ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio	)	
Plaintiff-Appellant,	)	
v.	)	**Case Nos. 2008-2127** **2008-2249**
John Rohrbaugh	)	
Defendant-Appellee	)	

MERIT BRIEF OF APPELLEE JOHN ROHRBAUGH

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FILED
AUG 14 2009
CLERK OF COURT
SUPREME COURT OF OHIO

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COMBINED STATEMENT OF THE CASE AND FACTS

Trial court proceedings

On March 13, 2007, the Logan County Grand Jury indicted John Rohrbaugh for the offenses of Breaking and Entering in violation of R.C. 2911.13(A), a fifth degree felony (Count I), Theft in violation of R.C. 2913.02, a fourth degree felony (Count II), Theft in violation of R.C. 29.13.02, a fifth degree felony (Count III), Breaking and Entering in violation of 2911.13(A), a fifth degree felony (Count IV), Theft in violation of R. C. 2913.02, a first degree misdemeanor (Count V), Theft in violation of R. C. 2913.02, a first degree misdemeanor (Count VI), Theft in violation of R. C. 2913.02, a first degree misdemeanor (Count VII), and Possession of Cocaine, in violation of R.C. 2925.11, a fifth degree felony.

On July 3, 2007, the prosecutor amended the first count of the indictment to change the offense from breaking and entering to receiving stolen property in violation of 2913.51, a fifth degree felony. The prosecutor did not file a bill of information as to the receiving stolen property charge. Mr. Rohrbaugh did not waive, either orally or in writing, his right to have the receiving stolen property charge presented to the grand jury. Mr. Rohrbaugh on the same date pled guilty to the offenses of receiving stolen property (Count I) and Possession of Cocaine (Count VIII).

On July 7, 2007, the trial court conducted the sentencing hearing. It imposed a sentence of eleven months on each count, with the

sentences to be served concurrently. [Tr. 21]. It further ordered that Mr. Rohrbaugh make restitution in the amount of $4,733.81. [Tr. 22]. On August 6, 2007, the trial court filed its entry journalizing the sentence. On August 21, 2007, the trial court filed an amended journal entry.

Appellate court proceedings

On September 20, 2007, Mr. Rohrbaugh filed his notice of appeal from the trial court's August 21, 2007 amended entry. On October 15, 2007, the Third Appellate District dismissed that appeal citing to the fact that the amended journal entry was in effect a *nunc pro tunc* entry. On November 6, 2007, the court denied Mr. Rohrbaugh's Motion for Reconsideration.

On December 24, 2007, Mr. Rohrbaugh filed a second notice of appeal and a motion for leave to file a delayed appeal. On January 10, 2008, the court granted that motion.

On March 20, 2008, Mr. Rohrbaugh filed his merit brief raising one assignment of error, "The Trial Court Erred When It Ordered Appellant to Make Restitution in the Amount of $4,733.81." The prosecution, subsequently filed its merit brief. On April 28, 2008, Mr. Rohrbaugh filed his Reply Brief.

On September 22, 2008, the Third Appellate District filed its opinion and journal entry, *State v. Rohrbaugh,* 3rd Dist. No. 8-07-03, 2008-Ohio-4781. The court held that prior to addressing the restitution issue at to Count I, it had to determine if Mr. Rohrbaugh had properly

entered a plea as to that Count. *Id.* at ¶ 12. The court found that Mr. Rohrbaugh had pled to a defective indictment which constituted plain error. *Id.* at ¶¶ 14-25.

On November 13, 2008, the Third Appellate District certified the following question "May a defendant consent to a negotiated plea to an offense that was neither indicted, nor a lesser included offense of he indicted offense, without a waiver of indictment pursuant to Criminal Rule 7(A) and Section 10, Article I of the Ohio Constitution?" *State v. Rohrbaugh,* Logan App. Case No. CA 8097-28 (November 13, 2007).

Ohio Supreme Court proceedings

On October 31, 2008, the state filed its memorandum in support of jurisdiction. On November 19, 2009, the state filed the notice of certification with this Court.

On April 22, 2009, this Court accepted the question as certified by the court of appeals:

> May a defendant consent to a negotiated plea to an offense that was neither indicted, nor a lesser included offense of he indicted offense, without a waiver of indictment pursuant to Criminal Rule 7(A) and Section 10, Article I of the Ohio Constitution?

State v. Rohrbaugh, 121 Ohio St. 3d 1449, 2009-Ohio-1820.

On the same date, the Court also accepted the state's discretionary appeal to address the proposition raised by its jurisdictional memorandum:

> When the parties agree to amend a charge in the indictment pursuant to a plea agreement and the amendment changes the name or identity of the crime charged, but the defendant has not been misled or prejudiced by the amendment, a plain error analysis does not apply, and if there is error, it is only invited error.

Id.

