<sup>2</sup> Under the State's misguided understanding of what is necessary to charge offense, an indictment which simply says "Robbery" would be sufficient. If the State is correct, the grand jury is a vestigial institution that should be eliminated.

An indictment which fails to charge all the elements of an offense is a quintessential structural error. The omission of an essential element from a grand jury indictment is a fundamental defect that “permeates” the entire course of the trial proceedings. Indeed, the criminal prosecution begins with a constitutional error—the return of an indictment that fails to contain all the elements of the crime allegedly charged. Because of the flawed indictment, 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. Indeed, the trial court failed to instruct the jury that the State had to prove, among other things, that Colon recklessly inflicted physical harm. As a result, the State was improperly relieved of its burden on one of the essential elements of robbery, and Colon’s conviction does not reflect a jury finding on each of the essential elements.

As discussed below, the principle that an indictment that fails to allege all of the elements of a crime creates a structural error finds support in both this Court’s precedent and federal case law.

1. Ohio Supreme Court Precedent: Structural Error in Practice

In *State v. Childs*, this Court affirmed the reversal of a conviction for conspiracy to commit aggravated trafficking because the indictment failed to specify an essential element of the offense (a specific, substantial overt act in furtherance of the conspiracy). (2000), 88 Ohio St. 3d 194, 199. Although the flawed indictment was *not* challenged prior to trial, that had no effect on this Court’s analysis. *Id.* at 200 (Cook, J. dissenting). Although this Court did not specifically refer to the error as “structural,” it treated the error as such by not requiring the defendant to demonstrate prejudice flowing from the defect in the indictment. *Childs* is therefore directly on point and controls the outcome of this case.

This Court's recent decision in *State v. Pelfrey* (2007), 112 Ohio St. 3d 422 provides further support for treating the omission of an essential element from an indictment as a structural error. In *Pelfrey*, the defendant was indicted for tampering with records, a misdemeanor offense which was enhanced to a third-degree felony because the tampering allegedly involved government records. *Id.* at 424. Although the indictment included the aggravating "government records" element and the jury was instructed on that element, the verdict form did not specify the degree of the offense or indicate that the aggravating element had been found, as required by R.C. 2945.75. *Id.* at 424-25. This Court found that defect fatal and vacated the defendant's conviction despite the defendant's failure to raise the issue at trial, despite the verdict form's incorporation of the language of the indictment, and despite evidence showing the presence of the aggravated element at trial. *Id.* at 426. In short, this Court reversed the conviction due to a statutory error omitting an element of the offense, raised for the first time on appeal, without requiring any demonstration of prejudice.

The constitutional error in this case presents a more fundamental defect in the proceedings. *Pelfrey* involved a *statutory* violation which *may* have resulted in a conviction for an aggravated offense in which the petit jury did not find the all the essential elements of the offense. Although the defendant was properly charged with the aggravating offense and the jury instructed on the aggravating element, one could not be sure, given the verdict form, that the jury actually found that aggravating element. Thus, reversal was appropriate. The instant case involves a *constitutional* error that *did* result in a conviction despite the failure of both the grand jury and the petit jury to find all the essential elements of robbery. Such a fundamental defect, more certain and severe than the flawed verdict form in *Pelfrey*, requires reversal without proof of specific prejudice. Ironically, the implications of reversal in this case are also far less severe

than in *Pelfrey*. In *Pelfrey*, the defendant, by virtue of a flawed verdict form, now stands convicted of a misdemeanor instead of a third-degree felony and cannot be retried on the greater offense. A reversal in this case would permit a retrial if the State secures a proper indictment for robbery.

Finally, it should be noted that the State does not dispute the notion that an indictment that fails to charge an offense constitutes a structural error. The State simply argues that an indictment charges an offense even if it omits essential elements. Such a position cannot be squared with this Court's precedent. See e.g., *Harris* and *Childs*, *supra*.

