

IN THE SUPREME COURT OF OHIO

STATE EX REL. JOHN B. GATES
INMATE NO. 455-506
TOLEDO CORRECTIONAL INSTITUTION
P.O. BOX 80033
TOLEDO, OHIO 43608

Case no. _____

Petitioner,

PRAECIPE

v.

CARL ANDERSON, WARDEN
TOLEDO CORRECTIONAL INSTITUTION
P.O. BOX 80033
TOLEDO, OHIO 43608

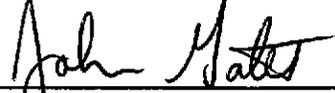
Respondent.

TO THE CLERK OF COURT:

Please serve a copy of all the following documents upon Respondent listed in the caption above pursuant to Civ. R. 4. 1. (A), to wit:

- 1.] Petition for Writ of Habeas Corpus;
- 2.] Praecip.

Respectfully submitted,



John B. Gates
Inmate no. #455-506
Toledo Correctional Institution
P.O. Box 80033
Toledo, Ohio 43608

IN THE SUPREME COURT OF OHIO

STATE EX REL. JOHN B. GATES
INMATE NO. 455-506
TOLEDO CORRECTIONAL INSTITUTION
P.O. BOX 80033
TOLEDO, OHIO 43608

Petitioner,

VS.

CARL ANDERSON, WARDEN
TOLEDO CORRECTIONAL INSTITUTION
P.O. BOX 80033
TOLEDO, OHIO 43608

Respondent.

CASE NO. _____

PETITION FOR WRIT OF
HABEAS CORPUS

I. INTRODUCTION

Petitioner, JOHN B. GATES (Hereinafter referred to as "Petitioner"), is an inmate unlawfully restrained of his liberty at the Toledo Correctional Institution, P.O. Box 80033, Toledo, Ohio 43608, and respectfully moves this Honorable Court for an order to compel his immediate release from the custody of the Respondent, Carl Anderson (Hereinafter referred to as "Respondent"), Warden of the Toledo Correctional Institution.

II. Venue

Petitioner is incarcerated at the Toledo Correctional Institution and the Respondent is the Warden of the Toledo Correctional Institution, which is located in the County of Lucas and, therefore, Venue is proper in this Court.

III. Jurisdiction

This court may exercise both personal and Subject Matter Jurisdiction over the parties and issues in this action pursuant to Section 2725.03 of the Ohio Revised code and Article IV, Section 3 (B) (C) of the Constitution of the state of Ohio.

IV. STATEMENT OF THE CASE AND FACTS

1. On May 22nd, 2003, Petitioner was arrested then booked into the Lucas County jail to answer to a charge of Robbery, R.C. 2911.02., Recieving Stolen Property R.C. 2913.51(A) and Failure to Comply R.C. 2921.33.1. which resulted in petitioner being issued a document purported to be an indictment though possibly returned by the Lucas County grand Jury as case no. CR0200302239. The counts are as follows: See Exhibit B.

count one: Robbery, R.C. 2911.02.

count two: Recieving Stolen Property, R.C. 2913.51(A).

count Threee: Failure to Comply, R.C. 2921.33.1.

2. On June 10th, 2003, Petitioner was arraigned and pled not guilty to the charges.

3. On July 22nd, 2003, Petitioner pled No Contest. On August 5th, 2003, Petitioner was sentenced to 9 years. 1 year RSP, 2 years Failure to Comply and 6 years for Robbery.

4. On November 5th, 2003, Petitioner was arrested then booked into the Knox County jail to answer to a charge of Robbery, R.C. 2911.02. which resulted in Petitioner being issued a document purported to be an indictment though possibly returned by the Knox County Grand Jury as case no. 03CR090062. The Count is as follows: See Exhibit B.

Count one: Robbery, R.C. 2911.02.

On November 6th, 2003, Petitioner was arraigned and pled not guilty to the charge. See Exhibit B.

On November 7th, 2003, Petitioner pled guilty and was sentenced to 7 years for Robbery to run concurrent to the Lucas County sentence. See Exhibit B.

V. THE MERITS

1. Petitioner contends that he is unlawfully restrained of his liberty and request an immediate release from the custody of Respondent, due to the fact that the trial court **Lacked Subject Matter Jurisdiction** since the document purported to be an indictment is worthless as a result of an omission of the mens rea element " Recklessly " for the actus reus element stated in subsection (2): " **Inflict attempt to inflict or threaten to inflict physical harm on another** ", Habeas Corpus will lie.

2. On an indictment charging an offense soley in the language of a statute is insufficient when a specific intent element has been judicially interpreted for that offense, **Constitution Article 1. 10; R.C. 2901.21(B); Rules of Crim. Proc., rule 7(B).**

The state must meet its duty to properly indict a defendant when a defective indictment so permeates a defendant's trial such that courts cannot reliably serve its functions as a vehicle for determination of guilt or innocence, the defective indictment will be held to be structural error. See *State v. Perry*, 101 Ohio St. 3d 118, 2004-ohio-297, 802 N.E. 2d 643 at 17.

4. Structural error is supported by the Ohio Constitution, which states that "no person shall be held to answer for a capital, or otherwise infamous crime unless presentment or indictment of a grand jury". Section 10, Article 1, Ohio Constitution. In *State v. Wozniak* (1961), 172 Ohio St. 517, 520, 180.0. 2d 58, 178 N.E. 2d 800, The Supreme Court held that prosecution 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". Id. At 520, 180.0. 2d 58 178 N.E. 2d 800.

5. As in *State v. colon* N.E. 2d, 2008 WL1077553 (Ohio), 2008-Ohio-1624, Plaintiff asserts that the "Structural Error" within the document purported to be an indictment resulted in the Lack of Subject Matter Jurisdiction by the trial court. And when an indictment fails to charge a Mens rea element of a crime, the error is structural error, and thus, the Plaintiff's failure to raise that defect in the trial court does not waive Appellate review of the error. Constitution Article 1. 10; Rules Crim. Proc., Rules 7 (B D), 12 (C) (2). Due to this Constitutional violation, the Writ of Habeas Corpus should be granted so that Plaintiff can be relieved of the illegal restraints that confine him to the Toledo Correctional Institution.

6. The state must prove, beyond a reasonable doubt, that the defendant "Knowingly" Committed or Attempted to Commit a Theft Offense. *State v. Mcswain* (1992), 79 Ohio App. 3d 207, paragraph one of the syllabus. By requiring the commission for attempt of a "Theft Offense", the Robbery statute implicitly "incorporates the "Knowingly" standard of culpability from Theft statute. *Mcswain*, 79 Ohio App. 3d at 606.

