

NO. 2006-2250 & 2006-2139

IN THE SUPREME COURT OF OHIO

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

STATE OF OHIO,

Plaintiff-Appellee

-vs-

VINCENT COLON,

Defendant-Appellant

**MOTION FOR RECONSIDERATION
SUBMITTED PURSUANT TO S. CT. R. P. XI, § 2**

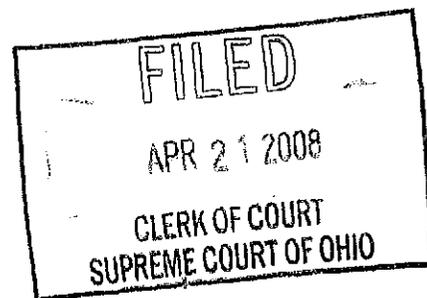
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The State of Ohio respectfully asks this Court to reconsider its decision released in this case on April 9, 2008, *State v. Colon*, --- N.E.2d ----, 2008 WL 1077553 (Ohio), 2008-Ohio-1624. The undersigned respectfully reports that since this Honorable Court announced its decision, numerous prosecuting attorneys from across Ohio have expressed grave concern about the effect of this ruling. Specifically, the State submits that the majority opinion in this case has thrown into question whether or not the State can even amend an indictment that omits a *mens rea* element. Additionally, an alleged defect in an indictment must be raised at the earliest possible moment: at the trial court, where it can be efficiently remedied. The State respectfully submits that this Honorable

Court's decision instead encourages a criminal defendant to withhold objection in lieu of sandbagging the State on appeal, should he be convicted.

As more fully explained below, the State respectfully submits that the majority opinion in this case warrants reconsideration because:

- The *Colon* opinion contradicts to two separate decisions from this Court: *State v. O'Brien* (1987), 30 Ohio St.3d 122, 124, 508 N.E.2d 144, and *State v. Wamsley* --- N.E.2d ----, 2008 -Ohio- 1195.
- This Honorable Court's *Colon* decision encourages shrewd criminal defense lawyers to withhold objection to a defective indictment and plant a *mens rea* time bomb set to detonate in the appellate court.
- The *Colon* decision drastically changes well-settled Ohio law that allows the State to amend an indictment to add the judicially determined *mens rea*.
- The *Colon* decision effectively abrogates Crim.R. 7(D) by casting doubt on whether an indictment may be amended to supply a missing *mens rea* element.

I. The *Colon* decision drastically changes previously well-settled Ohio law that allowed the State to amend an indictment to add a judicially determined *mens rea*.

As explained in sections II, III, and IV below, the State seeks reconsideration of the question accepted for review in this case: what is the standard of review when a defendant challenges an indictment for the first time on direct appeal? More importantly, however, the State and its *amici* seek clarification of an issue that was not directly at issue in this case but was discussed in the majority opinion: whether or not the State can amend an indictment to add a missing *mens rea* under Crim.R. 7(D) and *State v. O'Brien, supra*.

A. The *Colon* decision countermands this Court's decision in *State v. O'Brien* (1987), 30 Ohio St.3d 122, 124.

For over twenty years, Ohio law allowed the State to amend an indictment to supply an omitted *mens rea*. In *State v. O'Brien, supra*, this Court stated unequivocally that “an indictment ‘may be in the words of the applicable section of the statute so long as the words of that statute charge an offense.’ (Quoting Crim. R. 7(B)). In *O'Brien*, this Honorable Court permitted the State to amend an indictment that failed to include a term of intent required for the crime of endangering children. *O'Brien*, 30 Ohio St.3d at 124-26. Much like the case at bar, the *mens rea* for endangering children was judicially determined to be “reckless.” In allowing the state to amend the indictment to add the *mens rea* of reckless, this Court noted that crime remained the same after the indictment was amended.

Now, twenty years of settled law has been thrown into doubt. After *Colon*, it is unclear if the State can amend an indictment to add a judicially determined *mens rea* element. The State is particularly concerned about setting critical precedent for Ohio criminal law without having briefed the issue before the Court. Both the certified question and the proposition accepted in *Colon* concerned the narrow issue of what standard of review is applied when a defendant challenges a defective indictment for the first time on direct appeal. Neither of these two questions raised the issue of whether or not the State is permitted to amend an indictment.

