

2009-0678

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF JOSEPH PEPKA

Charles E. Coulson (0008667)
 Joshua S. Horacek (0080574)
 Prosecuting Attorney
 P. O. Box 490
 Painesville, OH 44077
 (440) 350-2683
 (440) 350-2585 fax

Albert L. Purola (0010275)
 38298 Ridge Road
 Willoughby, OH 44094
 (440) 951-2323
purola@hotmail.com

Counsel for Appellant, State of Ohio Counsel for Appellee, Joseph Pepka

FILED
 NOV 02 2009
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES/STATUTES	ii, iii
STATEMENT OF FACTS AND OF THE CASE	1
INTRODUCTION	5
ARGUMENT.....	6, 14
CONCLUSION	20
PROOF OF SERVICE	21

PROPOSTION OF LAW 1

Page

An indictment that charges a defendant with endangering children 6
in violation of Ohio Revised Code Section 2919.22(A) as a felony
of the third degree is sufficient regardless of whether it indicates
that the victim suffered serious physical harm

PROPOSTION OF LAW 2

Page

The elements of endangering children do not include serious 14
Physical harm suffered by the victim. Rather, serious physical
harm is a special finding to determine the degree of the offense,
but is not part of the definition of the crime

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Daubert v. Merrell Dow</i> , 509 U.S. 579 (1993)	18
<i>Ex Parte Bain</i> , 121 U.S. 1, (1887)	11
<i>Ford v. United State</i> , 273 U.S. 593, at 602	8
<i>Gaither v. United States</i> , 413 F.2d 1061,	8
<i>Hamling v. United States</i> , 418 US. 87, 117-8	12, 19
<i>Harris v. State of Ohio</i> , (1932) 125 Ohio St. 257, 264	7, 19, 20
<i>Horsley v. Alvis</i> , 281 F.2d 440	9, 13
<i>Hurtado v. California</i> , 110 U.S. 516	11
<i>State of Ohio v. Allen</i> , 29 Ohio St. 3d 53	15
<i>State of Ohio v. Childs</i> , 88 Ohio St. 3d 558	12, 19, 20
<i>State of Ohio v. Colon</i> , 118 Ohio St. 3d 26	4, 20
<i>State of Ohio v. Davis</i> , 121 Ohio St. 3d 239	13, 20
<i>State of Ohio v. Fairbanks</i> , 117 Ohio St. 3d 543.	16, 17, 18
<i>State of Ohio v. Headley</i> , 6 Ohio St. 3d 475	13, 20
<i>State of Ohio v. O'Brien</i> , 30 Ohio St. 3d 122 (1987)	13, 20
<i>State of Ohio v. Parker</i> , 150 Ohio St. 22	8
<i>State of Ohio v. Smith</i> , 117 Ohio St. 3d 447	16, 17, 18, 19

<i>State of Ohio v. Wozniak</i> , (1961) 172 Ohio St. 517, 521	7
<i>United States v. Cotton</i> , 535 U.S. 625, 631 (2002)	11
<i>United States v. Miller</i> , 471 U.S. 130	7, 8

TABLE OF STATUTES

<u>CASES</u>	<u>PAGE</u>
Criminal Rule 7.	7, 13
Ohio Revised Code Section 2505.39	3
Ohio Revised Code Section 2903.01	10
Ohio Revised Code Section 2919.22(A)	6
Ohio Revised Code Section 2941.08(E)	19

STATEMENT OF FACTS AND OF THE CASE

The prosecutor's statement of the trial facts is a fair summary of the event, as is the summary beginning the Court of Appeals opinion. While customarily these fact recitations appear at the beginning of the final opinion, because only one of three issues considered by the Court of Appeals is before this Court now, it would seem only the facts recounted from the end of page 4 through page 7 of the lower court opinion make any sense here. Other facts mentioned by the prosecutor and the Court of Appeals do not add even context to the question leave to appeal was granted to consider.

The prosecutor did leave out the course of proceedings up until now, which is illuminating, and which provides texture to the resolution of this case.

When the Court of Appeals issued the judgment under review it did so by a divided vote with two judges, Cannon, J. and O'Toole, J., holding the indictment was insufficient to charge felony child endangering, and one judge, Rice J., disagreeing entirely.

