

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, *

S.C. No. 09-0311

Plaintiff-Appellee, *

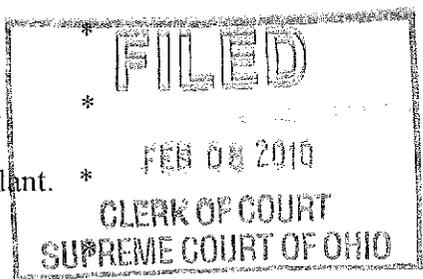
On Certified Conflict from
the Lucas County Court
of Appeals, Sixth
Appellate District

-vs-

GREGORY HORNER, *

C.A. Case No. L-07-1224

Defendant-Appellant. *



MERIT BRIEF OF PLAINTIFF-APPELLEE, STATE OF OHIO

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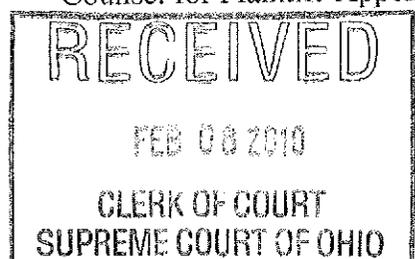


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STATEMENT OF THE FACTS

In March 2006, Defendant-Appellant, Gregory Horner ("Horner") and his co-defendant, James Hahn carried out a scheme to rob two Michigan businessmen, Rob Peck and Tim Mulroy, who specialize in buying and selling used automobiles known as "muscle cars."¹ Using a false name, Horner contacted Peck and Mulroy at their business in Farmington Hills Michigan, telling them that he had a 1970 Barracuda automobile that he wished to sell. Horner convinced Peck and Mulroy to meet him at a Toledo motel in order to view and purchase the car. Peck and Mulroy usually effect purchases and sales of such automobiles with cash. Because of this, both have secured concealed carry permits issued by the State of Michigan allowing them to legally carry handguns in order to protect themselves from theft. On March 30, 2006, Peck, Mulroy and Peck's 16 year old son arrived at the motel carrying significant amounts of cash, driving a heavy duty pickup truck with a car hauler in order to bring the vehicle they intended to purchase back to Michigan. After Horner directed the Pecks and Mulroy to a secluded location on Toledo's east side, Hahn, armed with a knife, appeared from a place of concealment and announced a robbery. Horner then initiated the attack by striking Peck from behind with a club. Peck and Mulroy attempted to defend themselves with their weapons. Horner and Hahn were able to wrest the firearms away from Peck and Mulroy and severely beat them, resulting in hospitalization and serious permanent injuries to both of the adult victims. At gunpoint, Peck and Mulroy were robbed of about \$1400. Both Horner and Hahn escaped the scene but were later identified by all three victims in photo arrays. Further investigation led to a six-count indictment against Horner.

¹ The facts underlying the charges against defendant and Hahn are drawn from the prosecutor's statement in support of Horner's no contest plea (2-27-07 Plea Hearing, pp. 21-26.)

Horner pleaded no contest to the first five counts of the indictment (including the two counts at issue here) on February 27, 2007 and his conviction and sentence were affirmed by the Lucas County Court of Appeals on December 1, 2008.

In the court of appeals, Horner argued that the two counts of his indictment charging serious physical harm Aggravated Robbery under R. C. 2911.01(A)(3) were defective pursuant to the holding of *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N. E.2d 917 ("*Colon I*") for omitting an allegation that the serious physical harm was inflicted or attempted "recklessly." *Colon I* held that it is structural error to indict for physical harm Robbery under R. C. 2911.02(A)(2) without an allegation that the offender recklessly inflicted, attempted or threatened such physical harm. The State argued that even if recklessness was required in Horner's indictment pursuant to *Colon I*, Horner's plea of no contest distinguished his case from that of defendant Colon with the result that his conviction for such offenses could be upheld under *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N. E.2d 169 ("*Colon II*"). *Colon II* determined that structural error analysis does not apply except in those rare cases in which multiple errors at trial follow the defective indictment and permeate the trial. The court of appeals simply held that Horner's indictment was not defective because *Colon I* was limited to R. C. 2911.02(A)(2). It did not consider whether, even if Horner's indictment might be defective, *Colon II* dictated that plain error, rather than structural error analysis applied.

ARGUMENT

In the first proposition of law the State urges the Court to hold, despite its ruling in *Colon I*, that Horner's indictments for serious physical harm Aggravated Robbery under R. C.

2911.01(A)(3) were not defective for failing to allege that the serious physical harm was done or attempted "recklessly." In the second proposition of law we urge the Court to hold, despite its ruling in *Colon I*, that structural error does not apply to an indictment missing a mens rea element with the result that plain error, not structural error analysis will apply. In the event that the Court determines that plain error analysis should henceforth apply to any indictment determined to be defective for lack of a mens rea element, Horner's conviction and sentence for the two counts of serious physical harm Aggravated Robbery should be affirmed because his conviction as a result of his plea of no contest to the two counts of the indictment, even if they were defective, did not constitute plain error. In the event this Court determines that the effect of such indictments should still to be analyzed as potentially involving structural error, Horner's conviction and sentence should nonetheless be affirmed because, as a result of his no contest plea, *Colon II* dictates a finding that such defect did not ripen into structural error.

FIRST PROPOSITION OF LAW

Proposition of Law No. 1: (1) If the section defining a crime refers to a mens rea requirement in any part thereof, then R. C. 2901.21(B) does not apply. (2) If R. C. 2901.21(B) does not apply because the section defining a crime refers to a mens rea requirement in any part thereof, it will be assumed that if a division or subdivision or other part of the section does not refer to a mental element, then the Legislature intended that such division, subdivision or other part of the section does not require proof of any mens rea, or stated another way, that such division, subdivision or other part imposes strict liability. (3) If the section defining a crime does not refer to a mens rea requirement in any part thereof, then R. C. 2901.21(B) does apply and it will be necessary to determine whether the section "plainly indicates a purpose to impose strict criminal liability for the conduct described in the section." If so, the section requires no proof of a mens rea. If not, proof of the mens rea of "recklessness" is required; *State v. Wac* (1981), 68 Ohio St.2d 84, 428 N. E.2d 428; *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N. E.2d 242; *State v. Fairbanks*, 117 Ohio St.3d 543, 2008-Ohio-1470, 885 N. E.2d 888, followed.

A.

Analysis of whether R. C. 2911.01(A)(3) requires a reckless mens rea begins by determining whether R. C. 2901.21(B) applies to Section R. C. 2911.01, which defines the offense of Aggravated Robbery.

R. C. 2901.21(B) provides:

(B) 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. (emphasis added)

R. C. 2911.01, pertaining to Aggravated Robbery is a *section*² defining that offense. That part of the Aggravated Robbery *section* pertaining to serious physical harm (R. C. 2911.01(A)(3)), is a *division* (or *subdivision*) of that section. See *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N. E.2d 242: ". . . 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." *Id.* at ¶22 (emphasis sic).

R. C. Section 2911.01, in relevant part, defines the elements of Aggravated Robbery as follows:

§ 2911.01. Aggravated Robbery

(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:

² "As used in the Ohio Revised Code, the word 'section' unambiguously refers to a decimal-numbered statute only." *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N. E.2d 690, ¶16.

* * *

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

(B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:

- (1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;
- (2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

It is readily apparent that R. C. 2901.21(B) does not apply to R. C. 2911.01, the section defining Aggravated Robbery. First, although subdivision 2911.01(A)(3) does not contain a mens rea element, division 2911.01(B) does specify a mens rea because an offender who robs a law enforcement officer of his weapon must act "knowingly." In addition, division (A) of section R. C. 2911.01 requires that the offender commit, attempt to commit or flee immediately after committing or attempting a theft offense defined by R. C. 2913.01. The theft offenses listed in R. C. 2913.01(K) and incorporated by reference in the Aggravated Robbery Section require the commission of the theft offense with a knowing or purposeful mens rea. Thus, division (A) of R. C. 2911.01 incorporates the "knowingly" and "purposefully" mens rea required to commit or attempt a theft offense under R. C. 2913.01 and the attempt statute, R. C. 2923.02(A).

By its terms, R. C. 2901.21(B) simply does not apply because the Aggravated Robbery section does "specify degrees of culpability" in division (A) and division (B) of R. C. 2911.01. *Maxwell*, supra at ¶22. This Court has established a corollary to its analysis when R. C. 2901.21(B) does not apply. In that situation, it is assumed that where a section defining a crime *does* contain a mens rea requirement in any part of the section, if any other part of the section is

silent as to a mental element then that part delineates a strict liability offense. This assumption makes sense because, prior to the enactment of R. C. 2901.21 in 1974, legislative silence as to mens rea in a statute was interpreted by this Court as an intention to impose strict liability. *State v. Schlosser* (1997), 79 Ohio St.3d 329, 331, 681 N. E.2d 911. It also is logical because, if the Legislature delineates a mens rea for one part of a section, such as, for example, knowingly, and it desires that recklessly should apply to another part, it would so designate such mens rea.

In *State v. Wac* (1981), 68 Ohio St.2d 84, 428 N. E.2d 428, this Court analyzed two criminal statutes, R. C. Section 2915.02 and R. C. Section 2915.03. Defendant Wac was found guilty of "bookmaking" under R. C. Section 2915.02(A)(1) which provides:

Sec. 2915.02. Gambling

(A) No person shall do any of the following:

- (1) Engage in bookmaking, or knowingly engage in conduct that facilitates bookmaking;

Defendant Wac was also found guilty of Operating a Gambling House under R. C.

Section 2915.03(A)(1). Section 2915.03 provides:

Sec. 2915.03. Operating a Gambling House

(A) No person, being the owner or lessee, or having custody, control, or supervision of premises, shall:

- (1) Use or occupy such premises for gambling in violation of section 2915.02 of the Revised Code;
- (2) Recklessly permit such premises to be used or occupied for gambling in violation of section 2915.02 of the Revised Code.

