

09-1878

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

09-1878

Plaintiff-Appellant,

**ON APPEAL FROM THE
MONTGOMERY COUNTY COURT
OF APPEALS, SECOND
APPELLATE DISTRICT**

vs.

FRANK ROBERT HAMILTON, III

**COURT OF APPEALS
CASE NO. 22895**

Defendant-Appellee.

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT STATE OF OHIO
DISCRETIONARY APPEAL AND CLAIMED APPEAL OF RIGHT**

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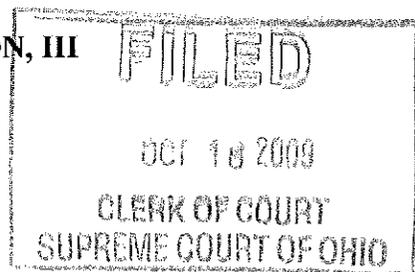


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WHY THIS APPEAL SHOULD BE ALLOWED

The Second District Court of Appeals impermissibly expanded *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 (“*Colon I*”) to prohibit the amendment of an indictment to add the mens rea element of “recklessly.” Its holding is directly contrary to *State v. O’Brien* (1987), 30 Ohio St.3d 122, 127-28, 508 N.E.2d 144, which held that such an amendment is proper under Crim.R. 7(D) and Section 10, Article I of the Ohio Constitution.

The court of appeals rejected *O’Brien* as having been implicitly overruled by *Colon I*. *State v. Hamilton*, Montgomery App. No. 22895, 2009-Ohio-4602, at ¶17. It then relied on *Colon I* to hold that the amendment to Appellee Frank Robert Hamilton’s indictment to add “recklessly” to the charge of discharging a firearm upon or over a public road or highway required him to answer for a crime charged other than on presentment or indictment of a grand jury in violation of his constitutional rights. *Id.* at 23.

The court of appeals’ holding is not supported by law. *Colon I* did not overrule *O’Brien*: (1) *Colon I* did not address the core issue in *O’Brien*, which was whether the indictment could be amended to include the mens rea element, because the indictment in *Colon I* was never amended; (2) *Colon I* was subsequently limited to its unique facts; and (3) this Court has cited *O’Brien* with approval after *Colon I*. *O’Brien* remains good law and is dispositive on the issue of amendments that add “recklessly” to the offense.

This case involves the substantial constitutional question of whether an amendment to add “recklessly” to an offense charged in an indictment requires a defendant to answer for a crime charged other than on presentment or indictment of a grand jury in violation of his constitutional rights. It also involves a question of public and great general interest because society has a strong interest in protecting against the unnecessary dismissal of indictments for re-

indictment when those indictments can be effectively cured by amendment. Following this Court's decision in *Colon I*, trial courts have relied on Crim.R. 7(D) to correct indictments that previously omitted the mens rea of "recklessly." Depriving the courts of the remedy of amendment will ultimately lead to congested court dockets and prevent the effective administration of justice.

Additionally, the court of appeals' holding that *Colon I* overruled *O'Brien* creates a conflict among appellate districts. The First District Court of Appeals came to the opposite conclusion in *State v. Rice*, Hamilton App. No. C-080444, 2009-Ohio-1080, at ¶13. A motion to certify a conflict between the First and Second appellate districts is currently pending in the Second District Court of Appeals.

For these reasons, Appellant State of Ohio urges this Court to accept this appeal.

STATEMENT OF THE CASE AND FACTS

On December 12, 2007, a Montgomery County Grand Jury indicted Hamilton for the first-degree felony of discharging a firearm upon or over a public road or highway, with a firearm specification. Hamilton moved to dismiss his indictment because it did not allege that the firearm was discharged recklessly. The State opposed the dismissal and asked the court to allow it to amend the indictment by adding "recklessly" as the culpable mental state. The court allowed the State's amendment under Crim.R. 7(D) and denied Hamilton's motion to dismiss.

Two weeks later, Hamilton pled no contest to the sole charge in the indictment in exchange for the State's agreement to nolle the firearm specification and not object to a sentence of community control. The trial court imposed community control on July 16, 2008, and Hamilton timely appealed his conviction.

On September 4, 2009, the court of appeals found that the trial court's amendment to include "recklessly" violated Hamilton's constitutional right to a grand jury indictment. The court of appeals reversed Hamilton's conviction.

