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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	Case No. 2009-0311 C.A. Case No. CL07-1224 C.P. Case No. CR06-3208
Plaintiff-Appellee,	)	
	)	
-vs-	)	**APPEAL FROM THE LUCAS COUNTY COURT OF APPEALS, SIXTH APPELLATE DISTRICT**
GREGORY HORNER,	)	
Defendant-Appellant.	)	

APPENDIX TO MERIT BRIEF OF DEFENDANT-APPELLANT, GREGORY HORNER

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On Behalf of Defendant-Appellant

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SUPREME COURT OF OHIO

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	Case No.: 09-0311
Appellee,	)	C.A. Case No.: L-07-1224 C.P. Case No.: CR06-3208
-vs-	)	APPEAL FROM THE LUCAS COUNTY COURT OF APPEALS
GREGORY HORNER,	)	
Appellant.	)	

NOTICE OF CERTIFIED CONFLICT

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SUPREME COURT OF OHIO

NOTICE OF CERTIFIED CONFLICT

Appellant, Gregory Horner, hereby gives notice that on January 14, 2009, the Lucas County Court of Appeals, Sixth Appellate District, issued a Decision and Judgment Entry in *State of Ohio vs. Gregory Horner*, Case No. L-07-1224, finding its decision in *State vs. Horner*, 2008-Ohio-6169 to be in conflict with the decision of the Eight District Court of Appeals in *State vs. Briscoe*, 2008-Ohio-6276 and the decision of the Third District Court of Appeals in *State vs. Alvarez*, 2008-Ohio-5189, and certifying the matter to the Ohio Supreme Court for review and final determination pursuant to Section 3(B)(4), Article IV of the Ohio Constitution.

The Decision and Judgment Entry dated January 14, 2009, certifying the conflict is attached hereto as **EXHIBIT A.** The Decision and Judgment Entry of the Sixth District Court of Appeals in *State vs. Horner*, 2008-Ohio-6169 is attached hereto as **EXHIBIT B.** The Journal Entry and Opinion of the Eight District Court of Appeals in *State vs. Briscoe*, 2008-Ohio-6276 is attached hereto as **EXHIBIT C.** The Opinion of the Third District Court of Appeals in *State vs. Alvarez*, 2008-Ohio-5189 is attached hereto as **EXHIBIT D.**

Pursuant to Sup. Ct. Prac. R. 4, Section 4(c), this case should be consolidated with Case No. 09-0079 in which a discretionary appeal and claimed appeal as of right is pending from the same case in which the existence of a conflict has been certified.

Respectfully submitted,

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CERTIFICATION

This is to certify that a copy of the foregoing was served by ordinary U.S. Mail this 10th day of February, 2009 upon: David F. Cooper, Assistant Lucas County Prosecutor, 700 Adams Street, 2nd Floor, Toledo, OH 43604.

John F. Potts

EXHIBIT A

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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

v.

Gregory Horner

Appellant

Court of Appeals No. L-07-1224

Trial Court No. CR-2006-3208

DECISION AND JUDGMENT ENTRY

Decided: JAN 14 2009

* * * * *

This matter is before the court on a motion to certify a conflict filed by appellant, Gregory Horner. Appellee, the state of Ohio, has filed a motion in opposition. Appellant argues that our November 26, 2008 decision in this case is in conflict with *State v. Alvarez*, 3d Dist. No. 04-08-02, 2008-Ohio-5189 and *State v. Briscoe*, 8th Dist. No. 89979, 2008-Ohio-6276.

Pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, "[w]henever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for

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review and final determination." The Ohio Supreme Court set forth three requirements that must be met in order for a case to be certified:

"First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be 'upon the same question.' Second, the alleged conflict must be on a rule of law--not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals." *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596.

In *State v. Horner*, 6th Dist. No. L-07-1224, Ohio-2008-6169, this court, citing our previous decision in *State v. Walker*, 6th Dist. No. L-07-1156, 2008-Ohio-4614, held that the holdings of *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio1624 ("*Colon I* "), and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*") apply only to the offense of robbery in violation of R.C. 2911.02.(A)(2). As such, this court declined to apply the holdings of *Colon I* and *Colon II* to Horner's indictment for aggravated robbery in violation of R.C. 2911.01(A)(3).

In *State v. Alvarez,* supra, and *State v.* Briscoe, supra, the Third and Eighth Districts took a more expansive view and found that the holdings in *Colon I* and *Colon II* also apply to aggravated robbery offenses in violation of R.C. 2911.01(A)(3). Clearly, this district, the Third and the Eighth District Court of Appeals are in conflict as to the

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scope of *Colon I* and *Colon II*. Accordingly, we grant appellant's motion to certify the conflict and certify the following question to the Supreme Court of Ohio for resolution:

Whether 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 in violation of R.C. 2911.01(A)(3) or only to the offense of robbery, a violation of R.C. 2911.02(A)(2).

The motion to certify is granted and the above question is certified to the Supreme Court of Ohio for resolution of the conflict pursuant to Section 3(B)(4), Article IV, Ohio Constitution. It is so ordered.

Mark L. Pietrykowski, J. _____ JUDGE

Arlene Singer, J. _____ JUDGE

Thomas J. Osowik, J. _____ JUDGE
CONCUR.

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EXHIBIT B

[Cite as *State v. Horner*, 2008-Ohio-6169.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

v.

Gregory Horner

Appellant

Court of Appeals No. L-07-1224

Trial Court No. CR-2006-3208

DECISION AND JUDGMENT

Decided: November 26, 2008

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, Jevne Meader and David F. Cooper, Assistant Prosecuting Attorneys, for appellee.

John F. Potts, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Gregory Horner, appeals the trial court's decision on a motion to withdraw a no contest plea, which was filed before sentencing. Because we conclude that the indictment was not defective, and that the trial court committed no reversible error, we affirm.

{¶ 2} This case arose out of a robbery scheme conducted by appellant, Gregory Horner, and his co-defendant, James Hahn, which occurred in Toledo, Ohio, on March 30, 2006. On June 19, 2006, appellant was indicted in a six-count indictment in trial court case No. CR-2006-2357, and Hahn was indicted in a separate six-count indictment in trial court case No. CR-2006-2581. A superseding indictment in trial court case No. CR-2006-3208 was issued against both appellant and Hahn. The indictment charged three counts of felony-one aggravated robbery in violation of R.C. 2911.01(A)(3) and three counts of felony-two felonious assault in violation of R.C. 2941.145. On February 27, 2007, both appellant and Hahn, by and through their counsel, elected to withdraw their former pleas of not guilty and enter pleas of no contest to the first five counts of the indictment (three aggravated robbery and two felonious assault charges along with their attendant firearm specifications.) Additionally, the state promised to recommend that both serve a maximum sentence of ten years. At the conclusion of the joint plea hearing, the court accepted the pleas of both appellant and Hahn and scheduled their sentencing for March 23, 2007.

{¶ 3} At the sentencing hearing on March 23, 2007, Hahn was sentenced first. After the state recommended the ten year maximum sentence cap, the trial court decided not to follow the prosecutor's ten year cap recommendation and Hahn received a total sentence of 12 years in prison. Appellant then orally requested leave to obtain new counsel and to file a motion to withdraw his no contest plea.

{¶ 4} On May 31, 2007, appellant's motion was heard by the court. Appellant, represented by new counsel, testified and was cross-examined by the state. The motion to withdraw the pleas was denied and the trial court then proceeded to sentence appellant to an 11 year prison term. Appellant now appeals setting forth the following assignments of error.

{¶ 5} "I. It constituted error to deny appellant's motion to withdraw plea.

{¶ 6} "II. Appellant did not receive effective assistance of counsel."

{¶ 7} In his supplemental brief, appellant sets forth a supplemental assignment of error for review:

{¶ 8} "III. It constituted error to find appellant guilty on counts one, two and three pursuant to appellant's plea of no contest."

{¶ 9} In his first assignment of error, appellant contends that the court erred in denying his motion to withdraw plea.