The *Wac* Court reasoned that the Legislature's inclusion of the mens rea element of "knowingly" to constitute a crime under the "facilitating bookmaking" clause of subdivision (A)(1) of Section 2915.02, signaled a legislative intention to omit a mens rea requirement for the clause prohibiting bookmaking in that same subdivision.

Similar reasoning applied to Wac's conviction for Operating a Gambling House under

subdivision (A)(1) of Section 2915.03. Since subdivision (A)(2) of Section 2915.03 required a mens rea element of "recklessness" in order to constitute Permitting a Gambling House, the *Wac* court assumed that the Legislature determined not to require a mental element for Operation of a Gambling House under subdivision (A)(1.)

The mens rea analysis and construction of R. C. 2901.21(B) in *State v. Wac* can be summarized as follows:

(1) If the section defining a crime refers to a mens rea requirement in any part thereof, then R. C. 2901.21(B) does not apply.

(2) If R. C. 2901.21(B) does not apply because the section defining a crime refers to a mens rea requirement in any part thereof, it will be assumed that if a division or subdivision or other part of the section does not refer to a mental element, then the Legislature intended that such division, subdivision or other part of the section does not require proof of any mens rea, or stated another way, that such division, subdivision or other part imposes strict liability. *In other words, recklessness will never be imported into any Code section, or part thereof, defining a criminal offense, unless the entire section is completely silent as to any mens rea.*

(3) If the section defining a crime does not refer to a mens rea requirement in any part thereof, then R. C. 2901.21(B) does apply and it will be necessary to determine whether the section "plainly indicates a purpose to impose strict criminal liability for the conduct described in the section." If so, the section requires no proof of a mens rea. If not, proof of the mens rea of "recklessness" is required³.

The *Wac* analysis is easy to apply, fully comports with the statutes, such as R. C. 2901.21, pertaining to criminal intent and is based upon a reasonable interpretation of legislative intent that has been adhered to, albeit somewhat inconsistently, since *Wac* was decided in 1981. Just as important, since the vast majority of criminal statutes do contain at least one mens rea element within the entire section defining a crime, in most cases an indictment in the words of or paraphrasing the text of the statute will correctly give notice as to all elements of proof required.

³ R. C. 2919.24, Contributing to Unruliness or Delinquency of a Child, is such a crime, because it is a section which contains no mention of any mens rea requirement. As a result, R. C. 2901.21(B) does apply and a reviewing court must determine whether the language of the section plainly indicates a purpose to impose strict criminal liability. Only the language of the section itself may be consulted and any public policy reasons which might support such a finding must be apparent from the face of the statute. *State v. Moody*, 104 Ohio St.3d 244, 2004-Ohio-6395, 819 N. E.2d 268, at ¶¶11-17.

Under Crim. R. 7(B), an indictment "may be made in ordinary and concise language without technical averments or allegations not essential to be proved. The statement *may be in the words of the applicable section of the statute*, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged." (emphasis added.)

Unfortunately, after *Wac* this Court has given lip service to the *Wac* analysis while following it only an intermittently, leading to great confusion in the bar and lower courts of this state. Two cases in point are *State v. Wharf*, 86 Ohio St.3d 375, 1999-Ohio-112, 715 N. E.2d 172, and *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, 916 N. E.2d 1038, which considered, respectively, the mens rea required to prove a deadly weapon Robbery under R. C. 2911.02(A)(1) and a deadly weapon Aggravated Robbery under R. C. 2911.01(A)(1).

Wharf was convicted of Robbery under R. C. 2911.02(A)(1) which provided that:

"(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall

* * *

(1) have a deadly weapon on or about the offender's person or under the offender's control."

Lester was convicted of Aggravated Robbery under R. C. 2911.01(A)(1) which provided that:

"(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 the offense, shall

* * *

(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."

In both *Wharf* and *Lester*, this Court reached the correct conclusion that both Robbery in violation of R. C. 2911.02(A)(1) and Aggravated Robbery in violation of R. C. 2911.01(A)(1) do

not require proof that the deadly weapon was possessed, controlled or brandished "recklessly," or, stated another way, that subdivision (A)(1) of each section establish strict liability offenses. Had the *Wharf* and *Lester* courts applied the analysis set forth in *Wac*, this Court would have concluded that R. C. 2901.21(B) does not apply, because both Robbery, R. C. Section 2911.02 and Aggravated Robbery, R. C. Section 2911.01 each specify degrees of culpability by incorporating theft offenses (which contain "knowing" or "purposeful" mens rea elements) as their predicate crime. In addition, as set forth above, division (B) of section R. C. 2911.01 requires a "knowing" act to deprive a law enforcement officer of his weapon. Therefore, the corollary of R. C. 2901.21(B) requires finding that any division or subdivision of either statute that does not set forth an additional mens rea requirement, indicates that the Legislature intended for that division or subdivision to impose strict liability. Instead of adhering to its earlier analysis in *Wac*, in both *Wharf* and *Lester* this Court, by construing R. C. 2901.21(B) as if it applied to divisions of the robbery statutes rather than to their entire sections, found that 2901.21(B) did apply. The Court then proceeded to engage in an attempt to divine the intent of the Legislature in proscribing use of a deadly weapon in those divisions.⁴ The *Wharf* court looked to the legislative history of the robbery statutes to conclude that the State need prove no more than that the offender merely had a deadly weapon on the offender's person or under his control. 86 Ohio St.3d 375 at 378. *Lester* employed a similar analysis, noting that its decision that deadly weapon Aggravated Robbery was a strict liability crime was not inconsistent with its holding in *State v. Clay*, 120 Ohio St.3d 528, 2008-Ohio-6325, 900 N. E.2d 1000,⁵ that possession of a firearm

⁴ Attempting to ascertain legislative intent by consideration of matters not within the four corners of the statute being considered, this Court has previously held, is not permitted. *State v. Moody*, supra.

⁵ Had the *Clay* court analyzed Having a Weapon Under a Disability section, R. C. 2923.13 as prescribed by *State v. Wac*, it would have determined that since subsection (A) of R. C. 2923.13 requires "knowing" possession (continued...)

while under indictment required additional proof that the offender acted recklessly. In *Clay*, this Court determined that possession of a firearm is constitutionally protected, and could perceive no "strong stance" of the Legislature to prohibit possession of firearms by those under indictment or convicted of certain serious criminal offenses. However, in *Lester*, this court determined that the possession and display of any deadly weapon during a theft offense was clearly intended by the Legislature to require no additional proof of mens rea.

In *State v. Maxwell*, supra, decided three years after *Wharf*, this Court returned to *Wac's* section-wide analysis of the application of R. C. 2901.21(B). Maxwell contended that his conviction for Pandering Obscenity Involving a Minor should be overturned because the State had failed to prove that he brought child pornography into Ohio either knowingly or recklessly.

The subdivision under which Maxwell was convicted, R. C. 2907.321(A)(6), provided:

"(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

" * * *

"(6) Bring or cause to be brought into this state any obscene material that has a minor as one of its participants or portrayed observers."

The *Maxwell* court held that R. C. 2901.21(B) did not apply, because Division (A) of section R. C. 2907.321 defining Pandering Obscenity Involving a Minor requires that the offender have "knowledge" of the obscene material involving a minor. As a result, although subdivision (A)(6) was silent as to any mental element required in bringing such material into

(...continued)

of a firearm, all of the subdivisions (1) to (5) describe strict liability crimes. However, where the charge is predicated upon having the firearm while under indictment, some knowledge by the offender of the existence of such indictment at the time of the offense is required as a matter of substantive due process.

Ohio, no mens rea is required to be proven, and a violation of subdivision (A)(6) is a strict liability offense. *Id.* at ¶¶22-29. At this point, the Court could have concluded its analysis. Instead, *Maxwell* went on to justify its strict liability analysis by concluding that the Legislature intended subdivision (A)(6) to require no proof of any mens rea because of its "strong stance" against child pornography. This additional analysis was not helpful, because the entire statute, not just subdivision (A)(6), prohibits dealing in child pornography and therefore exhibits a strong legislative stance against any such offense.

This court's application of a "strong stance" public policy rationale in attempting to determine legislative intent to impose strict liability, we submit, has been largely unnecessary and often confusing and inconsistent. In *Maxwell*, *Wharf*, and *Lester*, the strong stance of the legislature against child pornography and against deadly weapons such as firearms was posited as a justification for finding that, respectively, Pandering Obscenity Involving Minors, deadly weapon Robbery, and deadly weapon Aggravated Robbery defined strict liability offenses. Yet, in *State v. Clay*, Having a Weapon Under a Disability was determined not to be a strict liability offense because of a failure to perceive a strong legislative stance against possession of firearms, which possession is protected by state and federal constitutional provisions. Like the possession of firearms, the mere possession of obscene materials is also protected by the First Amendment to the United States Constitution and Article I Section 11 of the Ohio Constitution. The legislature has taken a strong stance, not against obscenity, but against obscenity involving minors. The Legislature has taken a strong stance not against firearms, but against the use of such weapons in perpetrating theft offenses. Thus, quite apart from the Court's misinterpretation of R. C. 2901.21(B), its holding that the Legislature's enactment of these crimes exhibits a strong

stance justifying strict liability merely begs the question and provides almost no elucidation as to whether a mens rea was intended.

State v. Lozier, 101 Ohio St.3d 161, 2004-Ohio-732, 803 N. E.2d 770, like *Wharf*, perpetuated the confusion concerning R. C. 2901.21(B) by incorrectly holding that it applied to a statute, R. C. 2925.03, prohibiting Trafficking in Drugs. As the Court noted, subdivision (A) of section R. C. 2925.03 requires that an offender commit the trafficking offense knowingly. Therefore, R. C. 2901.21(B) clearly does not apply since the *section* contains a knowingly mens rea element. Defendant was convicted of a specific violation of R. C. 2925.03(C)(5)(b), which imposes a sentencing enhancement where the offender has sold LSD in the vicinity of a school or of a juvenile. As Judge O'Connor observed in her dissent, analysis consistent with *Wac* and *Maxwell* dictated that sale of LSD either in the vicinity of a school or a juvenile constitutes a strict liability offense. *Id.* at ¶55. Instead, the Court determined that R. C. 2901.21(B) applied and engaged in an unnecessary analysis of legislative intent based upon a definition extracted from another section of the Code pertaining to drug offenses.