2. Federal Case Law: No Prejudice Required.

The United States Supreme Court has not yet decided whether the omission of an essential from an indictment constitutes a structural error. In *United States v. Resendiz-Ponce*, the Court granted certiorari to decide the specific question of "whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error." (2007), \_\_\_ U.S. \_\_\_, 127 S.Ct. 782, 785. Although a majority of the Court found it unnecessary to resolve that question, holding instead that no essential element had been omitted, the dissent made clear that an indictment that omits an essential element is structural error. *Id.* at 793 (Scalia, J. dissenting).

While the United States Supreme Court has not squarely decided whether the error presented in this case is structural, it has previously found structural error in conjunction with other defects in the grand jury proceeding. In *Vazquez v. Hillery*, it held that racial discrimination in the selection of a grand jury is a structural error. (1986), 474 U.S. 254, 263-64. In *Vazquez*, the Court explained that:

[A] conviction cannot be understood to cure the taint attributable to a charging body selected on the basis of race. Once having found discrimination in the

selection of a grand jury, we simply cannot know that the need to indict would have been assessed in the same way by a grand jury properly constituted. The overriding imperative to eliminate this systemic flaw in the charging process, as well as the difficulty of assessing its effect on any given defendant, requires our continued adherence to a rule of mandatory reversal.

*Id.* at 264. Similarly, a conviction cannot be understood to cure the defect of a charging instrument that omits an essential element of the offense, particularly when, as here, that element is not even found by the petit jury.

Although the federal circuit courts of appeal have not always referred to the omission of an essential element as a “structural error,” their analysis has generally focused on whether the indictment sufficiently states all of the elements of the charged offense irrespective of prejudice. (Appellant’s Merit Br. at 13). This is true even when the indictment is challenged for the first time on direct appeal. The only difference is that, when the challenge is raised for the first time on appeal, the conviction is only vacated if the indictment “fails *both* to allege an essential element of the offense *and* to contain language that can be reasonably construed to supply the missing element.” See e.g. *United States v. Wabaunsee* (7<sup>th</sup> Cir. 1975), 528 F.2d 1, 2-3; *United States v. Vitillo* (3<sup>rd</sup> Cir. 2007), \_\_\_ F.3d \_\_\_, 2007 WL 1805332, \*5. None of the federal case law relied on by the State or the appellant requires a demonstration of prejudice in order to justify a reversal.

### 3. Treating Indictments Which Omit an Essential Element As a Structural Error is Good Public Policy

The grand jury is a venerable institution which serves the interests of the State and protects the rights of citizens. 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. However, its role is much more expansive than merely making probable cause determinations:

The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense -- all on the basis of the same facts. Moreover, '[the] grand jury is not bound to indict in every case where a conviction can be obtained.'

*Vazquez*, 474 U.S. at 263 (citations omitted). To permit prosecutions for crimes not fully presented or indicted by the grand jury would make that institution of little relevance. If the State can secure a conviction regardless of what, if any, offense was indicted by the grand jury, it has no incentive to take that proceeding seriously, and the grand jury's constitutional role in the administration of justice would be substantially eroded. Indeed, the State has every incentive to secure indictments that encompass only some of the essential elements of the crime as that would certainly be easier. Even though it concedes here that Colon's indictment is defective, the State has proposed a remedy, i.e., review for plain error, that it contends will generally not impede future trials based on similarly defective indictments.

The State argues that it is better public policy to permit convictions based on materially defective indictments because otherwise "[t]he result will be a lack of finality in criminal trial[s]." (State's Br. at 16). The State is wrong, even assuming that an interest in finality should trump the constitutional role of the grand jury. Indeed, if this Court wants to ensure the finality of criminal convictions, it should not excuse sloppy and incomplete grand jury indictments. Such flawed indictments merely lead to extensive litigation in both state and federal court. One such example is *State v. Joseph* (1995), 73 Ohio St. 3d 450, 455, a case prominently relied on by the State. In *Joseph*, this Court rejected arguments regarding the defects in the defendant's indictment. 73 Ohio St. 3d at 455. However, eleven years later, the Sixth Circuit Court of Appeals affirmed the granting of a habeas corpus petition based, in part, on the defects in the indictment. *Joseph v. Coyle* (6<sup>th</sup> Cir. 2006), 469 F.3d 441, 445 and 463-64. As a consequence of

the flawed indictment, the defendant's death penalty was vacated. Defective indictments lead to flawed proceedings and imperil the validity of criminal convictions and sentences, none of which furthers the public's legitimate interest in the finality of judgments.