{¶ 10} A presentence motion to withdraw a plea of guilty should be freely and liberally granted. *State v. Xie* (1992), 62 Ohio St.3d 521, 526. A defendant, however, does not have an absolute right to withdraw a guilty plea prior to sentencing. There must be a reasonable and legitimate basis for the withdrawal of the plea. Id. at paragraph one of the syllabus. The decision to grant or deny a defendant's motion lies within the sound discretion of the trial court. Id. at paragraph two of the syllabus. Absent an abuse of discretion, the decision of the trial court must be affirmed. Id. at 527. In order to find an abuse of discretion, a reviewing court must find more than error; the reviewing court

"must find that the trial court's ruling was 'unreasonable, arbitrary or unconscionable.'" Id., quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 11} To determine whether a trial court abused its discretion, we look to, inter alia, "(1) whether the state will be prejudiced by withdrawal; (2) the representation afforded to the defendant by counsel; (3) the extent of the Crim.R. 11 plea hearing; (4) the extent of the hearing on the motion to withdraw; (5) whether the trial court gave full and fair consideration to the motion; (6) whether the timing of the motion was reasonable; (7) the reasons for the motion; (8) whether the defendant understood the nature of the charges and potential sentences; and (9) whether the accused was perhaps not guilty or had a complete defense to the charge." *State v. Dellinger*, 6th Dist. No. H-02-007, 2002-Ohio-4652, ¶ 18; quoting *State v. Griffin* (2001), 141 Ohio App.3d 551, 554, 2001-Ohio-3203.

{¶ 12} It is quite clear that the state would be prejudiced by the passage of time and the fact that the victims were from out of state. Further, appellant was represented by highly qualified counsel, and there is nothing in the record here suggesting counsel's performance was deficient. There is no claim that the trial court failed to comply with Crim.R. 11, and the record is clear that appellant understood the charges and the potential sentences. Appellant was given a full and fair hearing on the motion. The court heard evidence, judged appellant's demeanor and applied the factors set forth in *State v. Ebersole*, reaching a conclusion that appellant's motion was not supported by any reasonable, legitimate reasons. Finally, nothing in the record raises the claim that

appellant was actually innocent or had a valid defense. We cannot say that the court's decision to deny appellant's motion was arbitrary or capricious; accordingly, appellant's first assignment of error is not well-taken.

{¶ 13} In his second assignment of error, appellant contends he received ineffective assistance of counsel.

{¶ 14} To determine whether an appellant entered guilty pleas in reliance on ineffective assistance of counsel, the Supreme Court of Ohio uses the two-prong test set forth in *Strickland v. Washington* (1984), 466 U.S. 668. *Xie,* 62 Ohio St.3d at 524; see, also, *Hill v. Lockhart* (1985), 474 U.S. 52 (United States Supreme Court applying the *Strickland* test to guilty pleas). First, the appellant "must show that counsel's performance was deficient." *Xie,* at 524; *Strickland,* at 687; *Hill,* at 57. "Second, 'the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty.'" *Xie,* at 524; quoting *Hill,* at 59; see *Strickland,* at 687.

{¶ 15} Appellant asserts that his attorney at the time of entering his plea, was ineffective in failing to secure the promise of a reduced sentence prior to the plea.

{¶ 16} "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Sanders* (2002), 94 Ohio St.3d 150, 151, 2002-Ohio-350; quoting *Strickland,* 466 U.S. 689. Therefore, we are compelled by the *Strickland* standard to apply a "heavy measure of deference to counsel's judgments." *Sanders,* at 151, quoting *Strickland,* at 691. In our view, counsel's

judgment was sound and there is nothing in the record to support appellant's contention that his original counsel provided unreasonable professional assistance.

{¶ 17} Next, appellant contends that his attorney at the motion hearing was ineffective in failing to call his original counsel or the Wood County detectives as witnesses at such hearing.

{¶ 18} "'[C]ounsel's decisions on which witnesses to call fall within the province of trial strategy and will not usually constitute ineffective assistance of counsel.' *Toledo v. Prude*, 6th Dist. No. L-02-1250, 2000-Ohio-3226." *State v. Reissig*, 6th Dist. No. WD-03-019, 2004-Ohio-1642, ¶ 23. Even debatable trial tactics do not constitute ineffective assistance of counsel. *Ohio v. Clayton* (1980), 62 Ohio St.2d 45, 49.

{¶ 19} Moreover, reviewing courts must not use hindsight to second-guess trial strategy, and must keep in mind that different trial counsel will often defend the same case in different manners. *Strickland* at 689; *State v. Keenan* (1998), 81 Ohio St.3d 133, 153, 1998-Ohio-459. Upon review, this court concludes that appellant's trial counsel was not ineffective in failing to call additional defense witnesses. Appellant's second assignment of error is not well-taken.

{¶ 20} In his supplemental assignment of error, appellant challenges the sufficiency of his indictment pursuant to *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"), and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*"). This court has already determined that *Colon I* and *Colon II* apply only to cases in which a defendant has been indicted for the offense of robbery in violation of R.C.

2911.02(A)(2). *State v. Walker*, 6th Dist. No. L-07-1156, 2008-Ohio-4614, ¶ 71, and *State v. Hill*, 6th Dist. No. WD-07-022, 2008-Ohio-5798, ¶ 21. Therefore, we conclude that, in this case, the indictment was not defective, there is no plain error, and *State v. Colon* does not apply. Accordingly, appellant's supplemental assignment of error is not well-taken.

{¶ 21} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R.24. Judgment for the clerk's expense incurred in preparation of the record fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, P.J. _____ JUDGE

Arlene Singer, J. _____ JUDGE

Thomas J. Osowik, J. _____ JUDGE
CONCUR.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.

EXHIBIT C

[Cite as *State v. Briscoe*, 2008-Ohio-6276.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89979

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HARRY BRISCOE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART;
REVERSED IN PART AND
REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-487410

BEFORE: Sweeney, A.J., Gallagher, J., and Stewart, J.

RELEASED: December 4, 2008

JOURNALIZED:

[Cite as *State v. Briscoe*, 2008-Ohio-6276.]

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this Court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

[Cite as *State v. Briscoe*, 2008-Ohio-6276.]
JAMES J. SWEENEY, A.J.:

{¶ 1} Defendant-appellant, Harry Briscoe ("defendant"), relying on *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, appeals his murder and aggravated robbery convictions. For the following reasons, we affirm in part, reverse in part and remand for further proceedings.

{¶ 2} In October 2006, defendant was charged in a four-count indictment. Counts one and two charged him with aggravated murder. Counts three and four charged him with aggravated robbery. Counts one through three carried one- and three-year firearm specifications, a felony murder specification, two notice of prior conviction specifications, and two repeat violent offender specifications.[1] Count four, the remaining aggravated robbery charge, carried one- and three-year firearm specifications, two notice of prior conviction specifications, and two repeat violent offender specifications.

{¶ 3} The matter proceeded to a jury trial, at which he was found guilty of murder, the lesser included offense under count two and both counts of aggravated robbery.[2] The jury also found defendant guilty of the one- and three-year firearm specifications attached to all the three counts.

{¶ 4} The notice of prior conviction and repeat violent offender specifications were bifurcated and heard by the trial court, which found defendant guilty of the notice of prior

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[1]The felony murder specifications were dismissed by the State prior to trial.

[2]The trial court granted defendant's motion for acquittal on count one.

conviction specification as charged in counts two, three, and four. The trial court found defendant not guilty of the repeat violent offender specifications.

{¶ 5} The trial court sentenced defendant to three years in prison on the firearm specifications, 15 years to life for murder, and 10 years for each aggravated robbery charge, to be served concurrently to each other, but consecutively to the murder charge, for an aggregate of 28 years to life in prison.

{¶ 6} Defendant now appeals, raising two assignments of error for our review.

{¶ 7} "I. The trial court erred in convicting Mr. Briscoe based upon a constitutionally defective indictment that failed to state a necessary element of the charged offenses."

