

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO, : Case No. 2009-0311
 :
 Plaintiff-Appellee, :
 :
 v. : On Appeal from the
 : Sixth Appellate District,
 GREGORY HORNER, : Lucas County, Ohio
 : Case No. CR 200603208
 :
 Defendant-Appellant. :

**BRIEF OF AMICUS CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLANT GREGORY HORNER**

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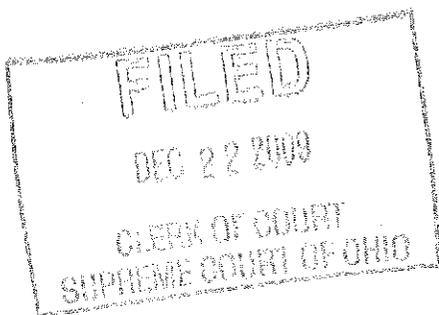


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STATEMENT OF THE CASE AND FACTS

As the certified question is a pure question of law, amicus counsel neither references nor takes any position on the specific facts of Mr. Horner's case. If additional statement is still desired by this Court, amicus counsel adopts by reference the statement of the case and facts set forth in the court of appeal's opinion.

INTEREST OF AMICUS CURIAE

The Office of the Ohio Public Defender represents indigent criminal defendants, and has provided representation in other cases in which the issue of the appropriate level of mens rea for aggravated robbery under R.C. 2911.01(A)(3) was raised. In fact, both the cases conflicting with the sixth district's opinion in this case involved indigent defendants represented on by this office.¹ This Court's recent attention to mens rea, in *State v. Colon*, prompted many appeals on the issue of imputed mens rea under R.C. 2901.21(B).² The issue presented in this case has not been difficult for the appellate courts, which, with the noteworthy exception of the sixth district, have been unanimous in their application of the *Colon* cases to aggravated robbery under R.C. 2911.01(A)(3). However, when the outcome of a specific issue depends upon the district in which the issue is considered, justice cannot be assured. Additional guidance by this Court will provide uniformity in Ohio's appellate courts and protect defendants' right to proof beyond a reasonable doubt on all elements and proper notice.

It is the essential mission of this office to provide quality representation to indigent defendants. Addressing the outlier decision of the sixth district will help this office and other attorneys to insure quality representation by clarifying the law in this area. Additionally, the Ohio Public Defender has a professional obligation to assist this Court when it is considering criminal matters in which the public defender has heightened or specialized knowledge. It is

¹ *State v. Alvarez*, 3rd Dist. No. 4-08-02, 2008-Ohio-5186; *State v. Briscoe*, 8th Dist. No. 89979, 2008-Ohio-6276.

² *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 (*Colon I*), reconsidered and limited by *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3479, 893 N.E.2d 169 (*Colon II*).

only by having the fullest understanding that this Court is empowered to render informed decisions. The Ohio Public Defender's Office offers this amicus brief to assist this Court in understanding the relative lack of dispute on the issue involved in the certified question.

ARGUMENT

FIRST PROPOSITION OF LAW

Proposition of Law No. I: The holdings of *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 are applicable to the offense of aggravated robbery, under R.C. 2911.01(A)(3), in addition to robbery, under R.C. 2911.02(A)(2).

The holdings of *Colon I* and *Colon II* are applicable to aggravated robbery under the serious physical harm subsection, as eight of the nine district courts to consider the issue and the Ohio Jury Instructions Committee all agree.

In *Colon I and II*, this Court reinforced the proper analysis for a statute lacking mens rea, and explained the effect of failing to include the mens rea in the indictment.³ This Court noted that mens rea “is a part of every criminal offense in Ohio, except those that plainly impose strict liability.”⁴ When the mens rea is not specified and strict liability is not imposed, recklessness is the proper mens rea under R.C. 2901.21(B).⁵ The mens rea in the indictment is an essential element, and failure to include it renders an indictment defective.⁶ Indictments lacking an essential element fail to charge an offense under Crim.R. 12(C), so the defect can be raised for the first time on appeal.⁷ This Court also noted that the type of error in *Colon I* created a

³ See generally, *Colon I*; *Colon II*.

⁴ *Colon I*, at ¶11 (citing *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, 803 N.E.2d 770, at ¶18).

⁵ *Id.* at ¶12 (citing *Lozier*, 2004-Ohio-732, at ¶19).

⁶ *Colon*, at ¶15.