Judge Cannon and Judge O'Toole could not agree on what mechanism should be employed to implement their judgment, Judge Cannon wanted to remand for sentencing and Judge O'Toole wanted to order the defendant discharged because the only valid sentence pursuant to the majority's judgment had expired as Pepka, by that time, had been in prison for more than the maximum time.

This was "resolved" by Judge Rice, who was not part of the court constituting the majority (and therefore entitled to consider the outcome), joining Judge Cannon in ordering remand for resentencing. Opinion of Judge O'Toole concurring and dissenting, below.

The remand occurred and Joseph Pepka was released on bond. The trial court ordered sentencing memoranda from the parties on the question whether it could sentence Pepka consecutively on the three (3) surviving misdemeanors. Before they were filed, and both were timely, the State had appealed to Supreme Court, and simultaneously asked this Court for a stay of the Court of Appeals' judgment, and remand order.

The defendant opposed the Motion for a Stay, which can be found in Case No. 2009-0678 on the Supreme Court's docket. On May 6, 2009, this Court denied the State's motion for a stay by entry in the same case number. The effect

of that action was to leave the State's application for leave to appeal pending and undecided, and the Court of Appeals' judgment and order extant and viable.

There being no stay in effect (the Court of Appeals had not been asked for a stay at his point), Pepka moved the trial court, on April 29, 2009, in Case No. 07 CR 245, to immediately follow the Court of Appeals' mandate. No action was taken on the motion. Sixty days after the Court of Appeals' judgment and order, no action to implement it had been taken by the trial court.

The trial court having initially said it was not going to act until the Supreme Court ruled, finally put on an order acknowledging no effort would be made to comply with the superior Court's order.

On May 29th, Pepka simultaneously filed in the original appeal a motion to recall the mandate that had been sent to Judge Lucci, and urging the Court of Appeals to sentence Pepka, itself, since it appeared its orders were being ignored, and separate petition for a Writ of Mandamus to accomplish the same result.

On to June 12, 2009, the State filed in the trial court (the Court of Appeals having rebuffed the prosecutor's vain attempt to get a stay after the Supreme Court had denied the same request) an application to stay that court's order pursuant Ohio Revised Code Section 2505.39. In friendly territory, this motion was granted

immediately with no hearing and no notice to Pepka's lawyer. [Examining the Judgment Entry itself, doc. 137, proves it was done ex parte. It says right on it "Prepared on June 12, 2009, at the direction of the Trial Court." That being the day the State's motion was filed, Doc 136, the only deduction reasonable would be the trial judge was presented with the motion by someone, and decided, then and there, to grant it, and notified the prosecutor's office to prepare an entry. The defendant was made aware of all of this when it was over and a *fait accompli*.

A separate appeal of that action is presently pending in the Court of Appeals, 2009-L-079, on the grounds of *res judicata*.

The trial court's failure to follow the order of the Court of Appeals was unprecedented and its undisguised willingness to give the state a chance to resuscitate the conviction is evident. Judge Rice, Judge Lucci and the prosecutor all seemed desirous of putting off implementation of the misdemeanor sentence, whether it be concurrent or consecutive, as they knew would be a jeopardy bar to this proceeding. *State v. Colon*, 118 Ohio St. 3d 26.

INTRODUCTION

This case was meant to be, and easily could have been, a regular prosecution of third degree felony child endangering. The reason it was not is three fundamental, and now fatal, administrative mistakes made by the local prosecutor's office.

The first mistake is simply that the secretary doing the document preparation neglected to insert the words "which resulted in serious physical harm to the child" in the body of the indictment, even though at the end the conclusion it was a third degree felony was typed in. This failure was certainly inadvertent.

The second mistake, also administrative and negligent, was the failure of the Prosecuting Attorney, or his designated deputy who actually signed the indictment, to notice the omission when reviewing it for signature because the indictment did not say what the prosecutor wanted it to say.

The third mistake of the prosecutor's office was to not dismiss the flawed indictment at the time it was discovered the necessary language was missing, and go back to the grand jury before jeopardy attached. The state plainly realized the critical nature of the omission when it filed the motion to amend the indictment and add the very language that distinguishes a felony from a misdemeanor.