7. The state must prove beyond a reasonable doubt, that the defendant Recklessly inflicted, attempted to inflict, or threatened to inflict physical harm. *Mcswain*, 79 Ohio App. 3d at 606; *Crawford*, 10 Ohio App. 3d at paragraph one of the syllabus and 209 construing the requisite mental state in the context of Agg-robbery, R.C. 2911.01 (A). when, as here, a criminal offense does not specify a particular degree of culpability,

R.C. 2911.01(A). When as here, a criminal offense does not specify a particular degree of culpability, Recklessness is the requisite mental state unless the statute plainly indicates a purpose to impose strict liability for the conduct described in the [statute] R.C. 2901.21(B); According to *State v. Mcgee* (1997) 79 Ohio St.3d 193, 195-196. With respect to a robbery involving the Infliction or attempt/threat/ of physical harm, the robbery statute does not plainly indicate a strict liability intent.

8. The statute failed to establish "Knowingly committed" and "Recklessly inflicted" in the document purported to be an indictment and when a properly returned indictment fails to charge a **mens rea element** of a crime, the error is structural error, and thus, the plaintiff's failure to raise the defect in the trial court does not waive Appellate review of the error. **Constitution Article 1. 10; Rules of crim. proc., rule 7 (B D), 12 (C) (2).**

9. Structural error (Mandates) a finding of "Perse prejudice", [Emphasis sic], *State v. Fisher*, 99 Ohio St. 3d 127, 2003-Ohio-2761, 789 N.E. 2d 222, at 9.

10. The material and essential facts constituting an offense are found by the presentment of the grand jury; and if one of the vital and material elements identifying and characterizing the crime has been omitted from the indictment, such defective indictment is insufficient to charge an offense, and cannot be cured by the court, as such a procedure would not only violate the constitutional rights of the accused, but would allow the court to convict him on an indictment essentially different from that found by the grand jury. *Harris v. State* (1932) 125 Ohio St. 257, 264, 181 N.E. 104.

11. In summary, the grand jury never passed a valid indictment to the trial court leaving the trial court without Subject Matter jurisdiction. This court lacked the authority to convict me of a felony offense.

VI COMMITMENT OR CAUSE OF DETENTION

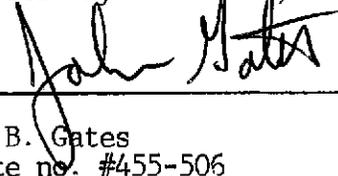
A copy of the commitment or cause of detention of Petitioner is procured without impairing the efficiency of the remedy and is attached as exhibit A.

VII. CONCLUSION

1. Due to the enclosed facts of law and information produced by agents of the state and who are sworn by oath of office to uphold the Ohio Constitution, laws, and rules of the state, the Knox County Common Pleas Court nor the Lucas County Common pleas court had the authority to hear case no. 03CR090062 or case no. CR200302239. as a result of not having **Subject Matter Jurisdiction** and because the trial court Lacked Subject Matter Jurisdiction this Honorable Court should issue an order for Petitioner's immediate release from the custody of the Respondent.

And in conclusion, Petitioner must add that in accordance to Ohio law and rules of law, Petitioner's Constitutional right to Due Process should never have been violated by the Lucas County Court of Common Pleas nor the Knox County Court of Common Pleas since proper and legal indictments were never returned by the Lucas County Grand Jury or the Knox County Grand Jury.

Respectfully submitted,



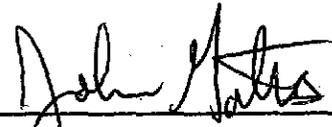
John B. Gates
Inmate no. #455-506
Toledo Correctional Inst.
P.O. Box 80033
Toledo, Ohio 43608

STATE OF OHIO)
COUNTY OF LUCAS)

SS: VERIFICATION

I, John B. Gates, having first been duly sworn and cautioned of the penalties for perjury, hereby states that the facts set forth within the foregoing petition for Writ of Habeas Corpus are true and correct to the best of my knowledge, belief, and recollection. Further, I hereby state that the foregoing documents attached to the petition for Writ of Habeas Corpus are true and accurate copies of those which are contained in my files.

Further Affiant Sayeth Naught.

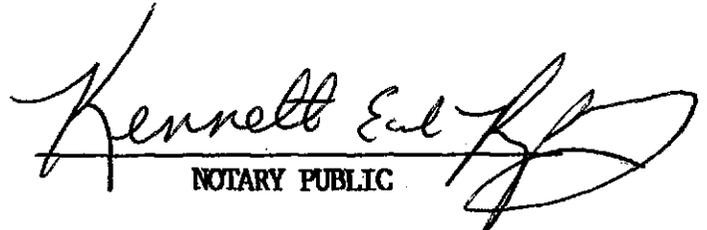


John B. Gates

Inmate No. # 455-506
Toledo Correctional Institution
P.O. Box 80033
Toledo, Ohio 43608

NOTARY CERTIFICATION

On this 9th day of June, 2008, personally before me came John B. Gates who, having first been duly sworn according to law, stated that the facts contained within the foregoing Petition for Writ of Habeas Corpus are true and accurate to the best of his knowledge, belief and recollection. John B. Gates further swore that the documents attached to the petition for Writ of Habeas Corpus are true and accurate copies of those which are contained in his files.



NOTARY PUBLIC



Kenneth Earl Rupert
Notary Public, State of Ohio
Commission Expires 4/30/2012

A P P E N D I X

EXHIBITS

PAGE NO.

- A. COMMITMENT PAPERS OR SENTENCING JOURNAL
- B. DOCUMENT PURPORTED TO BE AN INDICTMENT
- C. OHIO SUPREME COURT RULING FOR STATE V. COLON N.E. 2d
2008 WL1077553 (Ohio), 2008-Ohio-1624.

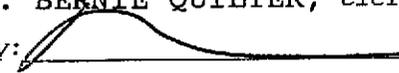
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THE STATE OF OHIO, LUCAS COUNTY, ss.

I, J. BERNIE QUILTER, Clerk of the Court of Common Pleas in and for said County, do hereby certify that the within and foregoing is a full, true and correct copy of the original indictment, together with the instruments thereon, now on file in my office.

WITNESS my hand and seal of said Court at Toledo, Ohio, this 19 day of June, 2008.

J. BERNIE QUILTER, clerk.

By:  Deputy.

FILED
LUCAS COUNTY

2008 MAY 30 P 12:13

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

No. CR03-02239

Lucas County Common
Pleas Court

THE STATE OF OHIO

vs.

