

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	Case No. 2009-678
	:	
v.	:	
	:	
Joseph Pepka,	:	
	:	
Defendand-Appellee.	:	

---

**Merit Brief of Amicus the Ohio Public Defender in Support of Appellee**

---

Charles E. Coulson, 0008667  
Lake County Prosecutor

Albert L. Purola, 0010275  
Attorney at Law

Joshua S. Horacek, 0080574  
Assistant Prosecuting Attorney  
Counsel of Record

38108 Third Street  
Willoughby, Ohio 44094  
(440) 951-2323  
purola@hotmail.com

Administration Building  
105 Main Street  
P.O. Box 490  
Painesville, Ohio 44077  
(440) 350-2683  
(440) 350-2585 - Fax

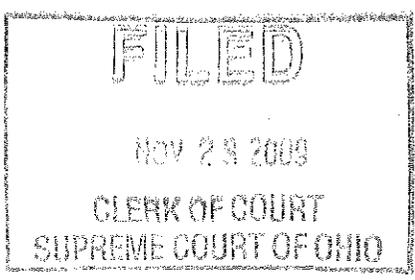
Counsel for Appellee,  
Joseph Pepka

Counsel for Appellant,  
State of Ohio

Office of the Ohio Public Defender  
By: Stephen P. Hardwick, 0062932  
Assistant Public Defender

250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 (fax)  
stephen.hardwick@opd.ohio.gov

Counsel for Amicus Curiae,  
Ohio Public Defender



**Table of Contents**

**Page No.**

Table of Authorities.....ii

Introduction .....1

Statement of the Case and the Facts.....2

Argument .....2

**Proposition of Law No. I of Amicus:**

**An additional fact that makes an offense one of a more serious degree is an element, not a “special finding.” R.C. 2945.75, applied. ....2**

**I. R.C. 2945.75 does not support a distinction between “special finding” and element.....2**

**II. Traditionally, criminal law does not distinguish between a “special finding” and an element. Statutes frequently increase the level of offense based on elements such as the attendant circumstances or the harm caused.....3**

**III. This Court’s distinction between “elements” and “special findings” will create problems in deciding whether one offense is a lesser-included of another, and in deciding whether one offense should merge into another.....4**

**Proposition of Law No. II of Amicus:**

**A litigant cannot raise an issue in the Supreme Court of Ohio if the litigant has forfeited the issue in the court of appeals. ....5**

Conclusion .....6

Certificate of Service .....7

**Table of Authorities**

**Page No.**

**Cases:**

Sherman v. Haines (1995), 73 Ohio St.3d 125 ..... 1,6  
State v. Derov, 121 Ohio St.3d 269, 2009-Ohio-1111 ..... 1,6  
State v. Fairbanks, 117 Ohio St.3d 543, 2008-Ohio-1470..... 2,3,4  
State v. Harris, 122 Ohio St.3d 373, 2009-Ohio-3323..... 4  
State v. Martello, 97 Ohio St.3d 398, 2002-Ohio-6661..... 1,6  
State v. Smith, 121 Ohio St.3d 409, 2009-Ohio-787 ..... 2,3

**Statutes:**

R.C. 2903.02..... 4  
R.C. 2907.02..... 4  
R.C. 2907.03..... 4  
R.C. 2909.03..... 4  
R.C. 2913.02..... 3  
R.C. 2919.22..... 5  
R.C. 2921.331..... 2,4  
R.C. 2941.25..... 4  
R.C. 2945.75..... 1,2,3,5,6

**Other Authority:**

Understanding Criminal Law, Second Edition (1995), Joshua Dessler,  
at §9.10[C-D]..... 3

## Introduction

The parties and the lower court do not cite to the critical statute. Under R.C. 2945.75(A)(1), when an “additional element[] makes an offense one of more serious degree[,]” the indictment “shall state the degree of the offense . . . , or shall allege such additional element or elements.” Because serious physical harm raises child endangering from a misdemeanor to a third-degree felony, the State would appear to have an argument that serious physical harm is an element that makes child endangering an offense of a more serious degree. Accordingly, the State was only required to allege the degree of felony in the indictment, which it did.

However, that argument would only be available if the State had raised it below. The State did not. The State lost in the court of appeals after resting its case on the theory that serious physical harm was not an element, but was instead a “special finding.” Accordingly, the State forfeited its potential R.C. 2945.75 argument, and this Court should not consider it. See, e.g., Sherman v. Haines (1995), 73 Ohio St.3d 125, 126, n.1; State v. Martello, 97 Ohio St.3d 398, 2002-Ohio-6661, at ¶41, n.2.