The State is also concerned that reversals for "technical errors in the charging instrument" will give criminal defendants a perverse incentive to "store[] away" indictment defects "to be used as a trap on appeal." (State's Br. at 14 and 16). The State's concerns are both exaggerated and misplaced. As an initial matter, this case does *not* present a "technical" defect in the indictment but rather a substantive defect involving the complete omission of an essential element of the offense. As such, finding structural error in this case hardly sets up a trap for the unwary prosecutor who forgets to dot the "i's" and cross the "t's." Rather, it provides a remedy when the State fails to perform the most basic (yet fundamental) of tasks: secure an indictment from an independent grand jury that charges all the essential elements of the offense. Moreover, the State is wrong that defendants lack an incentive to challenge fatally defective indictments in the trial court. If the State is forced to present the case properly to the grand jury, it is certainly possible that the grand jury would exercise its authority to charge a lesser offense or no bill the case. Moreover, even if the State is correct that defense attorneys may see a strategic advantage to not objecting to an indictment in a particular case, nothing prevents the State from doing its job and correcting "quickly and efficiently" what is generally an obvious error.

The public would be better served if the State were held to what the Ohio Constitution requires—indictments that allege all the essential elements of an offense. Although treating fundamentally flawed indictments as structural error may result in further proceedings in some cases, it will ultimately result in advantages that go beyond the already important goal of respecting the right to indictment. For example, had this case been properly indicted, the ensuing

trial would have been fair because the defendant would have been on notice of the elements of the offense and the jury would have been instructed accurately regarding those elements. Instead, when cases are not properly charged, the ensuing trial is oftentimes flawed, and the end result is verdicts and sentences that are subject to reversal, more litigation, and less finality. In short, it is good public policy to treat the fundamental defect in this case as a structural error.

**B. The State's Plain Error Argument Is Flawed.**

The State contends that Colon waived all but plain error by failing to object to the defective indictment in the trial court and that reversal is only warranted in those “rare cases where the alleged defect in the indictment truly prejudiced the defendant.” (State’s Br. at 15).

The State’s plain error argument is flawed in several respects.

1. An Indictment That Omits an Essential Element Must be Waived in Writing and In Open Court.

In urging this Court to review the deficient indictment for plain error review, the State fails to consider the impact of Rule 7 of the Ohio Rules of Criminal Procedure.

In general, the failure to object at trial results in the forfeiture of a claimed error on appeal. *United States v. Olano* (1993), 507 U.S. 725, 733. Although “waiver” and “forfeiture” are often used interchangeably, they are actually distinct concepts. “Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the ‘intentional relinquishment or abandonment of a known right.’” *Id.* This distinction has particular significance in conjunction with the constitutional right to a grand jury indictment.

Although forfeited errors are generally reviewed only for plain error pursuant to Rule 52(B), the constitutional right to an indictment cannot be forfeited. Rule 7(A) of the Rules of Criminal Procedure only permits the explicit waiver of that right and such waiver must be “in writing and in open court.” In other words, although most defects may be forfeited, the right to

an indictment can only be intentionally relinquished. “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. Because Colon’s indictment omitted an essential element and therefore failed to charge an offense, the indictment was fatally defective. Such a defect can only be remedied by the defendant’s knowing waiver as prescribed by Rule 7(A). Because no such waiver occurred in this case, Rule 52(B)’s plain error provision does not apply.

2. This Court Has Not Previously Applied Plain Error to Indictments Omitting an Essential Element.

Although the State cites four of this Court’s prior cases for the proposition that “this Court has consistently held that the failure to timely object to the allegedly defective indictment constitutes a waiver of the issues involved,” (State’s Br. at 8), none of these cases held that the omission of an essential element was subject to plain error review.