John B. Gates

INDICTMENT FOR

RECEIVING STOLEN PROPERTY-\$2913.51; FAILURE TO COMPLY WITH AN ORDER OR SIGNAL OF A POLICE OFFICER-\$2921.331(B) and (C)(5)(a)(ii); ROBBERY-\$2911.02(A)(2)

A TRUE BILL.


FOREPERSON OF THE GRAND JURY

ISSUE WARRANT
PROSECUTING ATTORNEY

Julia R. Bates

PROSECUTING ATTORNEY

INDICTMENT



THE STATE OF OHIO,
Lucas County, } ss.

Of the May, Term of 2003, A.D.

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that **JOHN B. GATES**, on or about the 21st day of May, 2003, in Lucas County, Ohio, did receive, retain or dispose of a motor vehicle, the property of another, knowing or having reasonable cause to believe that the property had been obtained through commission of a theft offense, in violation of **§2913.51 OF THE OHIO REVISED CODE, RECEIVING STOLEN PROPERTY, BEING A FELONY OF THE FOURTH DEGREE**, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SECOND COUNT

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that **JOHN B. GATES**, on or about the 21st day of May, 2003, in Lucas County, Ohio, did operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop, and the operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property, in violation of **§2921.331(B) and (C)(5)(a)(ii) OF THE OHIO REVISED CODE, FAILURE TO COMPLY WITH AN ORDER OR SIGNAL OF A POLICE OFFICER, BEING A FELONY OF THE**

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THIRD DEGREE, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

THIRD COUNT

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that **JOHN B. GATES**, on or about the 30th day of April, 2003, in Lucas County, Ohio, in attempting or committing a theft offense, or in fleeing immediately after the attempt or offense as defined in §2913.02 of the Revised Code, did knowingly inflict, attempt to inflict, or threaten to inflict physical harm on another, in violation of §2911.02(A)(2) **OF THE OHIO REVISED CODE, ROBBERY, BEING A FELONY OF THE SECOND DEGREE**, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.



Julia R. Bates
Lucas County Prosecutor

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FILED
LUCAS COUNTY

2003 AUG -7 P 3:41

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COMMON PLEAS COURT, LUCAS COUNTY, OHIO

STATE OF OHIO
Plaintiff.

v.

JOHN GATES
Defendant.

* CASE NO:
* G-4801-CR-0200302239
*
* JUDGMENT ENTRY
*
*
* JUDGE FREDERICK H. MCDONALD
*
*
*

On August 05, 2003 defendant's sentencing hearing was held pursuant to R.C. 2929.19. Court reporter KAREN LEMLE, defense attorney MATTHEW FECH and the State's attorney TIMOTHY WESTRICK were present as was the defendant who was afforded all rights pursuant to Crim.R. 32. The Court has considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12.

The Court finds that defendant has been convicted of RECEIVING STOLEN PROPERTY, count 1, a violation of R.C. 2913.51, a felony of the 4th degree, of FAILURE TO COMPLY WITH AN ORDER OR SIGNAL OF A POLICE OFFICER, count 2, a violation of R.C. 2921.331 (B) & (C) (5) (a) (ii), a felony of the 3rd degree, of ROBBERY, count 3, a violation of R.C. 2911.02 (A) (2), a felony of the 2nd degree.

The Court further finds pursuant to R.C. 2929.13(B) defendant had previous prison term served, as to count one.

The Court further finds the defendant is not amenable to community control and that prison is consistent with the purposes of R.C. 2929.11.

JOURNALIZED

AUG 08 2003

Cassette 237
P.G. 681

It is ORDERED that defendant serve a term of 12 months as to count one, 2 years as to count 2, and 6 years as to count three in prison. The counts in this sentence are ordered to be served consecutively to each another. Being necessary to fulfill the purposes of R.C. 2929.11, and not disproportionate to the seriousness of the offender's conduct or the danger the offender poses and the Court FURTHER FINDS: defendant's criminal history and defendant was under Federal parole, requires consecutive sentences; for a total period of incarceration of 9 years.

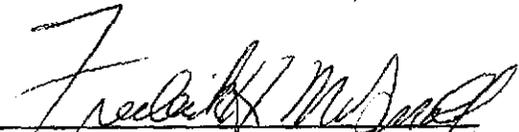
Defendant has been given notice under R.C. 2929.19(B)(3) and of appellate rights under R.C. 2953.08.

Defendants drivers license is Ordered suspended for a period of 3 years.

Defendant is ORDERED conveyed to the custody of the Ohio Department of Rehabilitation and Corrections forthwith. Credit for 76 days is granted as of this date along with future custody days while defendant awaits transportation to the appropriate state institution.

Defendant found to have, or reasonably may be expected to have, the means to pay all or part of the applicable costs of supervision, confinement, assigned counsel, and prosecution as authorized by law. Defendant ordered to reimburse the State of Ohio and Lucas County for such costs. This order of reimbursement is a judgment enforceable pursuant to law by the parties in whose favor it is entered. Notification pursuant to R.C. 2947.23 given.

Defendant ordered remanded into custody of Lucas County Sheriff for immediate transportation to appropriate state institution.


JUDGE FREDERICK H. MCDONALD

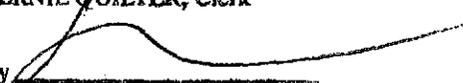
THE STATE OF OHIO, LUCAS COUNTY, as

I, BERNIE QUILTER, Clerk of Common Pleas Court and Court of Appeals, hereby certify this document to be a true and accurate copy of entry from the Journal of the proceedings of said Court filed 8-7-03 on case number CB-2239.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name officially and affixed the seal of said court at the Courthouse in Toledo, Ohio, in said County, this 11 day of August A.D., 2003

BERNIE QUILTER, Clerk

SEAL

By 
Deputy

FILED
LUCAS COUNTY
2003 AUG -7 P 3:41
COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

JOURNALIZED

AUG 08 2003

Cassette 237

P.G. 681

INDICTMENT

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the county aforesaid, on their oaths, in the name and by the authority of the state of Ohio, do find and present that

On or about the 23rd day of April, 2003, in the County of Knox, State of Ohio, JOHN B. GATES did commit ROBBERY, in that while attempting or committing a theft offense, as defined in Section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, JOHN B. GATES inflicted, attempted to inflict, or threatened to inflict physical harm on another, A FELONY OF THE SECOND DEGREE, contrary to and in violation of Section 2911.02(A)(2) of the Revised Code of Ohio, and contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Ohio.

