

IN THE OHIO SUPREME COURT  
Case Nos. 2007-1802 and 2007-1852

STATE OF OHIO :  
 :  
 Plaintiff-Appellee :  
 :  
 vs. :  
 :  
 HOWARD CLAY :  
 :  
 Defendant-Appellant :

On Appeal and Notice of Certified  
Conflict from the Cuyahoga County  
Court of Appeals, Eighth District  
Case No. 88823

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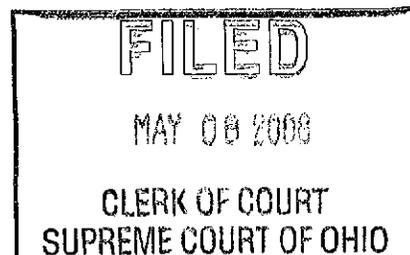
**APPELLANT'S REPLY BRIEF**

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## INTRODUCTION

Appellant Howard Clay was convicted of having a weapon while under the disability of a pending indictment, R.C. 2923.13(A)(3), despite the fact that he did not have knowledge or notice of the indictment at the time he possessed the weapon. This Court accepted this case as both a certified conflict and a discretionary appeal to determine an individual can be convicted of a having a weapon while under disability when he or she is unaware of the factual basis of the disabling condition (i.e. a pending indictment). In his initial brief, Clay argued that knowledge of the disabling condition was an essential element of the offense of having a weapon while under disability *and* that a conviction for having a weapon while under disability without notice of the disabling condition violates due process.

The State responds by arguing that having a weapon while under a disability is a strict liability offense and that the mere possession of a firearm, without any knowledge of a pending indictment, can constitute a violation of R.C. 2923.13(A)(3). Under the state's interpretation of R.C. 2923.13(A)(3), every gun owner in Ohio is at risk of committing a third-degree felony based solely on the fact that somewhere unbeknownst to him or her a grand jury has returned an indictment. Indeed, even if the gun owner is ultimately acquitted of the charges raised in the unknown indictment, he or she is still, under the State's theory, guilty of the third-degree felony and can face up to five years in prison.<sup>1</sup> In other words, individuals exercising their

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<sup>1</sup> In *State v. Taniguchi*, this Court held that a conviction for having a weapon while under disability based on a pending indictment remains sound even if there is an acquittal on, or a dismissal of, the indictment that served as the basis for the disability. (1995), 74 Ohio St 154, syllabus. *Taniguchi* specifically reserved the question raised by this case for a later day. *Id.* at 156, n. 1 (“Appellee does not argue that he had insufficient notice of the [indictment], nor does he argue any issue concerning inadequate notice that he would be disabled from weapons possession due to that prior indictment . . . . Therefore this case presents no notice issue for our review.”)

constitutionally protected right to bear arms, under the Second Amendment of the United States Constitution and Article I, Section 4 of the Ohio Constitution, could unwittingly be guilty of a serious felony offense. Such an irrational outcome cannot, and indeed, was not intended by the Ohio General Assembly.

### **LAW AND ARGUMENT**

Without reiterating the arguments outlined in his initial brief, Clay addresses here the specific issues raised by the State in their response brief.

#### **I. Knowledge of the Pending Indictment is an Essential Element of R.C. 2923.13(A)(3).**

Mr. Clay maintains that R.C. 2923.13(A)(3) unambiguously requires the State to prove that he had knowledge of his pending indictment to secure a conviction for having a weapon while under disability based on that pending indictment. Moreover, to the extent there is ambiguity in the statute, this Court must apply the rule of lenity to avoid criminalizing conduct that is otherwise perfectly legal and indeed constitutionally protected (possession of a gun) by virtue of a fact (existence of an indictment) of which gun owners are unaware. Indeed, as discussed below, this Court's decision in *State v. Jordan* (2000), 89 Ohio St. 3d 488, makes clear that knowledge of the pending indictment is an essential element of R.C. 2923.13(A).