Because the certified conflict and proposition are interrelated, this Court ordered consolidated briefing on the issue raised by each. *Id.*

On April 28, 2009, the record was filed with the Clerk's Office. On June 26, 2009, the prosecution filed its merit brief. On July 22, 2009, the parties, by stipulation, extended the time for Mr. Rohrbaugh to file his merit brief until August 17, 2009.

CERTIFIED QUESTION

MAY A DEFENDANT CONSENT TO A NEGOTIATED PLEA TO AN OFFENSE THAT WAS NEITHER INDICTED, NOR A LESSER INCLUDED OFFENSE OF THE INDICTED OFFENSE, WITHOUT A WAIVER OF INDICTMENT PURSUANT TO CRIMINAL RULE 7(A) AND ARTICLE I, SECTION 10, OF THE OHIO CONSTITUTION?

APPELLEE'S PROPOSITION OF LAW

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

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, § 10. The right to indictment provides defendants with a valuable protection. "Rooted in

long centuries of Anglo-American history," the grand jury is a "constitutional fixture in its own right" that is functionally independent of both the prosecutor and the judiciary. *United States v. Williams* (1992), 504 U.S. 36, 47-48. As such, it plays a special role in "insuring fair and effective law enforcement" *United States v. Calandra* (1974), 414 U.S. 338, 343. A grand jury's responsibilities include "both the determination of whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded prosecutions." *Id.* at 343; see also *Harris v. United States* (2002), 536 U.S. 545, 564 (explaining that the grand and petit juries thus form a "strong and two-fold barrier . . . between the liberties of the people and the prerogative of the government."). The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. *Stirone v. United States* (1960), 36 U.S. 212, 216.[1]

This Court has reached similar conclusions regarding the importance of the Ohio constitutional provision concerning the right to indictment. In 1857, this Court described the right as "a protection to innocence, and a safeguard against the oppressive and arbitrary exercise

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[1] While the grand jury provision of the federal constitution does not apply to the States, *see Hurtado v. California* (1984), 110 U.S. 516, 538, its wording is essentially identical to the grand jury provision under the Ohio Constitution. Accordingly, federal case law describing the origins, purpose, and import of a grand jury is useful in understanding its Ohio counterpart.

of power" and is "among the fundamental principles of government . . ." *Fouts v. State* (1857) 8 Ohio St. 98, 114. Within the last year this Court has twice affirmed the importance the state constitutional grand jury provision. *State v. Colon,* 118 Ohio St. 3d 26, 35, 2008-Ohio-1624, ¶ 44 ("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 right to proper indictment."); *State v. Davis,* 121 Ohio St. 3d 239, 243, 2008-Ohio-4537, ¶ 12 (error in indictment "affected substantial rights" and constituted "a manifest miscarriage of justice.)."

The right to a grand jury indictment requires that the "material and, essential facts constituting an offense are found by the presentment of the grand jury." *Harris v. State* (1932), 125 Ohio St. 2d 257, 264. An indictment that omits an essential element is fatally defective and insufficient to charge an offense. *Id,*; *State v. Cimpritz* (1953), 158 Ohio St. 490, 493; *State Wozniak* (1961), 172 Ohio St. 517, paragraphs one and two of the syllabus; *State v. Headley* (1983), 6 Ohio St 3d 475, 478 Where an indictment does not charge an offense, it is voidable for lack of subject matter jurisdiction. *Cimpritz,* 158 Ohio St. at 494, *as modified and explained by State v. Wozniak,* 172 Ohio St. at 522 and *Middling v. Perrini* (1968), 14 Ohio St. 2d 106, 107.

In this case it was not a matter of the grand jury omitting in the indictment one if the essential elements for the offense to which Mr. Rohrbaugh pled guilty. Instead, the charging instrument (indictment) did

not contain the offense to which he entered his plea. The indictment in this case violated Ohio's rules of criminal procedure, state and federal due process; and Mr. Rohrbaugh's state constitutional right to face only those criminal charges presented by a grand jury indictment.

I. A DEFENDANT MAY WAIVE HIS RIGHT TO INDICTMENT BUT ONLY IF THE COURT COMPLIES WITH CRIM R. 7.

The drafters of the criminal rules were cognizant of the importance of the state constitutional right to indictment. Crim R. 7. A defendant cannot waive his right to indictment in those cases involving a sentence of life or death. *Crim. R.* 7(A). In all other cases a defendant can waive his right to indictment, but only after the trial court: 1) explains the nature of the charge, 2) explains the right to indictment, 3) has the defendant waive his right to indictment, and 4) has the defendant execute a written waiver. *Id.* This procedure is similar to the procedure in which a court must engage a defendant when he waives his right to counsel. Crim 23(A). In the context of a waiver of the right to counsel, the court must follow all applicable steps or the waiver is invalid. *State v. Lomax,* 114 Ohio St. 3d 350, 353, 2007-Ohio-4277, ¶ 9.