FILED
KNOX COUNTY
COURT OF COMMON PLEAS
2003 SEP -9 AM 8:11
MARY JO HAWKINS
CLERK OF COURTS

This is to certify the foregoing to be a true and correct copy of the original Indictment now on file in my office.
Mary Jo Hawkins, Clerk
Thomas Baucher Deputy
Date 5-5-08

John W. Baker
.....
Prosecuting Attorney
Paul G. [Signature]
.....
Foreman of the Grand Jury

Endorsed: A true bill

FILED
KNOX COUNTY
COURT OF COMMON PLEAS

IN THE COURT OF COMMON PLEAS, KNOX COUNTY, OHIO

2003 NOV 13 PM 2:57

STATE OF OHIO

MARY JO HAWKINS
CLERK OF COURTS

Plaintiff

-vs-

Case No. 03CR090062

JOHN B. GATES

Defendant

JOURNAL ENTRY

This cause came before the Court on November 7, 2003, at the request of the defendant. The Court finds that the Defendant is present in the Courtroom with counsel, Fred E. Mayhew, Knox County Public Defender. The State of Ohio is represented in the person of John W. Baker, Knox County Prosecuting Attorney.

The Defendant, through Counsel, informed the Court that the Defendant wished to enter a plea of guilty to the charge of Robbery, in violation of Section 2911.02(A)(2) of the Revised Code of Ohio, a felony of the second degree as contained within the Indictment.

Pursuant to Rule 11(C)(2) of the Ohio Rules of Criminal Procedure, the Court thereupon personally addressed the Defendant as to the matters contained therein. The Court further determined that the Defendant understands the nature of the charges and the possible penalties. The Court upon inquiry into the circumstances of the case determines that a sufficient factual basis exists to support the Defendant's plea.

The Court finds that the Defendant's plea is freely, voluntarily and intelligently made. The Court further finds that the Defendant signed, in open Court, a written plea of guilty which is ordered filed and made a part of the record in this case.

JOHN W. BAKER
KNOX COUNTY
PROSECUTING ATTORNEY
117 EAST HIGH ST.
Suite 234
MOUNT VERNON, OH 43050
740-393-6720
Fax 740-397-7792

JM #83

WOB

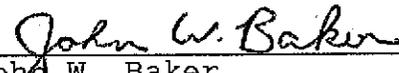
Case No. 03CR090062
Journal Entry
Page Two

This is to certify the foregoing to be a true
and correct copy of the original. *Entry*
now on file in my office.
Mary Jo Hawkins, Clerk
Mary Jo Hawkins Deputy
Date 5-5-08

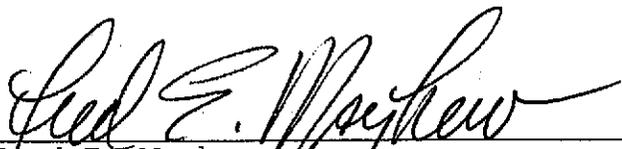


Otho Eyster, Judge

APPROVED:



John W. Baker (0017410)
Prosecuting Attorney



Fred E. Mayhew
Public Defender and
Attorney for Defendant

JOHN W. BAKER
KNOX COUNTY
PROSECUTING ATTORNEY
117 EAST HIGH ST.
Suite 234
MOUNT VERNON, OH 43050
740-393-6720
Fax 740-397-7792

JM # 84

IN THE COURT OF COMMON PLEAS
KNOX COUNTY, OHIO

FILED
KNOX COUNTY
COURT OF COMMON PLEAS

2003 NOV 17 PM 1:47

MARY JO HAWKINS
CLERK OF COURTS

STATE OF OHIO :
 PLAINTIFF, :
 -vs- : Case No. 03CR090062
 JOHN B. GATES : Judge Otho Eyster
 DEFENDANT, : **SENTENCING ENTRY**

This matter came before the Court on November 7, 2003, for the purpose of imposition of sentence. The Defendant, John B. Gates is present in the courtroom represented by Fred E. Mayhew, Knox County Public Defender and the State of Ohio is in the courtroom in the person of John Baker, Knox County Prosecuting Attorney.

On November 7, 2003, the Defendant, John B. Gates entered a guilty plea to Robbery, in violation of Ohio Revised Code Section 2911.02 (A)(2), a felony of the Second Degree as contained within the Indictment. The Court found a basis in fact to accept the guilty plea of the Defendant and the Defendant waived the Court Ordered presentence investigation and proceeded to sentencing.

The Court afforded counsel the opportunity to speak on behalf of the Defendant, and the Defendant was given the opportunity to speak on his own behalf on all matters regarding punishment. The Court heard and considered all the Defendant and his Attorney had to say.

The Court finds insufficient factors to rebut the presumption in favor of prison time for this offense. The Court further finds the Defendant's conduct is more serious than conduct normally constituting the offense the Defendant stands convicted of and that the Defendant is not amenable to an available Community Control sanction and a prison term is consistent with the purposes of felony sentencing contained in Ohio Revised Code Section 2929.11.

The Court finds pursuant to Ohio Revised Code Section 2929.14(B) that the shortest prison term will demean the seriousness of the Defendant's conduct and the shortest prison term will not adequately protect the public from future crime by this Defendant or others.

KNOX COUNTY COURT OF COMMON PLEAS, MOUNT VERNON, OHIO 43050

*11/17/03
B.S.C.
CM*

*open
B.S.C.
11/17/03
SS*

JM #

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It is the sentence of the Court that the Defendant serve a definite term of imprisonment of seven (7) years. This sentence is to be served concurrent with the sentence imposed in Lucas County Common Pleas Court Case No. CR0200302239. The Defendant is given 0 days jailtime credit along with future days while awaiting transportation to the appropriate institution.

The Defendant was advised of his right to appeal pursuant to Criminal Rule 32 and the Defendant acknowledged that he understood his appellate rights.

The Defendant is remanded to the custody of the Knox County Sheriff and the Clerk of this Court is Ordered to prepare the necessary papers for the conveyance of the Defendant to the Correction Reception Center located in Orient, Ohio.

The bond previously Ordered herein is canceled and held for naught. The Defendant is ordered to pay the costs of these proceedings.

IT IS SO ORDERED.


Otho Eyster, JUDGE

cc: Prosecuting Attorney
Defendant's Attorney
*700A
11/17/08
AM CM*

This is to certify the foregoing to be a true and correct copy of the original *entry* now on file in my office.
Mary Jo Hawkins, Clerk
Norma Boucher Deputy
Date 5-5-08

--- N.E.2d ---
--- N.E.2d ---, 2008 WL 1077553 (Ohio), 2008 -Ohio- 1624
(Cite as: --- N.E.2d ---, 2008 WL 1077553)

H
State v. Colon
Ohio, 2008.

Supreme Court of Ohio.
The STATE of Ohio, Appellee,
v.
COLON, Appellant.
Nos. 2006-2139, 2006-2250.

