

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

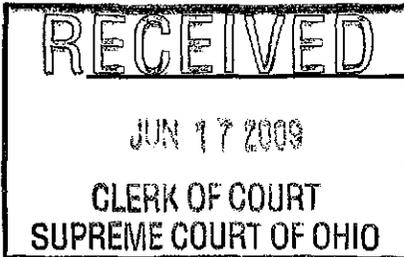
-vs-

JOHN W. FRAZIER,

Defendant-Appellant.

CASE NO. 2009-0991

On Appeal from the Fairfield
County Court of Appeals
Fifth Appellate District
Case No. 08-CA-0066



MEMORANDUM IN RESPONSE

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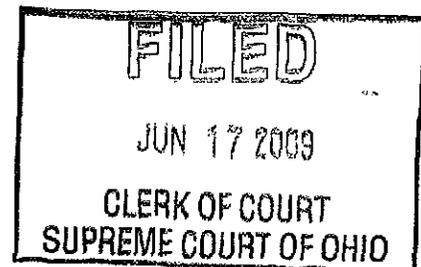


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**APPELLEE'S POSITION WHY THIS CASE DOES NOT INVOLVE A
SUBSTANTIAL CONSTITUTIONAL QUESTION, IS NOT OF GREAT
PUBLIC INTEREST, AND WHY LEAVE TO APPEAL SHOULD BE DENIED**

After committing a robbery of a local Dairy Mart, Appellant murdered Lancaster Police Department Police Officer Brett Markwood on February 21, 1993. Appellant was indicted by the Fairfield County Grand Jury for two counts of Aggravated murder with death penalty specifications, and one count of Aggravated Robbery. Shortly after a jury trial began, a plea agreement was reached wherein Appellant agreed to plead guilty to aggravated murder with a firearm specification and aggravated robbery in return for the State's agreement not to seek the death penalty. Appellant was represented by three highly competent attorneys at the time the plea agreement was reached.

After the plea agreement was reached, a three-judge panel was appointed and Appellant, while represented by the same three attorneys entered his plea. After determining that Appellant's plea was knowing, intelligent and voluntary, the panel recessed to commence deliberations. After the panel concluded its deliberations, the panel returned and stated that they now believed Appellant's plea was not voluntary. The panel had already heard mitigation evidence at the time they determined that Appellant's original plea was involuntary.

Nearly three years of litigation took place, and on May 16, 1996, Appellant while still represented by the same three attorneys, reaffirmed his guilty plea, waived a plea before a three-judge panel, and was sentenced to a term of life imprisonment without parole eligibility for thirty years to be served consecutively to a three-year firearm specification to be served consecutively to a sentence of not less than ten years nor more than twenty-five years indefinite term with the ten year term being served as a term of actual incarceration. Throughout both plea hearings and numerous other hearings before the trial court, Appellant's counsel consistently stated that their sole goal was to avoid the

death penalty for Appellant based on the strength of the State's case.

This case is not an appropriate one for this court to exercise jurisdiction. No constitutional issues are presented, and the only injustice that has occurred is when the family of Brett Markwood had to endure three years of litigation while waiting for Appellant's second guilty plea. Before filing his Motion for Delayed Appeal in this case, Appellant was actively pursuing at least ten different legal cases. This case presents a highly unusual fact pattern and does not affect significant numbers of people. Appellant's attorney in open court acknowledged that Appellant shot and killed Officer Brett Markwood. This appeal concerned Appellant's attempt to apply this Court's reasoning of *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, to a case that involves a guilty plea to aggravated robbery and aggravated murder that occurred in 1996. This case is easily distinguished from *State v. Colon*. Accordingly, this Court should deny leave to appeal.

STATEMENT OF THE CASE AND FACTS

On Thursday, May 16, 1996, Appellant, while represented by three attorneys, voluntarily waived and relinquished his right to a trial by jury and elected to reaffirm his guilty plea to aggravated murder with three specifications. Appellant also waived a plea before a three-judge panel. Appellant also plead guilty to one count of aggravated robbery. Appellant signed a reaffirmation of plea, waiver and consent for court to take judicial notice of the previous mitigation hearing. The State in return for the plea agreed not to seek the death penalty.