In this case, this Court need not address whether it is necessary that a trial court comply with all of the prerequisites contained in Crim. R. 7, for a defendant's waiver to be valid. The trial court did not comply

with any of the prerequisites prior to accepting Mr. Rohrbaugh plea of guilty to an offense not returned by the grand jury.[2]

The state asserts that the appellate court ignored the second half of Crim R. 7 rule which permits the trial court to change the name or identity of the offense contained in the indictment so long as the defendant has not been mislead or prejudice. [Appellant's Merit Brief, p. 11, See also p. 12]. The state's argument ignores the plain language of Crim R. 7 that only permits a trial court to grant a motion to amend the indictment "provided that no change is made in the identity of the of the crime." The state's argument also ignores the repeated holdings of this Court. *State v. O'Brien* (1987), 20 Ohio St. 3d 122, 123; *Headley,* 6 Ohio St. 3d at 479; *Davis,* 121 Ohio St. 3d at 241, 2008-Ohio-4537, ¶ 9. The state's argument would allow the court to convict a defendant on an indictment essentially different from the found by the grand jury. *State v. Childs* (2000), 88 Ohio St. 3d 194, 198.

II. A TRIAL COURT'S FAILURE TO COMPLY WITH CRIM. R. 7(A) RENDERS A DEFENDANT'S GUILTY PLEA VOID.

The gravaman of the state's appeal is not that the court correctly applied Crim. R. 7 (which it did not), but that the trial court's failure constituted either harmless error [Appellant's Brief, pp. 9-15] or invited error [Appellant's Brief, pp. 15-19]. Both of the state's assertions are

[2] The state does not claim that the offense to which Mr. Rohrbaugh pled guilty, receiving stolen property, is a lesser included offense of breaking and entering which was included in the indictment.

incorrect. Before reaching the state's contentions, Mr. Rohrbaugh will address the three assumptions upon which the state's arguments are premised.

A. A Defendant can first raise on direct appeal a jurisdictional defect in the indictment.

The state assumes or asserts that if a defendant does not raise prior to trial a jurisdictional defect in the indictment, then the issue is defaulted. [Appellant's Brief, p. 10]. This is incorrect.

This Court has long-recognized, both before and after the adoption of Ohio's rules of criminal procedure in 1973, a defendant's right to challenge an indictment which omits an essential element. This Court has sustained such challenges regardless of whether they were raised prior to trial, during trial, or after the jury verdict has been returned. See *e.g. Cimpritz,* 158 Ohio St. at 490 (indictment challenged prior to trial); Wozniak, 172 Ohio St. at paragraph three of the syllabus (indictment challenged during jury trial); *State v. Childs* (2000), 88 Ohio St. 3d 194 (indictment challenged after jury verdict returned); *Midling,* 14 Ohio St. 2d at 107 (explaining that an indictment missing an essential element cannot be collaterally attacked but can be challenged on direct appeal).

This Court's decision in Childs makes clear that Mr. Rohrbaugh did not waive his challenge to the defective indictment by not raising it prior to the entrance of his guilty plea to the offense of receiving stolen property. In *Childs*, the defendant was indicted with, among other things,

conspiracy to commit aggravated drug trafficking. 88 Ohio St. 3d at 197. Although the indictment did allege the commission of a "substantial, overt act," it did not "specifically detail any overt act done in furtherance of the conspiracy." *Id.* The defendant did not challenge the sufficiency of the indictment prior to or during his jury trial and was ultimately convicted of the charge. *Id.* at 194-97. On appeal, the defendant argued that the indictment was fatally defective because it failed to allege "at least one specific, substantial, overt act in furtherance of the conspiracy." *Id.* at 197. A majority of this Court agreed that the absence of a specific, overt act alleged in the indictment rendered it fatally defective and affirmed the reversal of the defendant's conviction. *Id.* at 199. The defendant's conviction was reversed despite his failure to challenge the defect in a pre-trial motion and notwithstanding a bill of particulars which set forth the specific conduct constituting the charge. *Id.* at 198 (dismissing the State's reliance on the bill of particulars because it "is not signed by the grand jury foreman, and there is no evidence that the material contained in the bill of particulars was ever presented to the grand jury.")

B. A Defendant does not need to demonstrate prejudice when the trial court fails to comply with Crim R. 7.

The state's argument assumes that Mr. Rohrbaugh must demonstrate prejudice to prevail with respect to the trial court's failure to notify him of his right to indictment. That assumption is incorrect.