{¶ 8} Under this assignment of error, defendant contends that the counts of his indictment for aggravated robbery, in violation of R.C. 2911.01(A)(1) and 2911.01(A)(3), were defective because they omitted the mens rea element of the crime. Defendant relies on *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"), to support his argument that the omission of the mens rea element constitutes structural error that requires reversal of the convictions, where the error permeates the entire criminal proceedings.

{¶ 9} The Ohio Supreme Court, on reconsideration, clarified its decision in *Colon I*, in a subsequent opinion, see *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*"). In *Colon II*, the court instructed:

{¶ 10} "Applying structural-error analysis to a defective indictment is appropriate only in rare cases, such as *Colon I*, in which multiple errors at the trial follow the defective indictment. In *Colon I*, the error in the indictment led to errors that 'permeate[d] the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence.' Id. at ¶23. Seldom will a defective indictment have this effect, and therefore, in most defective indictment cases, the court may analyze the error pursuant to Crim.R. 52(B) plain-error analysis. Consistent with our discussion herein, *we emphasize that the syllabus in Colon I is confined to the facts in that case*." Id. at ¶8 (emphasis added).

{¶ 11} In *Colon II*, the Ohio Supreme Court clarified that multiple errors must permeate the trial before the omission of the mens rea from an indicted offense can be considered under a structural error analysis. Specifically, the court cited a failure to include recklessness as an element of the crime in the jury instructions, or during closing argument, and that the State treated the offense as one of strict liability.

{¶ 12} In *Colon*, the Ohio Supreme Court addressed the omission of the mens rea element from an indictment for robbery in violation of R.C. 2911.02(A)(2), which provides:

{¶ 13} "(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:

{¶ 14} "***

{¶ 15} "(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another."

{¶ 16} The court held "R.C. 2911.02(A)(2) does not specify a particular degree of culpability for the act of 'inflict[ing], attempt[ing] to inflict, or threaten[ing] to inflict physical harm,' nor does the statute plainly indicate that strict liability is the mental standard. As a result, the State was required to prove, beyond a reasonable doubt, that the defendant recklessly inflicted, attempted to inflict, or threatened to inflict physical harm." *Colon I*, 2008-Ohio-1624, ¶14.[3]

{¶ 17} This Court has subsequently addressed the application of *Colon* to an indictment for aggravated robbery in violation of R.C. 2911.01(A)(1). *State v. Peterson*, Cuyahoga App. No. 90263, 2008-Ohio-4239, ¶15. R.C. 2911.01(A)(a) provides:

{¶ 18} "(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:

{¶ 19} "(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;"

{¶ 20} In *Peterson*, this Court held that *Colon* has no application to an indictment for aggravated robbery in violation of R.C. 2911.01(A)(1). Id. at ¶11. In *Peterson*, this Court

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[3]"When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." R.C. 2901.21(B).

followed *State v. Wharf* (1999), 86 Ohio St.3d 375, paragraph one of the syllabus, in holding that "[u]nlike the physical harm element, '[t]he deadly weapon element of R.C. 2911.02(A)(1), to wit, "[h]ave a deadly weapon on or about the offender's person or under the offender's control[,]" does not require the mens rea of recklessness.'" Therefore, it is "'not necessary to prove a specific mental state regarding the deadly weapon element of the offense of robbery [in violation of R.C. 2911.02(A)(1)].'"[4] Id., quoting *Wharf* at paragraph two of the syllabus; see, also, *State v. Saucedo*, Cuyahoga App. No. 90263, 2008-Ohio-3544; *State v. Wade*, Cuyahoga App. No. 90145, 2008-Ohio-4870 ("R.C. 2911.01(A)(1) is a strict liability offense, and the State did not err by failing to charge the mental element.")

{¶ 21} Accordingly, defendant's indictment for aggravated robbery in violation of R.C. 2911.01(A)(1) was not defective and the first assignment of error is overruled as to that conviction.

{¶ 22} However, in this case, defendant was also charged with, and convicted of, aggravated robbery in violation of R.C. 2911.01(A)(3), which provides:

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[4]Which provisions are substantially similar for purposes of determining the applicable mens rea as those contained in R.C. 2911.01(A)(1). See *Peterson*, supra; see, also, *State v. Kimble*, Mahoning App. No. 06 MA 190, 2008-Ohio-1539. R.C. 2911.02(A)(1) provides "(A) [n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:
"(1) Have a deadly weapon on or about the offender's person or under the offender's control."

{¶ 23} "(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:

{¶ 24} "***

{¶ 25} "(3) Inflict, or attempt to inflict, serious physical harm on another."

{¶ 26} The Ohio Supreme Court has determined that the required mental state under R.C. 2911.02(A)(2) is recklessness. *Colon I*, at ¶12-14. A comparison of analogous provisions contained in R.C. 2911.01(A)(3) leads us to conclude that the required mental state under that statute is recklessness. See *Colon I*, at ¶12-14; R.C. 2901.21(B); see, also, *State v. Alvarez*, Defiance App. No. 4-08-02,

{¶ 27} 2008-Ohio-5189, ¶18.

{¶ 28} The State contends that *Colon* should not be applied to R.C. 2911.01(A)(3) because the defendant did not suggest where "reckless" should be inserted into the statute. The Ohio Jury Instructions Committee has revised jury instructions pertaining to aggravated robbery to comport with *Colon*. See *State v. Ferguson*, Franklin App. No. 07AP-640, 2008-Ohio-3827, at ¶48, citing 4 Ohio Jury Instructions (2008), Section 511.01(A)(3) (Revised 5/3/08) ("In revising the jury instruction for aggravated robbery, the committee inserted the term 'recklessly' to the provisions of R.C. 2911.01(A)(3), i.e., that the defendant, while committing or attempting to commit a theft offense 'recklessly' inflicted or attempted to inflict serious physical harm on the victim.")

{¶ 29} Based on the rationale set forth by the Ohio Supreme Court in *Colon I*, the failure to include the requisite mens rea of recklessness in defendant's indictment for aggravated robbery in violation of R.C. 2911.01(A)(3) rendered it defective. Applying the dictates set forth by the Ohio Supreme Court in *Colon II* to the record in this case, a structural error analysis is required. This is because the indictment lacked the requisite mens rea element, there is no evidence that defendant had notice of the mens rea element of this offense, nor was there any instruction to the jury on the mens rea element of this offense, nor did the parties discuss or refer to recklessness as being an element to this aggravated robbery count in closing arguments. Therefore, this case presents essentially the same accumulation of errors that lead to a finding of structural error that required reversal in *Colon*. Accord, *Alvarez*, supra at ¶22, fn. 1. Accordingly, defendant's conviction for aggravated robbery in violation of R.C. 2911.01(A)(3) and the specifications related to it are reversed.

{¶ 30} This assignment of error is overruled in part and sustained in part.

{¶ 31} "II. The trial court erred in convicting Mr. Briscoe of murder and firearm specifications based upon a constitutionally defective indictment that failed to state a necessary element of the offenses underlying the count of murder and the firearm specifications."

{¶ 32} Defendant ties his argument under this assignment of error to his previously asserted position that both counts of aggravated robbery against him were defective. Since we have found no error concerning his indictment and conviction for aggravated robbery

pursuant to R.C. 2911.01(A)(1), his argument under this assignment of error necessarily fails. Aggravated robbery with a deadly weapon is a strict liability offense. Accordingly, it was not necessary to prove a specific mental state regarding the deadly weapon element of the predicate offense of aggravated robbery to obtain a conviction under R.C. 2903.02(B) or the related firearm specifications.[5]

{¶ 33} Further, according to the record the parties agreed to the jury instruction on R.C. 2903.02(B) as a lesser included offense to the charge of aggravated murder. "Under the invited-error doctrine, a party will not be permitted to take advantage of an error that he himself invited or induced the trial court to make." *State ex rel. V Cos. v. Marshall* (1997), 81 Ohio St.3d 467, 471, citing *State ex rel. Fuqua v. Alexander* (1997), 79 Ohio St.3d 206, 208, other citations omitted.