To correct these unintentional errors that have direct and most significant consequences for Joseph Pepka, the state, at whose door the fault lies, wants this Court to abandon more than 300 or so years of settled grand jury and indictment jurisprudence to save this one conviction.

This case is governed by multiple, and recent, decisions of this Court, and the Court of Appeals below correctly identified and followed them. Since no additional pronouncements are necessary on the subject of amending indictments that increase both the penalty and degree of the crime, this case should be dismissed as improvidently allowed.

PROPOSITION OF LAW 1 (ARGUMENT CONTRA)

An indictment that charges a defendant with endangering children in violation of Ohio Revised Code Section 2919.22(A) as a felony of the third degree is sufficient regardless of whether it indicates that the victim suffered serious physical harm.

The state's argument here is as bold as it is breathtaking. It seems to rest on a fundamental misunderstanding of the purpose and role of both the grand jury and the indictment, itself. The state's argument posits the distinguishing fact that

makes the subject conduct a felony does not even have to be in the indictment at all, as long as, according to the submission, the effect of that fact is added on.

What that would mean is it is a third degree felony because it says it is a third degree felony.

It does not take much to expose the failings of this hopeful argument. It is not disputed, nor could it be seriously, the Grand Jury's role is to find "[T]he material and essential *facts* constituting an offense...", *State v. Wozniak*, (1961), 172 Ohio St. 517, 521, quoting *Harris v. State*, (1932), 125 Ohio St.257, 264. [Emphasis added.]

The statement written at the end of the indictment "This act, to wit: Endangering Children, constitutes a Felony of the Third degree...." is, on its face, not a *fact*, rather it is a conclusion of law. A fact is something that must be proved; this statement cannot be proved.

The existence of 'serious physical harm' is a fact to be found, *vel non*, by the Grand Jury. As written, the language relied upon by the state is surplusage and could have been subject to a motion to strike under Criminal Rule 7. A federal example of like language can be found in *United States v. Miller*, 471 U.S. 130, where the Court held unanimously: "A part of the indictment unnecessary to and

independent of the allegations of the offense proved may normally be treated as ‘a useless averment’ that ‘may be ignored.’ *Ford v. United States*, 273 U.S. 593, at 602. In *Ford* the indictment included an allegation the act was in violation of a treaty which did not state a crime against the United States. “Although the grand jury had included the treaty allegation as part of the indictment, this Court upheld the conviction because “that part of the indictment [was] merely surplusage and may be rejected,” *Miller*, at 137 citing *Ford*, 602.”

Although there may be some difference between surplusage included in the indictment as in *Miller*, and surplusage added after body of the indictment, like here, it is not a difference helpful to the state.

Adding the legal conclusion “this is a felony of the third degree” language is the act of scrivener, not a finding of the grand jury. *Gaither v. United States*, 413 F.2d 1061, defined amendment as “when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or court after the grand jury has last passed upon them,” at 1071. The key word is “charging” term; the above language that this is a third degree felony is not charging language.

Multiple cases have held language like this is no part of the indictment. In the 1948 case of *State v. Parker*, 150 Ohio St. 22, this Court considered an appeal by the state where the trial court and the court of appeals had refused leave to the

prosecutor to amend the indictment in a case charging an illegal lottery by adding the words “for his own profit”, as required by the statute.

The prosecutor tried to argue the word “unlawfully”, which very regularly appears at the end of indictments along with ‘against the peace and dignity of the state of Ohio’ was the equivalent of “for his own profit”. This Court, at paragraph 9, held: “The word ‘unlawfully’ used in the indictment states a mere conclusion. It is not synonymous with the words ‘for his own profit,’ and hence does not cure the omission of that element which is found to be essential to state a violation of Section 13064.” (General Code. Other citations omitted.)

The Sixth Circuit, in considering Ohio law, held forcefully: “In our judgment the word, ‘unlawfully,’ as used in the challenged indictment before us amounts to no more than a legal conclusion and is not synonymous with or equivalent to the key words, ‘maliciously and forcibly,’ embodied in Section 12438, General Code. In other words, the employment of the word, ‘unlawfully’ does not supply that element which is indispensable in the circumstances of this case to stating a violation of Section 12438, General Code.” (citations omitted.) *Horsley v. Alvis*, 281 F.2d 440.