This Court has addressed the issue of prejudice in the context of a trial court's failure to properly notify a defendant at sentencing. *State v. Campbell* (2000), 90 Ohio St. 3d 320, 2000-Ohio-183. In that case the trial court, in violation of Crim. R. 32, failed to inquire of the defendant at sentencing whether the defendant wished to make a statement. *Id.* at 323. Defense counsel did not object to the trial court's error and the state argued on appeal that the issue was only cognizable as plain error. *Id.* This Court rejected the argument, citing to the fact that the court had an affirmative duty to inquire of the defendant if he wished to make a statement. This Court concluded that "were we to find waiver in this case, where the record of the sentencing hearing is silent as to the right of allocution, we would in effect be sanctioning a finding of waiver in every case in which the trial court failed to comply with the duty imposed by the rule." *Id.* at 325.

Similarly, the trial court in this case had a duty to advise Mr. Rohrbaugh of the nature of the offense and his right to indictment, as well as to obtain both a written and oral waiver of that right. For this Court to hold that the trial court did not error would be in effect sanctioning a finding of waiver in every case in which the trial court failed to comply with Crim. R. 7.

Mr. Rohrbaugh was required to waive in writing to his right to indictment. Crim. R. 7(A). This Court has addressed the situation in the context of the waiver other rights. A defendant's jury waiver must be in

writing. Crim. R. 23(A). This Court has required strict compliance with the Rule. If the defendant's written jury waiver fails to strictly comply with the requirements of the rule, the court lacks jurisdiction to try the defendant. *State v. Tate* (1979), 59 Ohio St. 2d 50, syllabus; *State v. Pless* (1996), 74 Ohio St. 3d 333, Syllabus One.

Similarly, a court may waive the payment of mandatory fines if the defendant timely files an affidavit of indigency. R.C. 2925.11(E)(1) and (E)(5). This Court has required strict compliance with the statute and held that the defendant must file his affidavit prior to the court filing its sentencing entry. *State v. Gipson*, 80 Ohio St. 3d 626, Syllabus. It held therein that if the defendant did not timely file his affidavit, then the court lacked jurisdiction to waive the payment of the mandatory fines. *Id.* at 633. This Court reached that conclusion even though his counsel in that case at sentencing had timely offered the affidavit to the court (as opposed to actually filing the affidavit). *Id.*

This Court should likewise require the same strict compliance with Crim. R. 7(A) that it has required with respect to filing of jury waivers and affidavits to excuse the payment of mandatory fines. The right to indictment is no less important that the right to a jury or not to pay a mandatory fine.

C. If a defendant is required to demonstrate prejudice, an appellate court should apply a substantial compliance test.

When a defendant enters a guilty plea, the trial court is required to advise him of the rights that he is relinquishing. Crim. R. 11(C). A trial

court's failure to advise a defendant of these rights can lead to the vacating of the defendant's plea. See *Boykin v. Alabama* (1969), 395 U.S. 238, 243. This Court recently extended the Crim R. 11(C) analysis to include a trial court's failure to advise a defendant of a statutory right. *State v. Francis,* 104 Ohio St. 3d 490, 498, 2004-Ohio-6894 at ¶ 45. ("RC. 2943.031(A) notification is similar to nonconstitutional notification [as Crim R. 11(C) rights] . . . and, therefore implicates the same standard."). Similarly, this Court should extend the Crim R. 11(C) analysis to a trial court's failure to advise a defendant of his right to indictment.

When a trial court has failed to advise a defendant of a right, the appellate court first identifies whether the error involves a constitutional or non-constitutional right. When a constitutional right is at issue, the trial court is required to advise the defendant in a reasonable manner as to that right. *State v. Ballard* (1981), 66 Ohio St. 2d 473, 478; *State v. Griggs,* 103 Ohio St. 3d 85, 87, 2004-Ohio-4415, ¶ 12. If a trial court does not inform a defendant of a specific constitutional right, there is a presumption that the plea was not knowingly and intelligently entered. *State v. Nero* (1990), 56 Ohio St. 3d 106, 108; *Griggs,* 2004-Ohio-4415, ¶ 12. This Court has yet to determine if this stricter test applies to state constitutional rights as well as federal constitutional rights. The state constitutional right to indictment is an important as the federal constitutional rights to which this Court has applied the stricter test. See

Fouts, 8 Ohio St. at 114; *Colon,* 2008-Ohio-1624, ¶ 44 *Davis,* 121 Ohio St. 3d 239, 243, 2008-Ohio-4537, ¶ 12. Accordingly, this Court should apply the stricter test with respect to the state constitutional right to indictment. In this case because the trial court did not inform Mr. Rohrbaugh of his state constitutional right to indictment, he did not knowingly and intelligently enter his guilty plea. *State v. Clark,* 119 Ohio St. 3d 239, 244, 2008-Ohio-3748, ¶ 31, *Griggs,* 2004-Ohio-4415 at ¶ 12.

