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IN THE

SUPREME COURT OF OHIO

STATE OF OHIO	:	**NO. 2006-2139** **2006-2250**
Plaintiff-Appellee	:	
vs.	:	
VINCENT COLON	:	
Defendant-Appellant	:	

MEMORANDUM IN SUPPORT OF APPELLEE'S MOTION FOR RECONSIDERATION BY AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION

William Mason
Cuyahoga County Prosecuting Attorney

Jon W. Oebker (0064255)
Assistant Prosecuting Attorney

The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

COUNSEL FOR PLAINTIFF-APPELLEE

Robert L. Tobik
Cuyahoga County Public Defender

Cullen Sweeney
Assistant Public Defender

310 Lakeside Avenue, #200
Cleveland, Ohio 44113

COUNSEL FOR DEFENDANT-APPELLANT

Joseph T. Deters (0012084P)
Prosecuting Attorney, Hamilton County Ohio

Philip R. Cummings (0041497P)
Assistant Prosecuting Attorney

230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3052; Fax No. (513) 946-3021

COUNSEL FOR AMICUS CURIAE, THE OHIO PROSECUTING ATTORNEYS ASSOCIATION

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STATEMENT OF INTEREST

The Ohio Prosecuting Attorneys Association ('OPAA') is an association of County Prosecutors in the eighty-eight counties in the State of Ohio. The Association is concerned because this Court's holding in ***State v. Colon*** appears contrary to its own established precedent in the area of indictment amendments and threatens to open a virtual "pandora's box" of uncertainty surrounding indictments pending throughout the state.

ARGUMENT

The test generally applied in reviewing an App.R. 26(A) motion for reconsideration, "is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for the court's consideration that was either not considered at all or was not fully considered by the court when it should have been."[1] Both criteria are met here. First, this Court established

[1]*State v. Wong* (1994), 97 Ohio App.3d 244, 246, 646 N.E.2d 538.

precedent in the area of indictment amendments in ***State v. O'Brien***.[2] It now appears that this Court has overruled ***O'Brien*** by the holding in this case - as it fell squarely within the holding of ***O'Brien***.

Secondly, reconsideration is necessary because the Court failed to fully consider the ramifications of its holding upon countless pending indictments throughout the state - including some capital indictments for which it is too late to re-indict.

In its April 9, 2008 decision, this Court held that:

> "[w]hen an indictment fails to charge a mens rea element of a crime and the defendant fails to raise that defect in the trial court, the defendant has not waived the defect in the indictment."

This Court found that the defective indictment so permeated Colon's trial proceedings that it constituted "structural error" in Colon's case. The Court held Colon's indictment did not include all the elements of the offense charged and that Colon had no notice that the state had to prove that he had been reckless in order to convict him of robbery. In so holding, the Court stated that, despite the language of Crim. R. 7(D) which permits the amendment of defective indictments, Colon's indictment was constitutionally deficient. Citing ***State v. Wozniak***,[3] this Court stated that an amendment of a defective indictment to include an omitted element was constitutionally ineffective to perfect the indictment because "the grand jury and not the prosecutor, even with the approval of the court, must charge the defendant with each essential element of that crime."[4] ***Colon's*** citation of this portion of ***Wozniak*** appears to signal that indictments can no longer be amended by trial courts to include culpable mental states - and that all such cases must now be dismissed and indicted

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[2] 30 Ohio St.3d 122, 508 N.E.2d 144.

[3] (1961), 172 Ohio St. 517, 520, 18 O.O.2d 58, 178 N.E.2d 800.

[4] ***Id.*** at 520, 178 N.E.2d 800.

anew by a grand jury. If this is truly the intended result of the ***Colon*** decision, the ramifications of the holding are staggering for hundreds of pending indictments statewide.

Amicus maintains ***Colon*** is in direct conflict with this Court's holding on the same issue in ***State v. O'Brien***.

Indeed, in ***O'Brien***, this Court held that a trial court can properly permit the State to amend an indictment which omitted an essential element. Specifically, this Court held that the amendment of an indictment to add "recklessness" as an essential element of the crime of endangering children did not change the name or identity of the crime and the State was properly permitted to amend to add that element.[5] In so holding, this Court specifically noted that ***Wozniak*** was a pre-Criminal Rule case which was not controlling.

Crim. R. 7(D), adopted in 1973, sets forth the procedures for amending indictments. This rule provides in part:

> "The court may at any time before, during, or after a trial amend the indictment, information, complaint or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. * * *"

The rule clearly permits errors of omission to be corrected during the course of or even after the trial, as long as such amendments makes no change in the name or identity of the crime charged.[6]

Application of this Court's ***O'Brien*** rationale to Colon's case would compel a conclusion that the trial court could have properly permitted the State to amend the robbery indictment to include

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[5] R.C. § 2919.22(B)3); Rules Crim. Proc., Rule 7(B,D).