{¶ 34} Finally, while the defense placed several objections to the jury instructions on the record, the defense did not object to the jury instruction given on the lesser included offense of R.C. 2903.02(B).

{¶ 35} Assignment of Error II is overruled.

Judgment affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

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[5]"[A] firearm specification does not constitute a separate offense and therefore does not impose a culpable mental state. Firearm specifications are penalty enhancements that attach to an underlying offense, thus do not include a specific mens rea of their own." *State v. Cook*, Summit App. No. 24058, 2008-Ohio-4841, ¶8, internal citations omitted.

It is ordered that appellee and appellant shall each pay their respective costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for further proceedings.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, ADMINISTRATIVE JUDGE

SEAN C. GALLAGHER, J., and
MELODY J. STEWART, J., CONCUR

KEYWORD SUMMARY

EXHIBIT D

[Cite as *State v. Alvarez*, 2008-Ohio-5189.]

IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
DEFIANCE COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 4-08-02

v.

FERNANDO B. ALVAREZ,

OPINION

DEFENDANT-APPELLANT.

CHARACTER OF PROCEEDINGS: An Appeal from Common Pleas Court

JUDGMENT: Judgment Affirmed in Part, Reversed in Part, and Cause Remanded

DATE OF JUDGMENT ENTRY: October 6, 2008

ATTORNEYS:

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PRESTON, J.

{¶1} Defendant-appellant, Fernando Alvarez (hereinafter "Alvarez"), appeals the Defiance County Common Pleas judgment of conviction and imposition of sentence. For reasons that follow, we reverse in part and affirm in part.

{¶2} On August 3, 2007, the Defiance County Grand Jury indicted Alvarez on four counts, including: count one of aggravated burglary in violation of R.C. 2911.11(A)(1), a first degree felony; count two of aggravated robbery in violation of R.C. 2911.01(A)(3), a first degree felony; count three of kidnapping in violation of R.C. 2905.01(B)(1), a first degree felony; and count four of felonious assault in violation of R.C. 2903.11(A)(1), a second degree felony.

{¶3} Alvarez was found indigent and appointed counsel on August 17, 2007. A jury trial was held on November 8, 2007. On November 9, 2007, the jury returned guilty verdicts on all four counts. On December 19, 2007, Alvarez was sentenced to: eight (8) years imprisonment on counts one, two, and three; and seven (7) years on count four. All sentences were run consecutively for a total of thirty-one (31) years imprisonment. Alvarez was also ordered to pay $3,719.95 restitution and court costs.

{¶4} On January 17, 2008 Alvarez filed his notice of appeal in this matter and now asserts three assignments of error for review.

ASSIGNMENT OF ERROR NO. I

By failing to charge any level of mens rea for the serious-physical-injury element of aggravated robbery, under R.C. 2911.01(A)(3), the indictment failed to properly charge Mr. Alvarez and failed to give him notice of the charges against him. This error violated Mr. Alvarez's constitutional rights of indictment by a grand jury and to due process. Section 10, Article I, Ohio Constitution; Section 16, Article I, Ohio Constitution; the Due Process Clause; *State v. Colon, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917*; (Indictment, August 3, 2007, Count Two).

{¶5} In his first assignment of error, Alvarez argues that his aggravated robbery conviction must be reversed on the basis of *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 (hereinafter *Colon* I). Alvarez argues that *Colon* I applies to his aggravated robbery conviction under R.C. 2911.01(A)(3), because that division is analogous to robbery under R.C. 2911.02(A)(2).

{¶6} The State, on the other hand, argues that *Colon* I was limited to robbery convictions under R.C. 2911.02(A)(2). The State further argues that: R.C. 2901.21(B) would import recklessness only if R.C. 2911.01 *in its entirety* lacked any mens rea element; R.C. 2911.01(B) contains the mens rea element of knowingly; and therefore, recklessness is not imported. The State also points out that R.C. 2911.01 requires the commission of a theft or theft-type offense, which requires proof that the defendant acted with the *purpose* to deprive the owner of property or services and *knowingly* obtained or exerted control over the property

or services; and therefore, R.C. 2901.21(B) does not import recklessness. The State further argues that *Colon* I is not authoritative since a motion for reconsideration is pending with the Ohio Supreme Court.

{¶7} In order to address the issues raised in this assignment of error, we must first analyze the Ohio Supreme Court's opinions in *Colon* I and II to determine if *Colon* I applies to the facts of this case. If we find that *Colon* I does apply, we must next determine, in light of *Colon* II, which standard of review applies—structural-error analysis or plain error analysis. Third, applying the appropriate standard of review, we must determine the case's disposition.

Colon I

{¶8} Defendant Colon was convicted by a jury on one count of robbery in violation of R.C. 2911.02(A)(2). *Colon*, 2008-Ohio-1624, at ¶2. The indictment charged Colon as follows: "[I]n attempting or committing a theft offense, as defined in R.C. 2913.01 of the Ohio Revised Code, or in fleeing immediately after the attempt or offense upon [the victim, the defendant did] inflict, attempt to inflict, or threaten to inflict physical harm on [the victim]." Id.

{¶9} On appeal, Colon argued that his "state constitutional right to a grand jury indictment and state and federal constitutional rights to due process were violated when his indictment omitted an element of the offense." Id. at ¶4. The Court of Appeals found that any alleged indictment defect was waived

pursuant to Crim.R. 12(C)(2) since Colon failed to raise the issue before trial. Id. at ¶5.

{¶10} The Ohio Supreme Court, however, reversed and found that the indictment was defective because it lacked a mental element for R.C. 2911.02(A)(2)'s actus reas: "Inflict, attempt to inflict, or threaten to inflict physical harm on another." Id. at ¶10. The Court in *Colon* then found that: R.C. 2911.02(A)(2) did not specify a particular degree of culpability nor plainly indicate strict liability; and therefore, recklessness was the required mental element pursuant to R.C. 2901.21(B). Id. at ¶¶12-14. Consequently, the Court in *Colon* concluded that a division (A)(2) robbery conviction required that "the state * * * prove, beyond a reasonable doubt, that the defendant recklessly inflicted, attempted to inflict, or threatened to inflict physical harm." Since Colon's indictment failed to charge that he recklessly inflicted or attempted to inflict physical harm and recklessness was an essential element of the crime, Colon's indictment was declared defective. Id. at ¶15.

{¶11} The Court in *Colon* then determined that the defective indictment constituted a structural error, which could be raised for the first time on appeal. Id. at ¶19. The Court reasoned that the error was structural because it: deprived Colon of his Ohio constitutional right to presentment and indictment by a grand jury (Section 10, Article I); and "permeated the defendant's entire criminal proceeding." Id. at ¶¶24-25, 32. Supporting its finding that the error permeated

the entire proceeding, the Court noted that: (1) there was no evidence that defendant had notice that the State was required to prove recklessness; (2) the State never argued that defendant's conduct was reckless; (3) the jury instructions failed to provide the recklessness element; (4) there was no evidence that the jury considered whether the defendant acted recklessly; and (5) the prosecutor treated robbery as a strict liability offense in closing argument. Id. at ¶¶30-31. The Court then found that this error could be raised for the first time on appeal, because Crim.R. 12(C)(2)'s exception for failure "to charge an offense" applied. Id. at ¶37.