“Unlawfully” in these two cases is exactly to the same effect as “This act, to wit: Endangering Children, constitutes a Felony of the Third degree, contrary

to....etc” in our case. In fact ours is worse because it employs “conclusory” language: ”Endangering Children *constitutes*....” The word ‘constitutes’ is by any definition a conclusion.

There is no doubt this circular, boot-strap argument could be applied to nearly all other indictments. For example, if an indictment charged AB in the following language: “purposely caused the death of CD” but concluded “This constitutes aggravated murder in violation of Ohio Revised Code Section 2903.01”, the prosecutor would be free under this logic to file a motion to amend the indictment by adding “and with prior calculation and design”, and claim in defense to a challenge that it really charged aggravated murder all along because the only way it could be the aggravated murder would be if the Grand Jury had found ‘prior calculation and design.’

The whole idea of what the Grand Jury ‘probably would have done’, or ‘must have done’ has attracted attention before. That is what is happening here: This indictment must have been for a third degree felony because the “only way that endangering children can be a felony of the third degree is if the victim suffered serious physical harm.” State’s brief, pp.6-7. The significance of the Grand Jury, sitting as does, at the junction of the judicial branch and executive branch, is that it is independent of the prosecutor. As Chief Justice Rehnquist

noted in *Cotton*, *infra*, "...the Fifth Amendment grand jury right serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power." *Id.*, at 634.

The grand jury's action cannot be presumed. There could be stack of \$50,000 dollars on the table before them, and the jurors could indict for stealing \$1,000.

In *Ex Parte Bain*, 121 U.S. 1, (1887), reaffirmed on this point in *U.S. v. Cotton*, 535 U.S. 625, 631 (2002) some of the guiding fundamentals appear:

If it lies within the province of a court to change the charging part of an indictment to suit its notions of what it ought to have been or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed.***Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus charged, the restriction which the constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists.' *Bain*, *supra*, at 10,¹

¹ Admittedly this is an interpretation of the Fifth Amendment Grand Jury protection which has not been incorporated against the states by the Fourteenth Amendment, *Hurtado v. California*, 110 U.S. 516, but Ohio has never shown any inclination to assert its sovereignty in a way fundamentally inconsistent with the common law, or United States Supreme Court precedents.

Time spent in demonstrating the defendant, Joseph Pepka, had actual notice of the charge he was facing is unhelpful, and incomplete. Trial counsel actually objected on ‘notice’ grounds, but this is immaterial as this case is not about notice. Objection to the defective indictment (to charge a third degree felony) was made by present counsel prior to sentencing.

State v. Childs, 88 Ohio St.3d 558, following *Hamling v. United States*, 418 U.S. 87, tells us that for an indictment to be constitutionally sufficient it must contain “ ‘the elements of the offense charged and fairly inform the defendant of the charge against which he must defend, and, second, enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense.’ ” *Childs*, supra, at 565, quoting *Hamling v. United States*, supra.

Under this analysis the first requirement has two parts: identification of the essential elements, and notice of what the charge is. This case is not about notice. Elements are the *sine qua non* of a criminal charge. They are things that must be proved to the trial jury beyond a reasonable doubt and in this case no allegation the victim suffered “serious physical harm” is present, and therefore the indictment fails for insufficiency as to a third degree felony.

The State, itself, agrees on page 8 of its brief here the indictment did not explicitly state the victim suffered serious physical harm.

While the state argues here the indictment did not have to allege in presence of serious physical harm, it acted much differently at the trial court by moving to formally amend the indictment to include the omitted language.

The perfectly valid indictment the state wanted to amend charged Joseph Pepka with three counts of child endangering which were first degree misdemeanors. The prosecutors successfully petitioned the trial court to amend that charge to a third degree felony. This event took the degree from a misdemeanor one, to a felony three, and the penalty from six months in the county jail to 1,2,3,4, or 5 years in the state prison system.