⁷ *Id.* at ¶37.

structural error because of its pervasive effect on the proceedings.⁸ *Colon II* limited *Colon I* to unique cases in which (1) the indictment is defective; (2) there is no evidence the defendant had notice of the required mens rea; (3) the State did not argue the defendant's mens rea to the trier of fact; (4) the jury was not instructed on the appropriate mens rea; and (5) the State treated the offense as strict liability in closing argument.⁹

Many appellate courts and legal bodies have had the opportunity to examine the breadth of *Colon I* and *Colon II*. The First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Tenth District Courts of Appeal have found that *Colon I* and *Colon II* apply to aggravated robbery under the serious physical harm subsection, R.C. 2911.01(A)(3).¹⁰ Both the First and Eighth Districts imputed recklessness into the serious physical harm section of the prior aggravated robbery statute before the *Colon* cases.¹¹ Additionally, the Ohio Jury Instructions Committee has

⁸ Id. at ¶32, 44.

⁹ *Colon II*, at ¶6.

¹⁰ *State v. Canyon*, 1st Dist. No. C-070729, C-070730, C-070731, 2009-Ohio-1263, ¶10-11; *State v. Green*, 2nd Dist. No. 2007 CA 2, 2009-Ohio-5529, ¶211; *State v. Alvarez*, 3rd Dist. No. 4-08-02, 2008-Ohio-5186, ¶18; *State v. Chaney*, 5th Dist. No. 2007CA00332, 2009-Ohio-6118, ¶43 (adopting the majority position by implication); *State v. Beshara*, 7th Dist. No. 07 MA 37, 2009-Ohio-6529, ¶90-91; *State v. Briscoe*, 8th Dist. No. 89979, 2008-Ohio-6276, ¶26; *State v. Hardges*, 9th Dist. No. 24175, 2008-Ohio-5567, ¶10; *State v. Ferguson*, 10th Dist. No. 07AP-640, 2008-Ohio-3827, ¶47-8.

¹¹ *State v. Crawford* (1983), 10 Ohio App.3d 207, 208, 461 N.E.2d 312 (1st District); *State v. McSwain* (1992), 79 Ohio App.3d 600, 607, 607 N.E.2d 929 (8th District).

applied *Colon I* and *II* to R.C. 2911.01(A)(3) to determine that it requires recklessness.¹² While the holdings of the district courts are not binding on this Court, they do provide a barometer of the Ohio judiciary's legal opinion. Similarly, this Court has previously found that the Ohio Jury Instructions, while not binding, "are helpful as an example of the generally accepted interpretation of the [relevant statute] in Ohio."¹³ In making their determinations, most courts remarked on the similarity between R.C. 2911.01(A)(3) and R.C. 2911.02(A)(2), which was the statute considered in *Colon I* and *Colon II*.

Colon I and *Colon II* address robbery under the physical harm subsection, R.C. 2911.02(A)(2), which states:

(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another

Similarly, R.C. 2911.01(A)(3) covers aggravated robbery under the comparable subsection, which states:

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

¹² 4 Ohio Jury Instructions (2008), Section 511.01(A)(3) (Revised 5/3/08).

¹³ *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, at ¶95 (no majority opinion, Lanzinger, dissenting).

(3) Inflict, or attempt to inflict, serious physical harm on another.

The two statutes have very similar language. Aggravated robbery differs only in (1) the seriousness of the harm required and (2) the lack of a threat-of-harm, alternative element.¹⁴ Neither difference appears to affect the type of mens rea or waiver analyses performed under *Colon I* or *Colon II*, since neither: (1) suggests that the legislature intended either a particular mens rea for the subsection or that it be strict liability; (2) prevents the error from permeating the proceedings; (3) modifies the underlying indictment to provide the defendant with notice; or (4) otherwise escapes from failing to charge the offense under Crim.R. 12(C) because of the lacking element.¹⁵ Similarly, the same *Colon II* structural error limitations should apply to aggravated robbery, under R.C. 2911.01(A)(3), to assure that structural error analysis is applied only in cases with the same unique errors as in *Colon*.

Given the essentially identical concerns present in the context of aggravated robbery under R.C. 2911.01(A)(3) and the widespread application of the *Colon I* and *II* analysis in Ohio's current appellate jurisprudence, this Court should find that the same holdings applied to robbery involving physical harm in *Colon I* and *II* should apply to aggravated robbery under R.C. 2911.01(A)(3).

¹⁴ Compare R.C. 2911.01(A)(3), with R.C. 2911.02(A)(2).

¹⁵ See *Colon I*, at ¶¶11, 15, 32, 37.

CONCLUSION

For the reasons noted, amicus counsel requests that this Court adopt the proposition of law that the holdings of *Colon I and II* apply to R.C. 2911.01(A)(3) in addition to R.C. 2911.02(A)(2).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Brief of Amicus Curiae Office of the Ohio Public Defender in Support of Appellant Gregory Horner** was served by regular U.S. mail, this 22nd day of December, 2009, upon the following:

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