Two of the cases cited by the State involved capital specifications with “technical errors.” *State v. Joseph* (1995), 73 Ohio St. 3d 450, 456-57; *State v. Biros* (1997), 78 Ohio St. 3d 426. In both cases, the indictment set forth all the essential elements of aggravated murder. *Joseph*, 73 Ohio St. 3d at 456; *Biros*, 78 Ohio St. 3d at 438. The flaw related only to the specification, which, in both cases, failed to precisely track the language of the capital specification. *Joseph*, 73 Ohio St. 3d at 457 (involving a “a substitutional error in the last word of the specification”); *Biros*, 78 Ohio St. 3d at 438 (explaining that the omission of “principal offender” language of no consequence because the defendant was “the only individual accused of killing Tami Engstrom and, as the only offender, appellant was, *ipso facto*, the ‘principal offender.’”). Such cases are clearly distinguishable from the present cases where an essential element has been completely omitted from the indictment and therefore no offense was charged. Moreover, this Court should

exercise caution in relying on these cases as *Biros* depended on the “rationale and holdings in *Joseph*,” *Biros*, 78 Ohio St.3d at 438., and a federal court held that the indictment flaw in *Joseph* constituted reversible constitutional error, *Joseph*, 469 F.3d at 445 and 463-64.

The third case identified by the State involved an allegedly vague indictment which did not “describe the victims.” *State v. Mills* (1992), 62 Ohio St.3d 357, 362-63. There is no suggestion in *Mills* that the indictment omitted any elements of the offense. It is therefore inapposite.

The final case relied on by the State, *State v. Carter* (2000), 89 Ohio St. 3d 593, also provides little support for the State’s position. In *Carter*, the defendant was charged with aggravated murder committed during an aggravated robbery, aggravated burglary, and rape. 89 Ohio St. 3d at 596. He was convicted of aggravated murder and two capital specifications, based on the aggravated robbery and rape, as well as aggravated robbery, rape, and criminal trespass. *Id.* Carter was sentenced to death for capital murder. *Id.* On appeal, he argued that “his death sentence is void because an element of the offense of rape was missing from the charge in the fourth count of the indictment.” *Id.* at 597. The State agreed that “the indictment on the rape count was missing the ‘engaging in sexual conduct’ language,” but argued that, even if that were reversible error, only the rape count would be affected. *Id.* at 598. Because the defendant’s argument focused on the validity of the capital murder conviction and this Court agreed that the defect in the rape count had no affect on that conviction, this Court did not need to squarely address the issue which is raised herein on behalf of Mr. Colon. See *id.*, at 599. The *Carter* Court explained:

Carter alleges that the error in the indictment is fatal error. Were this true, it would be fatal only as it relates to count four, the rape count. While Carter argues that this defect also affects the aggravated murder charge and the capital specification attached thereto, this argument lacks merit.

Id. Because the validity of the rape conviction was not squarely at issue, any discussion of whether such error should be reviewed for plain error is merely dicta.

Even the federal cases cited by State as persuasive authority are inapposite. The State contends that the Sixth Circuit, in *Mira v. Marshall* (6<sup>th</sup> Cir. 1986), 806 F.2d 636, applied the “waiver/plain error standard of review” to the omission of an essential element. That is simply not the case. *Mira* is a habeas case involving a due process challenge to the sufficiency of an indictment. 806 F.2d at 639. Because it involved a collateral attack on a state conviction, the plain error standard was neither employed nor mentioned. The State also relies on *United States v. Cotton* (2002), 535 U.S. 625. In *Cotton*, the United States Supreme Court, as a federal court interpreting federal law, considered whether “the omission from a federal indictment of a *fact* that enhances the statutory maximum sentence justifies a court of appeals’ vacating the enhanced sentence, even though the defendant did not object in the trial court.” *Id.* at 627 (emphasis added). The Court proceeded to apply the plain error standard of review to the indictment’s “failure to allege a fact, drug quantity, that increased the statutory maximum sentence.” *Id.* at 631-32. *Cotton* only involved the omission of a sentencing-enhancing fact from the indictment and the validity of the defendant’s sentence. It did not address the omission of an essential element of the underlying offense and the resulting validity of the defendant’s conviction. Accordingly, its persuasive value is limited where, as here, the indictment fails to even allege all the elements of an offense.