ARGUMENT

Proposition of Law:

***State v. Colon* did not overrule *State v. O'Brien*. Amendment of an indictment to include an omitted mens rea element does not violate the defendant's right not to answer for a crime charged other than on presentment or indictment of a grand jury where the amendment does not change the name or identity of the offense.**

State v. O'Brien (1987), 30 Ohio St.3d 122, 127-28, 508 N.E.2d 144 held that an indictment which does not contain all the essential elements of an offense may be amended to include the omitted element, if the name or the identity of the crime is not changed, and the accused has not been misled or prejudiced by the omission of such element from the indictment. An amendment to add the mens rea element of recklessness to the charge of endangering children did not change either the name or the identity of the crime charged. *Id.* at 126. It was therefore proper under Crim.R. 7(D) and did not allow the jury to convict the defendant on a charge different from that found by the grand jury. *Id.* at 126-27.

In this case, Hamilton's indictment was amended to add "recklessly" to the charge of discharging a firearm upon or over a public road or highway. The court of appeals rejected *O'Brien* and found that the trial court erred in allowing the State to amend the indictment. *Hamilton*, at ¶23. The court of appeals held that *O'Brien* was implicitly overruled by *Colon I. Hamilton*, at ¶17. The court concluded that, pursuant to *Colon I*, the amendment required Hamilton to answer for a crime charged other than on presentment or indictment of a grand jury in violation of his constitutional rights. *Id.* at ¶23.

Colon I did not overrule *O'Brien*: (1) *Colon I* did not address the core issue in *O'Brien*, which was whether the indictment could be amended to include the mens rea element, because the indictment in *Colon I* was never amended; (2) *Colon I* was subsequently limited to its unique facts; and (3) this Court has cited *O'Brien* with approval after *Colon I*.

Colon I involved an indictment that failed to charge that the defendant recklessly inflicted physical harm in attempting or committing a theft offense. *Id.* at ¶15. The indictment was not amended to add recklessly, as in *O'Brien* and this case. Consequently, the indictment remained defective up to and throughout the defendant's trial.

The defective indictment resulted in several violations of the defendant's constitutional rights. *Colon I*, at ¶29. The indictment was unconstitutional because it omitted the mens rea for inflicting physical harm, an essential element of robbery. *Id.* Additionally, the defendant's due process rights were violated because there was no evidence that he had notice that the State had to prove that he acted recklessly in order to convict him of robbery. *Id.* at ¶30. The State did not argue that the defendant's conduct in inflicting physical harm on the victim was reckless, the court failed to include the mens rea for the offense in its jury instruction, the defendant's counsel did not object to the incomplete instruction, there was no evidence that the jury considered whether the defendant acted recklessly in inflicting physical harm on the victim, and the State treated the robbery as a strict liability offense during closing argument. *Id.* at ¶30-31. The errors that resulted from the defective indictment permeated the entire criminal proceeding and thus amounted to structural error. *Id.* at ¶32.

This Court subsequently limited the holding of *Colon I* to its unique facts in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 ("*Colon II*"). This Court explained that "the defect in the defendant's indictment was not the only error that had

occurred.” *Colon II*, at ¶6. Rather, “the defective indictment resulted in several other violations of the defendant’s rights.” *Id.* Structural error existed in *Colon I* because of the multiple errors that were inextricably linked to the flawed indictment, which permeated the trial from beginning to end. *Colon II*, at ¶7. The Court stated that “[i]n most defective indictment cases in which the indictment fails to include an essential element of the charge, we expect that plain-error analysis, pursuant to Crim.R. 52(B), will be the proper analysis to apply.” *Id.* at ¶7. This Court did not address whether it would be error at all if the indictment was amended to include the omitted element, since that issue was not before the Court.

Five months after *Colon I*, this Court addressed an amendment to an indictment that changed an essential element of the offense in *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, 903 N.E.2d 609. The amendment at issue in *Davis* was not to the mens rea element, as in *O’Brien*. Instead, the amendment was to the amount of the controlled substance in a drug trafficking charge, which the Court held was improper because it changed the degree and/or penalty of the offense. *Davis*, at ¶3, 9. Nevertheless, in discussing the important distinction between amendments that change the identity of the offense and those that do not, the Court recognized the continued vitality of *O’Brien*’s holding that amendments that do not change the penalty or degree of the offense – like an amendment adding “recklessly” to the charge – are entirely appropriate. *Davis*, at ¶6-9.