The courts apply a substantial compliance test to non-constitutional rights relinquished by a guilty plea. *Nero,* at 107, Griggs, at 103 Ohio St. 3d at 87, 2004-Ohio-4415 at ¶ 12. If this Court determines that a state constitutional right is to be afforded less protection than a federal constitutional right, then this Court should apply the substantial compliance test. A trial court's total failure to address a defendant as to a non-constitutional does not constitute substantial compliance. *State v. Sarkozy,* 117 Ohio St. 3d 86, 90, 2008-Ohio-509, ¶ 22 ("A complete failure to comply with the rules does no implicate an analysis of prejudice. *Clark,* 119 Ohio St. 3d at 245, 2008-Ohio-3748 at ¶ 32 (same). In this case the trial court failed to inform Mr. Rohrbaugh of his right to indictment. Thus there was no substantial compliance and his guilty plea must be vacated.

Pursuant to this Court's recent analysis in *Clark,* Mr. Rohrbaugh prevails under either the constitutional or non-constitutional standard.

The trial court's failure to mention the state constitutional right to indictment invalidates his plea.

D. The failure of the trial court to advise a defendant of his right to indictment constitutes plain error.[3]

This Court recently addressed the issue of a defective indictment in the context of plain error. *State v. Davis,* 121 Ohio St. 3d 239, 2008-Ohio-4537. In that case the court during trial permitted the prosecution to amend the indictment to increase the amount of the schedule II drug that the defendant allegedly sold. *Id.* at 240, ¶ 3. The amendment increased the severity of the offense from a fourth degree to a second degree felony. [*Id.*]. Defense counsel did not object to the amendment. [*Id.*]. The state argued that this Court was limited to applying a plain error analysis. *Id.* at 242, ¶ 11. This Court concluded that "[i]t is clear that the facts in this case satisfy the criteria for plain error. . . . The error in this case thus clearly affected substantial rights and produced an outcome that would have been otherwise but for the error." *Id.* at 242, ¶¶ 11-12. If it constitutes plain error for a defendant to be convicted on the basis of a defective amendment to an indictment that increased the severity of the offense; then it is also plain error to convict Mr. Rohrbaugh on a totally different charge than the grand jury never found.

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[3] If the Court should determine that Mr. Rohrbaugh does not need to demonstrate prejudice or the substantial compliance test is applicable, it does not need to reach this issue.

E. A defective indictment is not the product of invited error.

Invited error occurs when a litigant himself induced the trial court to take the action that the litigant subsequently assigns as error on appeal. *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co,* (1986), 28 Ohio St. 3d 20, Syllabus One. Mr. Rohrbaugh did not invite or induce the trial court into failing to advise him of his right to indictment or to obtain a waiver of that state constitutional right.

This Court has addressed a very similar situation. *State v. Campbell,* 90 Ohio St. 3d 320, 2000-Ohio-183. The trial court therein failed at sentencing to ask the defendant if he wished to make a statement prior to it imposing sentence on the charge of capital murder. *Id.* at 324. This Court, in rejecting the state's claim of invited error, observed that "defense counsel did not suggest, request, or affirmatively consent to the procedure." It concluded that "[a]t worst, counsel acquiesced. But invited error must be more than 'acquiescence in the trial court's erroneous conclusion.'" *Id.* citing *Carrothers v. Hunter* (1970), 23 Ohio St. 2d 112, 116-17. In the present case, defense counsel "at worst acquiesced" in the trial court's failure to instruct as to the right to indictment. That acquiescence did not constitute invited error doctrine.

The state raises a related argument (citing to several cases from the lower appellate courts), that because Mr. Rohrbaugh has benefited from the plea bargain, he therefore knowingly and intelligently pled guilty to the offense not contained in the indictment. [Appellant's Brief, pp. 17-

19]. This Court addressed has addressed a similar situation. *State v. Tate* (1979), 59 Ohio St. 2d 50. In that case the defendant, who was represented by counsel, timely requested a jury trial as to the misdemeanor charge. *Id.* at 50. The defendant, while still represented counsel, proceeded to try his case to the court even though he had not waived his right to a jury. *Id.* The trial court found the defendant guilty and the defendant appealed arguing that he had never waived his right to a jury trial. *Id.* The appellate court found that the defendant had impliedly waived his right to a jury trial; citing to the attorney's knowledge of the criminal procedural rules and failure to object to the lack of a jury. *Id.* at pp. 52-53. This Court reversed the appellate court decision finding that "[w]hile the circumstances of this cause could lead one to surmise that appellant was aware of it [his right to a jury trial] and possibly took advantage of it, we cannot accept the proposition that there was a waiver of this right [to a jury trial] by silence. To do so would not only conflict with years of constitutional precedent . . ." *Id.* at 53. While it may be surmised that Mr. Rohrbaugh, or at least his counsel may have been aware of the requirements of Crim. R. 7, this Court should not assume a waiver by his silence.