On May 16, 1996, Appellant was sentenced and the Judgment Entry of Sentence was prepared and filed on that date. On May 24, 1996, an Entry of Sentence, Nunc Pro Tunc was prepared because the original entry that had been hastily prepared, designated Appellant's conviction as to count one when it should have been designated as count two. No other changes were made in the Entry of Sentence. More than 11 years later, Defendant filed a Petition for Post-Conviction Relief. This petition was overruled by the trial court on September 12, 2008.

On September 18, 2008, Judge Otho Eyster, sitting by assignment, ruled that Appellant's petition was untimely filed and does not satisfy the requirements of any recognized exception allowing untimely filing and is barred by *Res Judicata*. (Judgment Entry 9/12/08). The trial court determined that Appellant's petition relies on the case of *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624. *Id.* The trial court held that *Colon* does not apply to the facts in this case. *Id.* The trial court also determined that Appellant failed to show any prejudice that would warrant the Court granting post-conviction relief, denied Appellant's petition for post-conviction relief, and ordered Appellant was not entitled to court appointed counsel in this matter. *Id.*

Appellant pro se filed a timely Notice of Appeal which was denied on April 22, 2009. *State v. Frazier* April 22, 2009, Fairfield App., 2009-Ohio-1899.

RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW

FIRST PROPOSITION OF LAW

THE STATE COURT FAILED TO ACTUALLY LIST AGGRAVATED ROBBERY AS THE OFFENSE BEING CHARGED IN COURT THREE (3), AND TO LIST AND/OR MEET REQUIRED ELEMENTS OF THE OFFENSES UPON THE INDICTMENT REQUIRED TO CHARGE A CRIME, AND THUS IS IN VIOLATION OF ARTICLE I. SECTION 10 AND 16 OF THE OHIO CONSTITUTION, AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND O.R.C. §2901.21(B)(D) O.R.C. §2901.22(E) AND CRIMINAL RULE 7(B)(D), 12(C)(2)

The trial court properly ruled that Appellant's petition is barred as an untimely petition. Under R.C. 2953.21(A)(2), a petition for post-conviction relief was due within 180 days after the time expired for his appeals. Given the judgments of conviction entered on May 16, 1996, Appellant's time for appeal expired June 16, 1996, and the time for filing a post-conviction petition expired on December 16, 1996, which was more than 11 years before Appellant filed the present petition.

Although, there are narrow exceptions that allow untimely filing, Appellant cannot validly invoke those exceptions here. Under the first exception, untimely filing will be allowed if "the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief * * *." R.C. 2953.23(A)(1)(a). Appellant cannot validly invoke this exception as he relies on new case law, i.e., *State v. Colon*, 118 Ohio St. 3d 26, 2008-Ohio-1624, not on new facts. This exception does not apply to new legal developments. *State v. Gulertekin* (June 8, 2000), Franklin App. Case No. 99AP-900 (2000 Ohio App. Lexis 2412) (exception requires new factual information, not new legal theories or a claimed ignorance of the law).

Nor could Appellant satisfy the second exception by showing that, “subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.” R.C. 2953.23(A)(1)(a). Appellant does not invoke any new United States Supreme Court decision that post-dates his November 1996 deadline for filing a petition. *Colon* is not a decision of the United States Supreme Court.

Moreover, it is not retroactive to persons in Appellant’s situation. “The question of the sufficiency of the indictment does not relate to the jurisdiction of the court to try appellant for the crime for which he was convicted. [A defendant’s] remedy, if any, is by way of appeal from the judgment of conviction.” *Chapman v. Jago* (1976), 48 Ohio St. 2d 51, 51. Questions about the validity of the indictment must be raised by appeal. *Walker v. Maxwell* (1965), 1 Ohio St. 2d 136, 138. Appeal is an adequate remedy at law to challenge purported irregularities in the indictment. *In re Bryant* (1960), 171 Ohio St. 16. A challenge to the validity or sufficiency of an indictment “is nonjurisdictional in nature, and should have been raised in an appeal of his criminal conviction * * *.” *State ex rel. Raglin v. Brigano* (1998), 82 Ohio St.3d 410; *State ex rel. Hadlock v. McMackin* (1991), 61 Ohio St.3d 433, 434. Thus, a collateral attack on the validity of the indictment is not allowed. *State v. Wozniak* (1961), 172 Ohio St. 517, 522-23. “[A] postconviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment,” see *State v. Steffen* (1994), 70 Ohio St.3d 399, 410, Appellant cannot challenge the validity of the indictment in this collateral proceeding.