Because *Colon I* did not involve the propriety of an amendment to add “recklessly” to the crime charged in the indictment and, further, because *Davis* cited *O’Brien* with approval, *Colon I* did not overrule *O’Brien*. Consequently, *O’Brien* remains good law and is dispositive on the issue of amendments that add “recklessly” to the offense.

The court of appeals held in this case that the amendment to the indictment to add “recklessly” to the offense of discharging a firearm upon or over a public road or highway required Hamilton to answer for a crime charged other than on presentment or indictment of a grand jury in violation of his constitutional rights. *Hamilton*, at ¶23. That exact issue was raised in *O’Brien*, and this Court rejected it. *O’Brien*, at 126-27.

This Court held that Crim.R. 7(D) permitted the amendment because it did not change either the name or identity of the crime charged. *O’Brien*, at 126. Crim.R. 7(D) embodies the protections guaranteed in Section 10, Article I of the Ohio Constitution by limiting the court’s power to amend indictments “provided no change is made in the name or identity of the crime charged.” *State v. Headley* (1983), 6 Ohio St.3d 475, 479, 453 N.E.2d 716; *State v. Strozier* (Oct. 5, 1994), Montgomery App. No. 14021, at *2. Thus, the amendment did not allow the jury to convict the defendant on a charge different from that found by the grand jury. *O’Brien*, at 127.

The amendment to the indictment in this case was no different than the amendment at issue in *O’Brien*. Therefore, in accordance with *O’Brien*, the amendment to Hamilton’s indictment did not change the name, identity, or severity of the crime charged and was proper under both Crim.R. 7(D) and Section 10, Article I of the Ohio Constitution.

CONCLUSION

For the reasons discussed above, Appellant State of Ohio respectfully requests that this Court grant jurisdiction so that the important issue presented in this case can be reviewed on the merits.

Respectfully submitted,

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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22895
v.	:	T.C. NO. 2007 CR 3702
FRANK ROBERT HAMILTON, III	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

OPINION

Rendered on the 4th day of September, 2009.

.....

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.....

DONOVAN, P.J.

This matter is before the Court on the Notice of Appeal of Frank Robert Hamilton, III, filed August 14, 2008. On December 12, 2007, the grand jurors of Montgomery County

returned an indictment charging Hamilton with discharge of a firearm on or near prohibited premises, in violation of R.C. 2923.162(A)(3)(C)(4), a felony of the first degree, along with a firearm specification. Hamilton pled not guilty.

On May 14, 2008, Hamilton filed a Motion to Dismiss Indictment, arguing that the indictment "fails to specify any requisite degree of culpability, an essential element of the offense alleged to have been committed by Defendant." The State filed a Motion to Amend Indictment and a memorandum contra Hamilton's motion to dismiss.

On June 4, 2008, the trial court issued a Decision and Entry Denying Motion to Dismiss and Granting Motion to Amend Indictment. The trial court determined, "Crim.R. 7 permits the amendment of an indictment before, during or after trial provided no change is made in the name or identity of the crime charged. * * *

"* * * After the amendment in Mr. Hamilton's case, the indictment on which the Defendant will proceed to trial will not omit the essential mens rea element, and the Defendant will have due notice of all the elements of the offense." The trial court further noted that Hamilton did not allege that he would be misled or prejudiced by the amendment.

On June 11, 2008, Hamilton filed a Motion to Reconsider Court's Decision Denying Motion to Dismiss Indictment, which the trial court denied.

On June 20, 2008, Hamilton pled no contest to discharge of a firearm on or near prohibited premises, in exchange for the State's agreement to drop the firearm specification and to agree to a sentence of community control. Hamilton was sentenced to a period of five years of community control sanctions.

Hamilton asserts one assignment of error as follows:

"THE TRIAL COURT ERRED AND DENIED DEFENDANT'S CONSTITUTIONAL RIGHT TO ANSWER ONLY TO AN INDICTMENT OF CRIME BY A DULY CONSTITUTED GRAND JURY, BY FAILING TO DISMISS THE DEFECTIVE INDICTMENT AND ALLOWING THE STATE TO AMEND THE FATALLY DEFECTIVE INDICTMENT."