Shortly after *Lozier's* failure to embrace the analytical principles earlier outlined in *Wac* and *Maxwell*, this Court returned to such analysis in *State v. Fairbanks*, 117 Ohio St.3d 543, 2008-Ohio-1470, 885 N. E.2d 888. In *Fairbanks*, the Court applied *Maxwell* and *Wac* in determining whether a mens rea was required for R. C. 2921.331(C)(5)(a)(ii), a provision for the offense of failure to comply with an order or signal of a police officer which increases the penalty if serious physical harm is likely. The court noted that R. C. 2921.331(C)(5)(a)(ii) does not specify a mens rea, but that the statute itself, R. C. Section 2921.331, contains division (B), which specifies a degree of culpability of willfulness. Relying on *Maxwell* and *Wac*, the Court

concluded that strict liability applies to R. C. 2921.331(C)(5)(a)(ii) because paragraph (B) of the statute specifies a "willful" mens rea, but subsection (C)(5)(a)(ii) specifies no mens rea. Id at ¶14.

Less than one week after *Fairbanks*, this court decided *Colon I*. Because *Colon I* came to this court on a certified question pertaining only to the issue of waiver on appeal, the State conceded that the indictment for a violation of R. C. 2911.02(A)(2) was defective, Id. at ¶¶10, 15 and 33. Therefore, the issue of whether R. C. 2901.21(B) applied was not subject to the careful consideration provided in *Wac*, *Maxwell* and *Fairbanks*.⁶ As set forth above, neither the Robbery Section nor the Aggravated Robbery Section are "section(s) defining an offense which do(es) not specify any degree of culpability" such that R. C. 2901.21(B) would apply. Both sections incorporate as predicate crimes the attempt or commission of a theft offense and all theft offenses require either a "knowing" or a "purposeful" mens rea. In addition, R. C. 2911.01(B) specifies an additional mens rea requirement that an offender "knowingly" remove a law enforcement officer's deadly weapon. Because both sections defining Aggravated Robbery and Robbery do, in fact, specify a degree of culpability within their statutory language, R. C. 2901.21(B) simply does not apply to either crime. In that event, in accordance with precedent and logic, it is assumed that where a section defining a crime *does* contain a mens rea requirement in any part of the section, if any other part of the section is silent as to a mental element then that part delineates a strict liability offense.

Accordingly, this Court should now hold that there is no additional mens rea requirement of "recklessness" to properly charge a serious physical harm Aggravated Robbery under R. C. 2911.01(A)(3), in accordance with its decisions in *Wac*, *Maxwell* and *Fairbanks*.

⁶ "... the parties in *Colon I* did not contest the issue of whether R. C. 2911.02(A)(2) required a mens rea, and this court's discussion of that issue in *Colon I* consequently was limited." *State v. Lester*, supra, ¶30.

B.

Horner and his amicus focus on the similarity between the physical harm form of (A)(2) Robbery and the serious physical harm form of (A)(3) Aggravated Robbery. They contend that there is "no rational basis" to distinguish the offenses, so that a reckless mens rea should be imported and applied to (A)(3) Aggravated Robbery in the same way that recklessness was imported and applied to (A)(2) Robbery in *Colon I*. In making this argument, Horner and his amicus insist that the elements of (A)(2) and (A)(3) are substantially the same. But the elements, in fact, are not substantially the same because (A)(2) prohibits even the threat of "physical harm" while (A)(3) omits threats and requires "serious physical harm."

Assuming that the Court decides to adhere to its *Colon I* analysis treating R. C. 2901.21(B) as applying to divisions or subdivisions rather than to an entire section, there is an ample basis for this Court to nonetheless conclude that the Legislature intended R. C. 2911.01(A)(3) to indicate a purpose to impose strict liability.

First, while "physical harm" can comprise nothing more than mere jostling, "serious physical harm" produces more severe consequences since it encompasses mental illness or conditions that would normally require hospitalization or prolonged psychiatric treatment, and injuries that involve the substantial risk of death, incapacity, disfigurement or acute or prolonged pain.⁷ The Legislature's decision to punish serious physical harm robberies more severely than robberies associated only with physical harm evidences a legislative determination of the enhanced danger to the public.

Second, omitting threats of harm from the statute demonstrates an intent to treat serious

⁷ Compare R. C. 2901.01(A)(3) and R. C. 2901.01(A)(5.)

physical harm more seriously because Aggravated Robbery's serious physical harm, unlike physical harm referred to in the Robbery statute, has to have been accomplished or at least attempted. *Wharf* and *Lester* determined that as a matter of public policy, any deadly weapon robbery should be treated as a strict liability offense based upon the enhanced danger of coupling a theft offense with a deadly weapon such as a gun. This Court has not had occasion to consider the public policy in favor of treating the "physical harm" robberies as strict liability offenses. (*Colon I* did not examine public policy because of the prosecution's concession that the indictment charged a strict liability offense.) It would not be inconsistent with this Court's prior rulings in *Wharf* and *Lester* to hold that where an offender, in order to effect a theft, causes or attempts serious physical harm as opposed to merely threatening it, the Legislature concluded that the danger to the public was more pronounced and therefore of such gravity that strict liability should be imposed.

Third, had the Legislature intended that the offense requires a reckless mental state, it would thereby approve permitting offenders charged with serious physical harm Aggravated Robbery to defend by arguing that the serious physical harm was the result of negligence or even accident. It is very unlikely that the Legislature intended such a result.

Treating the offense as requiring no additional mens rea reflects the seriousness of coupling a theft offense with serious physical harm, whether accomplished or merely attempted. It is therefore reasonable to conclude that the offense plainly indicates a purpose to impose strict liability.

SECOND PROPOSITION OF LAW

Proposition of Law No. 2: Where an indictment is set forth in the words of or paraphrases the statute, a defendant forfeits all but plain error as to any defect in such indictment by failing to object at a time that such defect could have been corrected by the trial court. *State v. O'Brien* (1987), 30 Ohio St.3d 122, 30 Ohio Bar Rep. 436, 508 N. E.2d 144; *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N. E.2d 306; *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, 884 N. E.2d 45, followed. *State v. Colon*, 118 Ohio St.3d 26, 2009-Ohio-1624, 885 N. E.2d 917, overruled in part.

A.

Colon I determined that an indictment missing a mens rea element of the crime violates Section 10, Article I of the Ohio Constitution which provides that a felony defendant is guaranteed the right to an indictment, and the right "to demand the nature and cause of the accusation against him, and to have a copy thereof."⁸ The *Colon I* court then concluded that an indictment omitting a mens rea allegation is also defective under Crim. R. 7(B), which provides that an indictment can be set forth in the words of the statute provided that those words "charge an offense" *or* are sufficient to give notice as to "all the elements of the offense." Lastly, the Court determined that such an indictment could not be amended pursuant to Crim. R. 7(D) because, although changes in the form or substance are authorized, such changes must not change "the name or identity of the crime charged."

For over twenty years, Ohio law allowed the amendment of an indictment to supply an omitted mens rea. In *State v. O'Brien* (1987), 30 Ohio St.3d 122, 30 Ohio Bar Rep. 436, 508 N. E.2d 144, this Court permitted the State to amend an indictment that failed to state a mens rea allegation required for the crime of Endangering Children. *Id.* at pp. 124-26. As in this case, the

⁸The right to demand the nature and cause of an accusation of a felony crime does not necessarily guarantee a defect-free indictment particularly where the accused may obtain clarification of the charges by way of a bill of particulars.

mens rea for endangering children was judicially determined to be "reckless." As in *Colon I*, and as well as in this case, the indictment in *O'Brien* was cast in the form of the statute, set forth the name of the crime, the statutory citation and indicated its severity. In allowing the state to amend the indictment, pursuant to Crim. R. 7(D), to add the mens rea of reckless, *O'Brien* noted that although the substance of the indictment changed, the name, identity and severity of the crime remained the same after the indictment was amended. *Id.*, p. 126. *O'Brien* thus would provide ample authority that the indictment in both *Colon I* and in this case could have been properly amended under Crim. R. 7.

In so holding, *Colon I* relied upon *State v. Wozniak* (1961), 172 Ohio St. 517, 18 O. O.2d 58, 178 N. E.2d 800 for the proposition that an indictment missing an element cannot be amended. However, *Wozniak* can be distinguished for several reasons. First, *O'Brien*, specifically noted that *Wozniak* was a pre-Criminal Rule case decided prior to the enactment of Crim. R. 7(D) and was thus not controlling. *O'Brien*, *supra* at p. 125, n.5. Second, the indictment in *Wozniak*, which left out an allegation that the breaking and entering was with intent to steal or commit a felony, did not charge such crime by quoting the words of the statute, as was done in *O'Brien*, *Colon I* and in this case.⁹

Colon I only mentioned *O'Brien* for the proposition that "[a]n indictment charging an offense solely in the language of a statute is insufficient when a specific intent element has been

⁹ The defect in *Wozniak* was more serious than in *O'Brien*, because statutory language was omitted from the indictment. The defect in *O'Brien* was worse than in *Colon I* and this case because the missing mens rea element for *O'Brien*'s crime had been determined to be necessary by this Court several years earlier. When the indictments in *Colon I* and this case were drawn, this Court had not construed any of the robbery statutes to require an additional mens rea element.

judicially interpreted for that offense." *Colon I*, at ¶ 42. The majority opinion did not discuss the second paragraph of the syllabus of *O'Brien* clearly permitting inclusion of the missing element in a Crim. R. 7(D) amendment, nor explain why the common sense reasoning of *O'Brien* should be abandoned.