Submitted Nov. 7, 2007.
Decided April 9, 2008.

THE STATE OF OHIO, APPELLEE, v. COLON, APPELLANT.

Background: Defendant was convicted, after a jury trial in the Court of Common Pleas, Cuyahoga County, No. CR-470439, of robbery. Defendant appealed. The Court of Appeals, 2006 WL 2899957, affirmed in part, vacated in part, remanded, and certified a conflict of appellate authorities.

Holding: The Supreme Court, Moyer, C.J., held that when an indictment fails to charge a mens rea element of a crime, the error is structural error, and thus, the defendant's failure to raise that defect in the trial court does not waive appellate review of the error.

Court of Appeals reversed.

O'Donnell, J., filed a dissenting opinion, in which Lundberg Stratton, J., concurred.

Lanzinger, J., filed a dissenting opinion, in which Lundberg Stratton, J., concurred.

[1] Criminal Law 110 ↪20

110 Criminal Law
110I Nature and Elements of Crime
110k19 Criminal Intent and Malice
110k20 k. In General. Most Cited Cases

Criminal Law 110 ↪21

110 Criminal Law
110I Nature and Elements of Crime
110k19 Criminal Intent and Malice
110k21 k. Acts Prohibited by Statute.
Most Cited Cases
The mental state of the offender is a part of every criminal offense in Ohio, except those that plainly impose strict liability. R.C. § 2901.21(A)(2), (B).

[2] Criminal Law 110 ↪21

110 Criminal Law
110I Nature and Elements of Crime
110k19 Criminal Intent and Malice
110k21 k. Acts Prohibited by Statute.
Most Cited Cases

Criminal Law 110 ↪23

110 Criminal Law
110I Nature and Elements of Crime
110k19 Criminal Intent and Malice
110k23 k. Negligence. Most Cited Cases
Recklessness is the catchall culpable mental state for criminal statutes that fail to mention any degree of culpability, except for strict liability statutes for which the accused's mental state is irrelevant. R.C. § 2901.21(B).

[3] Robbery 342 ↪3

342 Robbery
342k3 k. Intent. Most Cited Cases
Recklessness is the mens rea element for inflicting, attempting to inflict, or threatening to inflict physical harm, as element of robbery. R.C. §§ 2901.21(B), 2911.02(A)(2).

[4] Indictment and Information 210 ↪60

210 Indictment and Information
210V Requisites and Sufficiency of Accusation
210k58 Subject-Matter of Allegations
210k60 k. Elements and Incidents of Offense in General. Most Cited Cases

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The material and essential facts constituting an offense are found by the presentment of the grand jury, and if one of the vital and material elements identifying and characterizing the crime has been omitted from the indictment, such defective indictment is insufficient to charge an offense, and cannot be cured by the court, as such a procedure would not only violate the constitutional rights of the accused, but would allow the court to convict him on an indictment essentially different from that found by the grand jury. Const. Art. 1, § 10.

[5] Criminal Law 110 ⇨ 1162

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1162 k. Prejudice to Rights of Party

as Ground of Review. Most Cited Cases

"Structural errors" are constitutional defects that defy analysis by harmless-error standards, because they affect the framework within which the trial proceeds, rather than simply being an error in the trial process itself; they permeate the entire conduct of the trial from beginning to end, so that the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.

[6] Criminal Law 110 ⇨ 1163(1)

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1163 Presumption as to Effect of Error

Error

110k1163(1) k. In General. Most Cited

Cases

A structural error mandates a finding of per se prejudice.

[7] Criminal Law 110 ⇨ 1162

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1162 k. Prejudice to Rights of Party

as Ground of Review. Most Cited Cases

In determining whether an alleged error is a structural error, the threshold inquiry is whether such error involves the deprivation of a constitutional right, and if an error in the trial court is not a constitutional error, then the error is not structural error.

[8] Criminal Law 110 ⇨ 1032(5)

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in

Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1032 Indictment or Information

110k1032(5) k. Requisites and Sufficiency of Accusation. Most Cited Cases

Indictment and Information 210 ⇨ 60

210 Indictment and Information

210V Requisites and Sufficiency of Accusation

210k58 Subject-Matter of Allegations

210k60 k. Elements and Incidents of Of-

fense in General. Most Cited Cases

When an indictment fails to charge a mens rea element of a crime, the error is structural error, and thus, the defendant's failure to raise that defect in the trial court does not waive appellate review of the error. Const. Art. 1, § 10; Rules Crim.Proc., Rules 7(B, D), 12(C)(2).

[9] Indictment and Information 210 ⇨ 60

210 Indictment and Information

210V Requisites and Sufficiency of Accusation

210k58 Subject-Matter of Allegations

210k60 k. Elements and Incidents of Offense in General. Most Cited Cases

Indictment and Information 210 ⇨ 71.2(2)

210 Indictment and Information

210V Requisites and Sufficiency of Accusation

210k71 Certainty and Particularity

210k71.2 Purpose of Requirement and

-- N.E.2d ----

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Test of Compliance

210k71.2(2) k. Informing Accused of
Nature of Charge. Most Cited Cases

Indictment and Information 210 ↪71.2(4)

210 Indictment and Information

210V Requisites and Sufficiency of Accusation

210k71 Certainty and Particularity

210k71.2 Purpose of Requirement and
Test of Compliance

210k71.2(4) k. Protection Against Sub-
sequent Prosecution. Most Cited Cases

In order to be constitutionally sufficient, an indictment, first, must contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend, and second, must enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense. Const. Art. 1, § 10.

[10] Constitutional Law 92 ↪4581

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)4 Proceedings and Trial

92k4578 Charging Instruments; Indict-
ment and Information

92k4581 k. Form, Requisites, and
Sufficiency. Most Cited Cases

Constitutional Law 92 ↪4629

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)4 Proceedings and Trial

92k4627 Conduct and Comments of
Counsel; Argument

92k4629 k. Prosecutor. Most Cited
Cases

Constitutional Law 92 ↪4637

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)4 Proceedings and Trial

92k4635 Instructions

92k4637 k. Particular Issues and
Applications. Most Cited Cases

Criminal Law 110 ↪717

110 Criminal Law

110XX Trial

110XX(E) Arguments and Conduct of Coun-
sel

110k712 Statements as to Facts, Com-
ments, and Arguments

110k717 k. Arguing or Reading Law to
Jury. Most Cited Cases

Robbery 342 ↪17(2)

342 Robbery

342k16 Indictment or Information

342k17 Requisites and Sufficiency

342k17(2) k. Intent. Most Cited Cases

Robbery 342 ↪27(3)

342 Robbery

342k25 Trial

342k27 Instructions

342k27(3) k. Intent. Most Cited Cases
Defendant's due process rights were violated, in prosecution for robbery, where the indictment omitted the required mens rea of recklessness for the crime of robbery, defendant lacked notice that the State was required to prove that he had been reckless in order to convict him of robbery, the State did not argue at trial that defendant's conduct in inflicting physical harm on the victim constituted reckless conduct and instead the prosecutor's closing argument treated robbery as a strict-liability offense, and the jury instructions failed to include the required mens rea for the offense. U.S.C.A. Const. Amend. 14, R.C. § 2911.02(A)(2).

