

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. 2007-0268  
Plaintiff-Appellee, :  
v. : On Appeal from the  
DANIELLE SMITH, : First Appellate District,  
 : Hamilton County, Ohio  
 : Case No. C060077  
Defendant-Appellant. :

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**MEMORANDUM IN SUPPORT OF APPELLANT DANIELLE SMITH'S MOTION FOR RECONSIDERATION BY AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER AND CUYAHOGA COUNTY PUBLIC DEFENDER**

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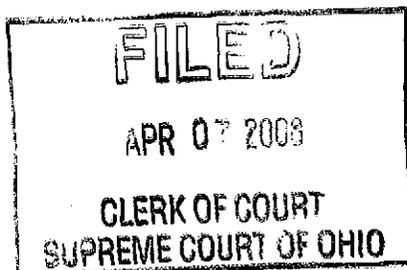
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**MEMORANDUM IN SUPPORT OF APPELLANT DANIELLE SMITH'S  
MOTION FOR RECONSIDERATION**

On March 26, 2008, this Court affirmed Defendant-Appellant Danielle Smith's conviction for fifth-degree felony theft by holding that "the crime of theft, as defined in R.C. 2913.02, is a lesser included offense of robbery as defined in R.C. 2911.02." *State v. Smith*, 2008-Ohio-1260 at ¶29. In so holding, a majority of this Court concluded that "proof of the value of the property stolen" is merely a "special finding" used to determine the degree of the offense of theft and not, as Ms. Smith had argued, an element of the crime itself. *Id.* at ¶31. Ms. Smith timely filed a Motion for Reconsideration. For the reasons outlined below, the Office of the Ohio Public Defender and the Cuyahoga County Public Defender jointly submit this Memorandum in Support of Ms. Smith's Motion for Reconsideration.

***The Test for Reconsideration***

In ruling on a motion for reconsideration, the test generally applied is "whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the Court when it should have been." *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, at syllabus, paragraph 2. In this case, reconsideration is necessary because the Court failed to fully consider the constitutional ramifications of its holding that "the elements of theft do not include value" but are merely "special findings" related to the degree of the offense. *Smith*, 2008-Ohio-1260, at ¶31. Moreover, reconsideration is the only remedy that will prevent the litigation that will be necessary to parse the meaning and effect of this new category of "special findings."

***The Basis for Reconsideration***

The undersigned amici ask this Court to reconsider only one paragraph of its opinion. In the final paragraph of its opinion, this Court states that "the elements of theft do not include

value. Rather, value is a special finding to determine the degree of offense, but it is not part of the definition of the crime.” *Id.* The Court followed a similar rationale one week later—in *State v. Fairbanks*, 2008-Ohio-1470, the Court held that “serious physical harm to persons or property” is a “penalty enhancement” to the underlying crime of felony failure to comply, rather than an element of that offense. *Id.* at ¶¶9-11.

***The Paragraph to Be Reconsidered Creates a Standard That Will Generate Confusion Among Lower Courts***

The consequences of removing “special findings” and “penalty enhancements” from an elemental analysis of a crime are significant. See, e.g. *id.* at ¶¶23-4 (Lanzinger, J., dissenting). Moreover, neither judicial precedent, nor any Ohio statute, nor the Ohio Rules of Criminal Procedure provide for this “special finding” analysis. Given the absence of any authority to support a distinction between “elements” and “special findings,” the Court should reconsider this unworkable standard.

What is further troubling is the Court’s failure to provide any guidance to lower courts as to how these “special findings” are to be interpreted and applied. As a result, trial courts are left to speculate as to whether these “special findings” must be charged in the indictment, and proven by the prosecution beyond a reasonable doubt. Employing this Court’s reasoning that “special findings” are not elements of the crime, the State can easily manipulate the definition of a crime in a way that relieves it of its constitutional obligations to charge each element in the indictment, submit each element to the jury, and prove each element beyond a reasonable doubt.

***The Paragraph to Be Reconsidered Is Contrary to This Court’s Established Precedent Regarding the Right to Indictment Guaranteed Under the Ohio Constitution***

Recognition of a broad and undefined category of “special findings” is in conflict with the constitutional right to indictment. The Ohio Constitution provides that “. . . no person shall

be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury.” Section 10, Article I, Ohio Constitution. As this Court has long recognized, “this provision guarantees the accused that the essential facts constituting the offense for which he is tried will be found in the indictment of the grand jury.” *Harris v. State* (1932), 125 Ohio St. 257, 264. In addition, this constitutional provision “provides an inalienable protection to the defendant that he will be tried on the same essential facts on which the grand jury found probable cause.” *State v. Vitale* (1994), 96 Ohio App.3d 695, 699 (citing *State v. Headley* (1983), 6 Ohio St.3d 475, 478-79). By recasting certain essential elements as “special findings,” this Court creates a risk that a defendant will be indicted for a crime without the presentation of evidence to the grand jury demonstrating probable cause for each and every element of the offense.

The possibility that this Court's ruling will be used to evade the constitutional right to indictment is not unreasonable or speculative. Indeed, in this very case, the grand jury made no finding as to the value of the item the defendant was ultimately convicted of stealing. See, e.g., Indictment. And because the transcripts are secret, there is no way to determine whether evidence of value was even presented to the grand jury. The Court's parsing of “elements” to “special findings” has operated to deprive Ms. Smith of her constitutional right to be tried on the same essential facts on which the grand jury found probable cause. Cf. *id.* This result violated Ms. Smith's right to indictment and may warrant reversal of her conviction, but the majority opinion did not address the issue.