Colon II

{¶12} Following *Colon* I, the State of Ohio filed a motion for reconsideration. On July 31, 2008, the Ohio Supreme Court issued its decision clarifying and upholding *Colon* I. *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 ("*Colon* II"). The Court in *Colon* II stated "[w]e assume that the facts that led to our opinion in *Colon I* are unique," and "[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 ¶¶6, 7. The Court also noted that structural error was "appropriate only in rare cases, such as *Colon I*, in which multiple errors at the trial follow the defective indictment." Id. at ¶8. Noting the differences between *Colon* I and "most defective-indictment cases," the Court

pointed to the errors that it considered for determining that structural-error analysis was appropriate:

> **In *Colon I*, we concluded that there was no evidence to show that the defendant had notice that recklessness was an element of the crime of robbery, nor was there evidence that the state argued the defendant's conduct was reckless. Further, the trial court did not include recklessness as an element of the crime when it instructed the jury. In closing argument, the prosecuting attorney treated robbery as a strict-liability offense.**

Id. at ¶¶6-7, citing *Colon* I, 2008-Ohio-1624 at ¶¶30-31. The Court also stated that "[s]eldom will a defective indictment" lead to errors, such as those in *Colon* I, which "permeate the trial from beginning to end and put into question the reliability of the trial court in functioning as a vehicle for determination of guilt or innocence." Id. at ¶8, citing *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶17. The Court concluded by stating that, "we emphasize that the syllabus in *Colon I* is confined to the facts in that case." Id. at ¶8.

Whether *Colon* I is authoritative or applicable

{¶13} The State argues that *Colon* I is not authoritative because a motion for reconsideration is pending before the Court. Since the Ohio Supreme Court has since ruled on the motion for reconsideration, this argument is meritless. *Colon*, 2008-Ohio-3749 (*Colon* II). The State also argues that *Colon* I is inapplicable to the present case because the defendant in *Colon* I was convicted of robbery in violation of R.C. 2911.02(A)(2); whereas, Alvarez was convicted of aggravated robbery in violation of R.C. 2911.01(A)(3). Although the State's

argument has support from other courts' dicta, including the Ohio Supreme Court in *Colon* II, we are not persuaded that this distinction prevents *Colon* I's application.

{¶14} In *Colon* II, the Ohio Supreme Court stated that "the syllabus in *Colon I* is confined to the facts in that case." 2008-Ohio-3749, at ¶8. While this statement, read in isolation, supports the State's contention that *Colon* I should not be expanded to other crimes, the Court in *Colon* II was not limiting *Colon* I's central holding—"when an indictment fails to charge a mens rea element of a crime and the defendant fails to raise that defect in the trial court, the defendant has not waived the defect in the indictment"—in *Colon* II; rather, the Court was limiting the application of structural-error analysis and emphasizing that, generally speaking, plain-error analysis applies. Likewise, we are not persuaded that the Court's limiting comments in *Colon* II indicate that its holding applies only to R.C. 2911.02(A)(2); instead, the comments should be read as limiting the application of structural-error analysis.

{¶15} Similarly, the Court of Appeals for the Tenth District noted that it was "reluctant to expansively construe *Colon I*'s holding to statutes not considered by *Colon I*, especially since *Colon II* emphasized that the syllabus in *Colon I* is confined to the facts in that case." *State v. Hill*, 10th Dist. No. 07AP-889, 2008-Ohio-4257, ¶34. In *Hill*, the tenth district was presented with *Colon* I's application to aggravated robbery under R.C. 2911.01(A)(1). Id. at ¶35. The

Court in *Hill* ultimately concluded, however, that *Colon* I was inapplicable to aggravated robbery convictions under R.C. 2911.01(A)(1) based upon its prior opinion in *State v. Ferguson*, 10th Dist. No. 07AP-640, 2008-Ohio-3827. In *Ferguson*, the Court found that *Colon* I was inapplicable to R.C. 2911.01(A)(1) because that sub-section imposes strict liability like the lesser included crime of robbery under R.C. 2911.02(A)(1). 2008-Ohio-3827, at ¶¶38-46, citing *State v. Kimble*, 7th Dist. No. 06 MA 190, 2008-Ohio-1539; *State v. Wharf* (1999), 86 Ohio St.3d 375, 715 N.E.2d 172. Accordingly, we find the Tenth District's statement concerning *Colon* I's application to other criminal statutes to be dicta.

{¶16} The State further argues that: R.C. 2901.21(B) imports recklessness only if section R.C. 2911.01 *in its entirety* lacks any mens rea element; R.C. 2911.01(B) contains the mens rea element of knowingly; and therefore, recklessness is not imported. The State also points out that R.C. 2911.01 requires the commission of a theft or theft-type offense, which requires proof that the defendant acted with the *purpose* to deprive the owner of property or services and *knowingly* obtained or exerted control over the property or services; and therefore, R.C. 2901.21(B) does not import recklessness. In support of its argument, the State points to the Ohio Supreme Court's decision in *State v. Maxwell*, wherein it stated:

> **[A] court must be able to answer in the negative the following two questions before applying the element of recklessness pursuant to R.C. 2901.21(B): (1) does the section defining an**

> **offense specify any degree of culpability, and (2) does the section plainly indicate a purpose to impose strict criminal liability?**
> *** * ***
> **Appellant argues that the court of appeals misinterpreted the word "section" in R.C. 2901.21(B) to mean "division" of a Revised Code section, and mistakenly applied R.C. 2901.21. We agree. The General Assembly distinguishes between sections and divisions in the Ohio Revised Code. * * * Thus, in determining whether R.C. 2901.21(B) can operate to supply the mental element of recklessness to R.C. 2907.321(A)(6), we need to determine whether the entire *section* includes a mental element, not just whether *division* (A)(6) includes such an element.**

95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242, ¶¶21-22. The State further points out that the Ohio Supreme Court has followed this R.C. 2901.21(B) analysis at least as far back as its decision in *State v. Mac* (1981) and as recently as *State v. Fairbanks* (2008). 68 Ohio St.2d 84, 86, 428 N.E.2d 428; 117 Ohio St.3d 543, 2008-Ohio-1470, 885 N.E.2d 888, ¶¶11, 13-14.

{¶17} Implicit in the State's argument is that the Court in *Colon* I incorrectly applied R.C. 2901.21(B) because it only searched for a mental element in division (A)(3) of R.C. 2911.01 rather than searching the entire section for mental elements. Although members of this Court may be sympathetic to the State's argument, we are an intermediary court and, therefore, bound by the Ohio Supreme Court's opinions in *Colon* I and II.

{¶18} The statutory language at issue in this case is almost identical to that in *Colon* I. Colon was convicted of robbery under R.C. 2911.02(A)(2), which provides, in pertinent part:

> **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;**

R.C. 2911.02(C)(2) provides: "'Theft offense" has the same meaning as in section 2913.01 of the Revised Code." Alvarez was convicted of aggravated robbery under R.C. 2911.01(A)(3), which provides, in pertinent part:

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

(Emphasis added). The only substantive differences between these two statutes are: (1) the degree of physical harm that the defendant attempted to inflict or inflicted—physical harm vs. serious physical harm; and (2) a threat of physical harm is sufficient to constitute an (A)(2) robbery, but not sufficient to constitute an (A)(3) aggravated robbery. We fail to see how these distinctions evade *Colon* I's requirement that "recklessly" be imported into division (A)(3) of the aggravated robbery statute. Therefore, we are not persuaded that *Colon* I is distinguishable from the present case as the State argues.

{¶19} Furthermore, this Court notes along with our sister court that:

> **[f]ollowing the Ohio Supreme Court's decision in *Colon*, the Ohio Jury Instructions Committee ("the Committee") revised,**

> **through provisional instructions, the jury instructions for aggravated robbery, robbery, and aggravated burglary, in order to comport with *Colon*. In revising the jury instruction for aggravated robbery, the committee inserted the term "recklessly" to the provisions of R.C. 2911.01(A)(3), i.e., that the defendant, while committing or attempting to commit a theft offense "recklessly" inflicted or attempted to inflict serious physical harm on the victim.**

Ferguson, 2008-Ohio-3827, at ¶48, citing 4 Ohio Jury Instructions (2008), Section 511.01(A)(3) (Revised 5/3/08). Although the Ohio Jury Instructions are not binding legal authority, they are, nonetheless, "helpful as an example of the generally accepted interpretation of Ohio statutes." Id. at ¶47, citing *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶97 (Lanzinger, J., dissenting). See also, *State v. Mullins*, 2nd Dist. No. 22301, 2008-Ohio-2892, ¶23.