Contrasted with the clear holding of the syllabus in *O'Brien*, where this court held that Crim. R. 7(D) allowed the State to amend an indictment to add an omitted *mens rea* element, this Honorable Court's *Colon* decision strongly suggest that *O'Brien* is no longer good law:

{¶ 25} [In *Wozniak*] this court held that the prosecutor was not permitted to perfect the defective indictment by amendment, 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.” *Id.* at 520, 178 N.E.2d 800.

* * *

{¶ 27} Despite the language of Crim.R. 7(D) permitting amendment, an indictment must still meet constitutional requirements, and its failure to do so may violate a defendant's constitutional rights.

Colon at ¶ 25-27. The State, as well as its *Amici*, respectfully submit that the majority's citation to *Wozniak* is particularly troubling because long ago this Court had distinguished *Wozniak* because it pre-dated Crim.R. 7(D). In *O'Brien*, this Court specifically noted that *Wozniak* was a pre-Criminal Rule case which was not controlling. Again, the State's ability to amend an indictment to add *mens rea* element was well-settled law and not the issue in the *Colon* case. However, by citing to *Wozniak* and not addressing *O'Brien* in the opinion, this Court has cast a cloud over both *O'Brien* and Crim.R. 7(D).

While the majority Court did cite to *O'Brien*, it mentioned *O'Brien* for the proposition that “[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.” *Colon*, at ¶ 42. The majority opinion did not discuss the second paragraph of the syllabus from *O'Brien* that clearly allowed the State to amend an indictment under Crim.R. 7(D) to add an omitted *mens rea*. Appellee joins its *Amici* in stating that clarification of this Honorable Court's *Colon* decision is urgently needed to determine if

such indictments can still be amended pursuant to Crim. R. 7 or must they all be re-indicted or dismissed.¹

II. The *Colon* decision creates unsound judicial policy by encouraging a defendant withhold objection to a defective indictment at trial in an effort to automatically vacate a conviction on appeal.

The State submits is that an un-objected defect in the indictment that is raised for the first time on appeal should be subject to a plain error standard of review. It is a fundamental principle of federal and state criminal law that a defendant can waive both constitutional and statutory rights. “It is beyond argument that a criminal defendant may waive constitutional and statutory trial rights.” *State v. Girts* (1997), 121 Ohio App.3d 539, 556, 700 N.E.2d 395, citing *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709, 1712.

The majority opinion in this case rejected the State’s position and held that the defect regarding the *mens rea* was structural error. This holding essentially abrogates another opinion released by this court less than three weeks prior to *Colon*. In *State v. Wamsley, supra*, this court faced the issue of whether the an un-objected failure to instruct a jury on the *mens rea* element amounted to plain error or structural error. In *Wamsley*, this Honorable Court explained that it “has rejected the concept that structural error exists in every situation in which even serious error occurred.” *Wamsley, supra*, 2008-Ohio-1195, at ¶ 18. Unlike the *Colon* decision, this Court in *Wamsley* determined that an un-objected defect regarding the *mens rea* element of a crime is subject to a plain error review, not structural error review. *Id.*, at ¶¶ 24-27.

¹ See Memorandum in Support of Appellee’s Motion for Reconsideration by *Amicus Curiae* OPAA, at 3.

Three aspects of the *Wamsley* decision are significant to this case. First, this Court provided a list of errors that are structural without ever mentioning a defective indictment as a qualifying error. *Id.*, at ¶ 16. Second, if this Court determined that failure to have a jury find a mental state was not structural error, failure of the indictment should not be structural error.

Third, by applying a plain error analysis as opposed to structural error analysis, this Court embraced the same rationale espoused by the State in case at bar: failing to apply a plain error standard of review is unsound judicial policy because it encourages trial defense attorneys not to object. In arguing for a plain error standard of review, as opposed to structural error, the State's merit brief in the case at bar explained that:

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.").