The State argues that R.C. 2923.13(A)(3) is a strict liability statute. This Court has repeatedly emphasized that a criminal statute will only be interpreted as imposing strict liability if the statute "clearly" demonstrates a legislative intent to dispense with a culpable mental state. *State v. Moody* (2004), 104 Ohio St. 3d 244, 246. The mere absence of a specified mental state is not sufficient to plainly indicate a purpose to impose strict liability. *Id.* at 247. Rather, "there must be other language in the statute to evidence the General Assembly's intent to impose strict criminal liability." *Id.* Public policy considerations are not enough to justify the conclusion that a

particular statute imposes strict liability. *State v. Collins* (2000), 89 Ohio St. 3d 524, 529-30 (rejecting “convincing public policy arguments” that the failure to follow a court-ordered child support order should be a strict liability offense).

In advancing its strict liability argument, the State relies almost exclusively on this Court’s decision in *State v. Maxwell* (2002), 95 Ohio St. 3d 254. In *Maxwell*, this Court addressed the question of whether the offense of pandering obscenity to a minor, R.C. 2907.321(A)(6), requires proof of a *mens rea* in conjunction with the act of bringing child pornography into the state. 95 Ohio St. 3d at 255-56. R.C. 2907.321(A) provides:

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

\* \* \*

(6) Bring or cause to be brought into this state any obscene material that has a minor as one of its participants or portrayed observers.

In interpreting the pandering obscenity involving a minor statute, this Court concluded that “knowledge is a requirement only for the discrete cause within which it resides.” *Id.* at 258. Given the “strong stance” taken by the General Assembly against sex-related acts involving minors, it was “reasonable to presume” that a specific reference to a knowledge requirement concerning the character of the material and the absence of a mental element elsewhere in the statute “reflect legislative intent to impose strict liability for the act of bringing child pornography into the state of Ohio.” *Id.* Thus, to convict a defendant of a violation of R.C. 2907.321(A)(6), the State must prove that the defendant knew that the material involved child pornography but need not prove that the defendant knew the material was being transmitted, in that case on-line, from another state. *Id.*

The State contends that *Maxwell*’s reasoning requires this Court to conclude that R.C.

2923.13(A)(3) is a strict liability statute. *Maxwell* is readily distinguishable, however. As an initial matter, it bears emphasis that pandering obscenity involving a minor does not impose criminal liability without any proof of criminal intent and therefore is not truly a strict liability statute. To be convicted of pandering obscenity involving a minor, the State must prove that the defendant knew that the material involved was child pornography. This is quite different from the State's suggested interpretation of 2923.13(A)(3). Under the state's interpretation of R.C. 2923.13(A)(3), an individual could be convicted of a criminal offense by knowingly possessing a gun without any *criminal* intent. The State's argument that the two statutes are "identically structured" ignores this distinction and is predicated on the premise that possession of child pornography is akin to the constitutionally protected right to possess a gun. The General Assembly's "strong stance" against sex-related acts involving a minor can hardly be compared to its treatment of gun ownership. Another significant structural distinction between R.C. 2907.321(A)(6) and R.C. 2923.13(A)(3) is that the knowledge requirement imposed in the pandering obscenity statute clearly applies only to the character of the material involving while "knowingly," as used in R.C. 2923.13(A)(3), is not circumscribed by its placement in a discrete clause. In light of the structural and substantive differences between R.C. 2907.321(A)(6) and R.C. 2923.13(A)(3), *Maxwell* provides little support for the State.

In fact, this Court previously rejected an almost identical argument in interpreting a substantively and structurally similar criminal statute, R.C. 2923.17(A). *See State v. Jordan* (2000), 89 Ohio St. 3d 488, 493. R.C. 2923.17(A) provides that "no person shall knowingly acquire, have, carry, or use any dangerous ordinance." In *Jordan*, the State argued that "knowingly" is an adverb and thus only modifies the verbs in the statute related to possession and did not apply to dangerous ordinance. *Id.* After noting that the "benefit of engaging in an

exercise of English grammar when interpreting a criminal statute is subject to serious debate,” this Court emphasized that criminal statutes should not be read in a “vacuum” and should “inform citizens of average intelligence what activity is being forbidden.” *Id.* In so doing, this Court concluded that the mental state of “knowingly” in R.C. 2923.17(A) must be extended “beyond the element of possession to the object of possession, *i.e.* dangerous ordinance.” *Id.*

Applying *Jordan*’s reasoning to the instant case, it is clear that the *mens rea* of knowingly applies to the pendency of an indictment in R.C. 2923.13(A)(3). Any statute, including R.C. 2923.17(A) or R.C. 2923.13(A)(3), that expressly includes a culpable mental state “can never impose strict liability.” *Id.* As in *Jordan* if this Court were to construe the mental state of knowingly as modifying only the element of possession in R.C. 2923.13(A)(3), as urged by the State, the “practical effect” would be the creation of strict criminal liability with regard to the element (pendency of an indictment) which makes the act of possession criminal. *Id.* Because the General Assembly did not plainly indicate an intent to create a strict liability statute with R.C. 2923.13(A)(3), this Court should apply *Jordan* and conclude that knowledge of the pending indictment is an essential element of R.C. 2923.13(A)(3).