In addition to foreclosing amendment of indictments which are defective for omitting a mens rea element, *Colon I* also closed the door to any argument that such a defective indictment must be challenged by the defendant to avoid waiver or forfeiture.

R. C. 2941.29 provides that no conviction shall be set aside or reversed on account of any defect in the form or substance of an indictment unless objection to such indictment, specifically stating the defect claimed, is made prior to commencement of trial or at such other time as permitted by the court.

Additionally, Ohio Criminal Rule 12 (C)(2) requires that defenses and objections based on defects in the indictment (other than failure to show jurisdiction in the court or to charge an offense) must be made before trial. This Court determined that, since an indictment missing a mens rea element does not charge an offense, a defective indictment is excepted from those defenses and objections that a defendant must raise before trial, ignoring *O'Brien's* teaching that an indictment missing such an element, which is in the language of the statute and otherwise specific as to the crime charged, its identity and severity, *does* "charge an offense."

Next, *Colon I* held that defendant's failure to raise the defective indictment at any time prior to the appeal did not work a forfeiture. In *State v. Carter*, 89 Ohio St.3d 593, 2000-Ohio-172, 734 N.E.2d 345, although defendant's indictment omitted an essential element for the offense of rape (an allegation of "sexual conduct"), he failed to raise the issue until his appeal.

Following long-standing precedent, the Court stated that since "Carter never challenged the sufficiency of the indictment at any time before or during his trial. An appellate court need not consider an error that was not called to the attention of the trial court at a time when such error could have been avoided or corrected by the trial court. * * * As a result such error is waived absent plain error." Id. at 598.

However, ignoring *Carter*, *Colon I* held that defendant's forfeiture of his defective indictment claim need not be tested by the plain error standard because it determined that the defective indictment so infected the entire proceedings, that "structural error" had occurred.

Colon I's structural error holding essentially abrogated *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, 884 N.E.2d 45, released by this court less than three weeks prior to *Colon I*. *Wamsley* considered the issue of whether the an un-objected-to failure to instruct a jury on the mens rea element amounted to plain error or structural error.¹⁰ The *Wamsley* Court explained that it "has rejected the concept that structural error exists in every situation in which even serious error occurred." Id. at ¶ 18. *Wamsley* determined that an un-objected-to defect regarding the mens rea element of a crime is subject to a plain error, not structural error review. Id., at ¶¶ 24-29. Structural error, resulting in automatic reversal, occurs in only a very limited class of case such as denial of counsel, a biased trial judge, a racially biased jury, denial of self-representation, denial of a public trial and a defective reasonable doubt instruction. Id. at ¶16. Because it determined that the improper instructions did not "present a violation of a fundamental constitutional right that would lead to the kind of basic unfairness" cited in such examples, the

¹⁰ The trial court failed to instruct the jury that trespass, as part of a burglary charge, required the offender to act knowingly, recklessly or negligently and failed to instruct as to all of the elements of the underlying offense of Assault. *Wamsley*, at ¶¶14,17.

Wamsley court decided that plain error analysis should apply. *Id.* at ¶24.

Wamsley also recognized that any holding that defective jury instructions constitute structural error would encourage defendants to remain silent in the face of easily correctable errors:

As we held in *Perry*, "both this court and the United States Supreme Court have cautioned against applying a structural-error analysis where, as here, the case would be otherwise governed by Crim. R. 52(B) because the defendant did not raise the error in the trial court. * * * This caution is born of sound policy. For to hold that an error is structural even when the defendant does not bring the error to the attention of the trial court would be to encourage defendants to remain silent at trial only later to raise the error on appeal where the conviction would be automatically reversed. We believe that our holdings should foster rather than thwart judicial economy by providing incentives (and not disincentives) for the defendant to raise all errors in the trial court -- where, in many cases, such errors can be easily corrected." (Emphasis sic.) *Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, P 23.

Wamsley, at ¶28.

Colon I recognized that its structural error determination might encourage defendants to sit on their rights in order to play a previously undisclosed trump card on appeal, but the Court simply pointed out that it was the State's burden to make sure that the indictment is correct in all respects. Ensuring that an indictment does not omit an element of a crime is difficult in instances, such as in *Colon I* and in this case, where a mens rea element is judicially determined *after* the indictment is drawn. Moreover, no prosecutor wants to have to sustain a conviction by arguing that an error in an indictment is not plain error.

Colon I's structural error holding is difficult or impossible to reconcile with *Wamsley*. Why would omitting a mens rea requirement from an indictment constitute a violation of a fundamental constitutional right leading to per se basic unfairness and structural error when failure to instruct a jury as to the mens reas necessary to convict would not? Indeed, less than a year before *Colon I*, this Court, in *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.

E.2d 306, held that permitting a trial judge to decide sentencing factors in violation of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N. E.2d 470 and *Blakely v. Washington* (2004), 542 U. S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403, is akin to a failure to submit an element of an offense to a jury, but is nonetheless, *not* structural error, citing *Neder v. United States* (1999), 527 U. S. 1, 19-20, 119 S. Ct. 1827, 144 L. Ed.2d 35¹¹ *Payne*, at ¶20.

So far as we can determine, prior to *Colon I*, this Court has never found structural error, and has certainly not applied structural error to a defective indictment case. This case presents an opportunity for this Court to return to its holdings in *Wamsley* and *Payne*, with the attendant benefit that defendants who attempt to set a trap for an unwary prosecutor or judge, will at least run the risk of plain error scrutiny.

B.

A prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it. *In re Estate of Holycross*, 112 Ohio St. 3d 203, 2007-Ohio-1, ¶22, 858 N. E.2d 805; *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N. E.2d 1256, first paragraph of the syllabus.

Colon I's holding that an indictment which is defective because of a missing mens rea element constitutes structural error, as explained above, was wrongly decided and meets the first requirement of *Galatis* for overruling a prior precedent.

¹¹ *Neder* held that failure to submit the "materiality" element to the jury in a tax fraud case is not structural error.

Colon I's structural error holding defies practical workability since it provides a disincentive to defense counsel to raise the issue of a defective indictment at the trial level, when such defect could be easily corrected. We recognize that *Colon II* represents a substantial retreat from the structural error holding of *Colon I*. *Colon I* appeared to require automatic reversal of any criminal case involving an indictment found to be defective because of a missing mens rea element. In contrast, *Colon II* recognized that only in the unusual case where a defective indictment results in multiple errors that are inextricably linked to the flawed indictment, and such errors have permeated the trial from beginning to end would structural error analysis be appropriate. *Colon II*, at ¶¶6-8. While we welcome *Colon II's* salutary relaxation of what constitutes structural error, *Colon II* also raises workability problems because it is and will remain difficult for prosecutors, trial judges and appellate courts to determine just when a defective indictment has so permeated a criminal trial as to require structural rather than plain error analysis. For example, does structural error or plain error apply where a flawed indictment is never corrected at trial, but jury instructions include the missing mens rea element?¹² Does structural error apply if the indictment omits a reckless allegation but the prosecutor does not treat the crime as a strict liability offense?¹³ What is the standard for adjudging error where the indictment omits an allegation that the crime was committed recklessly but defendant's counsel,

¹²*State v. Jones*, 7th Dist. No. 07-MA-200, 2008-Ohio-6971, discretionary appeal not allowed, *State v. Jones*, 121 Ohio St.3d 1502, 2009-Ohio-2511, 907 N. E.2d 325, held that plain error analysis applied. Although the indictment omitted a reckless allegation, the jury was instructed that the crime had to be committed knowingly.

¹³ *State v. White*, 12th Dist. No. CA2008-02-046, 2009-Ohio-2965, discretionary appeal not allowed, *State v. White*, 123 Ohio St.3d 1471, 2009-Ohio-5704, 915 N. E.2d 1254, held that plain error analysis was appropriate where, although the indictment for Robbery in violation of R. C. 2911.02(A)(2) did not charge recklessness, the prosecutor did not treat the offense as a strict liability crime.

in his closing statement, argues that recklessness is necessary?¹⁴

Colon II's treatment of structural error, which depends upon a rather subjective analysis of whether a defective indictment has "permeated" a trial, saddles trial and appellate courts with a standard which is difficult to apply and likely to lead to disparate results. As the U. S. Supreme Court emphasized in *Neder v. United States*, supra, "[A] constitutional error is either structural or it is not." 527 U.S. 1, 14. This Court can sweep away such classification problems by simply holding that the appellate courts of this state should return to pre-*Colon* plain error analysis of defective indictment cases.

Abandoning the structural error analysis required by the *Colon* cases will create little or no hardship upon those who may have justifiably relied upon them. First, any precedential effect of the *Colon* cases is attenuated by the fact that they both were decided less than two years ago. Second, it is safe to say that prosecutors and trial judges would not wish to be involved in the prosecution of a case initiated by a flawed indictment which could later result in structural error with a good probability of automatic reversal. They would attempt to amend the indictment or have the case re-submitted to the grand jury as soon as possible. Defendants and their counsel might well rely upon an expectation that, in the event of a conviction, an appeals court might reverse for structural error and therefore remain silent about an indictment that they suspect is defective. But such reliance is not justified and should be discouraged, not encouraged, because any such reliance is against the interests of justice and the efficient, fair administration of the criminal judicial system.

C.

¹⁴ *State v. McMillen*, 5th Dist. No. 2008-CA-00122, 2009-Ohio-210, held no structural error.

In the event that this Court determines that it should reject the State's two proposed propositions of law, by holding that Horner's indictments were defective and that the structural error analysis of both *Colon* cases should be applied, Horner's conviction and sentence should nonetheless be affirmed. Because of the differences in the process whereby Horner's convictions in this case were secured in contrast to *Colon I*, even if the indictments were defective, the fact that Horner's guilt was determined by his no contest pleas rather than by a jury, requires that structural error analysis should not apply. *Colon I* found that the defective indictment "clearly permeated the defendant's entire criminal proceeding," from the issuance of the indictment, up to and through trial, which included a failure to issue correct jury instructions and the prosecutor's improper arguments as to the elements that the State was required to prove. This case is entirely different, because there was no trial, no jury instructions and no improper final arguments. Instead, there was a knowing and voluntary plea.