III. STRICT COMPLIANCE WITH CRIM. R. 7 IS GOOD POLICY.

The state asserts that the appellate court's interpretation will be an impediment to plea bargaining upon which the criminal justice system is dependent. [Appellant's Brief, pp. 14-15]. This assertion is incorrect. The

error would have been avoided in the present case if the prosecutor had prepared a bill of information (which is a one or two page document that can be placed in the computer for later reference in other cases) and a waiver of the right to indictment (which is a simple one page document) for Mr. Rohrbaugh to execute. The state claims that it is sometimes unclear as to whether an offense constitutes a lesser included offense of a charge contained in the indictment. [Appellant's Merit Brief, pp. 13-15]. In those cases when it is unclear, then it would behoove the prosecution to expend a few minutes to prepare a bill of information and a waiver of indictment.

The state's argument also encompasses the doctrine of finality. [Appellant's Merit Brief, p. 14]. The state asserts if the Court accepts Mr. Rohrbaugh's proposition, that a subsequent decision of this Court defining a lesser included offense could serve as a basis to collaterally attack previously entered guilty pleas. However, there exists a safeguard even if the prosecution does not expend the extra time to draft a bill of information and grand jury waiver. This Court can limit its subsequent ruling to cases on direct appeal at the time of its decision. See, *State ex rel Larkin v. Baker* (1995), 73 Ohio St. 3d 658, 661. Likewise, this Court can limit the effect of this decision by similarly restricting it to cases on direct appeal.

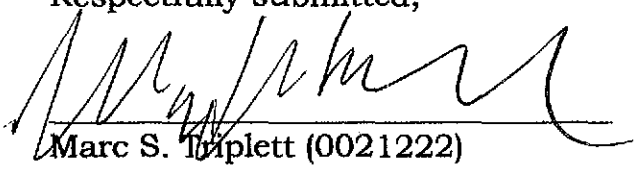
When a defendant enters a guilty plea both he and society in general have an interest in the process. *State v. Ballard* (981), 66 Ohio

St. 2d 473, 478. The defendant has an interest in having a complete understanding of the rights that he is relinquishing and his interest is best protected by the trial court fully and meticulously advising him of his rights. *Id.* Society's interest involves obtaining finality when the defendant enters a guilty plea. This interest is also best served by the court fully and meticulously advising the defendant of his rights to preclude subsequent attack on the plea. *Id.* The same interests are involved when a defendant pleads guilty to an offense not contained in the indictment. Both the defendant's and society's interests are best served by requiring the trial court to strictly comply with Crim. R. 7. The state's arguments protects neither interest.

CONCLUSION

For the forgoing reasons, John Rohrbaugh respectfully requests this Court to answer the certified question in the negative, adopt his proposition of law, affirm the decision of the Third District Court of Appeals, and vacate his convictions.

Respectfully submitted,



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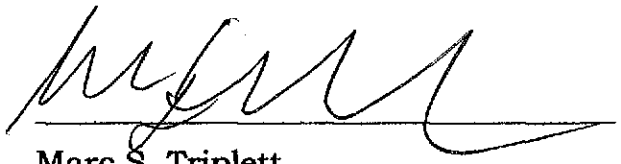
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Merit Brief Of Appellee John Rohrbaugh* was served upon Eric C. Stewart, Logan County Assistant Prosecuting Attorney, Attorney for Appellant, 117 E. Columbus, Avenue, Suite 200, Bellefontaine, Ohio 43311 via regular mail this 14th day of August, 2009.



Marc S. Triplett
Counsel for Appellee John Rohrbaugh

§ 2925.11. Possession of drugs

(A) No person shall knowingly obtain, possess, or use a controlled substance.

(B) This section does not apply to any of the following:

(1) Manufacturers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct was in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code;

(2) If the offense involves an anabolic steroid, any person who is conducting or participating in a research project involving the use of an anabolic steroid if the project has been approved by the United States food and drug administration;

(3) Any person who sells, offers for sale, prescribes, dispenses, or administers for livestock or other nonhuman species an anabolic steroid that is expressly intended for administration through implants to livestock or other nonhuman species and approved for that purpose under the "Federal Food, Drug, and Cosmetic Act," *52 Stat. 1040 (1938), 21 U.S.C.A. § 301,* as amended, and is sold, offered for sale, prescribed, dispensed, or administered for that purpose in accordance with that act;

(4) Any person who obtained the controlled substance pursuant to a lawful prescription issued by a licensed health professional authorized to prescribe drugs.

(C) Whoever violates division (A) of this section is guilty of one of the following:

(1) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, cocaine, L.S.D., heroin, and hashish, whoever violates division (A) of this section is guilty of aggravated possession of drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(1)(b), (c), (d), or (e) of this section, aggravated possession of drugs is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, aggravated possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, aggravated possession of drugs is a felony of the second degree, and the court shall impose

as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount but is less than one hundred times the bulk amount, aggravated possession of drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(e) If the amount of the drug involved equals or exceeds one hundred times the bulk amount, aggravated possession of drugs is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of *section 2929.14 of the Revised Code.*

(2) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates division (A) of this section is guilty of possession of drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(2)(b), (c), or (d) of this section, possession of drugs is a misdemeanor of the first degree or, if the offender previously has been convicted of a drug abuse offense, a felony of the fifth degree.