According to Hamilton, "the amended indictment changed the 'identity' of the charge against Mr. Hamilton since the original indictment did not charge a crime at all." The State responds that "the addition of an essential element of the charge did not amend the substance of the indictment." The State relies upon *State v. O'Brien* (1987), 30 Ohio St.3d 122. On March 20, 2009, the State filed a Notice of Additional Authority, further directing our attention to *State v. Rice*, Hamilton App. No. C-080444, 2009-Ohio-1080 (referencing *O'Brien* in dicta).

In *O'Brien*, the defendant was indicted upon, inter alia, two counts of endangering children, and he moved to dismiss the two counts on the basis that each failed to include the element of recklessness. *O'Brien*, at 122-23. The trial court overruled the motion to dismiss, and a jury was impaneled. *Id.*, at 123. At the conclusion of the State's case-in-chief, the trial court dismissed one count of endangering children, and after the defense rested, the State moved to amend the remaining endangering children charge to include the mens rea of recklessness. *Id.* The trial court granted the State's motion, and the court of appeals reversed the decision of the trial court, determining that "the omission of the mental state element fatally flawed the indictment, and that allowing appellant to cure such an error permitted the jury to convict the accused on a charge essentially different from that upon which the grand jury indicted him." *Id.*

The Supreme Court of Ohio subsequently noted on appeal that Crim.R. 7 "controls the sufficiency of and amendments to criminal indictments." *Id.*, at 124. The rule provides in relevant part: "The indictment shall * * * contain a statement that the defendant has committed a public offense specified in the indictment. * * * The statement may be made in ordinary and concise language without technical averments or allegations not essential to be proved. The statement may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged." Crim.R. 7(B).

Further, the *O'Brien* Court considered Crim.R. 7(D), which provides in part: "The court may at any time before, during, or after a trial amend the indictment * * * in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged." *Id.*, at 125.

The *O'Brien* Court determined that the addition of the term "recklessness" to the indictment did not change the name or the identity of the crime of endangering children, nor did the addition change the penalty nor the degree of the offense charged, and the Court found that the amendment was proper pursuant to Crim.R. 7(D). *Id.*, at 126.

In the next step of its analysis, the *O'Brien* Court applied the remainder of Crim.R. 7(D) to *O'Brien's* indictment. *Id.* The rule further provides: "If any amendment is made to the substance of the indictment, * * * the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impaneled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been

misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by postponement thereof to a later day with the same or another jury."

The court noted that the addition of recklessness to the indictment amended its substance, but it noted that O'Brien did not move for the discharge of the jury after the indictment was amended. *O'Brien*, at 126. According to the Court, "[e]ven had appellee done so, we find that it would have been proper for the trial court to overrule the motion as the appellee would have been unable to show that he had been misled or prejudiced by the permitted amendment. Appellee had notice of both the offense and the applicable statute. Appellee's knowledge of the appropriate mental state standard is evidenced by his continuing efforts, before and during trial, to dismiss the indictment on the basis that such element was *not included* in the indictment." *Id.* The court found that O'Brien "was neither misled nor prejudiced by the amendment to the originally defective indictment." *Id.*

In conclusion, the *O'Brien* Court held, "[a]n indictment which does not contain all the essential elements of an offense, may be amended to include the omitted element, if the name or identity of the crime is not changed, and the accused has not been misled or prejudiced by the omission of such element from the indictment." *Id.*, at syllabus ¶ 2.

In contrast to the State, Hamilton relies upon *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"), and after thorough review thereof, we conclude that *Colon I* implicitly overruled *O'Brien*. In *Colon I*, in summary, the indictment for aggravated robbery omitted the required mens rea for the charge, Colon did not object to the indictment, there was no evidence that Colon had notice that the state was required to prove recklessness, and the State did not argue that Colon was reckless in inflicting physical harm on the

victim. Id., at ¶ 29-30. Further, the trial court did not instruct the jury on the required mens rea of recklessness, and during closing argument, the State treated robbery as a strict liability offense. Id., at ¶ 31.

The Supreme Court concluded, "the defective indictment in this case failed to charge all the essential elements of the offense of robbery and resulted in a lack of notice to the defendant of the mens rea required to commit the offense. This defect clearly permeated the defendant's entire criminal proceeding. The defendant did not receive a constitutional indictment or trial, and therefore, the defective indictment in this case resulted in structural error." Id., at ¶ 32.

