IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Plaintiff-Appellant,	:	
vs.	:	**Case No. 2008-2127**
JOHN ROHRBAUGH,	:	
Defendant-Appellee	:	

APPEAL FROM THE COURT OF APPEALS, THIRD APPELLATE DISTRICT
LOGAN COUNTY COURT OF APPEALS CASE NO. 8-07-28

APPELLEE JOHN ROHRBAUGH 'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST OR INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

The answer to the question raised by Appellant is very clear in Ohio law. In the State of Ohio, there are only two methods to charge a defendant with a felony at the common pleas court level, by indictment or by a bill of information. If the State wishes to charge a defendant with an additional offense not included in the indictment, it must either seek a second a second indictment from the grand jury; or if the defendant is wishes to waive presentation to the grand jury, the State may file a bill of information.

The State asks this Court to use this case as a vehicle to revisit its recent decision in *State v. Colon*, 118 Ohio St. 3d 26, 2008-Ohio-1624, 885 N.Ed.2d 917. This Court has already done that once and this case presents no reason to do that again. *State v. Colon*, __ Ohio St. 3d __, 2008-Ohio-337 Assuming that *Colon* even has any bearing on this case (In *Colon* the Court did not address the manner for instituting felony charges), then the facts and holding in *Colon* are dispositive as to this case. In *Colon,* this Court addressed the remedy when the prosecution had failed to include a *single* element of the offense in the indictment. In this case the prosecution, because it entirely failed to present the offense to the grand jury, failed to include *any* of the elements in the indictment. The error in this case is much more pervasive, and therefore Appellee is entitled to the same remedy as the defendant in *Colon.*

Finally, the State argues that the appellate court's holding undercuts plea bargaining because the State and defendant will no longer having the option of resolving a case by the defendant pleading to an offense that is not included in the indictment. That is incorrect. That option will still remain available; the State will simply have to file a bill of information charging the agreed upon offense and the defendant will have to waive his right to having the prosecutor present that offense to the grand jury. If the State had followed that option in this case, this appeal would not be pending herein.

COMBINED STATEMENT OF THE CASE AND FACTS

For purposes of this Memorandum in Support of Jurisdiction, Appellee John Rohrbaugh accepts the Statement of the Case and Statement of Facts contained in Appellant's Memorandum in Support of Jurisdiction.

PROPOSITION OF LAW

A TRIAL COURT CANNOT ACCEPT A GUILTY OR NO CONTEST PLEA TO A FELONY OFFENSE WHEN THE DEFENDANT HAS NOT BEEN CHARGED BY INDICTMENT OR BILL OF INFORMATION WITH THAT OFFENSE.

The dispositive facts as this appeal in are not dispute. Mr. Rohrbaugh pled guilty to one count of Receiving Stolen Property, a fifth degree felony in violation of O.R.C. § 2913.41. The offense of Receiving Stolen Property was neither included in the indictment, nor was it a lesser included offense of a charge contained in the indictment. The prosecution did not charge Appellant with the offense by filing of a bill of information. Finally, Mr. Rohrbaugh at no time waived his right to indictment for the offense of Receiving Stolen Property.

Appellant asks this Court to accept jurisdiction for two reasons: the appellate court's application of the plain error standard and its failure to find invited error. Both of Appellant's arguments concede or assume the existence of error by the trial court. Appellant at no point in its Memorandum addresses the failure of the prosecution to charge Mr. Rohrbaugh with the offense of Receiving Stolen Property, either through indictment or bill of information. For the reasons that will be discussed herein, the charging issue renders moot the two issues that Appellant does address. Even if not moot, the two issues as to which Appellant wishes this Court to accept jurisdiction, the appellate court below correctly addressed and resolved. More importantly, those two issues do

not warrant further review by this Court and the expenditure of its limited resources.

I. A TRIAL COURT CAN NOT ACCEPT A PLEA TO A FELONY OFFENSE FOR WHICH A DEFENDANT HAS NOT BEEN CHARGED EITHER BY INDICTMENT OR BILL OF INFORMATION.

The Ohio Constitution provides, in pertinent part, that "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury," Art. I, § 0. The right to a grand jury indictment requires that "material and, essential facts constituting an offense are found by the presentment of the grand jury." *Harris v. State* (1932) 125 Ohio St. 257, 264, 181 N.E. 104. An indictment that omits an essential element is fatally defective and insufficient to charge an offense. *Id. State v. Cizpritz* (1953), 158 Ohio St. 490, 493, 110 N.E.2d 416; *State Wozniak* (1961), 172 Ohio St. 517, 178 N.E2d 800, paragraphs one and two of the syllabus; *State v. Headley* (1983), 6 Ohio St 3d 475, 478, 453 N.E. 2d 716. Where an indictment does not charge an offense, it is voidable for lack of subject matter jurisdiction. *State v. Cimpritz* (1953), 158 Ohio St. 490, 494, 110 N.E.2d 416, as modified and explained by *State v. Wozniak*, 172 Ohio St. at 522 and *Middling v. Perrini* (1968), 14 Ohio St. 2d 106, 107, 236 N.E.2d 557.

