

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,
Plaintiff-Appellant

vs.

JAMES LESTER,
Defendant-Appellee

:
: No. 08-1725
: App. Case No. C-070383
:
:
:
:

MEMORANDUM IN RESPONSE

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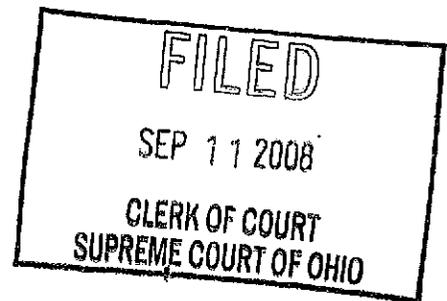


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ISSUES OF THIS CASE DO NOT RAISE SUBSTANTIAL CONSTITUTIONAL
QUESTIONS AND ARE NOT OF GREAT PUBLIC INTEREST

This matter does not raise substantial constitutional questions nor is it of great public interest to the State of Ohio; the First District Court of Appeals clearly followed established law in its holding and properly decided this case. Therefore, jurisdiction should be denied.

STATEMENT OF THE CASE AND PROCEDURAL POSTURE

An incident occurred on October 24, 2006 in Hamilton County, Ohio which resulted in Appellee James Lester being indicted on the aggravated robbery and robbery charges. According to the alleged victim, Carlos Gray, he was approached by Mr. Lester while he was at the U.S. Bank in Queensgate; Mr. Gray stated that he had just withdrawn \$1,800. Mr. Gray testified that Mr. Lester stated he was trying to find someone on "Pea Green Street." He further testified that, despite having a great deal of cash on him, he allowed Mr. Lester into his vehicle. At some point, he testified that another man walked up to the vehicle and he let him get in as well. Instead of keeping the \$1,800 on his person, Mr. Gray stated that he left the money in his opened briefcase behind his seat. He then went on to tell a "convoluted" story of "making an example out of Mr. Lester" and him putting \$100 into a bag. This wholly unbelievable story ended with Mr. Lester allegedly taking the \$1,800 (although Mr. Gray did not see him to it) and pulling a knife onto Mr. Gray. A knife was identified at trial by Mr. Gray, but no one testified that it was a knife recovered from Mr. Lester.

On April 12, 2006, Mr. Lester allegedly played a card game with Otha Bonner, after Mr. Bonner had driven him around. It appeared to be unclear whether Mr. Bonner lost the money in the card game or someone took the money because Mr. Bonner testified that no one made him do anything, he voluntarily got into the card game with Mr. Lester and another man, and he lost his

money.

On October 24, 2006, Mr. Lester and another man allegedly played a card game with Sherman Lymen. Mr. Lymen voluntarily gave Mr. Lester an automobile ride, voluntarily let another man into his car, and voluntarily began playing the card game. At some point, Mr. Lymen gave his wallet to the other man, but Mr. Lester had nothing to do with that. Mr. Lymen also testified that he withdrew \$3,000 out of the bank because the other man, not Mr. Lester, “coerced” him. Again, it appeared that Mr. Lymen simply lost his money in the card game.

Based on these incidents, Mr. Lester was indicted for aggravated robbery and robbery on November 1, 2006 in Case No. B-0609954; and he was indicted in Case No. B-0610741 for two counts of theft from an elderly person on November 22, 2006. The State of Ohio filed a Motion to Consolidate these cases on February 15, 2007. At some point, the trial court granted that Motion. On April 20, 2007, after the trial court denied motions for a continuance and new counsel, a jury trial began. On April 20, the jury returned verdicts of guilty to all charges. Mr. Lester was then sentenced to 7 years on the aggravated robbery charge; the robbery charge was merged for purposes of sentencing. This sentence was consecutive to the 3-year sentence in Case No. B-0610741. A Notice of Appeal was timely filed on May 29, 2007 with the First District Court of Appeals. The First District reversed the trial court's judgement for the aggravated robbery conviction on July 18, 2008. The State of Ohio then filed a Notice of Appeal to this Court on August 29, 2008.

PROPOSITION OF LAW

Where the indictment omits the *mens rea*, a necessary element of

the offense, Defendant-Appellant's due process rights and right to a proper grand jury indictment were violated by the structural defect.

On April 9, 2008, this Court held that an indictment that fails to charge a *mens rea* element of a crime is so defective that it resulted in structural error which need not be raised at trial; structural errors are "constitutional defects" which deprive a defendant of a constitutional right. As the defective indictment was a structural error that "permeate[d] 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," the defendant's conviction had to be reversed. State v. Colon (Ohio 2008), 118 Ohio St.3d. 26, 885 N.E.2d 917, 2008-Ohio-1624; see also State v. Perry (Ohio 2004), 101 Ohio St.3d 118, 802 N.E.2d 643, 2004-Ohio-297. Support for this position was found in Art. I, Section 10 of 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." It also stated that the defendant's due process rights were violated because he had no notice of what *mens rea* the State was required to prove.

In the case at bar, Mr. Lester's case is almost directly on point to the Colon case; he was convicted of the charges of aggravated robbery and robbery. No where in the indictment for either of these charges is a culpable mental state mentioned. The indictment in this case, just as the indictment in the Colon case states that Mr. Lester 1) "in committing or attempting to commit a theft offense . . . or in fleeing immediately thereafter, had a deadly weapon on or about his person or under his control, and displayed, brandished, indicated possession or used the deadly weapon;" and 2) "in committing or attempting to commit a theft offense . . . or in fleeing immediately thereafter, inflicted or attempted to inflict or threatened to inflict physical harm . . ."

This indictment was defective and unconstitutional and resulted in a structural error that permeated the proceedings; there is “no evidence 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 [his] due process rights were violated.” Colon at 32. Therefore, Mr. Lester was prejudiced by this structural error.

The State of Ohio contends that this Court’s decision in State v. Wharf (Ohio 1999), 86 Ohio St.3d 375, 715 N.E.2d 172, 1999-Ohio-112 supports a reversal of the First District’s decision; this contention is erroneous. This Court in the Colon decision clearly states that “[w]hen a section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.” Colon at 28. Even Justice Lanzinger in her dissent recognizes that the majority, for the first time, was holding that “the state is required to prove that the defendant *recklessly* inflicted . . . physical harm.” Colon at 40. Similarly, nowhere in R.C. Section 2911.01(A)(1), the aggravated robbery section under which Mr. Lester was convicted, is a culpable mental state indicated nor is there indication of a purpose to impose strict liability. Therefore, as the indictment failed to state the *mens rea* of “recklessness,” it is structurally defective under this Court’s decision in Colon. The First District Court of Appeals decision in this case was properly decided.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court deny leave to appeal and allow the First District Court of Appeals’ decision to stand, which reversed the trial

court.

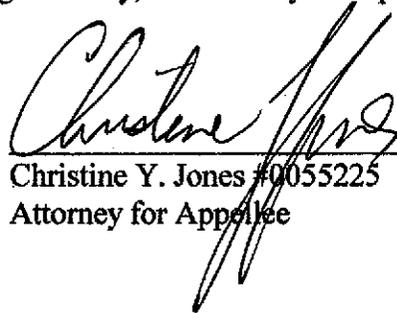
Respectfully submitted,



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CERTIFICATE OF SERVICE

In hereby certify that a copy of the foregoing brief was personally served upon Judith Anton Lapp, Assistant Hamilton County Prosecuting Attorney, this 10th day of September, 2008.



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