(b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, possession of drugs is a felony of the fourth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount, possession of drugs is a felony of the second degree, and the court shall impose upon the offender as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(3) If the drug involved in the violation is marihuana or a compound, mixture, preparation, or substance containing marihuana other than hashish, whoever violates division (A) of this section is guilty of possession of marihuana. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(3)(b), (c), (d), (e), or (f) of this section, possession of marihuana is a minor misdemeanor.

(b) If the amount of the drug involved equals or exceeds one hundred grams but is less than two hundred grams, possession of marihuana is a misdemeanor of the fourth degree.

(c) If the amount of the drug involved equals or exceeds two hundred grams but is less than one thousand grams, possession of marihuana is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(d) If the amount of the drug involved equals or exceeds one thousand grams but is less than five thousand grams, possession of marihuana is a felony of the third degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(e) If the amount of the drug involved equals or exceeds five thousand grams but is less than twenty thousand grams, possession of marihuana is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) If the amount of the drug involved equals or exceeds twenty thousand grams, possession of marihuana is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(4)(b), (c), (d), (e), or (f) of this section, possession of cocaine is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds five grams but is less than twenty-five grams of cocaine that is not crack cocaine or equals or exceeds one gram but is less than five grams of crack cocaine, possession of cocaine is a felony of the fourth degree, and there is a presumption for a prison term for the offense.

(c) If the amount of the drug involved equals or exceeds twenty-five grams but is less than one hundred grams of cocaine that is not crack cocaine or equals or exceeds five grams but is less than ten grams of crack cocaine, possession of cocaine is a felony of the third degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree.

(d) If the amount of the drug involved equals or exceeds one hundred grams but is less than five hundred grams of cocaine that is not crack cocaine or equals or exceeds ten grams but is less than twenty-five grams of crack cocaine, possession of cocaine is a felony of the second degree, and the court

shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds five hundred grams but is less than one thousand grams of cocaine that is not crack cocaine or equals or exceeds twenty-five grams but is less than one hundred grams of crack cocaine, possession of cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds one thousand grams of cocaine that is not crack cocaine or equals or exceeds one hundred grams of crack cocaine, possession of cocaine is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of *section 2929.14 of the Revised Code.*

(5) If the drug involved in the violation is L.S.D., whoever violates division (A) of this section is guilty of possession of L.S.D. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(5)(b), (c), (d), (e), or (f) of this section, possession of L.S.D. is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) If the amount of L.S.D. involved equals or exceeds ten unit doses but is less than fifty unit doses of L.S.D. in a solid form or equals or exceeds one gram but is less than five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the fourth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) If the amount of L.S.D. involved equals or exceeds fifty unit doses, but is less than two hundred fifty unit doses of L.S.D. in a solid form or equals or exceeds five grams but is less than twenty-five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of L.S.D. involved equals or exceeds two hundred fifty unit doses but is less than one thousand unit doses of L.S.D. in a solid form or equals or exceeds twenty-five grams but is less than one hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of L.S.D. involved equals or exceeds one thousand unit doses but is less than five thousand unit doses of L.S.D. in a solid form or equals or exceeds one hundred grams but is less than five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of L.S.D. involved equals or exceeds five thousand unit doses of L.S.D. in a solid form or equals or exceeds five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of *section 2929.14 of the Revised Code.*

(6) If the drug involved in the violation is heroin or a compound, mixture, preparation, or substance containing heroin, whoever violates division (A) of this section is guilty of possession of heroin. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(6)(b), (c), (d), (e), or (f) of this section, possession of heroin is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds ten unit doses but is less than fifty unit doses or equals or exceeds one gram but is less than five grams, possession of heroin is a felony of the fourth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds fifty unit doses but is less than one hundred unit doses or equals or exceeds five grams but is less than ten grams, possession of heroin is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds one hundred unit doses but is less than five hundred unit doses or equals or exceeds ten grams but is less than fifty grams, possession of heroin is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds five hundred unit doses but is less than two thousand five hundred unit doses or equals or exceeds fifty grams but is less than two hundred fifty grams, possession of heroin is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds two thousand five hundred unit doses or equals or exceeds two hundred fifty grams, possession of heroin is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of *section 2929.14 of the Revised Code*.

(7) If the drug involved in the violation is hashish or a compound, mixture, preparation, or substance containing hashish, whoever violates division (A) of this section is guilty of possession of hashish. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(7)(b), (c), (d), (e), or (f) of this section, possession of hashish is a minor misdemeanor.

(b) If the amount of the drug involved equals or exceeds five grams but is less than ten grams of hashish in a solid form or equals or exceeds one gram but is less than two grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a misdemeanor of the fourth degree.