The two counts of Horner's indictment for the serious physical harm Aggravated Robberies, if defective they were, did not lead to multiple errors, nor permeate the case. Horner's case, therefore was not one of the rare cases which, according to *Colon II*, result in a finding of structural error.¹⁵ Because of this, *Colon II* dictates that the effect of any error involved in Horner's indictment must be determined by plain error analysis.

Plain error analysis requires the reviewing court to determine whether: (1) there was an error as a result of deviation from a legal rule; (2) the error was "plain," constituting an "obvious"

¹⁵ Although briefed by both sides in the court of appeals, the appeals court did not reach the structural error issue after determining that the indictments were not defective. However, this Court, although not approving the specific ground upon which the intermediate court acted, may proceed to consider whether another ground before it would sustain the judgment for any other reason. *Collings-Taylor Co. v. American Fidelity Co.* (1917), 96 Ohio St. 123, 130, 117 N. E. 158.

defect in the trial proceedings; and, (3) the error affected "substantial rights" by affecting the outcome of the trial. *State v. Barnes*, 94 Ohio St. 3d 21, 27, 2002-Ohio-68, 759 N. E.2d 1240. The plain error rule is applied under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, ¶11, 903 N. E.2d 609. Moreover, ". . . even if the defendant satisfies this burden, the appellate court has discretion to disregard the error and should correct it 'only to prevent a manifest miscarriage of justice.'" *Wamsley*, supra, ¶27, quoting *State v. Long* (1978), 53 Ohio St.2d 91, 7 Ohio Op.3d 178, 372 N. E.2d 804, paragraph three of the syllabus.

Horner claims that the trial court should have examined Horner's indictment prior to acceptance of his no contest plea, determined that the serious physical harm Aggravated Robbery counts were defective, and then dismissed those counts for failure to state all of the required elements. However, this is only another way of stating that the counts were defective, and does not address the issue of whether Horner's waiver or forfeiture of any errors in the proceedings constituted plain error.

It is clear that by not objecting to the indictments and entering into the no contest plea, Horner waived or forfeited any claim that the indictments were defective. Horner's no contest plea was based, not only upon the allegations in the indictments, but also upon *the statement of the prosecutor*, which statement was entered into the record before defendant's plea was accepted. The written no contest plea agreement signed by defendant indicated that his plea to the agreed-upon counts would be based upon the indictment and the statement of the prosecutor. At the February 27, 2007 plea hearing the trial court reiterated to defendant that his plea could only be accepted based upon the indictment and the prosecutor's "supplemental statement" as to each

charge. (Tr. 2-27-07 hearing, p. 14.) Thereafter, the prosecutor gave a detailed statement of the charges and the evidence supplementing the indictment (Tr. 2-27-07 hearing pp. 21-26.) The prosecutor's statement (which consisted of a detailed account unquestionably demonstrating that Horner intentionally did cause serious physical harm to Rob Peck and Tim Milroy) therefore served to cure any defects in the counts of the indictment as may have previously existed. That is because the statement was sufficiently detailed as to include all elements of the offenses to which defendant was pleading, and being acceded to by defendant, and accepted by the trial judge, served to eliminate any defects that may have existed when the indictments were first secured.

Just as important, the two counts of serious physical harm Aggravated Robbery were accompanied by two Felonious Assault counts pertaining to the same two victims (Rob Peck and Tim Milroy.) The Felonious Assault indictments alleged that Horner "did knowingly cause serious physical harm," to those victims and the serious injuries intentionally inflicted upon both of them were described in detail by the prosecutor. Therefore, the indictments, taken together, *did* charge defendant with causing serious physical harm with an appropriate level of culpability.¹⁶ Thus, in *State v. Chaney*, 5th Dist. No. 2007CA00332, 2009-Ohio-6118, no structural or plain error was found to have occurred where defendant was charged with both serious physical harm Aggravated Robbery and Felonious Assault against the same victim. This was so, *Chaney* held, because, even if the robbery indictment was defective for not alleging recklessness, defendant was charged with knowingly causing the serious physical harm necessary for both the Aggravated Robbery and the Felonious Assault charges and for which element of culpability the

¹⁶ R. C. 2901.22(E) provides that when recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element.

jury found defendant guilty.

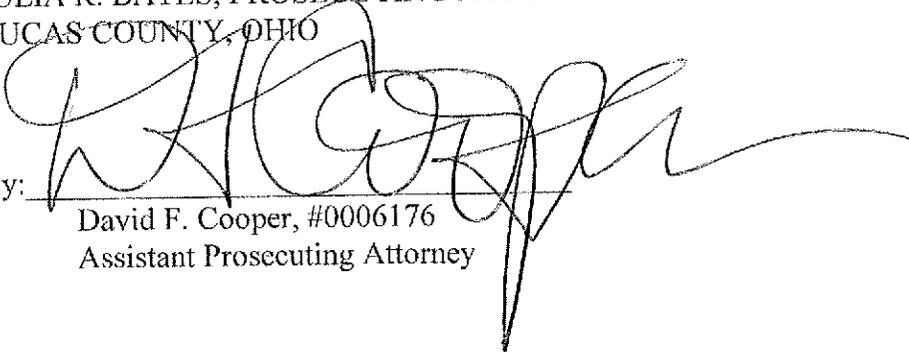
Plain error clearly did not occur here. Even if it was error to have charged Horner with an indictment missing an allegation of recklessness and assuming that such error or Horner's failure to object was "obvious," Horner has the burden of demonstrating the third requirement of plain error, which is that such error affected the outcome of the case. *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶105, 842 N. E.2d 996. Had defense counsel objected to the failure of the indictment to allege "recklessness," the State could have re-submitted the matter to the grand jury in order to secure a corrected indictment. Or, the State could have requested an amendment to the indictment pursuant to Crim. R. 7(D). For these reasons, no plain error occurred and the conviction and sentence of Horner for violation of R. C. 2911.01(A)(3) should be affirmed.

CONCLUSION

For the reasons set forth above, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: 

David F. Cooper, #0006176
Assistant Prosecuting Attorney

On Behalf of Plaintiff-Appellee

CERTIFICATION

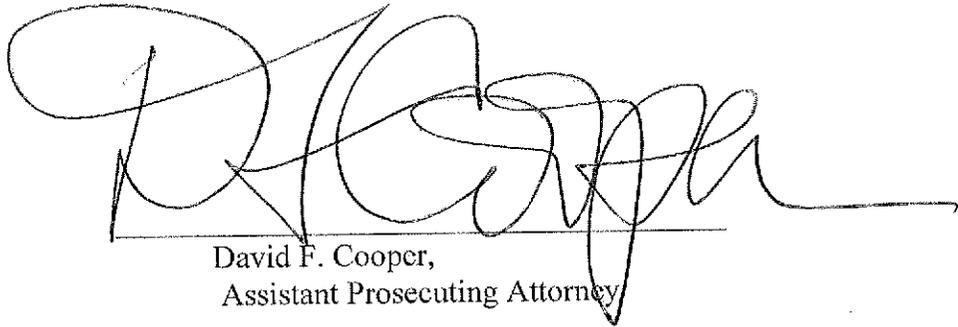
This is to certify that a copy of the foregoing was sent via ordinary U.S. Mail this

5th day of February, 2010, to:

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APPENDIX

CONSTITUTIONS

FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

OHIO CONSTITUTION, ARTICLE I SECTION 11

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

STATUTES

R. C. 2901.01(A)(3) and (A)(5)

(A) As used in the Revised Code:

* * *

(3) "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration.

* * *

(5) "Serious physical harm to persons" means any of the following:

(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

(b) Any physical harm that carries a substantial risk of death;

(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

(e) 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.

R. C. 2901.21

§ 2901.21. Requirements for criminal liability

(A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:

(1) The person's liability is based on conduct that includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing;

(2) The person has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.

(B) 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.

(C) Voluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense. Voluntary intoxication does not relieve a person of a duty to act if failure to act constitutes a criminal offense. Evidence that a person was voluntarily intoxicated may be admissible to show whether or not the person was physically capable of performing the act with which the person is charged.

(D) As used in this section:

(1) Possession is a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of the possessor's control of the thing possessed for a sufficient time to have ended possession.

(2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

(3) "Culpability" means purpose, knowledge, recklessness, or negligence, as defined in section 2901.22 of the Revised Code.

(4) "Intoxication" includes, but is not limited to, intoxication resulting from the ingestion of

alcohol, a drug, or alcohol and a drug.

R. C. 2907.321

§ 2907.321. Pandering obscenity involving a minor

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

- (1) Create, reproduce, or publish any obscene material that has a minor as one of its participants or portrayed observers;
- (2) Promote or advertise for sale or dissemination; sell, deliver, disseminate, display, exhibit, present, rent, or provide; or offer or agree to sell, deliver, disseminate, display, exhibit, present, rent, or provide, any obscene material that has a minor as one of its participants or portrayed observers;
- (3) Create, direct, or produce an obscene performance that has a minor as one of its participants;
- (4) Advertise or promote for presentation, present, or participate in presenting an obscene performance that has a minor as one of its participants;
- (5) Buy, procure, possess, or control any obscene material, that has a minor as one of its participants;
- (6) Bring or cause to be brought into this state any obscene material that has a minor as one of its participants or portrayed observers.

(B) (1) This section does not apply to any material or performance that is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(2) Mistake of age is not a defense to a charge under this section.

(3) In a prosecution under this section, the trier of fact may infer that a person in the material or performance involved is a minor if the material or performance, through its title, text, visual representation, or otherwise, represents or depicts the person as a minor.