While Colon did not raise the issue of his defective indictment until after judgment, Hamilton objected to the indictment at the trial court level on the basis that it lacked a culpable mental state. In *Colon I*, the Supreme Court noted, "our case law follows the Ohio Constitution, which provides that 'no person shall be held to answer for a capital, or otherwise infamous, crime, unless on *presentment or indictment of a grand jury.*' Section 10, Article I, Ohio Constitution. 'The material and essential facts constituting an offense are found by the presentment of the grand jury; and if one of the vital and material elements identifying and characterizing the crime has been omitted from the indictment such defective indictment is insufficient to charge an offense, and *cannot be cured by the court*, as such a procedure would not only violate the constitutional rights of the accused, but would allow the court to convict him on an indictment *essentially different from that found by the grand jury.*' *State v. Harris* (1932), 125 Ohio St. 257, 264 * * * ." Id., at ¶ 17 (emphasis added). See *State v. Childs* (2000), 88 Ohio St.3d 558 (An indictment must, first, contain the **elements** of the offense charged and fairly inform the defendant of the

charge against which he must defend.)

The Supreme Court further emphasized the critical function of the grand jury in fairly instituting criminal proceedings, noting that its holding in *Colon I* “protects defendants’ right to a grand jury indictment. The grand jury is an important part of American citizens’ constitutional rights. Our grand jury system is derived from its English counterpart, and the concept was brought to this country by early colonists and incorporated into the federal Constitution. (Internal citation omitted). ‘The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. * * * Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges.

“In discussing the grand jury provision of the federal Constitution, which is very similar to the grand jury provision of the Ohio Constitution, the Supreme Court of the United States has stated that the grand jury is a ‘constitutional fixture in its own right.’ (Internal citations omitted). ‘In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by ‘a presentment or indictment of a Grand Jury.’ The grand jury’s historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions.” (Citations omitted). *Colon I*, ¶¶ 39-40. (Emphasis added).

Hamilton’s indictment provides in relevant part, “The Grand Jurors of the County of Montgomery, in the name, and by the authority of the State of Ohio, upon their oaths do

find that Frank Robert Hamilton, III, on or about September 8, 2007, in the County of Montgomery aforesaid, and State of Ohio, did discharge a firearm upon or over a public road or highway and said violation caused serious physical harm to a person; contrary to the form of the statute (in violation of Section 2923.162(A)(3)(C)(4) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio."

Pursuant to *Colon I*, the error in Hamilton's indictment cannot be cured by the court, and the trial court accordingly erred in allowing the State to amend the indictment. In other words, by its error, the trial court required Hamilton to answer for the crime charged other than on "presentment or indictment of a grand jury," in violation of Hamilton's constitutional rights.

Finally, we note our awareness that the precedential value of *Colon I* was subsequently limited to its unique facts by *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*"). In *Colon II*, the court stressed that structural-error analysis of a defective indictment is only appropriate in rare cases where multiple errors follow the defective indictment, as in *Colon I*. *Id.*, at 205. The matter herein, however, is not one of structural error permeating a trial (Hamilton pled no contest), nor plain error (Hamilton objected to the indictment prior to judgment), and Hamilton's amended indictment is not saved by *Colon II*'s limitations of *Colon I*.

Hamilton's sole assignment of error is sustained, and the judgment of the trial court is reversed.

.....

BROGAN, J. and FAIN, J., concur.

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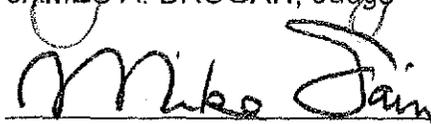
IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
 Plaintiff-Appellee : C.A. CASE NO. 22895
 v. : T.C. NO. 2007 CR 3702
 FRANK ROBERT HAMILTON, III : **FINAL ENTRY**
 Defendant-Appellant :

Pursuant to the opinion of this court rendered on the 4th day of
September, 2009, the judgment of the trial court is reversed.

Costs to be paid as stated in App.R. 24.


 MARY E. DONOVAN, Presiding Judge

 JAMES A. BROGAN, Judge

 MIKE FAIN, Judge

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support was sent by first class mail on this 10th day of October, 2009, to the following: Daniel J. O'Brien, 1210 Talbott Tower, 131 North Ludlow Street, Dayton, Ohio 45402 and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, OH 43215-9311.

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