In so doing the state ran headlong into *State v. Davis*, 121 Ohio St. 3d 239, which specifically prohibits an amendment that changes the “degree” or the “penalty” of the offense. *Davis* was breaking no new ground with that holding as much older cases had reached the same conclusion, for example *State v. Headley*, 6 Ohio St. 3d 475, and *State v. O’Brien*, 30 Ohio St. 3d 122. Even *Alvis*, supra, interpreting the predecessor statute to Criminal Rule 7, Ohio General Code Section 13437-29, concluded if the sentence went from 15 years before the amendment to life after the amendment, the identity of offense had been unconstitutionally changed.

Of course now the state does not want to call this an “amendment” even though it was the state who filed the successful “MOTION TO AMEND THE INDICTMENT”, Docket Entry 66 in Court of Appeals case # 2009-L-079, to add the very language the state now claims is superfluous.

As the Court of Appeals majority held below, there is no way to conclude by looking at the indictment if the Grand Jury ever considered the question of “serious physical harm”.

PROPOSITION OF LAW II

The elements of endangering children do not include serious physical harm suffered by the victim. Rather, serious physical harm is a specific finding to determine the degree of the offense, but is not part of the definition of the crime.

In the first proposition of law the state maintains the “serious physical harm” language is unnecessary as long as the indictment says it is a third degree felony; the second proposition goes further and says it is not an element of the crime. The fact that these two are categorically inconsistent is apparent.

The first admits the serious physical harm is an element which must be proved, but it is already there (in the indictment) because it couldn't be a third degree felony, which it proclaims it is, if the grand jury had not actually considered and found that. The second says the existence of serious physical harm is not an element, but a "special finding", that while elevating the degree and penalty of the crime, does not have to be submitted to the grand jury or included in the indictment.

This Court has previously looked at cases that involved differences between "facts" and elements. In *State v. Allen*, 29 Ohio St. 3d 53, the Court considered the effects of adding on a prior conviction where the statute had provided a more enhanced penalty if the offender had a prior conviction. The holding, in syllabus law, agreed to by all Members of the Court, was a prior conviction that enhances the penalty, but does not elevate the *degree of the offense*, is not an element that must be alleged in the indictment.

"Where the existence of a prior conviction enhances the penalty for a subsequent offense, but does not elevate the degree thereof, the prior conviction is not an essential element of the subsequent offense, and need not be alleged in the indictment or proved as a matter of fact." *State v. Allen*, supra.

It is impossible to escape the logical conclusion from this holding that if something does raise the degree of the offense, it is an element and must be proved as a fact. The “fact” that the state would like to rely on most assuredly raises the degree of the offense.

The state’s misguided reliance on skewed applications of cases like *State v. Fairbanks*, 117 Ohio St. 3d 543, *State v. Smith*, 117 Ohio St. 3d 447 does great violence to both the language and traditions of our Grand Jury jurisprudence.

The state has tried to overlay other cases involving multiple parts and specifications on the child endangering statute and draw a parallel to achieve its desired result. Not only are the principles decided in these other cases not the least analogous, they do not deal with the constitutional requirement of the grand jury.

Fairbanks began as a Double Jeopardy case as the lower court had concluded the original misdemeanor plea to reckless driving barred the subsequently filed felony charge of failure to comply, with a ‘harm to the officer’ specification. This Court’s analysis on the State’s appeal was focused on the “same offense”-lesser included offense question that always lies at the bottom of a Double Jeopardy evaluation. This Court concluded, at page 545, element

differences in the operative statutes meant the two were not the “same” for constitutional purposes.

It then became necessary for the Court to consider whether what has been described as a penalty enhancement (the fact the officer suffered injury) contained a culpable mental state. Answering that question “NO”, the Court decided the penalty could be enhanced if the jury found the existence of the enhancement beyond a reasonable doubt.

The stark difference between *Fairbanks* and our case is *Fairbanks* had BEEN INDICTED for the specification, meaning the facts supporting it had been considered and found by the grand jury. Any comparison of the indicted “substantial risk of serious harm” in that case, and the unindicted “serious physical harm” here, is completely inapt.