This Court should either affirm the court of appeals because the State forfeited the R.C. 2945.75 argument, or dismiss the State’s appeal as improvidently allowed. If this Court determines that the court of appeals decision creates incorrect precedent, it should order that the “opinion of the court of appeals may not be cited as authority except by the parties inter se.” State v. Deroy, 121 Ohio St.3d 269, 2009-Ohio-1111, at ¶4.

## Statement of the Case and the Facts

The parties adequately set forth the procedural and factual history of this case.

### Argument

#### Proposition of Law No. I of Amicus:

**An additional fact that makes an offense one of a more serious degree is an element, not a “special finding.” R.C. 2945.75, applied.**

#### **I. R.C. 2945.75 does not support a distinction between “special finding” and element.**

In the court of appeals and in this Court, the State argues that serious physical harm need not be alleged in an indictment because the serious physical harm is a “special finding,” not an element. Brief at 10-20. But under R.C. 2945.75(A)—a statute never addressed by the State in the court of appeals, or in its jurisdictional memorandum or merit brief in this Court—the General Assembly expressly referred to “additional elements [that] make[] an offense one of more serious degree. . . .” Emphasis supplied.

This Court has sometimes made the distinction to which the State refers. See, e.g. State v. Fairbanks, 117 Ohio St.3d 543, 2008-Ohio-1470, at ¶11 (“not an element” but “a penalty enhancement [] contingent upon a factual finding”), but see *id.*, at ¶23 (“I disagree with the majority’s analysis of the R.C. 2921.331(C)(5)(a)(ii) specification as simply a “penalty enhancement.”) (Lanzinger, J., dissenting, joined by Pfiefer, J.); State v. Smith, 121 Ohio St.3d 409, 2009-Ohio-787, at ¶7 (“While the special findings identified in R.C.

2913.02(B)(2) affect the punishment available upon conviction for the offense, they are not part of the definition of the crime of theft set forth in R.C.

2913.02(A).”), but see, *id.*, at ¶21 (“No statute or case is offered to support the majority’s conclusion that the value element, which is part of the definition of the offense itself and affects the level of the offense and potential punishment, is a ‘special finding.’”) (Lanzinger, J., dissenting, joined by Pfeifer, J.)

Respectfully, the plain language of R.C. 2945.75(A)(1) supports the dissenting opinions of Justices Pfeifer and Lanzinger in Smith and Fairbanks. The General Assembly has determined that a fact that increases an offense is an element, not a “special finding” or “penalty enhancement.”

**II. Traditionally, criminal law does not distinguish between a “special finding” and an element. Statutes frequently increase the level of offense based on elements such as the attendant circumstances or the harm caused.**

The holding of the Smith and Fairbanks majority opinions that a fact is not an element when it “is purely a question of fact concerning the consequences flowing from the defendant’s” actions does not comport with traditional uses of that term. Smith at ¶12, quoting Fairbanks, at ¶12. As one criminal law text explained, “[a]n offense may be defined in terms of a prohibited result.” *Understanding Criminal Law, Second Edition* (1995), Joshua Dessler, at §9.10[C-D] (under the heading, “Result’ Elements”).

Crimes are often defined or enhanced by the results of the defendant’s actions or attendant facts. For example, the fact the victim dies as a result of the commission of another felony is unquestionably an “element” of murder, not a “penalty enhancement” of “committing or attempting to commit an

offense of violence. . . .” R.C. 2903.02(B). Likewise, the age of the victim of rape or sexual battery can make the offense more serious. R.C. 2907.02(B) and 2907.03(B). The value of the property destroyed in a fire makes arson more serious. R.C. 2909.03(B). The seriousness of failing to obey a police officer is enhanced when the defendant caused serious physical harm or a substantial risk of serious physical harm. R.C. 2921.331(C)(5)(a).

**III. This Court’s distinction between “elements” and “special findings” will create problems in deciding whether one offense is a lesser-included of another, and in deciding whether one offense should merge into another.**

Forcing trial and appellate courts to decide whether a fact needed to obtain a conviction is an element or a special finding could cause confusion when lower courts attempt to decide whether one offense is a lesser-included of another or whether one offense should merge into another under R.C. 2941.25. When determining whether two offenses are allied, this Court has held that courts must “compare the elements of offenses in the abstract, i.e., without considering the evidence in the case,” to see if one offense can be committed without committing the other. State v. Harris, 122 Ohio St.3d 373, 2009-Ohio-3323, at ¶12 (citations omitted). To conduct this analysis, trial courts must know what “elements” are and are not.