{¶20} Like robbery's division (A)(2) in *Colon* I, aggravated robbery division (A)(3) lacks any mental element *and* does not impose strict liability; therefore, R.C. 2901.21(B) imports the default mental element of recklessness. *Colon* I, 2008-Ohio-1624, ¶¶11-15. Count two of the grand jury indictment against Alvarez provided, in pertinent part:

> *** * * on or about June 24, 2007, at Defiance County, Ohio, Fernando B. Alvarez did, in attempting or committing a theft offense, as defined in R.C. 2913.01 of the Ohio Revised Code, or in fleeing immediately after the attempt or offense, inflict, or attempt to inflict, serious physical harm on another, in violation of Ohio Revised Code Section 2911.01(A)(3), Aggravated Robbery, a Felony of the First Degree, and against the peace and dignity of the State of Ohio; * * ***

(Aug. 3, 2007 Indictment, Doc. No. 2). Since Alvarez's indictment lacked the necessary mental element of recklessness for aggravated robbery division (A)(3), his indictment was defective. *Colon* I, 2008-Ohio-1624, at ¶15. Alvarez may argue this indictment defect for the first time on appeal. Id. at ¶45, syllabus.

Applicable Standard After *Colon* II

{¶21} Since we have found that *Colon* I applies to this case and that Alvarez's indictment was defective, we must now determine, in light of *Colon* II, whether a plain-error analysis or structural-error analysis applies. We find that structural-error analysis applies.

{¶22} The Court in *Colon* I and II outlined four prongs that must be met to apply structural-error analysis; if any one prong is lacking, then plain-error analysis applies. Those four prongs are as follows: (1) there is "no evidence to show that the defendant had notice that recklessness was an element of the crime"; (2) there is no "evidence that the state argued that the defendant's conduct was reckless"; (3) "the trial court did not include recklessness as an element of the crime when it instructed the jury"; and (4) "[i]n closing argument, the prosecuting

attorney treated [the crime] as a strict-liability offense."[1] *Colon* I, 2008-Ohio-1624, at ¶¶29-31; *Colon* II, 2008-Ohio-3749, at ¶6.

{¶23} Like *Colon* I, all four prongs are met in this case. First, there is no evidence to show that Alvarez had notice that recklessness was an element of the crime of aggravated robbery under R.C. 2911.01(A)(3). Aside from the fact the indictment failed to mention recklessness, the bill of particulars was also silent as to the required culpability. The bill of particulars provided, in pertinent part:

> **With respect to Count Two of the Indictment, the State's evidence will show that on or about June 14, 2007, the Defendant did, 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, inflict or attempt to inflict serious physical harm on another, in violation of Ohio Revised Code Section 2925.03(A)(1); specifically, on or about the date stated, Defendant while assaulting Dewayne Sanders took property belonging to Mr. Sanders. The assault continued after leaving the residence and continued causing Mr. Sanders serious physical harm.**

(Nov. 2, 2007 Bill of Particulars, Doc. No. 67). Second, there was no evidence that the State argued that Alvarez's conduct was reckless. In fact, the prosecution never mentioned recklessness in either its opening or closing statements to the

[1] The four prongs here were taken from *Colon* II; however, the four prongs outlined in *Colon* I are substantially similar. The Court in *Colon* I provided these four prongs: (1) the indictment against defendant did not include all the elements of the offense charged as the indictment omitted the required mens rea; (2) there was no evidence in the record that the defendant had notice that the state was required to prove that he had been reckless in order to convict him of robbery—further the state did not argue that defendant's conduct was reckless; (3) the trial court failed to include the required mens rea in the jury instructions; and (4) in closing argument the prosecuting attorney treated robbery as a strict-liability offense. 2008-Ohio-1624, at ¶¶29-31.

jury. (Nov. 8, 2007 Tr. at 163, 483). Third, the trial court did not include recklessness as an element of the offense. The trial court instructed, in pertinent part, as follows:

> **In Count Two of the indictment, the Defendant is charged with Aggravated Robbery. Before you can find the Defendant guilty of Aggravated Robbery as charged in this Count, you must find beyond a reasonable doubt that on or about June 24, 2007, at Defiance County, Ohio, the Defendant, Fernando B. Alvarez, did, in attempting or committing a theft offense, or in fleeing immediately after the attempt or offense, inflict, attempt to inflict or threaten to inflict serious physical harm on another.[2]**
>
> **An attempt occurs when a person knowingly engages in conduct which, if successful, would result in the commission of the offense.**
>
> **It is an element of Aggravated Robbery as charged here that the Defendant committed, or attempted to commit, a theft offense. A theft offense means that the Defendant, knowingly, obtained or exerted control over the property of another with the purpose to deprive the owner of such property without the consent of the owner or a person authorized to give consent. A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result. A purpose has – A person has knowledge of circumstances when he is aware that such circumstances probably exist. And since you cannot look into the mind of another, knowledge is determined from all the facts and circumstances in evidence. You will determine from these facts and circumstances whether there existed at the time in the mind of the Defendant an awareness of the probability that he was obtaining or exerting control over the property of**

[2] This Court notes that the trial court improperly instructed the jury with respect to aggravated robbery's (A)(3) element. The trial court included "threaten to inflict" in its instructions even though threatening to inflict is not sufficient to establish an (A)(3) aggravated robbery. R.C. 2911.01(A)(3). A threat of physical harm is only sufficient for an (A)(2) robbery. R.C. 2911.02(A)(2). Since there was no objection to the instruction, we review for plain error. Applying that standard, we are not convinced the outcome of the trial would have been different in this case given the evidence of *actual* serious physical harm presented. (State's Exs. 1-40). Furthermore, given our disposition based on the defective indictment, we need not address this error further.

another without the consent of the owner or person authorized to give consent.

Property means any property, real or personal, tangible or intangible.

Purpose to deprive the owner of property is an essential element of theft. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the Defendant a specific intention to deprive another of property. Purpose is a decision of the mind to do an act with the conscious objective of producing a specific result. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing. The purpose with which a person does an act is known only to himself unless he expresses it to others or indicates it by his conduct. The purpose which a person does an act is determined from the manner in which it is done, the means or weapon used and all other facts and circumstances in evidence.

Deprive means to withhold property of another permanently or for such period of time as to appropriate a substantial portion of its value of use or with a purpose to restore it only upon a payment or reward or other consideration. Deprive also means to accept the use or appropriate money, property or services with a purpose not to give proper consideration in return therefore and without reasonable justification or excuse for not giving proper consideration.

The act of inflicting, attempting to inflict or threatening to inflict serious physical harm must occur during or immediately after the theft offense.

Physical harm to a person means any illness, excuse me, any injury, illness or physiological impairment regardless of its gravity or duration.

Serious physical harm to persons means any of the following: Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric

> **treatment; any physical harm that carries a substantial risk of death; any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity; any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement; any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.**

(Nov. 8, 2007 Tr. at 503-06). Fourth, in closing argument the prosecution treated the division (A)(3) aggravated robbery as a strict-liability offense. Summarizing the evidence presented with regard to division (A)(3), the prosecutor stated the following:

> *** * * And, again, you're going to have the opportunity to review the photographs that are here. There are also stipulated medical reports from Defiance Hospital indicating the severity of the injuries sustained by Mr. Sanders and what transpired and, of course, you heard the testimony of Mr. Sanders and Ms. Sanders and also don't forget Margaret Roddy who told you how bloody he was and I think she characterized it as it looked like somebody out of a horror movie and said that it looked much worse than these photographs taken by the Sheriff's Department because he had gone in an cleaned himself up. So these pretty nasty pictures *in and of themselves* but he looked worse than that when she first saw him after he had to walk ten minutes from the wooded area to her house.**

(Nov. 8, 2007 Tr. at 483-84). (Emphasis added). The State basically argued that the photographic and medical evidence speaks for itself and was sufficient to find Alvarez guilty under of a division (A)(3) aggravated robbery. As such, the State treated the division (A)(3) aggravated robbery as a strict-liability offense.

