

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO)	Case No.: 2009 Ohio 0678
)	
Plaintiff-Appellee)	On Appeal from the Lake County
)	Court of Appeals Eleventh Appellate
vs.)	District
)	
JOSEPH PEPKA)	Court of Appeals Case No.:
)	2008 - L - 016
Defendant-Appellant)	

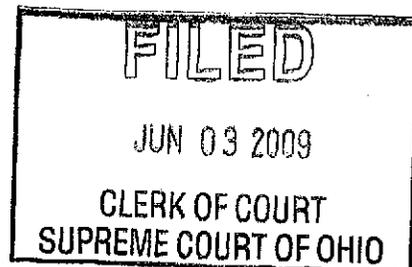
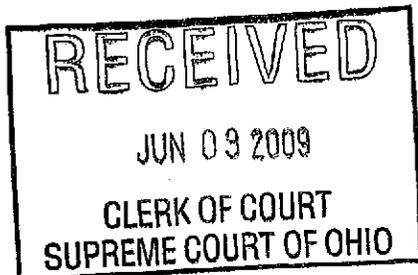
MEMORANDUM OPPOSING JURISDICTION

Charles E. Coulson (0008667)
Prosecuting Attorney
P. O. Box 490
Painesville, OH 44077
(440) 350-2683
(440) 350-2585 fax

Counsel for Appellant, State of Ohio

Albert L. Purola (0010275)
38108 Third Street
Willoughby, OH 44094
(440) 951-2323
(440) 951-5005 fax
purola@hotmail.com

Counsel for Appellee, Joseph Pepka



**EXPLANATION CONTRA WHY THIS CASE IS OF PUBLIC
OR GREAT GENERAL INTEREST, OR INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case is not unique, and is a correct application of recent and dispositive precedent from this Court.

It is about amending an indictment that when returned, charged three (3) misdemeanor counts of child endangering but when tried purported to charge three (3) counts of felony child endangering because of an improper amendment.

The Eleventh District properly applied the syllabus law of *State v. Davis*, 121 Ohio St. 3d 239, which prohibits, as violative of Criminal Rule 7(D), amendments that change the penalty or the degree of the indicted offense.

The “amendment” here did both.

This is settled law, and no reason exists to grant review here.

ARGUMENT IN SUPPORT OF APPELLEE’S POSITION

Proposition of Law I

Just because the indictment said it was charging a felony does not make it a felony if the statutory ingredients to constitute a felony are not there. An indictment could say it was charging a capital crime but without the aggravating circumstances included in the material returned by the Grand Jury, it does not charge a capital crime.

This juvenile example is only made to highlight by way of analogy why the self-produced “label” on the indictment is insufficient to substitute for actual findings. The basis for this position is venerable. In *Harris v. State*, 125 Ohio St. 257, 264, this Court wrote: “...guarantees the accused that the essential facts constituting the offense for

which he will be tried will be found in the indictment by the grand jury.” (Emphasis added.)

Just as the kind of drug in *Headley* (*State v. Headley*, 6 Ohio St. 3d 475) was a “fact” required to be found by the grand jury, and the amount of the drug required to be found by the grand jury in *Davis* was a “fact”, so, too, the amount of harm necessary to elevate this from a misdemeanor to a felony was a “fact” that would have to have been found by the grand jury, and included in the body of the indictment.

To say this self-labeled indictment charges a third degree felony because it says it does is the classic circular argument. This case is not about the ‘due process-notice’ prong of an indictment’s purpose, it is about the actual finding of facts, by the grand jury, that meet the statutory requirements.

Proposition of Law 2

To say that serious physical harm is not an element of felony child endangering is disingenuous in the extreme.

The prosecutor has been seduced by the use of words like ‘specification’, and ‘special finding’ that appear in other cases like *State v. Smith*, 117 Ohio St. 3d 447, and *State v. Fairbanks*, 117 Ohio St. 3d 543, neither of which was decided to address the limits of the legislature’s power *vis a vis* the grand jury.

If “serious physical harm” is not an element why would it have to be ‘found’ beyond a reasonable doubt? And ‘found’ by the jury? If it is a “fact” sufficient to satisfy the *In Re Winship* [397 U.S. 358] requirement the due process clause protects against conviction except upon proof beyond a reasonable doubt of every fact necessary

to constitute the crime charged, why would it not be an “essential fact” which *Harris v. State*, supra, requires to be not just in the indictment, but found by the grand jury?

The child endangering without serious physical harm is a lesser included offense of child endangering with serious physical harm, *State v. Deem*, 40 Ohio St.3d 205, and therefore the ‘same offense’ for constitutional purposes. The comparison of lesser and greater offenses only make sense if the degree of harm is an element.

These so-called ‘specifications’, or ‘special findings’ are at odds with the legislature’s requirement in Ohio Revised Code Section 2941.14 *et seq.* that enhancements like age of victim, motive of offender or possession of a gun be found by the grand jury and included in the indictment in order to raise or enhance the penalty. The effect of the prosecutor’s expansion of the charging process is to negate the historical constitutional role of the grand jury.

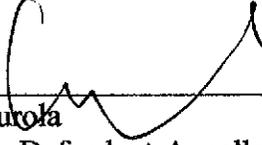
The lower court was correct because the indictment as written charged only “facts” that amounted to first degree misdemeanors. After the “amendment” the charge was for felonies of the third degree and that was prohibited by Criminal Rule 7(D) and *State v. Davis*, supra.



Albert L. Purola, #0010275
Attorney for Defendant-Appellant
38108 Third Street
Willoughby, OH 44094
(440) 951-2323

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum Opposing Jurisdiction was sent by regular U. S. mail, postage prepaid, this 3 day of June, 2009, to Charles Coulson, Prosecuting Attorney, at P. O. Box 490, Painesville, Ohio 44077.



Albert L. Purola
Attorney for Defendant-Appellant