(C) Whoever violates this section is guilty of pandering obscenity involving a minor. Violation of division (A)(1), (2), (3), (4), or (6) of this section is a felony of the second degree. Violation of division (A)(5) of this section is a felony of the fourth degree. If the offender previously has been

convicted of or pleaded guilty to a violation of this section or section 2907.322 [2907.32.2] or 2907.323 [2907.32.3] of the Revised Code, pandering obscenity involving a minor in violation of division (A)(5) of this section is a felony of the third degree.

R. C. 2911.01

§ 2911.01. Aggravated robbery

(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:

- (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;
- (2) Have a dangerous ordnance on or about the offender's person or under the offender's control;
- (3) Inflict, or attempt to inflict, serious physical harm on another.

(B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:

- (1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;
- (2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

(D) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(2) "Law enforcement officer" has the same meaning as in section 2901.01 of the Revised Code and also includes employees of the department of rehabilitation and correction who are authorized to carry weapons within the course and scope of their duties.

R. C. 2911.02

§ 2911.02. Robbery

(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:

- (1) Have a deadly weapon on or about the offender's person or under the offender's control;
- (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;
- (3) Use or threaten the immediate use of force against another.

(B) Whoever violates this section is guilty of robbery. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree.

(C) As used in this section:

- (1) "Deadly weapon" has the same meaning as in section 2923.11 of the Revised Code.
- (2) "Theft offense" has the same meaning as in section 2913.01 of the Revised Code.

R. C. 2913.01

§ 2913.01. Definitions

As used in this chapter, unless the context requires that a term be given a different meaning:

(A) "Deception" means knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.

(B) "Defraud" means to knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another.

(C) "Deprive" means to do any of the following:

- (1) Withhold property of another permanently, or for a period that appropriates a substantial portion of its value or use, or with purpose to restore it only upon payment of a reward or other consideration;

(2) Dispose of property so as to make it unlikely that the owner will recover it;

(3) Accept, use, or appropriate money, property, or services, with purpose not to give proper consideration in return for the money, property, or services, and without reasonable justification or excuse for not giving proper consideration.

(D) "Owner" means, unless the context requires a different meaning, any person, other than the actor, who is the owner of, who has possession or control of, or who has any license or interest in property or services, even though the ownership, possession, control, license, or interest is unlawful.

(E) "Services" include labor, personal services, professional services, rental services, public utility services including wireless service as defined in division (F)(1) of section 4931.40 of the Revised Code, common carrier services, and food, drink, transportation, entertainment, and cable television services and, for purposes of section 2913.04 of the Revised Code, include cable services as defined in that section.

(F) "Writing" means any computer software, document, letter, memorandum, note, paper, plate, data, film, or other thing having in or upon it any written, typewritten, or printed matter, and any token, stamp, seal, credit card, badge, trademark, label, or other symbol of value, right, privilege, license, or identification.

(G) "Forge" means to fabricate or create, in whole or in part and by any means, any spurious writing, or to make, execute, alter, complete, reproduce, or otherwise purport to authenticate any writing, when the writing in fact is not authenticated by that conduct.

(H) "Utter" means to issue, publish, transfer, use, put or send into circulation, deliver, or display.

(I) "Coin machine" means any mechanical or electronic device designed to do both of the following:

(1) Receive a coin, bill, or token made for that purpose;

(2) In return for the insertion or deposit of a coin, bill, or token, automatically dispense property, provide a service, or grant a license.

(J) "Slug" means an object that, by virtue of its size, shape, composition, or other quality, is capable of being inserted or deposited in a coin machine as an improper substitute for a genuine coin, bill, or token made for that purpose.

(K) "Theft offense" means any of the following:

(1) A violation of section 2911.01, 2911.02, 2911.11, 2911.12, 2911.13, 2911.31, 2911.32, 2913.02, 2913.03, 2913.04, 2913.041 [2913.04.1], 2913.05, 2913.06, 2913.11, 2913.21, 2913.31, 2913.32, 2913.33, 2913.34, 2913.40, 2913.42, 2913.43, 2913.44, 2913.45, 2913.47, former

section 2913.47 or 2913.48, or section 2913.51, 2915.05, or 2921.41 of the Revised Code;

(2) A violation of an existing or former municipal ordinance or law of this or any other state, or of the United States, substantially equivalent to any section listed in division (K)(1) of this section or a violation of section 2913.41, 2913.81, or 2915.06 of the Revised Code as it existed prior to July 1, 1996;

(3) An offense under an existing or former municipal ordinance or law of this or any other state, or of the United States, involving robbery, burglary, breaking and entering, theft, embezzlement, wrongful conversion, forgery, counterfeiting, deccit, or fraud;

(4) A conspiracy or attempt to commit, or complicity in committing, any offense under division (K)(1), (2), or (3) of this section.

(L) "Computer services" includes, but is not limited to, the use of a computer system, computer network, computer program, data that is prepared for computer use, or data that is contained within a computer system or computer network.

(M) "Computer" means an electronic device that performs logical, arithmetic, and memory functions by the manipulation of electronic or magnetic impulses. "Computer" includes, but is not limited to, all input, output, processing, storage, computer program, or communication facilities that are connected, or related, in a computer system or network to an electronic device of that nature.

(N) "Computer system" means a computer and related devices, whether connected or unconnected, including, but not limited to, data input, output, and storage devices, data communications links, and computer programs and data that make the system capable of performing specified special purpose data processing tasks.

(O) "Computer network" means a set of related and remotely connected computers and communication facilities that includes more than one computer system that has the capability to transmit among the connected computers and communication facilities through the use of computer facilities.

(P) "Computer program" means an ordered set of data representing coded instructions or statements that, when executed by a computer, cause the computer to process data.

(Q) "Computer software" means computer programs, procedures, and other documentation associated with the operation of a computer system.

(R) "Data" means a representation of information, knowledge, facts, concepts, or instructions that are being or have been prepared in a formalized manner and that are intended for use in a computer, computer system, or computer network. For purposes of section 2913.47 of the

Revised Code, "data" has the additional meaning set forth in division (A) of that section.

(S) "Cable television service" means any services provided by or through the facilities of any cable television system or other similar closed circuit coaxial cable communications system, or any microwave or similar transmission service used in connection with any cable television system or other similar closed circuit coaxial cable communications system.

(T) "Gain access" means to approach, instruct, communicate with, store data in, retrieve data from, or otherwise make use of any resources of a computer, computer system, or computer network, or any cable service or cable system both as defined in section 2913.04 of the Revised Code.

(U) "Credit card" includes, but is not limited to, a card, code, device, or other means of access to a customer's account for the purpose of obtaining money, property, labor, or services on credit, or for initiating an electronic fund transfer at a point-of-sale terminal, an automated teller machine, or a cash dispensing machine. It also includes a county procurement card issued under section 301.29 of the Revised Code.

(V) "Electronic fund transfer" has the same meaning as in 92 Stat. 3728, 15 U.S.C.A. 1693a, as amended.

(W) "Rented property" means personal property in which the right of possession and use of the property is for a short and possibly indeterminate term in return for consideration; the rentee generally controls the duration of possession of the property, within any applicable minimum or maximum term; and the amount of consideration generally is determined by the duration of possession of the property.

(X) "Telecommunication" means the origination, emission, dissemination, transmission, or reception of data, images, signals, sounds, or other intelligence or equivalence of intelligence of any nature over any communications system by any method, including, but not limited to, a fiber optic, electronic, magnetic, optical, digital, or analog method.

(Y) "Telecommunications device" means any instrument, equipment, machine, or other device that facilitates telecommunication, including, but not limited to, a computer, computer network, computer chip, computer circuit, scanner, telephone, cellular telephone, pager, personal communications device, transponder, receiver, radio, modem, or device that enables the use of a modem.

(Z) "Telecommunications service" means the providing, allowing, facilitating, or generating of any form of telecommunication through the use of a telecommunications device over a telecommunications system.

(AA) "Counterfeit telecommunications device" means a telecommunications device that, alone or with another telecommunications device, has been altered, constructed, manufactured, or programmed to acquire, intercept, receive, or otherwise facilitate the use of a telecommunications service or information service without the authority or consent of the provider of the

telecommunications service or information service. "Counterfeit telecommunications device" includes, but is not limited to, a clone telephone, clone microchip, tumbler telephone, or tumbler microchip; a wireless scanning device capable of acquiring, intercepting, receiving, or otherwise facilitating the use of telecommunications service or information service without immediate detection; or a device, equipment, hardware, or software designed for, or capable of, altering or changing the electronic serial number in a wireless telephone.

(BB) (1) "Information service" means, subject to division (BB)(2) of this section, the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, including, but not limited to, electronic publishing.

(2) "Information service" does not include any use of a capability of a type described in division (BB)(1) of this section for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

(CC) "Elderly person" means a person who is sixty-five years of age or older.

(DD) "Disabled adult" means a person who is eighteen years of age or older and has some impairment of body or mind that makes the person unable to work at any substantially remunerative employment that the person otherwise would be able to perform and that will, with reasonable probability, continue for a period of at least twelve months without any present indication of recovery from the impairment, or who is eighteen years of age or older and has been certified as permanently and totally disabled by an agency of this state or the United States that has the function of so classifying persons.

(EE) "Firearm" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(FF) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

(GG) "Dangerous drug" has the same meaning as in section 4729.01 of the Revised Code.

(HH) "Drug abuse offense" has the same meaning as in section 2925.01 of the Revised Code.

(II) (1) "Computer hacking" means any of the following:

(a) Gaining access or attempting to gain access to all or part of a computer, computer system, or a computer network without express or implied authorization with the intent to defraud or with intent to commit a crime;

(b) Misusing computer or network services including, but not limited to, mail transfer programs, file transfer programs, proxy servers, and web servers by performing functions not authorized by the owner of the computer, computer system, or computer network or other person authorized to

give consent. As used in this division, "misuse of computer and network services" includes, but is not limited to, the unauthorized use of any of the following:

(i) Mail transfer programs to send mail to persons other than the authorized users of that computer or computer network;

(ii) File transfer program proxy services or proxy servers to access other computers, computer systems, or computer networks;

(iii) Web servers to redirect users to other web pages or web servers.