In addition, *Colon* stated that the constitutional right it was enforcing was not “new,” since *Colon* contended that the right to have an indictment state all of the elements of the offense had existed “[a]s early as 1855.” *Colon*, at ¶ 16. *Colon* also cited cases dating from, inter alia, 1932 and 1961. *Id.* at ¶¶ 17, 25. The statute it applied to conclude that “reckless” should be part of the robbery offense under R.C. 2911.02(A)(2) had existed since 1974. *Colon* did not create a “new right.”

Even if Appellant could satisfy one of these exceptions, he would be further required to show “by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact finder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable fact finder would have found the petitioner eligible for the death sentence.” R.C. 2953.23(A)(1)(b). On its face, this prong does not apply to plea-based convictions, as a defect in an indictment, which resulted in a guilty plea, would not be a “constitutional error at trial.”

Even if an outcome-determination standard could allow a tardy challenge to a plea-based conviction, Appellant would be unable to make such a showing. As stated below in part B, the aggravated robbery charge was valid regardless of *Colon*, and the purported error, if any, could have been corrected by reindicting that count or amending the count to add recklessness or by reaching a plea agreement for a guilty plea to other count(s). Appellant’s motive for pleading guilty in this case was to avoid the death penalty.

A.

Another ground for rejecting the motion/petition is *res judicata*. “*Res judicata* is applicable in all postconviction relief proceedings.” *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 95. “Under the

doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant * * * on an appeal from that judgment.” *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus.

Defective-indictment claims are barred by res judicata. *State v. Chafin* (March 25, 1999), Franklin App. Case No. 98AP-865 1999 Ohio App. Lexis 1470. Indeed, even when the claim is that the Defendant could not be convicted of the offense at all because of subsequent case law, the claim is barred by res judicata. *Szefcyk*, supra.

Colon’s conclusion that the omission of recklessness from a charge is “structural error” does not change this analysis. “Structural error” only means that the error is per se prejudicial so as to avoid affirmance on harmless-error grounds on direct appeal. It does not mean that such a claim can be raised for the first time on post-conviction review. *Colon* only held that the issue could be raised for the first time on direct appeal and therefore does not approve raising it on post-conviction review.

B.

Appellant’s reliance on *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, is mistaken, as Appellant’s aggravated robbery conviction is not implicated by *Colon*. The Court in *Colon* confined its holding to Ohio’s robbery statute under R.C. 2911.02(A)(2) stating that “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.” *Id.* at ¶ 14. As a result, the Court found that the indictment charging the defendant with (A)(2) robbery was defective, and that the defect “resulted in structural error.” *Id.* at ¶ 19.

In this case, Appellant was not convicted of R.C. 2911.02(A)(2) robbery. Instead, the indictment charged him with aggravated robbery under R.C. 2911.01. Appellant appears to be arguing by analogy that, since the (A)(2) “physical harm” form of robbery requires recklessness, then the “serious physical harm” form of aggravated robbery under R.C. 2911.01(A)(3) should also require recklessness. But such an argument misses a number of important points.

Colon addresses whether R.C. 2901.21(B) imports a mental state of “recklessness” into the *robbery* statute, not the *aggravated robbery* statute. Recklessness cannot be imported into a section of the Revised Code if that “section” already includes a mens rea in any of its provisions. *State v. Maxwell* (2002) 95 Ohio St.3d 254, 257 (“in determining whether R.C. 2901.21(B) can operate to supply the mental element of recklessness * * *, we need to determine whether the entire *section* includes a mental element, not just whether *division* (A)(6) includes such an element.”) The *Maxwell* Court, relying on its earlier decision in *State v. Wac* (1981), 68 Ohio St.2d 84, stated that, in order to import the element of recklessness pursuant to R.C. 2901.21(B), “a court must be able to answer in the negative the following two questions * * * (1) does the section defining an offense specify any degree of culpability, and (2) does the section plainly indicate a purpose to impose strict criminal liability?” *Id.*, at 257.