## **II. Due Process Precludes a Conviction Under R.C. 2923.13(A)(3) Absent Proof of Criminal Intent or Notice of the Pending Indictment.**

Appellant’s conviction for having a weapon while under disability based on a disabling condition of which he was unaware violates two components of due process. First, his due process rights are violated by a statute which criminalizes the possession of an ordinary firearm without any criminal intent. Second, his due process rights are violated by a conviction based on a fact (pendency of an indictment) of which he had no notice.

The State limits its response to the question of whether due process prohibits criminalizing possession of firearm while an indictment is pending absent proof of criminal

intent. Noting that this Court has “affirmed” offenses without a criminal intent, the State, citing *State v. Schlosser* (1997), 79 Ohio St. 3d 329, seems to suggest that a statute which dispenses with proof of criminal intent can never offend due process.<sup>2</sup> That is not the case. It is well-established that “the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.” *Dennis v. United States* (1951), 341 U.S. 494, 500. Although strict liability offenses are not *per se* unconstitutional, the United States Supreme Court “has indicated that the due process clause may set some limits on the imposition of strict criminal liability.” *United States v. Engler* (1986), 806 F.2d 425, 433-34 (citing *United States v. Inter. Minerals & Chemical Corp.* (1971), 402 U.S. 558, 564-65 and *Lambert v. California* (1957), 355 U.S. 225, 228). “The elimination of criminal intent does not violate the due process clause where (1) the penalty is relatively small and (2) where conviction does not gravely besmirch.” *United States v. Wulff* (6<sup>th</sup> Cir. 1985), 758 F. 2d 1121, 1125 (citing *Holdridge v. United States* (8<sup>th</sup> Cir. 1960), 282 F. 2d 302). A violation of R.C. 2923.13(A)(3) does not meet these criteria as it involves a serious felony offense carrying a maximum prison sentence of five years and a fine of up to \$10,000. Moreover, the due process problems with a strict liability interpretation of R.C. 2923.13(A)(3) are exacerbated by the fact that it criminalizes constitutionally protected conduct (possession of a firearm) without proof of criminal intent.

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<sup>2</sup> The State also argues that, even under its interpretation, R.C. 2923.13(A)(3) is “not devoid of an intent element” because the State must prove that the defendant knowingly possessed a firearm and that it is therefore “not wholly a strict liability offense.” (Appellee’s Br. at ¶10). That contention lacks merit in light of *Jordan*’s conclusion that the practical effect of a statute where “knowingly” only modifies the act of possession and not its object is to create strict criminal liability. 89 Ohio St. 3d at 493. Pandering obscenity involving a minor is a better example of an offense that does not impose strict liability because it require proof of a criminal intent; namely the possession of material that a defendant knows is child pornography. See generally, *State v. Maxwell*, *supra*. Ohio’s RICO statute, which was at issue in *Schlosser*, is likewise not wholly devoid of proof of criminal intent as the State is required to demonstrate that the defendant voluntarily engaged in a “pattern of corrupt activity.” 79 Ohio St. 3d 329, 334.