{¶24} Accordingly, this Court finds that all four *Colon* prongs are met in this case. Since all four *Colon* prongs are met, this Court must follow the Supreme Court's direction and conclude that the defective indictment so permeated Alvarez's trial such that the trial court did not reliably function as a vehicle for determination of guilt or innocence; and therefore, the defective indictment was a structural error. *Colon* I, 2008-Ohio-1624, at ¶44, citing *Perry*, 2004-Ohio-297, at ¶17.

{¶25} Alvarez's first assignment of error is sustained.

ASSIGNMENT OF ERROR NO. II

The trial court committed plain error by ordering Mr. Alvarez to pay $3,719.95 restitution without considering his present and future ability to pay, as required by R.C. 2929.19(B)(6). (Sentencing Transcript, Dec. 19, 2007, at 14; Judgment Entry, Dec. 26, 2007).

{¶26} In his second assignment of error, Alvarez argues that the trial court erred in ordering him to pay restitution without considering his present or future ability to pay as required by R.C. 2929.19(B)(6). Specifically, Alvarez argues that he was determined to be indigent, the trial court heard no evidence on his ability to pay, and the pre-sentence investigation did not contain information about his work history. Under these circumstances, Alvarez argues that the trial court abused its discretion by failing to consider his ability to pay. The State, on the other hand, maintains that the PSI contains sufficient information upon which

the trial court could rely in considering Alvarez's ability to pay; and therefore, the trial court did not abuse its discretion. We agree with the State.

{¶27} We review a trial court's determination of the defendant's ability to pay restitution under an abuse of discretion standard. *State v. Brewer* (Jan. 28, 1998), 3d Dist. No. 2-97-20, at *3; *State v. Horton* (1993), 85 Ohio App.3d 268, 619 N.E.2d 527; *State v. Myers*, 9th Dist. No. 06CA0003, 2006-Ohio-5958, ¶12. An abuse of discretion suggests that a decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. "Generally, R.C. 2929.19(B)(6) is satisfied where a trial court considered a PSI, which typically contains pertinent financial information, or where the transcript demonstrates that the trial court at least considered a defendant's ability to pay." *State v. Troglin*, 3d Dist. No. 14-06-57, 2007-Ohio-4368, ¶38.

{¶28} Alvarez's arguments lack merit. To begin with, Alvarez invited the error of which he now complains by failing to cooperate in the preparation of the PSI. (Dec. 19, 2007 Tr. at 7); (PSI). He will not be rewarded for such action by this Court. Furthermore, the trial court noted that it had reviewed the PSI, and it contained sufficient information from which the trial court could reasonably conclude that Alvarez would have, at least, the future ability to pay restitution. As an initial matter, the trial court ordered a relatively low amount of restitution in this case: $3,719.95. (Id. at 14). Alvarez was twenty-two years of age and was

sentenced to serve thirty-one (31) years imprisonment. (Id. at 13). Accordingly, the trial court could reasonable conclude that Alvarez could pay restitution after he was released from prison around age fifty-three (53). Furthermore, the trial court could reasonably conclude, based upon his felonious assault convictions in this case, that Alvarez was physically able to work, and thus, pay restitution. Under these circumstances, the trial court did not abuse its discretion in ordering that Alvarez pay $3,719.95 in restitution.

{¶29} Alvarez's second assignment of error is, therefore, overruled.

ASSIGNMENT OF ERROR NO. III

Counsel provided ineffective assistance by failing to impeach Dewayne Sanders' claim of blurry vision during the initial photographic identification with the stipulated medical record. That impeachment addressed identification which was the main issue in the case and would have created a reasonable probability that the jury would not have found Mr. Alvarez guilty beyond a reasonable doubt. Section 10, Article, I, Ohio Constitution; The Sixth Amendment; Strickland v. Washington (1984) 466 U.S. 668; (State's Exhibit 39, Emergency Room Report, labeled page 7).

{¶30} In his third assignment of error, Alvarez argues that he was denied effective assistance of counsel because counsel failed to impeach the victim's claim of blurry vision during the initial photographic identification. The State argues that counsel's failure to cross-examine the victim was a trial strategy; and therefore, insufficient to establish ineffective assistance of counsel. We agree with the State.

{¶31} A defendant asserting a claim of ineffective assistance of counsel must establish: (1) the counsel's performance was deficient or unreasonable under the circumstances; and (2) the deficient performance prejudiced the defendant. *State v. Kole* (2001), 92 Ohio St.3d 303, 306, 750 N.E.2d 148, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. In order to show counsel's conduct was deficient or unreasonable, the defendant must overcome the presumption that counsel provided competent representation and must show that counsel's actions were not trial strategies prompted by reasonable professional judgment. *Strickland*, 466 U.S. at 687. Counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675, 693 N.E.2d 267. Tactical or strategic trial decisions, even if unsuccessful, do not generally constitute ineffective assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965. Rather, the errors complained of must amount to a substantial violation of counsel's essential duties to his client. See *State v. Bradley* (1989), 42 Ohio St. 3d 136, 141-142, 538 N.E.2d 373, quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396, 358 N.E.2d 623.

{¶32} It is well settled that the scope of cross-examination is considered a trial strategy, and debatable trial tactics do not establish ineffective assistance. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶101, citing, *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48,

¶45; *State v. Campbell* (2000), 90 Ohio St.3d 320, 339, 738 N.E.2d 1178. In this case, defense counsel may have decided not to cross-examine because this would have re-emphasized the victim's injuries and bolstered the victim's in-court identification. Such considerations are trial strategy; and as such, do not constitute ineffective assistance of counsel.

{¶33} Alvarez's third assignment of error is, therefore, overruled.

{¶34} Having found error prejudicial to the appellant herein with regard to assignment of error one but no prejudicial error to appellant with regard to assignments of error two and three, we reverse in part and affirm in part the trial court's judgment and remand for proceedings consistent with this opinion.

Judgment Affirmed in Part,
Reversed in Part and
Cause Remanded.

SHAW, P.J. and WILLAMOWSKI, J., concur.

/jlr

FILED
LUCAS COUNTY

2007 JUN -1 P 3:26

CLERK OF COURTS

IN THE COMMON PLEAS COURT, LUCAS COUNTY, OHIO

STATE OF OHIO Plaintiff.	*	CASE NO: G-4801-CR-0200603208-000
v.	*	JUDGMENT ENTRY
GREGORY HORNER Defendant.	*	JUDGE GARY G. COOK

* * * * * * *

This matter came before the Court upon defendant's Motion to Withdraw Plea. Witness sworn in. Testimony offered on behalf of the defense. Motion is hereby DENIED. Matter proceeded to sentencing.

On May 31, 2007 defendant's sentencing hearing was held pursuant to R.C. 2929.19. Court reporter CHRISTINE ARDLEY, defense attorney ADRIAN CIMERMAN and the State's attorney JEVNE MEADER were present as was the defendant who was afforded all rights pursuant to Crim.R. 32. The Court has considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12.

The Court finds that defendant has been convicted of Aggravated Robbery, count 1, in violation of R.C. 2911.01(A)(3) a felony of the 1st degree and the attached firearm specification in violation of R.C. 2941.145; Aggravated Robbery, count 2, in violation of R.C. 2911.01(A)(3) a felony of the 1st degree and the attached firearm specification in violation of R.C. 2941.145; Aggravated Robbery, count 3, in violation of R.C. 2911.01(A)(1) a felony of the 1st degree and the attached firearm specification in violation of R.C. 2941.145; Felonious Assault, count 4, in violation of R.C. 2903.11(A)(1) a felony of the 2nd degree and the attached firearm specification in violation of R.C. 2941.145 and Felonious Assault, count 5, in violation of R.C. 2903.11(A)(1) a felony of the 2nd degree and the attached firearm specification in violation of R.C. 2941.145.