The aggravated robbery statute requires that the offender committed or attempted to commit a theft offense, thereby already importing the mens rea requirements for theft or other theft offenses into the crime. For example, the crime of theft has “purpose” and “knowingly” mens rea requirements. The default-recklessness provision in R.C. 2901.21(B) is only meant to import recklessness into statutory crimes that otherwise would amount to strict liability. The result of importing recklessness under R.C. 2901.21(B) is that “recklessness is sufficient culpability to

commit the offense.” But recklessness plainly is not sufficient culpability for aggravated robbery, as aggravated robbery would require proof of purpose and knowledge in relation to the commission or attempted commission of the theft offense. The aggravated robbery offense is simply not a strict liability offense, and the importation of recklessness into the crime would not save it from becoming a strict liability offense. Under that circumstance, the default-recklessness provision has no application.

In any event, Appellant cannot show any prejudice warranting post-conviction relief. Because count three was valid under R.C. 2911.01, Appellant’s conviction under that count is unassailable, and there is no outcome-determinative error that would warrant the granting of post-conviction relief. Appellant plead guilty on two separate occasions with the assistance of three attorneys.

Appellant does not indicate how the recklessness issue would have made a difference in his decision to plead guilty. Had the defense raised this issue at the time, the parties could have arrived at a negotiated plea that involved a guilty plea to one or more of the other charges. In addition, the State dismissed count one of the charges as consideration for the plea and did not seek the death penalty.

The State also could have sought to reindict or amend count three to add reckless to the language in that count. *State v. O’Brien* (1987), 30 Ohio St.3d 122, paragraph two of the syllabus. *Colon* did not overrule *O’Brien*. Although there is tension between *Colon* and *O’Brien*, only the Ohio Supreme Court can purport to overrule *O’Brien*, and it has not done so, thereby leaving this Court bound to follow *O’Brien*. *Agostini v. Felton* (1997), 521 U.S. 203, 237-38 (“if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line

of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”; quoting another case); *Smith v. Klem* (1983), 6 Ohio St.3d 16, 18 (only Supreme Court can decide that a part of earlier syllabus was dicta). “Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.” *Hohn v. United States* (1998), 524 U.S. 236, 252-53.

An assessment of prejudice would also consider that post conviction relief would mean that the State could reinstate all of the nolle charges, as Appellant would now be withdrawing from the plea agreement and thereby allowing the State to proceed on the original charges. It is difficult to see how Appellant was prejudiced by a guilty plea that he would have entered anyway, even if “reckless” had been included, especially when that guilty plea resulted in the state not seeking the death penalty.

Therefore, based on the foregoing, the trial court properly denied Appellant’s petition. In addition, the trial court properly denied Appellant’s request for counsel. That motion was properly denied as defendants are not entitled to appointed counsel after appeals are concluded. This Proposition of Law does not support leave to appeal.

SECOND PROPOSITION OF LAW

THE FIFTH APPELLATE DISTRICT COURT OF APPEALS VIOLATED APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENTS WHEN IT CREATED A CONFLICT OF AUTHORITY

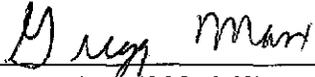
Appellant overlooks the fact that his case is distinguished from the cases he cites. Appellant plead guilty and reaffirmed his plea of guilty three years later. Appellant filed his petition 11 years after his second plea.

The case cited by Appellant arose on a direct appeal after a jury trial. See *State v. Alvarez* (October 5, 2008), Defiance App. No. 04-08-02 2008-Ohio-5189. The *Alvarez* decision is simply not in conflict with the Court of Appeals decision in this case. Accordingly this proposition does not support leave to appeal.

CONCLUSION

For the reasons stated in this Memorandum in Response, this Court should deny leave to appeal.

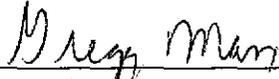
Respectfully submitted,



Gregg Marx (0008068)
Assistant Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Response was served upon John W. Frazier, A328-957, R.C.I. 8-A 150-B, P.O. Box 7010, Chillicothe, Ohio, 45601, by ordinary U.S. Mail, postage pre-paid, this 17th day of June, 2009.



Gregg Marx
Assistant Prosecuting Attorney