Even if due process does not preclude an interpretation of R.C. 2923.13(A)(3) which eliminates criminal intent, it does not permit a conviction for having a weapon while under disability when the defendant lacks notice of the disabling condition. The State *does not* address the separate constitutional requirement of notice in its brief. The fair warning requirement of the Due Process Clause prohibits an individual from being held “criminally responsible for conduct which he could not reasonably understand to be proscribed.” *Rose v. Locke* (1975), 423 U.S. 48, 49. Due Process requires laws to give sufficient warning so that individuals “may conduct themselves so as to avoid that which is forbidden.” *Id.* at 50; *see also Grayned v. Rockford* (1972), 408 U.S. 104, 108-109. In this case, the State contends that appellant can be convicted of having a weapon while under the disability of a pending indictment without having received notice that a grand jury, convened in secret, returned that indictment against him. Such a construction of R.C. 2923.13(A)(3) offends due process because it fails to afford individuals sufficient information so that they can conform their conduct to what the law requires. *Cf. Jordan*, 89 Ohio St. 3d at 493 (criminal statutes should “inform citizens of average intelligence what activity is being forbidden). When individuals possess guns without knowledge that an indictment is pending against them, they understandably believe that they are engaging in an activity that is not only wholly lawful but constitutionally protected.

### **III. The Reversal of a Conviction in a Multi-Conviction Case Requires Resentencing on the Remaining Counts of Conviction.**

If this Court vacates Clay’s having a weapon while disability conviction, it must also vacate his sentence on the felonious assault charges because the trial court was statutorily required to consider all of Clay’s convictions when fashioning sentences for each individual offense. As explained in Clay’s initial brief, the reversal of a conviction in a multi-count case is quite different from the reversal of a single sentence in a multi-count case. Thus, this Court’s

prior holding in *State v. Saxon* (2006), 109 Ohio St. 3d 176, that each *sentence* in a multi-count case is wholly independent, does not dictate the proper remedy in this case.

In its brief, the State does not address the differences between the reversal of a conviction and the reversal of a sentence in a multi-count case. Rather, it contends that this Court's summary reversal in *State v. Webb* (2007), 113 Ohio St. 3d 254 forecloses the argument raised by Clay here. That is simply not the case. Although *Webb* is factually similar to this case, this Court was not presented with and did not consider the specific issue raised by appellant—whether vacating a *conviction* in a multi-count case requires a resentencing hearing on the remaining counts.

In *Webb*, the defendant had one conviction in a multi-count case reversed on appeal. *State v. Webb*, Cuyahoga App. No. 85318, 2005 Ohio 3839, ¶ 3. Relying solely on the sentencing package doctrine (the theory that sentences in a multi-count case are interdependent), the Eighth District held that vacating one sentence in a multi-count case required a resentencing on every count. *Id.* at ¶¶ 7-13. In so doing, the Eighth District did not consider the distinction between vacating a conviction and vacating a sentence in a multi-count case. On appeal, the State argued that the Eighth District erred in applying the sentencing package doctrine. This Court summarily reversed the Eighth District's application of the sentencing package doctrine on the authority of *Saxon* and *State v. Evans* (2007) 113 Ohio St.3d 100. Neither *Saxon* nor *Evans* considered whether the reversal of a conviction in a multi-count case required resentencing on the remaining counts.

This Court has made clear that “[a] reported decision, although a case where the question might have been raised, *is entitled to no consideration whatever* as settling . . . a question not passed upon or raised at the time of the adjudication.” See *State v. Payne* (2007), 114 Ohio St.

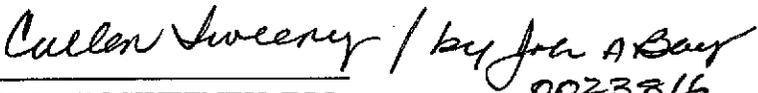
3d 502, 504 (emphasis added). Because the question of whether the reversal of a *conviction* in a multi-count case requires resentencing on the remaining counts was not raised in *Webb*, this Court's summary reversal of the Eighth District's decision did not resolve that issue. If this Court vacates Clay's conviction for having a weapon while under disability, it will face a remedial question not raised in *Webb*, *Saxon*, or *Evans*.

In short, this Court is not "bound by any perceived implications that may have been inferred from [*Webb*]," *Payne*, 114 Ohio St. 3d at 504, and should conclude that the reversal of a conviction in a multi-count case requires a resentencing on the remaining counts.

### CONCLUSION

For the reasons set forth above and in appellant's initial brief, Defendant-Appellant Howard Clay respectfully asks this Court to answer the certified question in the affirmative, adopt his two propositions of law, reverse the decision of the Eighth District Court of Appeals, vacate his conviction for having a weapon while under disability, and remand his case for resentencing.

Respectfully Submitted,

  
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**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 6<sup>th</sup> day of May, 2008.

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