Reliance on *Smith I & II* is similarly unhelpful. While *Fairbanks* was accepted for, and decided on, Double Jeopardy grounds, *Smith* was accepted for, and decided on, lesser included offense grounds. It holds, only as far as arguably relevant here, when theft as a lesser included offense of robbery, which requires no value allegation, is before the jury, the value to be considered by the jury to determine the level of the crime for punishment is a finding of fact, not unlike the one in *Fairbanks*, and is not an element of the crime.

However in that case, the robbery had been previously considered and found by the grand jury, just like *Fairbanks*, and it therefore bears no relevance to an attempt to ‘find as a fact’ something that has never been considered by the Grand Jury. [It is settled law the elements of a lesser included offense are subsumed in the elements of the greater.]

In all fairness, the prosecutor does not argue this case is controlled by either *Fairbanks* or *Smith*; his argument is by analytical analogy minus the grand jury, which he would like to ignore.

The trial court here took the creative, if completely un -authorized, step of submitting the question of “serious physical harm” to the trial jury, thereby treating it as a *Fairbanks*-type question of fact. This resulted in a conviction by a trial jury for an offense for which he was never indicted, raising the spectre of a Due Process violation under the Fourteenth Amendment.

The grand jury’s role is roughly analogous to the gate keeper envisioned in *Daubert* [509 U.S. 579]. Even in a case like this where we are talking about ‘serious physical harm’, there are gradations and evidentiary nuances that not everyone may agree on. Those allegations must, under the Grand Jury regime envisioned by our Constitution, pass the completely independent scrutiny of no

fewer than nine citizens, seven of whom must agree, before they can even be exposed to the final twelve.

The *Smith* Court did note if the indictment originally had been for theft, Due Process would require notice of the amount purloined². In both of these cases proper indictments had already occurred, which make them very different from our case in which the proper indictment was for a misdemeanor that was enhanced by an improper amendment.

The existence of ‘serious physical harm’ is both a “fact” as that term is used in *Harris v. State*, (1932), 125 Ohio St. 257, 264---“essential facts constituting an offense”---, and an “element” as that term is used in *State v. Childs*, (2000), 88 Ohio St.3d 558, quoting *Hamling v United States*, (1974), 418 U.S. 87, 117-8. In this case that was not considered by the Grand Jury, and not found by them.

To say “serious physical harm” is not an element of third degree felony child endangering is to deny reality. If there was a jury trial on any such indictment and at the end of the state’s case the only evidence regarding the victim was that she

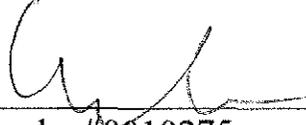
² This is in keeping with Section 2941.08 (E) of the Revised Code, which says an indictment is not insufficient: “For want of a statement of the value or price of a matter or thing, or the amount of damage or injury where the value or price or the amount of damages or injury is not of the essence of the offense, and in that case it is sufficient to aver that the value or price of the property is less than, equals, or exceeds the certain value or price which determines the offense, or grade thereof

spent all of her days merrily playing in meadows, can anyone doubt the defendant would be entitled to a directed verdict of acquittal on the felony charge, for failure of proof on the 'serious physical harm' element of the charge? Ohio Jury Instruction, 405.05 specifically says the state must prove every essential *element* of the crime charged.

Cases like *Colon*, *Childs*, *O'Brien* and *Davis*, all recent, all point in the same direction re-affirming the constitutional protections of the grand jury.

CONCLUSION

This case should be dismissed as improvidently allowed because it does not present any issue needing refinement, or expansion. It cannot now look like what it may have seemed. An affirmance based on *Davis*, *Harris* or *Headley* will add nothing, and a reversal would be so contrary to the holdings in all those cases it would upset the precepts long thought to be settled law.



Albert L. Purola, #0010275
Attorney for Defendant-Appellee Pepka
38298 Ridge Road
Willoughby, OH 44094
(440) 951-2323

CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief was sent by regular U. S. mail, postage prepaid, this 28 day of October, 2009, to Charles E. Coulson, Prosecuting Attorney, Lake County Court of Common Pleas, 105 Main Street, P. O. Box 490, Painesville, Ohio 44077.



Albert L. Purola
Attorney for Defendant-Appellee