In sum, none of the cases cited by the State are inconsistent with *State v. Childs*, supra, a case in which this Court did *not* review the omission of an essential element for plain error. This Court should continue to follow *Childs* and reject the State’s suggestion that it modify its standard of review for the fundamental defect present in this case.

### 3. Structural Errors Modify the Plain Error Standard

Even if this Court agreed with the State that the plain error standard of review should apply, that standard of review differs for structural errors.

To reverse on the basis of plain error, the error must be obvious and must generally be of such a character that, in its absence, “the outcome of the trial would clearly have been different.” *State v. Waddell* (1996), 75 Ohio St. 3d 163, 166. However, when the defect involves a structural error, prejudice need not be shown and the error can be corrected regardless of its outcome on the proceeding. *Olano*, 507 U.S. at 735. “Structural error affects the substantial rights of a criminal defendant, even absent a specific showing that the outcome of the trial would have been different, and requires automatic reversal.” *Martin*, 103 Ohio St. 3d at 397 (Moyer, C.J. concurring in judgment).

Because, as discussed above, the omission of an essential element from an indictment is a structural error, the error requires reversal notwithstanding any demonstration of prejudice.

### 4. Colon Was Prejudiced By the Omission of an Essential Element From His Indictment

Finally, appellant did suffer prejudice from the omission of an essential element from his indictment. Accordingly, his conviction should be reversed even if this Court declines to find the omission of an essential element to be structural error and subjects the defective indictment claim to the State’s plain error review.

Although the State contends that “Colon has never argued any prejudice as a result of this indictment,” (State’s Br. at 10), prejudice in this case was manifest. Because of the flawed indictment, the trial was conducted on the mistaken assumption that the State did not have to prove any mens rea associated with the infliction of physical harm. The prosecutor treated the physical harm portion of the statute as a strict liability offense and the trial court failed to instruct

the jury on the essential element of recklessness. As a consequence, the defective indictment led directly to relieving the State of its burden of proving all the essential elements of robbery beyond a reasonable doubt. Like the grand jury, the petit jury never considered the question of whether the physical harm in this case was recklessly as opposed to accidentally or negligently inflicted. Indeed, defense counsel's primary argument was that it was unclear under what circumstances the victim sustained his minor injuries and thus the defendant could not be convicted of robbery. (Tr. at 353-57). The State responded to that argument by asking the jury to "keep it simple" and by stating that nobody would have been on the ground "but for this man grabbing that man's wallet." (Tr. at 359). Rather than having to prove that Colon recklessly inflicted physical harm, the State only had to argue that, "but for" his actions, no harm would have occurred. Given this was a disputed issue at trial, Colon was seriously prejudiced when the issue was improperly removed from the province of the jury.

Indeed, the prejudice in this case stands in stark contrast to the other cases relied on by the State. In *Joseph*, this Court emphasized that the technical defect in the capital specification did not prejudice the defendant because the specification was correctly phrased in the verdict form. 73 Ohio St. 3d at 457. Similarly, this Court found no prejudice in *Carter* because the jury instructions correctly identified all the essential elements of the crime charged. 89 Ohio St. 3d at 599. Unlike *Joseph* and *Carter*, neither the verdict form nor the jury instructions supplied the essential element omitted from the indictment. As a consequence, appellant's robbery conviction was obtained without a grand jury or petit jury finding one of the essential elements of the offense.

In conclusion, appellant's defective indictment was clearly prejudicial because it ultimately relieved the State's burden of proving a essential element of robbery which was the

subject of dispute at trial. As such, even under the State's plain error review, Colon's conviction should be reversed.

### **CONCLUSION**

For the reasons set forth above and in appellant's initial brief, Defendant-Appellant 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.  
Assistant Public Defender

### **SERVICE**

A copy of the foregoing Appellant's Reply Brief was served upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on this 23 day of July 2007.



CULLEN SWEENEY, ESQ.  
Assistant Public Defender