(c) (i) Subject to division (II)(1)(c)(ii) of this section, using a group of computer programs commonly known as "port scanners" or "probes" to intentionally access any computer, computer system, or computer network without the permission of the owner of the computer, computer system, or computer network or other person authorized to give consent. The group of computer programs referred to in this division includes, but is not limited to, those computer programs that use a computer network to access a computer, computer system, or another computer network to determine any of the following: the presence or types of computers or computer systems on a network; the computer network's facilities and capabilities; the availability of computer or network services; the presence or versions of computer software including, but not limited to, operating systems, computer services, or computer contaminants; the presence of a known computer software deficiency that can be used to gain unauthorized access to a computer, computer system, or computer network; or any other information about a computer, computer system, or computer network not necessary for the normal and lawful operation of the computer initiating the access.

(ii) The group of computer programs referred to in division (II)(1)(c)(i) of this section does not include standard computer software used for the normal operation, administration, management, and test of a computer, computer system, or computer network including, but not limited to, domain name services, mail transfer services, and other operating system services, computer programs commonly called "ping," "tcpdump," and "traceroute" and other network monitoring and management computer software, and computer programs commonly known as "nslookup" and "whois" and other systems administration computer software.

(d) The intentional use of a computer, computer system, or a computer network in a manner that exceeds any right or permission granted by the owner of the computer, computer system, or computer network or other person authorized to give consent.

(2) "Computer hacking" does not include the introduction of a computer contaminant, as defined in section 2909.02 of the Revised Code, into a computer, computer system, computer program, or computer network.

(JJ) "Police dog or horse" has the same meaning as in section 2921.321 [2921.32.1] of the

Revised Code.

(KK) "Anhydrous ammonia" is a compound formed by the combination of two gaseous elements, nitrogen and hydrogen, in the manner described in this division. Anhydrous ammonia is one part nitrogen to three parts hydrogen (NH₃). Anhydrous ammonia by weight is fourteen parts nitrogen to three parts hydrogen, which is approximately eighty-two per cent nitrogen to eighteen per cent hydrogen.

(LL) "Assistance dog" has the same meaning as in section 955.011 [955.01.1] of the Revised Code.

(MM) "Federally licensed firearms dealer" has the same meaning as in section 5502.63 of the Revised Code.

R. C. 2915.02

§ 2915.02. Gambling

(A) No person shall do any of the following:

- (1) Engage in bookmaking, or knowingly engage in conduct that facilitates bookmaking;
- (2) Establish, promote, or operate or knowingly engage in conduct that facilitates any game of chance conducted for profit or any scheme of chance;
- (3) Knowingly procure, transmit, exchange, or engage in conduct that facilitates the procurement, transmission, or exchange of information for use in establishing odds or determining winners in connection with bookmaking or with any game of chance conducted for profit or any scheme of chance;
- (4) Engage in betting or in playing any scheme or game of chance as a substantial source of income or livelihood;
- (5) With purpose to violate division (A)(1), (2), (3), or (4) of this section, acquire, possess, control, or operate any gambling device.

(B) For purposes of division (A)(1) of this section, a person facilitates bookmaking if the person in any way knowingly aids an illegal bookmaking operation, including, without limitation, placing a bet with a person engaged in or facilitating illegal bookmaking. For purposes of division (A)(2) of this section, a person facilitates a game of chance conducted for profit or a scheme of chance if the person in any way knowingly aids in the conduct or operation of any such game or scheme, including, without limitation, playing any such game or scheme.

(C) This section does not prohibit conduct in connection with gambling expressly permitted by law.

(D) This section does not apply to any of the following:

(1) Games of chance, if all of the following apply:

(a) The games of chance are not craps for money or roulette for money.

(b) The games of chance are conducted by a charitable organization that is, and has received from the internal revenue service a determination letter that is currently in effect, stating that the organization is, exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3) of the Internal Revenue Code.

(c) The games of chance are conducted at festivals of the charitable organization that are conducted either for a period of four consecutive days or less and not more than twice a year or for a period of five consecutive days not more than once a year, and are conducted on premises owned by the charitable organization for a period of no less than one year immediately preceding the conducting of the games of chance, on premises leased from a governmental unit, or on premises that are leased from a veteran's or fraternal organization and that have been owned by the lessor veteran's or fraternal organization for a period of no less than one year immediately preceding the conducting of the games of chance.

A charitable organization shall not lease premises from a veteran's or fraternal organization to conduct a festival described in division (D)(1)(c) of this section if the veteran's or fraternal organization already has leased the premises four times during the preceding year to charitable organizations for that purpose. If a charitable organization leases premises from a veteran's or fraternal organization to conduct a festival described in division (D)(1)(c) of this section, the charitable organization shall not pay a rental rate for the premises per day of the festival that exceeds the rental rate per bingo session that a charitable organization may pay under division (B)(1) of section 2915.09 of the Revised Code when it leases premises from another charitable organization to conduct bingo games.

(d) All of the money or assets received from the games of chance after deduction only of prizes paid out during the conduct of the games of chance are used by, or given, donated, or otherwise transferred to, any organization that is described in subsection 509(a)(1), 509(a)(2), or 509(a)(3) of the Internal Revenue Code and is either a governmental unit or an organization that is tax exempt under subsection 501(a) and described in subsection 501(c)(3) of the Internal Revenue Code;

(e) The games of chance are not conducted during, or within ten hours of, a bingo game conducted for amusement purposes only pursuant to section 2915.12 of the Revised Code.

No person shall receive any commission, wage, salary, reward, tip, donation, gratuity, or other form of compensation, directly or indirectly, for operating or assisting in the operation of any game of chance.

(2) Any tag fishing tournament operated under a permit issued under section 1533.92 of the Revised Code, as "tag fishing tournament" is defined in section 1531.01 of the Revised Code;

(3) Bingo conducted by a charitable organization that holds a license issued under section 2915.08 of the Revised Code.

(E) Division (D) of this section shall not be construed to authorize the sale, lease, or other temporary or permanent transfer of the right to conduct games of chance, as granted by that division, by any charitable organization that is granted that right.

(F) Whoever violates this section is guilty of gambling, a misdemeanor of the first degree. If the offender previously has been convicted of any gambling offense, gambling is a felony of the fifth degree.

R. C. 2915.03

§ 2915.03. Operating a gambling house

(A) No person, being the owner or lessee, or having custody, control, or supervision of premises, shall:

(1) Use or occupy such premises for gambling in violation of section 2915.02 of the Revised Code;

(2) Recklessly permit such premises to be used or occupied for gambling in violation of section 2915.02 of the Revised Code.

(B) Whoever violates this section is guilty of operating a gambling house, a misdemeanor of the first degree. If the offender previously has been convicted of a gambling offense, operating a gambling house is a felony of the fifth degree.

(C) Premises used or occupied in violation of this section constitute a nuisance subject to abatement pursuant to sections 3767.01 to 3767.99 of the Revised Code.

R. C. 2919.24

2919.24. Contributing to unruliness or delinquency of a child

(A) No person, including a parent, guardian, or other custodian of a child, shall do any of the following:

(1) Aid, abet, induce, cause, encourage, or contribute to a child or a ward of the juvenile court becoming an unruly child, as defined in section 2151.022 of the Revised Code, or a delinquent

child, as defined in section 2152.02 of the Revised Code;

(2) Act in a way tending to cause a child or a ward of the juvenile court to become an unruly child, as defined in section 2151.022 of the Revised Code, or a delinquent child, as defined in section 2152.02 of the Revised Code;

(3) If the person is the parent, guardian, or custodian of a child who has the duties under Chapters 2152. and 2950. of the Revised Code to register, register a new residence address, and periodically verify a residence address, and, if applicable, to send a notice of intent to reside, and if the child is not emancipated, as defined in section 2919.121 of the Revised Code, fail to ensure that the child complies with those duties under Chapters 2152. and 2950. of the Revised Code.

(B) Whoever violates this section is guilty of contributing to the unruliness or delinquency of a child, a misdemeanor of the first degree. Each day of violation of this section is a separate offense.

R. C. 2921.331

§ 2921.331. Failure to comply with order or signal of police officer

(A) No person shall fail to comply with any lawful order or direction of any police officer invested with authority to direct, control, or regulate traffic.

(B) No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop.

(C) (1) Whoever violates this section is guilty of failure to comply with an order or signal of a police officer.

(2) A violation of division (A) of this section is a misdemeanor of the first degree.

(3) Except as provided in divisions (C) (4) and (5) of this section, a violation of division (B) of this section is a misdemeanor of the first degree.

(4) Except as provided in division (C) (5) of this section, a violation of division (B) of this section is a felony of the fourth degree if the jury or judge as trier of fact finds by proof beyond a reasonable doubt that, in committing the offense, the offender was fleeing immediately after the commission of a felony.

(5) (a) A violation of division (B) of this section is a felony of the third degree if the jury or judge as trier of fact finds any of the following by proof beyond a reasonable doubt:

(i) The operation of the motor vehicle by the offender was a proximate cause of serious physical harm to persons or property.

(ii) The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property.

(b) If a police officer pursues an offender who is violating division (B) of this section and division (C) (5) (a) of this section applies, the sentencing court, in determining the seriousness of an offender's conduct for purposes of sentencing the offender for a violation of division (B) of this section, shall consider, along with the factors set forth in sections 2929.12 and 2929.13 of the Revised Code that are required to be considered, all of the following:

(i) The duration of the pursuit;

(ii) The distance of the pursuit;

(iii) The rate of speed at which the offender operated the motor vehicle during the pursuit;

(iv) Whether the offender failed to stop for traffic lights or stop signs during the pursuit;

(v) The number of traffic lights or stop signs for which the offender failed to stop during the pursuit;

(vi) Whether the offender operated the motor vehicle during the pursuit without lighted lights during a time when lighted lights are required;

(vii) Whether the offender committed a moving violation during the pursuit;

(viii) The number of moving violations the offender committed during the pursuit;

(ix) Any other relevant factors indicating that the offender's conduct is more serious than conduct normally constituting the offense.