The error present in this case is not a matter of the grand jury having considered the offense in question, but through oversight omitted an element of that offense in the indictment. Instead, the error is much

more significant, the grand jury *never considered* the offense in question and therefore the indictment contained no references to the offense in question. There was a total lack of presentment to the grand jury. This is the quintessential example of a violation of an individual's Ohio Constitutional right to indictment. Mr. Rohrbaugh did not waive the lack of presentment, either by consenting to a bill or particulars or by waiving the state constitutional right after being so informed by the trial court.

II. A PROSECUTION'S FAILURE TO PRESENT AN OFFENSE TO THE GRAND JURY IS NOT SUBJECT TO PLAIN ERROR REVIEW.

Appellant does not contend that the Court of Appeals failed to apply a plain error analysis. Instead, it contends that the Court of Appeals incorrectedly applied the doctrine of plain error, by not requiring Mr. Rohrbaugh to demonstrate prejudice. Appellant is incorrect in its contention.

The Ohio appellate courts have not required a demonstration of prejudice when the amendment to the indictment results in a change in the in the name or identify of the crime charged. *State v. Fairbanks*, 172 Ohio App. 3d 766, 2007-Ohio-4117 876 N.E.2d 1293, ¶17; *Middletown v. Blevins* (1987), 35 Ohio App. 3d 65, 67, 519 N.E.2d 846. The lower court correctly relied on these cases when it decided the plain error issue in the present case. *State v. Rohrbaugh*, 3rd Dist. No. 8-07-02, 2007-Ohio-4781, ¶17. In *Fairbanks* the appellate court found that the trial court erred when it permitted the prosecution to add a single element to the indictment. The error was more egregious in the present case; the

prosecution never presented the offense in question to the grand jury. The nature of the error herein, is to be compared with the reversible error this Court found to exist in *State v. Colon,* 118 Ohio St. 3d 26, 2008-Ohio-1624, 885 N.E.2d 917 . The indictment in *Colon* lacked one of the elements of the offense in question and this Court found plain error inapplicable. In this case the indictment lacked all of the elements of the offense in question. Mr. Rohrbaugh is entitled to the same remedy as the Court imposed in *Colon.*

III. THE DOCTRINE OF INVITED ERROR IS NOT APPLICABLE TO AN ISSUE THAT AN APPELLATE COURT SUA SPONTE RAISES.

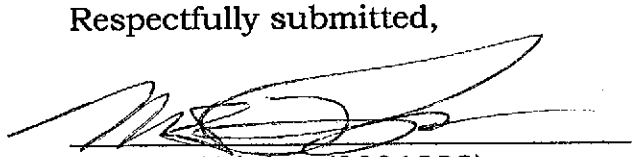
The State also argues that the appellate court erred by not applying the doctrine of invited error, citing to *State v. Robinson,* 8TH Dist. No. 90411, 2008-Ohio-3972. The invited error doctrine precludes a party from raising on appeal an error that he invited or precipitated in the trial court. The doctrine in effect precludes a party from "sand bagging." Unlike the Appellant in *Robinson,* Appellant herein did not raise on appeal the issue upon which this appellate court granted relief. The lower appellate court sua sponte raised the issue upon which it granted relief. Unless this prosecution can prove that defense counsel: 1) created the issue at trial, 2) knowing that the appellate court would sua sponte raise the issue, and 3) then grant relief, the doctrine of invited error is inapplicable.

The prosecution fails to address the fact that it was complicit in the creation of the reversible error. The prosecution was intimately involved in the plea bargain. It was certainly aware of its constitutionally and statutory imposed obligation to obtain an indictment or file a bill of particulars.

CONCLUSION

For the reasons set forth herein, this Court should deny Appellant's request to accept jurisdiction and the appellate court's certification.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *John Rohbraugh's Memorandum in Opposition to Jurisdiction* was served upon Eric C. Stewart, Logan County Assistant Prosecuting Attorney, Attorney for Appellee, 117 E. Columbus, Avenue, Suite 200, Bellefontaine, Ohio 43311 via regular mail this 1st day of December, 2008.

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Counsel for Appellee John Rohrbaugh