[11] Criminal Law 110 ↪1032(5)

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in
Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1032 Indictment or Information

110k1032(5) k. Requisites and Sufficiency of Accusation. Most Cited Cases

Indictment and Information 210 ↪60

210 Indictment and Information

210V Requisites and Sufficiency of Accusation

210k58 Subject-Matter of Allegations

210k60 k. Elements and Incidents of Offense in General. Most Cited Cases

An indictment that omits the mens rea element of the offense fails to charge an offense, for purposes of criminal procedure rule providing that a defendant's objection that the indictment fails to charge an offense shall be noticed by the court at any time during the pendency of the proceeding, as exception to general rule requiring objections to the indictment to be made before trial. Rules Crim.Proc., Rule 12(C)(2).

[12] Indictment and Information 210 ↪110(4)

210 Indictment and Information

210V Requisites and Sufficiency of Accusation

210k107 Statutory Offenses

210k110 Language of Statute

210k110(4) k. Exceptions to Rule. Most Cited Cases

An 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. Const. Art. 1, § 10; R.C. § 2901.21(B); Rules Crim.Proc., Rule 7(B).

APPEAL from and CERTIFIED by the Court of Appeals for Cuyahoga County, No. 87499, 2006-Ohio-5335.

SYLLABUS OF THE COURT

*1 When 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.

William Mason, Cuyahoga County Prosecuting Attorney, and Jon W. Oebker, Assistant Prosecuting Attorney, for appellee.

Robert L. Tobik, Cuyahoga County Public Defender, and Cullen Sweeney, Assistant Public Defender, for appellant.

Jason A. Macke, urging reversal for amicus curiae Ohio Association of Criminal Defense Lawyers.

MOYER, C.J.

MOYER, C.J.

{¶ 1} Pursuant to Section 3(B)(4), Article IV of the Ohio Constitution and App.R. 25, the Eighth District Court of Appeals certified its judgment in this case as being in conflict with the judgments of the First District Court of Appeals in *State v. Shugars*, 165 Ohio App.3d 379, 2006-Ohio-718, 846 N.E.2d 592, and the Third District Court of Appeals in *State v. Daniels*, Putnam App. No. 12-03-12, 2004-Ohio-2063, 2004 WL 877695, on the following issue: "Where an indictment fails to charge the mens rea element of the crime, and the defendant fails to raise that issue in the trial court, has the defendant waived the defect in the indictment?" The answer to this question is no.

{¶ 2} Defendant-appellant, Vincent Colon, was convicted by a jury of the offense of robbery in violation of R.C. 2911.02(A)(2). Prior to the trial, the Cuyahoga County Grand Jury had returned a single-count indictment against the defendant, charging: "[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]."

{¶ 3} At the defendants trial, the court instructed the jury on the elements of robbery pursuant to R.C. 2911.02(A)(2), and summarized the elements as (1) "in attempting or committing a theft offense or in fleeing immediately after the attempt or offense,"

(2) the defendant inflicted, or attempted to "inflict, or threatened to inflict physical harm upon [the victim]." The jury found the defendant guilty.

{¶ 4} On appeal, the defendant argued that his "state constitutional right to a grand jury indictment and state and federal constitutional rights to due process were violated when his indictment omitted an element of the offense." The indictment did not expressly charge the mens rea element of the crime of robbery.

{¶ 5} The court of appeals did not address the defect in the indictment; instead, the court affirmed the defendants conviction pursuant to Crim.R. 12(C)(2). Crim.R. 12(C)(2) states that defects in an indictment are waived if not raised before trial, except that failure to show jurisdiction in the court or failure to charge an offense may be raised at any time during the pendency of the proceeding. The court of appeals held that because defendant did not raise the issue before his trial, he waived the argument that his indictment was defective.

*2 {¶ 6} Defendant was convicted of the offense of robbery, pursuant to R.C. 2911.02(A)(2). That statute states:

{¶ 7} "(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶ 8} " * * *

{¶ 9} "(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another."

I

{¶ 10} There is no dispute that the defendants indictment was defective. The indictment purportedly charged the defendant with robbery in violation of R.C. 2911.02(A)(2), but the indictment omitted a mens rea element for the actus reus element stated in subsection (2): "Inflict, attempt to inflict, or threaten to inflict physical harm on another."

A

[1]{¶ 11} While the robbery statute does not expressly state the degree of culpability required for subsection (2), the mental state of the offender is a part of every criminal offense in Ohio, except those that plainly impose strict liability. See *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, 803 N.E.2d 770, ¶ 18. Under R.C. 2901.21(A)(2), in order to be found guilty of a criminal offense, a person must have "the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense."

{¶ 12} R.C. 2901.21(B) addresses both strict-liability statutes and those statutes, like the robbery statute (R.C. 2911.02), that do not expressly state a culpable mental state. *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, 803 N.E.2d 770, at ¶ 19. R.C. 2901.21(B) states that "[w]hen the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense."

[2]{¶ 13} Thus, "recklessness is the catchall culpable mental state for criminal statutes that fail to mention any degree of culpability, except for strict liability statutes, where the accused's mental state is irrelevant. However, for strict liability to be the mental standard, the statute must plainly indicate a purpose to impose it." *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, 803 N.E.2d 770, at ¶ 21.

[3]{¶ 14} R.C. 2911.02(A)(2) does not specify a particular degree of culpability for the act of "inflict[ing], attempt[ing] to inflict, or threaten [ing] to inflict physical harm," nor does the statute plainly indicate that strict liability is the mental standard. As a result, the state was required to prove, beyond a reasonable doubt, that the defend-

ant recklessly inflicted, attempted to inflict, or threatened to inflict physical harm.

*3 {¶ 15} In this case, the indictment failed to charge that the physical harm was recklessly inflicted. The state agrees that the omission in the indictment of one of the essential elements of the crime of robbery rendered the defendant's indictment defective.

