

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	
	:	S.C. Case No. 2006-2139
Plaintiff-Appellee	:	2006-2250
v.	:	
VINCENT COLON	:	
Defendant-Appellant	:	

<p>MEMORANDUM IN SUPPORT OF APPELLEE'S MOTION FOR RECONSIDERATION BY AMICUS CURIAE THE CLARK COUNTY PROSECUTOR'S OFFICE</p>
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## MEMORANDUM IN SUPPORT

The Clark County Prosecutor's Office respectfully requests this Honorable Court to reconsider its recent ruling in *State v. Colon*, 2008-Ohio-1624, under S.C. Rule XI. The test for reconsideration under App. R. 26(A) is generally (i) whether the motion alerts the court to an obvious error in its decision or (ii) raises an issue that was neither considered or not fully considered by the court. *Columbus v. Hodge* (1987), 37 Ohio App.3d 68. Reconsideration of this Court's decision is necessary because, apart from Justice Lanzinger's note in her dissent at ¶63-64, this Court failed to consider whether the parties' agreement as to the "recklessness" *mens rea* of R.C. § 2911.02(A)(2) was correct as a matter of law. This Court accepted the parties' agreement and has made it law without a thorough analysis by this Court. As this issue is a matter of first impression before this Court, this Court ought to conduct a thorough and independent analysis to determine whether the parties' agreement was a correct statement of law prior to its acceptance.

Furthermore, in considering this Court's holding in *State v. Wharf* (1999), 86 Ohio St.3d 375, 1999-Ohio-112, this Court's recent ruling results in a contradiction of the rules of statutory construction. There is no clear language present in either R.C. § 2911.02(A)(1) or (2) to determine the applicable degree of culpability. However, pursuant to R.C. § 2901.21(B), "recklessness" is applied in the absence of a specified degree of culpability or a plain indication that strict liability should be imposed.

Nevertheless, in *Wharf*, this Court conducted a thorough assessment of the legislative intent by reviewing the General Assembly's Committee Comments. This

Court concluded that it was the Legislature's intent to impose a strict liability degree of culpability to offenders in possession of a deadly weapon. *Wharf*, 86 Ohio St.3d at 380. It is The Clark County Prosecutor's Office's position that applying a different degree of culpability to R.C. § 2911.02(A)(2) than that which has been applied to R.C. § 2911.02(A)(1) is contrary to principles of statutory construction, particularly in the absence of express language denoting different degrees of culpability.

The Committee Comments provide the following instructive language:

This section is framed around the precept that the difference between simple theft and robbery should be that robbery contains an element of actual or threatened personal harm to the victim; and that the degree of actual or potential harm involved should determine the seriousness of a robbery. Thus, aggravated robbery includes not only robbery while armed, but also robbery in which the offender inflicts or attempts to inflict serious personal harm, whether he is armed or not, since in both cases there is a high degree of actual or potential harm to persons.

Committee Comment to Am.Sub.H.B. No. 511.

In reviewing R.C. § 2911.02(A)(1), this Court in *Wharf* stated, "Our reading of the statute leads us to conclude that the General Assembly intended that a theft offense, committed while an offender was in possession or control of a deadly weapon, is robbery and no intent beyond that required for the theft offense must be proven." *Wharf*, 86 Ohio St.3d at 377. Furthermore, this Court agreed with the reasoning in *State v. Edwards* (1976), 50 Ohio App. 2d 63, that "[m]erely *having* the weapon is the potentially dangerous factual condition warranting the more severe penalty." *Wharf*, 86 Ohio St.3d at 379, citing *Edwards*, 50 Ohio App. 2d at 66-67 (emphasis in original). Finally, this Court cited favorably "the thrust and philosophy of [Am.Sub.] H.B. [No.] 511 is to remove the potential for harm that exists while one is committing a theft offense." *Wharf*, 86 Ohio St.3d at 378, citing *Edwards*, 50 Ohio App. 2d at 66-67.