The distinction between “special findings” and elements, which has no basis in the Ohio Revised Code, creates yet another layer of confusion that will take years of offense-by-offense litigation to sort through (especially considering that a “special finding” is defined as “a question of fact concerning the consequences flowing from the defendant’s” actions. Fairbanks, at ¶12).

Further, whether one offense is a lesser included offense of another can benefit either the State or the defense, depending on the facts of each case. But both sides need a clear set of rules. Uncertainty creates litigation and impairs finality.

This Court should reject the State's assertion that facts that enhance a penalty are "special findings" instead of elements. Under R.C. 2945.75, any fact that enhances a penalty is an element.

**Proposition of Law No. II of Amicus:**

**A litigant cannot raise an issue in the Supreme Court of Ohio if the litigant has forfeited the issue in the court of appeals.**

Section 2945.75 might appear to assist the State in its argument that serious physical harm need not be alleged in the indictment. Serious physical harm is an "additional element[] [that] makes an offense one of more serious degree[,] " in this case, raising the offense from a misdemeanor to a third-degree felony. R.C. 2919.22(E)(1)(c). But the State forfeited that argument by failing to raise it in the trial court or the court of appeals. See, Motion for Leave to Amend Indictment, Dec. 11, 2007, T.d., 66; T.p. (trial) 4-19; Appellee's Merit Brief, Court of Appeals, Jun. 25, 2007. In the trial court and court of appeals, Mr. Pepka complained that because physical harm was an element it must be in the indictment. The State never argued that R.C. 2945.75 excused the State from alleging physical harm. Instead, the State rested on the theories that the indictment put Mr. Pepka on sufficient notice and that physical harm was a special finding, not an element.

This Court generally refuses to consider issues raised for the first time in this Court. See, e.g., Sherman v. Haines (1995), 73 Ohio St.3d 125, 126, n.1; State v. Martello, 97 Ohio St.3d 398, 2002-Ohio-6661, at ¶41, n.2. Here, the State failed to make an R.C. 2945.75 argument in the trial court, the court of appeals, and in Court. The State should not use an appeal to this Court to add issues the State should have presented first to the court of appeals. This Court typically does not act as a court of mere error correction when a lower court erred. It should not act as a court of litigant's error correction either.

### **Conclusion**

This Court should affirm the decision of the court of appeals because the State did not present the R.C. 2945.75 argument to the court of appeals. In the alternative, if this Court is determines that the court of appeals erred, this Court should dismiss this appeal, but hold that the opinion below may only be cited by the parties. See, e.g., State v. Deroy, 121 Ohio St.3d 269, 2009-Ohio-1111 (cause partially dismissed, and “[t]he opinion of the court of appeals may not be cited as authority except by the parties inter se”). Such a result would avoid the negative effects of a precedent this Court determines to be incorrect, but also would uphold the principle that parties must present arguments to the lower court before coming to this Court.

Respectfully submitted,

Office of the Ohio Public Defender



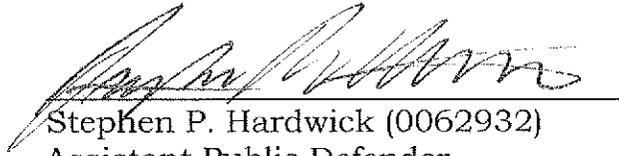
By: Stephen P. Hardwick (0062932)  
Assistant Public Defender

250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 (Fax)  
stephen.hardwick@opd.ohio.gov

Counsel for Amicus Curiae,  
Ohio Public Defender

**Certificate of Service**

I certify that on November 23, 2009, the foregoing **Merit Brief of Amicus the Ohio Public Defender in Support of Appellee** was served via regular U.S. mail on Joshua S. Horacek, Lake County Assistant Prosecuting Attorney, Administration Building, 105 Main Street, P.O. Box 490, Painesville, Ohio 44077 and Albert L. Purola, Esq., 38108 Third Street, Willoughby, Ohio 44094.

  
Stephen P. Hardwick (0062932)  
Assistant Public Defender

Counsel for Amicus Curiae,  
Ohio Public Defender

#310371