(Ape. Br. at 5). Similarly, this Court in *Wamsley*, in choosing plain error over structural error stated as follows:

{¶ 28} As we held in *Perry*, "both this court and the United States Supreme Court have cautioned against applying a structural-error analysis where, as here, the case would be otherwise governed by Crim.R. 52(B) because the defendant did not raise the error in the trial court. * * * This caution is born of sound policy. **For to hold that an error is structural even when the defendant does not bring the error to the attention of the trial court would be to encourage defendants to remain silent at trial only later to raise the error on appeal where the conviction would be automatically reversed.** We believe that our holdings should foster rather than thwart judicial economy by providing incentives (and not disincentives) for the defendant to raise all errors in the trial court-where, in many cases, such

errors can be easily corrected.” (Emphasis sic.) *Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 23.

Wamsley, *supra*, at ¶ 28 (emphasis added).

Indeed a comparison of these two cases released within a month of each other reveals a glaring inconsistency. If, under *Wamsley*, the failure to instruct the jury on the applicable *mens rea* and (thus the failure of the jury to find the applicable *mens rea*) is reviewed under plain error, as opposed to structural error, then why, under *Colon*, is the failure to indict the *mens rea* review under structural error as opposed to plain error?

The Supreme Court of Vermont appropriately explained:

A defendant who gains no advantage by objecting-given the virtual certainty that the court will correct the error and thereby remove the basis for a winnable appeal-has no incentive “to object to errors that involve omissions of essential elements of the crime.” * * * Precisely because defendant gains from overlooking the court's error, requiring an objection becomes more compelling. A defendant who fails to object in these circumstances should at least risk a normal plain error analysis. * * *

State v. Pelican (1993), 160 Vt. 536, 632 A.2d 24 (internal citations omitted.)

In rejecting the argument that the criminal defense bar will use *Colon* to ensnare unwary prosecutors and judges, this Court stated that the answer is for the state to properly indict a defendant. Of course the State seeks to properly indict cases; however, it is possible that a mistake can be made, especially in a county like Cuyahoga where there are over 16,000 indictment a year. Under a plain error standard of review, the State still has an incentive to indict cases properly in order to survive a plain error challenge. The problem with the *Colon* opinion's application of structural error is the fact that under the *Colon* framework, there is **no** incentive whatsoever for the defendant to object. *Colon* tips all of the incentive away from objecting and remedying the problem in the trial court. The astute criminal defense lawyer can sit back and plant a

mens rea time bomb set to detonate in the appellate court, should the defendant be convicted.

What better chance of obtaining an automatic reversal following conviction than allowing a structural error that is immune from the normal Crim. R. 52(C) objection requirement? The State therefore respectfully requests that this Honorable Court reconsider its decision in this case.

III. The Colon Opinion sidesteps Ohio statutory law and the Ohio Rules of Criminal Procedure.

Moreover, in addition to bypassing this Court's own precedent, the majority opinion countermanded Ohio statutory law and the Ohio criminal rules. The opinion failed to reconcile R.C. 2941.29 which requires 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.

Additionally the opinion bypassed Ohio Criminal Rule 12 (C)(2) which 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).

Neither of these provisions were address by the majority opinion in *Colon*. As explained in sections I and II, *supra*, the State therefore requests that this Honorable Court reconsider its decision in this case.

IV. The *Colon* decision marks a retreat from precedent that consistently held that defects in an indictment were subject to waiver doctrine.

Another change in Ohio law as a result of the *Colon* decision is the departure from this Court's well-established line of cases held a defect in an indictment constitutes a waiver of the issues involved. This Court has consistently held that the failure to timely object to an 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).

CONCLUSION

For the foregoing reasons, the State of Ohio respectfully asks that this Court reconsider its *Colon* opinion, or at least clarify and reaffirm the holding from *O'Brien* that the State can amend an indictment, under Crim. R. 7(D) to add an omitted *mens rea*.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR



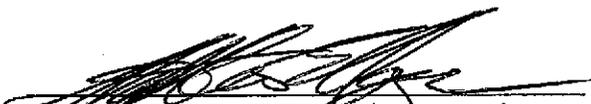
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CERTIFICATE OF SERVICE

A copy of the foregoing Motion to Reconsider has been mailed this 21st day of April, 2008, to Cullen Sweeney, Assistant Public Defender, 310 Lakeside Avenue, Suite 200, Cleveland, OH 44113.



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