Similar logic should apply to the subsection regarding the infliction, attempted infliction, threatened infliction of physical harm under R.C. § 2911.02(A)(2). “In order to determine [legislative] intent, we must read words and phrases in context according to the rules of grammar and common usage.” *State ex rel. Russo v. McDonnell*, 110 Ohio St.3d 144, 149, 2006-Ohio-3459. (internal citations omitted). The plain language of the statute does not express any clear degree of culpability in either of these subsections. The General Assembly’s comments treat both robbery while armed and robbery in which the offender inflicts physical harm equally as creating a high degree of actual or potential harm to persons. Moreover, the examples provided in the Committee Comments do not suggest any mental state or intent when inflicting physical harm.<sup>1</sup>

This Court found strict liability applied to one subsection, and because there is no clear indication to the contrary, all other subsections within that statute should be treated similarly. Therefore, this Court should find that the infliction, attempted infliction, or threatened infliction of physical harm alone is sufficient to warrant a more severe penalty without assessment of the offender’s intent or mental state.

This Court, in *Wharf*, disclosed the “recklessness” application to R.C. § 2911.01(A)(2) but concluded that the two provisions were not analogous and could not be compared in answering the certified question in *Wharf*.<sup>2</sup> This Court did not assess the holding in *State v. Crawford* (1983), 10 Ohio App.3d 207, and neither affirmed or overruled *Crawford*.

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<sup>1</sup> Examples provided are “the purse-snatcher who knocks an old lady down and thus causes her to break her hip, the pickpocket who when discovered makes a break for freedom and seriously injures a bystander impeding his flight, and the stick-up artist who relieves another of his wallet at knifepoint but does not harm or attempt to harm his victim.” Committee Comment to Am.Sub.H.B. No. 511.

<sup>2</sup> Although *Crawford* involved R.C. § 2911.01(A)(2) rather than R.C. § 2911.02(A)(2), similar language is involved and the Committee Comments apply to both robbery and aggravated robbery.

assess the holding in *State v. Crawford* (1983), 10 Ohio App.3d 207, and neither affirmed or overruled *Crawford*.

Although this Court has stated that the two provisions are not analogous and could not be compared, the concern is how this Court could then interpret two different degrees of culpability into subsections within the same statute (R.C. § 2911.02) by virtue of this Court's recent ruling in *Colon* and this Court's prior ruling in *Wharf* without any express language directing it to be so and when the Committee Comments demonstrate that both subsections were discussed equally as creating "a high degree of actual or potential harm to persons." See Committee Comment to Am.Sub.H.B. No. 511.

Furthermore, The Clark County Prosecutor's Office is particularly concerned about the prosecution and the ensuing jury deliberations assessing an offender's behavior when fleeing after a theft offense. The Committee Comments and the examples provided take into consideration the inherent danger involved when fleeing immediately after a theft or attempted theft. By its very nature, flight is inherently dangerous with a high degree of actual or potential harm. It is illogical to suppose that one could flee the scene of a theft without there being some risk of harm to the victim, innocent bystanders, or peace officers. This Court's recent ruling would require all prosecutors to prove and jurors to find that a particular offender's behavior while fleeing was also "reckless." To require the additional finding of "recklessness" to an offender's flight, jurors would be confused and conflicted on what behavior would rise to the level of "recklessness" when the behavior in fleeing alone is inherently dangerous.

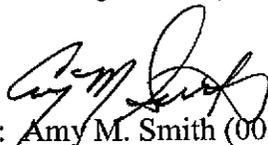
Therefore, The Clark County Prosecutor's Office respectfully requests this Court to independently analyze R.C. § 2911.02(A)(2) to determine the applicable *mens rea*.

The Clark County Prosecutor's Office respectfully requests this Court review the holdings in *State v. Crawford, supra* and *State v. Wharf, supra* in assessing the applicable degree of culpability, keeping in mind rules of statutory construction and the absence of express intent to treat R.C. § 2911.02(A)(1) and (2) differently. Finally, The Clark County Prosecutor's Office respectfully requests this Court hold that strict liability applies to all subsections under R.C. § 2911.02.

Respectfully,



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#### CERTIFICATE OF SERVICE

This is to certify that a copy of this Memorandum was mailed by regular U.S. mail to all interested parties as listed on the cover page on this 21<sup>st</sup> day of April, 2008.



Amy M. Smith (0081712)  
Asst. Clark County Prosecutor