B

{¶ 16} This court has consistently protected defendants' rights to a proper indictment. As early as 1855, Chief Justice Ranney stated the importance of including all the essential elements in an indictment: " 'The nature and cause of the accusation' are not sufficiently stated to enable the accused to know what he might expect to meet upon the trial; and it is neither consistent with general principles nor constitutional safeguards, to allow a man to be thus put to trial upon a criminal charge in the dark." *Dillingham v. State* (1855), 5 Ohio St. 280, 285.

[4]{¶ 17} Our case law follows the Ohio Constitution, which 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. "The material and essential facts constituting an offense are found by the presentment of the grand jury; and if one of the vital and material elements identifying and characterizing the crime has been omitted from the indictment such defective indictment is insufficient to charge an offense, and cannot be cured by the court, as such a procedure would not only violate the constitutional rights of the accused, but would allow the court to convict him on an indictment essentially different from that found by the grand jury." *Harris v. State* (1932), 125 Ohio St. 257, 264, 181 N.E. 104.

{¶ 18} The Ohio Rules of Criminal Procedure reflect the principle that an indictment that fails to in-

clude all the essential elements of an offense is a defective indictment. Crim.R. 7(B) provides that an indictment must include a statement that "the defendant has committed a public offense specified in the indictment. * * * 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." (Emphasis added.)

II

{¶ 19} Having concluded that the indictment in this case was defective because it failed to charge an essential element of the offense, we next determine whether an indictment that fails to include the mens rea of the offense charged may be challenged for the first time on appeal. In this case, the defective indictment resulted in structural error, and the court of appeals erred when it held that the error could not be raised for the first time on appeal.

A

*4 [5][6]{¶ 20} Structural errors are "constitutional defects that "defy analysis by 'harmless error' standards" because they "affect[] the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself." " (Brackets added in *Fisher*.) *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, at ¶ 17, quoting *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, at ¶ 9, quoting *Arizona v. Fulminante* (1991), 499 U.S. 279, 309, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302. "Such errors permeate [t]he entire conduct of the trial from beginning to end" so that the trial cannot "reliably serve its function as a vehicle for determination of guilt or innocence." "Id., quoting *Arizona* at 309-310, 111 S.Ct. 1246, 113 L.Ed.2d 302, quoting

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Rose v. Clark (1986), 478 U.S. 570, 577-578, 106 S.Ct. 3101, 92 L.Ed.2d 460. "[A] structural error mandates a finding of 'per se prejudice.'" (Emphasis sic.) *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, at ¶ 9.

[7] ¶ 21 "In determining whether an alleged error is 'structural,' our threshold inquiry is whether such error 'involves the deprivation of a constitutional right.'" *Id.*, citing *State v. Issa* (2001), 93 Ohio St.3d 49, 74, 752 N.E.2d 904 (Cook, J., concurring). If an error in the trial court is not a constitutional error, then the error is not structural error. See *State v. Issa* at 74, 752 N.E.2d 904 (Cook, J., concurring).

¶ 22 We have previously cautioned against applying a structural-error analysis in cases that would otherwise be governed by Crim.R. 52(B) because the defendant did not raise the error in the trial court.^{FNI} See *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, at ¶ 23. "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." (Emphasis omitted.) *Id.*

¶ 23 The instant case could be decided by applying plain-error analysis pursuant to Crim.R. 52(B), because the defendant's substantial rights were prejudiced by the errors in the indictment, and the defendant failed to object to the indictment at the trial court. However, here, the defects in the indictment led to significant errors throughout the defendant's trial, and therefore, structural-error analysis is appropriate. As stated previously, structural errors permeate the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, at ¶ 17.

B

*5 [8] ¶ 24 Our holding in the instant case that the defect in the indictment resulted in structural error is supported by the Ohio Constitution, which states 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. In order to establish structural error, the defendant must first establish that a constitutional error has occurred.

¶ 25 As we explained in *State v. Wozniak* (1961), 172 Ohio St. 517, 520, 18 O.O.2d 58, 178 N.E.2d 800, "[t]o require defendants to answer for the crime sought to be charged in [the indictment] after amendment of the indictment by addition thereto of a missing charge of an essential element of that crime would be to require defendants to answer for a crime other than on 'presentment or indictment of a grand jury.'" In *State v. Wozniak*, the indictment did not include the element of intent specified in former R.C. 2907.10, now R.C. 2911.13, breaking and entering. *Id.* at 519, 18 O.O.2d 58, 178 N.E.2d 800. 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, 18 O.O.2d 58, 178 N.E.2d 800.

¶ 26 Crim.R. 7, first adopted in 1973, affected the rule with respect to the amendment of indictments. Crim.R. 7(D) states: "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."

[9] ¶ 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

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rights. In order to be constitutionally sufficient, an indictment must, first, contain "the elements of the offense charged and fairly inform[] a defendant of the charge against which he must defend, and, second, enable[] him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *State v. Childs* (2000), 88 Ohio St.3d 558, 565, 728 N.E.2d 379, quoting *Hamling v. United States* (1974), 418 U.S. 87, 117-118, 94 S.Ct. 2887, 41 L.Ed.2d 590.

{¶ 28} In the instant case, the indictment did not meet constitutional requirements, as it did not include all the essential elements of the offense charged against the defendant. Thus, the defendant was not properly informed of the charge so that he could put forth his defense.

{¶ 29} The defective indictment in this case resulted in several violations of the defendant's constitutional rights. First, the indictment against the defendant did not include all the elements of the offense charged, as the indictment omitted the required mens rea for the crime of robbery. Therefore, the defendant's indictment was unconstitutional.

*6 [10]{¶ 30} Second, there is no evidence in the record that the defendant had notice that the state was required to prove that he had been reckless in order to convict him of the offense of robbery, and thus the defendant's due process rights were violated. Further, the state did not argue that the defendant's conduct in inflicting physical harm on the victim constituted reckless conduct.

{¶ 31} In addition to the defendant's being unaware of the elements of the crime with which he was charged, and the prosecutor's failing to argue that the defendant's conduct in this case was reckless, when the trial court instructed the jury on the elements of robbery necessary to find the defendant guilty, the court failed to include the required mens rea for the offense. The defendant's counsel did not object to the incomplete instruction. There is no evidence in the record that the jury considered

whether the defendant was reckless in inflicting, attempting to inflict, or threatening to inflict physical harm, as is required to convict under R.C. 2911.02(A)(2). Finally, during closing argument, the prosecuting attorney treated robbery as a strict-liability offense.^{FN2}

{¶ 32} In summary, the defective indictment in this case failed to charge all the essential elements of the offense of robbery and resulted in a lack of notice to the defendant of the mens rea required to commit the offense. This defect clearly permeated the defendant's entire criminal proceeding. The defendant did not receive a constitutional indictment or trial, and therefore the defective indictment in this case resulted in structural error.