*Headley* is particularly pertinent to this Court's reconsideration of this case. *Headley* involved a defendant charged with trafficking in a controlled substance but did not specify the identity of the controlled substance. Instead, the trial court permitted the indictment to be

amended to include that the controlled substance was, in fact, cocaine. This Court reversed, holding that the defendant's right to indictment under Article I, Section 10, had been violated. This Court held that the statute prohibiting the trafficking in controlled substances actually defined a number of crimes, depending upon the identity of the controlled substance.<sup>1</sup> Accordingly, the *Headley* Court concluded that the right to indictment demanded that the grand jury find probable cause as to which of those crimes had been committed, by returning an indictment that specified the essential element of the identity of the drug. *Headley's* opinion was the subject of a solitary dissent, which argued that the "nature of the drug involved does not affect the identity of the offense, only the degree of the felony." *Id.*, at 480 (Holmes, J., dissenting).

The wisdom of the *Headley* majority opinion is illustrated in the following example, which also illustrates the unintended consequences of following the *Headley* dissent. If the *Headley* dissent were correct, then a person who is dealing three types of drugs at the same time can only be indicted for and convicted of a single offense – the offense of drug trafficking in a controlled substance. The three types of dangerous drugs, being only a factor that impacts the degree of the felony, would have to be combined and the defendant would be punished for only trafficking in one drug (presumably the most serious of the three). While it would be of benefit to innumerable criminal defendants, this outcome was surely not intended by the legislature., an analysis that is confusing, unnecessary, unworkable, and without any prior legal foundation.

Just as in *Headley*, in this case this Court is confronted with a statute that defines the degree of the offense by proof of a single fact that is not common to all forms of the offense. In

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<sup>1</sup> As in *Headley*, this Court has concluded that a statute – here, R.C. 2911.02, defining robbery – can be committed in more than one way.

*Headley*, the distinction between the various offenses under the drug trafficking statute depended upon the type of drug. Here, the distinction between the various offenses under the theft statute depends upon the value of the property. The *Headley* majority concluded that these distinctions between offenses must be submitted to the grand jury. But the paragraph under reconsideration effectively overrules *Headley* and adopts the *Headley* dissent – and will thus inherit its unintended consequences. And countless other crimes in the Revised Code are subject to the same “special findings” analysis.

***The Paragraph to Be Reconsidered is Inconsistent with the Right to Trial By Jury As Interpreted By the United States Supreme Court***

This Court's creation of new category of non-elemental “special findings” is also cause for serious concern in the context of the Sixth Amendment's right to trial by jury. As the United States Supreme Court has “made clear beyond peradventure that *Winship's* due process and associated jury protections extend, to some degree, to determinations that go not to a defendant's guilt or innocence, but simply to the length of his sentence.” *Apprendi v. New Jersey* (2000), 530 U.S. 466, 484, discussing *In Re Winship* (1970), 397 U.S. 358 (internal citations omitted). Thus, the Supreme Court has repeatedly invalidated efforts by the government to “circumvent the protections of *Winship* merely by redefining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.” *Id.* at 485. Moreover, the Constitution “limits the States' authority to define away facts necessary to constitute a criminal offense.” *Id.* at 486.

Taken to its ultimate conclusion, this Court's distinction between “elements” and “special findings” could be used to eviscerate both the reasonable-doubt standard and the Constitution itself. Consider, as an example, the following hypothetical from Justice Stevens' dissent in *McMillan v. Pennsylvania* (1986), 477 U.S. 79, 103 (Stevens, J., dissenting):

A legislative definition of an offense named “assault” could be broad enough to encompass every intentional infliction of harm by one person upon another, but surely the legislature could not provide that only that fact must be proved beyond a reasonable doubt and then specify a range of increased punishments if the prosecution could show by a preponderance of the evidence that the defendant robbed, raped, or killed his victim during the commission of the offense.

While such a scheme would never be tolerated in practice, such an example serves to demonstrate the inherent danger in drawing arbitrary definitional boundaries between elements of crimes and other factors related solely to the degree punishment.

Unfortunately, this Court's distinction between elements and special findings presents a serious risk that lower courts will take this as a signal to revert to a process whereby certain elements that expose the defendant to greater punishment are withdrawn from the consideration of the jury based solely on their label as “special findings.” The Supreme Court has made manifest that the Constitution prohibits such efforts by the government to “treat as a non-element a fact that by law sets or increases punishment.” *Apprendi*, 530 U.S. at 521 (Thomas, J., concurring). See also *Ring v. Arizona* (2002), 536 U.S. 584, 602, citing *Apprendi*, at 482-83 (“If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt”). In order to avoid another burdensome and lengthy round of litigation on the application of the Supreme Court's Sixth Amendment jurisprudence to Ohio's criminal code, this Court should reconsider its ruling in the present case to the extent that it draws a distinction between elements and “special findings.”

### **Conclusion**

In light of the significant impact this Court's decision in this case will have on Ohio's criminal justice system, the Office of the Ohio Public Defender and the Cuyahoga County Public Defender urge this Court to reconsider its decision in this case to the extent that it creates an

artificial and unnecessary distinction between “elements” and “special findings.”

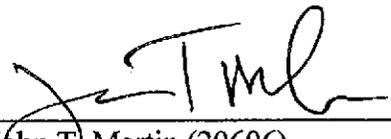
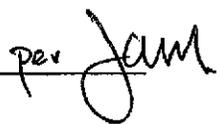
Respectfully Submitted,

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing **Memorandum in Support of Appellant Danielle Smith's Motion for Reconsideration** was served by regular U.S. mail, this 7 day of April, 2008, upon the following:

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