[6] Crim. R. 7(D).

the "reckless" mens rea - had the State sought such an amendment. The addition of the term "reckless" would have changed neither the name nor the identity of the crime charged. Neither the penalty nor the degree of the offense would change.

Crim. R. 7(D) further provides that:

> " * * * If any amendment is made to the substance of the indictment, * * * the accused is entitled to a discharge of the jury on his motion, if a jury has been impanelled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that his rights will be fully protected by proceeding with the trial, or by a post-ponement thereof to a later day with the same or another jury. * * *" (Emphasis added.)

Again, here, the ***O'Brien*** rationale compels a conclusion that Colon would not have been able to reasonably claim prejudice by an amendment to include the mens rea reckless. Colon had notice of both the offense and applicable statute. And here, Colon's indictment tracked the statute.

Crim. R. 7(B) provides for what form an indictment is to take:

> "The statement may be made in ordinary and concise language without technical averments or allegations not essential to be proved. The statement may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged."

Here, Colon's indictment tracked the statute. It read:

> "[I]n 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 [the victim,] [the defendant did] inflict, attempt to inflict, or threaten to inflict physical harm on [the victim]."

And R.C. 2901.21(B) provides all notice that the default mens rea is reckless. It states:

> "When the section [defining an offense] neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense."[7]

Thus, by tracking the robbery statute, R.C. 2911.02(A)(2), the indictment did not mislead Colon and any amendment, pursuant to the ***O'Brien*** rationale, would not have prejudiced Colon. Ohio law puts all on notice of the default mens rea. To the extent ***Colon*** stands for the proposition that a defective indictment is structural error and can not be cured by amendment, the ***Colon*** decision does not comport with ***O'Brien*** and its language can not be reconciled with Crim.R. 7 jurisprudence. ***Colon*** must be reconsidered for this reason alone.

Moreover, this Court must grant Appellee's motion to reconsider the staggering ramification of the ***Colon*** decision on countless indictments pending throughout the state. If omissions of mens rea elements in indictments are "structural errors" which can not be cured by Crim. 7 amendments, the State will now be unable to prosecute countless cases - including potentially capital cases - for which it is now too late to re-indict for speedy trial purposes.[8]

In ***State v. Adams***, this Court held that:

> when a defendant waives his right to a speedy trial as to an initial charge, that waiver is not applicable to additional charges arising from the same set of circumstances that are brought subsequent to the execution of the waiver.[9]

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[7] Arguably, the ***Colon*** decision has effectively written this statutory provision out of existence.

[8] See ***State v. Adams*** (1989), 43 Ohio St.3d 67, 538 N.E.2d 1025.

[9] ***Id.***

Thus, if ***Colon*** stands for the proposition that indictments can no longer be cured by amendment, but rather must be re-indicted, then time waivers executed by defendants as to the initial charge will not be applicable to the re-indicted charges. Hundreds of cases will thus become non-prosecutable as out-of-time for speedy trial purposes.

CONCLUSION

Amicus suggests that because Ohio law provides the default culpable mental state of reckless whenever an offense does not specify a culpability,[10] Colon had notice of the culpable mental state Appellee was required to prove.

Amicus urges reconsideration of the ***Colon*** decision that finds material omissions in indictments to be "structural error." Defendants should be encouraged to object to such omissions - not be encouraged to sit on their rights as a trump card on appeal. After ***Colon***, defense counsel, aware of a defective indictment, will sit silently with fingers crossed hoping for structural error. And if they are really lucky, the State's witnesses will have left town before a re-trial.

Alternatively, amicus urges reconsideration to re-affirm ***O'Brien*** and the principle that indictments can be amended pursuant to Crim. R. 7 to cure omissions - when neither the name nor identity of the crime would change. By citing the pre-rule case of ***Wozniak***, while remaining obliquely silent about the conflicting case ***O'Brien***, this Court has alarmed prosecutors statewide who are now uncertain as to what is to be done with countless pending prosecutions. Clarification of ***Colon*** is desperately needed to determine if such indictments can still be amended pursuant to Crim. R. 7 or must they all be re-indicted.

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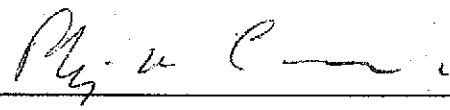
[10] R.C. 2901.21(B)

Respectfully,

Joseph T. Deters (0012084P)
Prosecuting Attorney, Hamilton County Ohio

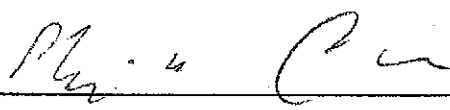


by: Philip R. Cummings (0041497P)
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202

COUNSEL FOR AMICUS CURIAE, THE OHIO PROSECUTING ATTORNEYS ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing Motion, by United States mail, addressed to all interested parties listed on the cover page, this 17 day of April, 2008.



Philip R. Cummings (0041497P)
Assistant Prosecuting Attorney