(c) If the amount of the drug involved equals or exceeds ten grams but is less than fifty grams of hashish in a solid form or equals or exceeds two grams but is less than ten grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(d) If the amount of the drug involved equals or exceeds fifty grams but is less than two hundred fifty grams of hashish in a solid form or equals or exceeds ten grams but is less than fifty grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the third degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(e) If the amount of the drug involved equals or exceeds two hundred fifty grams but is less than one thousand grams of hashish in a solid form or equals or exceeds fifty grams but is less than two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) If the amount of the drug involved equals or exceeds one thousand grams of hashish in a solid form or equals or exceeds two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

(D) Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness.

(E) In addition to any prison term or jail term authorized or required by division (C) of this section and *sections 2929.13, 2929.14, 2929.22, 2929.24,* and *2929.25 of the Revised Code* and in addition to any other sanction that is imposed for the offense under this section, *sections 2929.11* to *2929.18*, or *sections 2929.21* to *2929.28 of the Revised Code*, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section shall do all of the following that are applicable regarding the offender:

(1) (a) If the violation is a felony of the first, second, or third degree, the court shall impose upon the offender the mandatory fine specified for the offense under division (B)(1) of *section 2929.18 of the Revised Code* unless, as specified in that division, the court determines that the offender is indigent.

(b) Notwithstanding any contrary provision of *section 3719.21 of the Revised Code*, the clerk of the court shall pay a mandatory fine or other fine imposed for a violation of this section pursuant to division (A) of *section 2929.18 of the Revised Code* in accordance with and subject to the requirements of division (F) of *section 2925.03 of the Revised Code*. The agency that receives the fine shall use the fine as specified in division (F) of *section 2925.03 of the Revised Code*.

(c) If a person is charged with a violation of this section that is a felony of the first, second, or third degree, posts bail, and forfeits the bail, the clerk shall pay the forfeited bail pursuant to division (E)(1)(b) of this section as if it were a mandatory fine imposed under division (E)(1)(a) of this section.

(2) The court shall suspend for not less than six months or more than five years the offender's driver's or commercial driver's license or permit.

(3) If the offender is a professionally licensed person, in addition to any other sanction imposed for a violation of this section, the court immediately shall comply with *section 2925.38 of the Revised Code*.

(F) It is an affirmative defense, as provided in *section 2901.05 of the Revised Code*, to a charge of a fourth degree felony violation under this section that the controlled substance that gave rise to the charge is in an amount, is in a form, is prepared, compounded, or mixed with substances that are not controlled substances in a manner, or is possessed under any other circumstances, that indicate that the substance was possessed solely for personal use. Notwithstanding any contrary provision of this section, if, in accordance with *section 2901.05 of the Revised Code*, an accused who is charged with a fourth degree felony violation of division (C)(2), (4), (5), or (6) of this section sustains the burden of going forward with evidence of and establishes by a

preponderance of the evidence the affirmative defense described in this division, the accused may be prosecuted for and may plead guilty to or be convicted of a misdemeanor violation of division (C)(2) of this section or a fifth degree felony violation of division (C)(4), (5), or (6) of this section respectively.

(G) When a person is charged with possessing a bulk amount or multiple of a bulk amount, division (E) of *section 2925.03 of the Revised Code* applies regarding the determination of the amount of the controlled substance involved at the time of the offense.

Rule 11. Pleas, Rights Upon Plea

(A) Pleas.

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas.

With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under *Crim. R. 32*.

(C) Pleas of guilty and no contest in felony cases.

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to *Crim. R. 44* by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove

the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses.

In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to *Crim. R. 44* by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses.

In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty.

The counsel provisions of *Crim. R. 44(B)* and (C) apply to division (E) of this rule.

(F) Negotiated plea in felony cases.

When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea.

If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity.

The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

Rule 23. Trial by Jury or by the Court

(A) Trial by jury.

In serious offense cases the defendant before commencement of the trial may knowingly, intelligently and voluntarily waive in writing his right to trial by jury. Such waiver may also be made during trial with the approval of the court and the consent of the prosecuting attorney. In petty offense cases, where there is a right of jury trial, the defendant shall be tried by the court unless he demands a jury trial. Such demand must be in writing and filed with the clerk of court not less than ten days prior to the date set for trial, or on or before the third day following receipt of notice of the date set for trial, whichever is later. Failure to demand a jury trial as provided in this subdivision is a complete waiver of the right thereto.

(B) Number of jurors.

In felony cases juries shall consist of twelve.

In misdemeanor cases juries shall consist of eight.

If a defendant is charged with a felony and with a misdemeanor or, if a felony and a misdemeanor involving different defendants are joined for trial, the jury shall consist of twelve.

(C) Trial without a jury.

In a case tried without a jury the court shall make a general finding.