E-JOURNALIZED

JUN 4 2007

It is ORDERED that defendant serve a term of 4 years as to counts 1, 2, and 3 to be served concurrently to one another; 4 years as to counts 4 and 5 to be served concurrently to one another and an additional term is imposed as a mandatory and consecutive term pursuant to R.C. 2929.14(D)(1) of 3 years to each of the five attached firearm specifications to be served concurrently to one another. The sentence in counts 1, 2 & 3 is ordered to be served consecutively to the sentence imposed in counts 4 & 5. The sentence imposed as to the attached firearm specifications are to be served consecutively to the sentence imposed in counts 1,2 & 3 as well as to the sentence imposed in counts 4 & 5 for a total of 11 years in prison.

The 1 year prison term imposed for post release control as it relates to 02CR463 is vacated due to post release control having been terminated.

Defendant given notice of appellate rights under R.C. 2953.08 and post release control notice under R.C. 2929.19(B)(3) and R.C. 2967.28.

Pursuant to the request of the State of Ohio a nolle prosequi is entered as to count 6.

Defendant is therefore ORDERED conveyed to the custody of the Ohio Department of Rehabilitation and Corrections forthwith. Credit for 171 days is granted as of this date along with future custody days while defendant awaits transportation to the appropriate state institution.

Defendant found to have, or reasonably may be expected to have, the means to pay all or part of the applicable costs of supervision, confinement, assigned counsel, and prosecution as authorized by law. Defendant ordered to reimburse the State of Ohio and Lucas County for such costs**and to pay restitution in the amount of $4208.00 to Robert Peck and $350.00 to Tim Mulray** . This order of reimbursement and restitution is a judgment enforceable pursuant to law by the parties in whose favor it is entered. Defendant further ordered to pay the cost assessed pursuant to R.C. 9.92(C), 2929.18 and 2951.021. Notification pursuant to R.C. 2947.23 given.

Defendant ordered remanded into custody of Lucas County Sheriff for immediate transportation to appropriate state institution. Defendant is remanded into the custody of the Lucas County Sheriff's Department.

JUDGE GARY G. COOK

FILED
LUCAS COUNTY
2007 JUN -1 P 3: 26
COMMON PLEAS COURT
CLERK OF COURTS

INDICTMENT

THE STATE OF OHIO,
Lucas County, } ss.

Of the September, Term of 2006, A.D.

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that **GREGORY A. HORNER and JAMES K. HAHN**, on or about the 30th day of March, 2006, in Lucas County, Ohio, in attempting or committing a theft offense as defined in §2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, did inflict, or attempt to inflict, serious physical harm on another, in violation of §2911.01(A)(3) **OF THE OHIO REVISED CODE, AGGRAVATED ROBBERY, BEING A FELONY OF THE FIRST DEGREE,** contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION THAT OFFENDER DISPLAYED, BRANDISHED, INDICATED POSSESSION OF OR USED FIREARM-§2941.145

The Grand Jurors further find and specify that the said **GREGORY A. HORNER and JAMES K. HAHN** had a firearm on or about the offender or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm or used it to facilitate the offense.

SECOND COUNT

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that **GREGORY A. HORNER and JAMES K. HAHN**, on or about the 30th day of March, 2006, in Lucas County, Ohio, in attempting or committing a theft offense as defined in §2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, did inflict, or attempt to inflict, serious physical harm on another, in violation of **§2911.01(A)(3) OF THE OHIO REVISED CODE, AGGRAVATED ROBBERY, BEING A FELONY OF THE FIRST DEGREE**, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION THAT OFFENDER DISPLAYED, BRANDISHED, INDICATED POSSESSION OF OR USED FIREARM-§2941.145

The Grand Jurors further find and specify that the said **GREGORY A. HORNER and JAMES K. HAHN** had a firearm on or about the offender or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm or used it to facilitate the offense.

THIRD COUNT

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that **GREGORY A. HORNER and JAMES K. HAHN**, on or about the 30th day of March, 2006, in Lucas County, Ohio, in attempting or committing a theft offense as defined in §2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, did inflict, or attempt to inflict, serious physical harm on another, in violation of **§2911.01(A)(3) OF THE OHIO REVISED**

(A)(1) amended on 2-27-07 Clerk of Court

CODE, AGGRAVATED ROBBERY, BEING A FELONY OF THE FIRST DEGREE, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SCANNED

SPECIFICATION THAT OFFENDER DISPLAYED, BRANDISHED, INDICATED POSSESSION OF OR USED FIREARM-§2941.145

The Grand Jurors further find and specify that the said **GREGORY A. HORNER and JAMES K. HAHN** had a firearm on or about the offender or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm or used it to facilitate the offense.

FOURTH COUNT

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that **GREGORY A. HORNER and JAMES K. HAHN**, on or about the 30th day of March, 2006, in Lucas County, Ohio, did knowingly cause serious physical harm to another, in violation of §2903.11(A)(1) **OF THE OHIO REVISED CODE, FELONIOUS ASSAULT, BEING A FELONY OF THE SECOND DEGREE**, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION THAT OFFENDER DISPLAYED, BRANDISHED, INDICATED POSSESSION OF OR USED FIREARM-§2941.145

The Grand Jurors further find and specify that the said **GREGORY A. HORNER and JAMES K. HAHN** had a firearm on or about the offender or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm or used it to facilitate the offense.

SCANNED

FIFTH COUNT

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that **GREGORY A. HORNER and JAMES K. HAHN**, on or about the 30th day of March, 2006, in Lucas County, Ohio, did knowingly cause serious physical harm to another, in violation of **§2903.11(A)(1) OF THE OHIO REVISED CODE, FELONIOUS ASSAULT, BEING A FELONY OF THE SECOND DEGREE**, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION THAT OFFENDER DISPLAYED, BRANDISHED, INDICATED POSSESSION OF OR USED FIREARM-§2941.145

The Grand Jurors further find and specify that the said **GREGORY A. HORNER and JAMES K. HAHN** had a firearm on or about the offender or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm or used it to facilitate the offense.

SIXTH COUNT

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that **GREGORY A. HORNER and JAMES K. HAHN**, on or about the 30th day of March, 2006, in Lucas County, Ohio, did knowingly cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance, in violation of **§2903.11(A)(2) OF THE OHIO REVISED CODE, FELONIOUS ASSAULT, BEING A FELONY OF THE SECOND DEGREE**, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION THAT OFFENDER DISPLAYED, BRANDISHED, INDICATED POSSESSION OF OR USED FIREARM-§2941.145

SCANNED

The Grand Jurors further find and specify that the said **GREGORY A. HORNER** and **JAMES K. HAHN** had a firearm on or about the offender or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm or used it to facilitate the offense.

Julia R. Bates
Lucas County Prosecutor

No. CR06-03208

Lucas County Common Pleas Court

FILED
LUCAS COUNTY

THE STATE OF OHIO

vs.

Gregory A. Horner
and
James K. Hahn

INDICTMENT FOR

AGGRAVATED ROBBERY-§2911.01(A)(3) (3 counts)-with firearm specification §2941.145 (3 counts); FELONIOUS ASSAULT-§2903.11(A)(1) (2 counts)-with firearm specification §2941.145 (2 counts); FELONIOUS ASSAULT-§2903.11(A)(2)-with firearm specification §2941.145

A TRUE BILL.

FOREPERSON OF THE GRAND JURY

Julia R. Bates

PROSECUTING ATTORNEY

THE STATE OF OHIO, LUCAS COUNTY, SS.

I, J. BERNIE QUILTER, Clerk of the Court of Common Pleas in and for said County, do hereby certify that the within and foregoing is a full, true and correct copy of the original indictment, together with the instruments thereon, now on file in my office.

WITNESS my hand and seal of said Court at Toledo, Ohio, this _____ day of _____, 2006.

J. BERNIE QUILTER, Clerk.

By _____, Deputy.

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OHIO CONSTITUTION
ARTICLE 1, SECTION 10

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

CERTIFICATION

This is to certify that a copy of the foregoing was served by ordinary U.S. mail this 21st day of December, 2009, upon: David F. Cooper, Assistant Lucas County Prosecutor, 700 Adams Street, 2nd Floor, Toledo, OH 43604.

John F. Potts (0033846)