C
{¶ 33} The state agrees that the indictment charging the defendant is defective, but argues that the Ohio Rules of Criminal Procedure require that any objection based on defects in the indictment must be raised before trial. Crim.R. 12(C) provides:

{¶ 34} "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:

{¶ 35} " * * *

{¶ 36} "(2) 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)."

[11]{¶ 37} As stated in the Crim.R. 12(C)(2), there are two specific exceptions to the general rule. Defects in an indictment that fail either "to show jurisdiction in the court" or "to charge an offense" do not need to be raised prior to trial and can be raised any time during the pendency of the proceeding. An

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indictment that omits the mens rea element of recklessness fails to charge the offense of robbery, and is therefore an exception to the general rule stated in Crim.R. 12(C).

{¶ 38} Our conclusion that an indictment that omits an essential element fails to charge an offense is supported by case law. In *State v. Wozniak*, 172 Ohio St. 517, 18 O.O.2d 58, 178 N.E.2d 800, paragraph one of the syllabus, we held that the intent element of an offense is an essential element of the crime and an indictment that does not charge a defendant with intent does not charge a defendant with the crime. Also, in *State v. Childs*, we concluded that the defendant did not waive his challenge to an indictment that omitted a material element identifying the crime by not raising it prior to trial. Id. (2000), 88 Ohio St.3d 194, 724 N.E.2d 781. “ “[I]f one of the vital and material elements identifying and characterizing the crime has been omitted from the indictment such defective indictment is insufficient to charge an offense, and cannot be cured by the court, as such a procedure would not only violate the constitutional rights of the accused, but would allow the court to convict him on an indictment essentially different from that found by the grand jury.” ”Id. at 198, 724 N.E.2d 781, quoting *Wozniak* at 521, 18 O.O.2d 58, 178 N.E.2d 800, quoting *Harris v. State* (1932), 125 Ohio St. 257, 264, 181 N.E. 104.

III

*7 {¶ 39} Our holding today, that a defendant can challenge for the first time on appeal an indictment that omits an essential element of the crime, protects defendants' right to a grand jury indictment. The grand jury is an important part of American citizens' constitutional rights. Our grand jury system is derived from its English counterpart, and the concept was brought to this country by early colonist and incorporated into the federal constitution. *Costello v. United States* (1956), 350 U.S. 359, 362, 76 S.Ct. 406, 100 L.Ed. 397. “The basic purpose of the English grand jury was to

provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. * * * Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges.”Id.

{¶ 40} In discussing the grand jury provision of the federal constitution, which is very similar to the grand jury provision of the Ohio Constitution, the Supreme Court of the United States has stated that the grand jury is a “ ‘constitutional fixture in its own right.’ ” *United States v. Williams* (1992), 504 U.S. 36, 47, 112 S.Ct. 1735, 118 L.Ed.2d 352, quoting *United States v. Chanen* (C.A.9, 1977), 549 F.2d 1306, 1312, quoting *Nixon v. Sirica* (C.A.D.C.1973), 487 F.2d 700, 712, fn. 54. “In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by ‘a presentment or indictment of a Grand Jury.’ The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions.” (Citation omitted.) *United States v. Calandra* (1974), 414 U.S. 338, 343, 94 S.Ct. 613, 38 L.Ed.2d 561.

{¶ 41} The state argues that despite the constitutional significance of the grand jury, permitting defendants to challenge a defective indictment for the first time on appeal will encourage defendants to withhold their challenges until after trial, resulting in inefficient proceedings. Our answer to this argument is simple: the state can thwart a defendant's ability to harbor his challenge until after judgment by securing an indictment from the grand jury that properly charges all the essential elements of the offense.

*8 [12]{¶ 42} Crim.R. 7(B) plainly states that an “indictment shall * * * contain a statement that the defendant has committed a public offense specified

in the indictment."Further, Crim.R. 7(B) states, "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."(Emphasis added.) "[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."State v. O'Brien (1987), 30 Ohio St.3d 122, 124, 30 OBR 436, 508 N.E.2d 144, citing State v. Adams (1980), 62 Ohio St.2d 151, 16 O.O.3d 169, 404 N.E.2d 144.

{¶ 43} Applying Crim.R. 7(B) to this case, since the language of R.C. 2911.02(A)(2) does not include the mental element required to commit the offense, the indictment was required to be in "words sufficient to give the defendant notice of all the elements."Further, pursuant to State v. O'Brien, the defendant's indictment was required to include the term "recklessly" in order to properly charge the offense. It is not an unreasonable burden to require counsel for the state to ensure that the defendant receives the benefit of his fundamental constitutional protections, nor is it unreasonable to expect a trial judge to properly instruct the jury regarding all the elements of the crime with which the defendant is charged.

{¶ 44} A defendant has a constitutional right to grand jury indictment and to notice of all the essential elements of an offense with which he is charged. The state must meet its duty to properly indict a defendant, and we will not excuse the state's error at the cost of a defendant's longstanding constitutional right to a proper indictment. When a defective indictment so permeates a defendant's trial such that the trial court cannot reliably serve its function as a vehicle for determination of guilt or innocence, the defective indictment will be held to be structural error. See State v. Perry, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, at ¶ 17.

{¶ 45} In conclusion, we hold that when an indict-

ment 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.

Judgment reversed.

PFEIFER, O'CONNOR, and WOLFF, JJ., concur.
LUNDBERG STRATTON, O'DONNELL, and LANZINGER, JJ., dissent.
WILLIAM H. WOLFF JR., J., of the Second Appellate District, sitting for CUPP, J.
PFEIFER, O'CONNOR, AND WOLFF, JJ., CONCUR.LUNDBERG STRATTON, O'DONNELL, AND LANZINGER, JJ., DISSENT.WILLIAM H. WOLFF JR., J., OF THE SECOND APPELLATE DISTRICT, SITTING FOR CUPP, J.
O'DONNELL, J., dissenting.
*9 O'DONNELL, J., dissenting.

{¶ 46} As the majority acknowledges, there is no dispute that Colon's indictment is constitutionally defective because it omitted a necessary element for the offense of robbery. I respectfully dissent, however, from the conclusion that this defect is structural. Thus, in my view, a defendant forfeits all but plain error associated with such a defect by failing to object at a time when it could have been corrected by the trial court. Therefore, I would affirm the judgment of the court of appeals and answer the certified question in the affirmative.

Structural Error

{¶ 47} A structural error, according to Johnson v. United States (1997), 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718, is a defect "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," and thus it is "so serious as to defy harmless-error analysis."Id., quoting Arizona v. Fulminante (1991), 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302.Moreover, the court explained in Neder v. United States (1999), 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35, that "[s]uch errors