(D) If an offender is sentenced pursuant to division (C) (4) or (5) of this section for a violation of division (B) of this section, and if the offender is sentenced to a prison term for that violation, the offender shall serve the prison term consecutively to any other prison term or mandatory prison term imposed upon the offender.

(E) In addition to any other sanction imposed for a violation of this section, the court shall impose a class two suspension from the range specified in division (A)(2) of section 4510.02 of the Revised Code. If the offender previously has been found guilty of an offense under this section, the court shall impose a class one suspension as described in division (A)(1) of that section. The court shall not grant limited driving privileges to the offender. No judge shall suspend the first three years of suspension under a class two suspension of an offender's license,

permit, or privilege required by this division on any portion of the suspension under a class one suspension of an offender's license, permit, or privilege required by this division.

(F) As used in this section:

(1) "Moving violation" has the same meaning as in section 2743.70 of the Revised Code.

(2) "Police officer" has the same meaning as in section 4511.01 of the Revised Code.

R. C. 2923.02

§ 2923.02. Attempt

(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.

(B) It is no defense to a charge under this section that, in retrospect, commission of the offense that was the object of the attempt was either factually or legally impossible under the attendant circumstances, if that offense could have been committed had the attendant circumstances been as the actor believed them to be.

(C) No person who is convicted of committing a specific offense, of complicity in the commission of an offense, or of conspiracy to commit an offense shall be convicted of an attempt to commit the same offense in violation of this section.

(D) It is an affirmative defense to a charge under this section that the actor abandoned the actor's effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of the actor's criminal purpose.

(E) (1) Whoever violates this section is guilty of an attempt to commit an offense. An attempt to commit aggravated murder, murder, or an offense for which the maximum penalty is imprisonment for life is a felony of the first degree. An attempt to commit a drug abuse offense for which the penalty is determined by the amount or number of unit doses of the controlled substance involved in the drug abuse offense is an offense of the same degree as the drug abuse offense attempted would be if that drug abuse offense had been committed and had involved an amount or number of unit doses of the controlled substance that is within the next lower range of controlled substance amounts than was involved in the attempt. An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted. In the case of an attempt to commit an offense other than a violation of Chapter 3734. of the Revised Code that is not specifically classified, an attempt is a misdemeanor of the first degree if the offense attempted is a felony, and a misdemeanor of the fourth degree if the offense attempted is a

misdemeanor. In the case of an attempt to commit a violation of any provision of Chapter 3734. of the Revised Code, other than section 3734.18 of the Revised Code, that relates to hazardous wastes, an attempt is a felony punishable by a fine of not more than twenty-five thousand dollars or imprisonment for not more than eighteen months, or both. An attempt to commit a minor misdemeanor, or to engage in conspiracy, is not an offense under this section.

(2) If a person is convicted of or pleads guilty to attempted rape and also is convicted of or pleads guilty to a specification of the type described in section 2941.1418 [2941.14.18], 2941.1419 [2941.14.19], or 2941.1420 [2941.14.20] of the Revised Code, the offender shall be sentenced to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code.

(3) In addition to any other sanctions imposed pursuant to division (E)(1) of this section for an attempt to commit aggravated murder or murder in violation of division (A) of this section, if the offender used a motor vehicle as the means to attempt to commit the offense, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(F) As used in this section:

(1) "Drug abuse offense" has the same meaning as in section 2925.01 of the Revised Code.

(2) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

R. C. 2923.13

§ 2923.13. Having weapons while under disability

(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

(1) The person is a fugitive from justice.

(2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.

(3) The person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been an offense involving the illegal possession, use, sale, administration,

distribution, or trafficking in any drug of abuse.

(4) The person is drug dependent, in danger of drug dependence, or a chronic alcoholic.

(5) The person is under adjudication of mental incompetence, has been adjudicated as a mental defective, has been committed to a mental institution, has been found by a court to be a mentally ill person subject to hospitalization by court order, or is an involuntary patient other than one who is a patient only for purposes of observation. As used in this division, "mentally ill person subject to hospitalization by court order" and "patient" have the same meanings as in section 5122.01 of the Revised Code.

(B) Whoever violates this section is guilty of having weapons while under disability, a felony of the third degree.

R. C. 2925.03

§ 2925.03. Trafficking in drugs

(A) No person shall knowingly do any of the following:

(1) Sell or offer to sell a controlled substance;

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person.

(B) This section does not apply to any of the following:

(1) Manufacturers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct is in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code;

(2) If the offense involves an anabolic steroid, any person who is conducting or participating in a research project involving the use of an anabolic steroid if the project has been approved by the United States food and drug administration;

(3) Any person who sells, offers for sale, prescribes, dispenses, or administers for livestock or other nonhuman species an anabolic steroid that is expressly intended for administration through implants to livestock or other nonhuman species and approved for that purpose under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040 (1938), 21 U.S.C.A. 301, as amended, and is sold, offered for sale, prescribed, dispensed, or administered for that purpose in accordance with that act.

(C) Whoever violates division (A) of this section is guilty of one of the following:

(1) If the drug involved in the violation is any compound, mixture, preparation, or substance included in schedule I or schedule II, with the exception of marihuana, cocaine, L.S.D., heroin, and hashish, whoever violates division (A) of this section is guilty of aggravated trafficking in drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(1)(b), (c), (d), (e), or (f) of this section, aggravated trafficking in drugs is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(1)(c), (d), (e), or (f) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, aggravated trafficking in drugs is a felony of the third degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, aggravated trafficking in drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(e) If the amount of the drug involved equals or exceeds fifty times the bulk amount but is less than one hundred times the bulk amount and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds one hundred times the bulk amount and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the first degree, the offender is a major

drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(2) If the drug involved in the violation is any compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates division (A) of this section is guilty of trafficking in drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(2)(b), (c), (d), or (e) of this section, trafficking in drugs is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(2)(c), (d), or (e) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in drugs is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, trafficking in drugs is a felony of the fourth degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, trafficking in drugs is a felony of the third degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in drugs is a felony of the second degree, and there is a presumption for a prison term for the offense.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds fifty times the bulk amount, trafficking in drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved equals or exceeds fifty times the bulk amount and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(3) If the drug involved in the violation is marihuana or a compound, mixture, preparation, or substance containing marihuana other than hashish, whoever violates division (A) of this section is guilty of trafficking in marihuana. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(3)(b), (c), (d), (e), (f), or (g) of this section, trafficking in marihuana is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(3)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds two hundred grams but is less than one thousand grams, trafficking in marihuana is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one thousand grams but is less than five thousand grams, trafficking in marihuana is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the second degree, and there is a presumption that a prison term shall be imposed for the offense.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds five thousand grams but is less than twenty thousand grams, trafficking in marihuana is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the second degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds twenty thousand grams, trafficking in marihuana is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree. If the amount of the drug involved equals or exceeds twenty thousand grams and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the first degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(g) Except as otherwise provided in this division, if the offense involves a gift of twenty grams or less of marihuana, trafficking in marihuana is a minor misdemeanor upon a first offense and a misdemeanor of the third degree upon a subsequent offense. If the offense involves a gift of

twenty grams or less of marihuana and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a misdemeanor of the third degree.

(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of trafficking in cocaine. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(4)(b), (c), (d), (e), (f), or (g) of this section, trafficking in cocaine is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(4)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds five grams but is less than ten grams of cocaine that is not crack cocaine or equals or exceeds one gram but is less than five grams of crack cocaine, trafficking in cocaine is a felony of the fourth degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within one of those ranges and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds ten grams but is less than one hundred grams of cocaine that is not crack cocaine or equals or exceeds five grams but is less than ten grams of crack cocaine, trafficking in cocaine is a felony of the third degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree. If the amount of the drug involved is within one of those ranges and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one hundred grams but is less than five hundred grams of cocaine that is not crack cocaine or equals or exceeds ten grams but is less than twenty-five grams of crack cocaine, trafficking in cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved is within one of those ranges and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds five hundred grams but is less than one thousand grams of cocaine that is not crack cocaine or equals or exceeds twenty-five grams but is less than one hundred grams of crack cocaine and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(g) If the amount of the drug involved equals or exceeds one thousand grams of cocaine that is not crack cocaine or equals or exceeds one hundred grams of crack cocaine and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(5) If the drug involved in the violation is L.S.D. or a compound, mixture, preparation, or substance containing L.S.D., whoever violates division (A) of this section is guilty of trafficking in L.S.D. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(5)(b), (c), (d), (e), (f), or (g) of this section, trafficking in L.S.D. is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(5)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds ten unit doses but is less than fifty unit doses of L.S.D. in a solid form or equals or exceeds one gram but is less than five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in L.S.D. is a felony of the fourth degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds fifty unit doses but is less than two hundred fifty unit doses of L.S.D. in a solid form or equals or exceeds five grams but is less than twenty-five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in L.S.D. is a felony of the third degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree. If the amount of the drug involved is within that range and if the offense was

committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds two hundred fifty unit doses but is less than one thousand unit doses of L.S.D. in a solid form or equals or exceeds twenty-five grams but is less than one hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in L.S.D. is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds one thousand unit doses but is less than five thousand unit doses of L.S.D. in a solid form or equals or exceeds one hundred grams but is less than five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(g) If the amount of the drug involved equals or exceeds five thousand unit doses of L.S.D. in a solid form or equals or exceeds five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(6) If the drug involved in the violation is heroin or a compound, mixture, preparation, or substance containing heroin, whoever violates division (A) of this section is guilty of trafficking in heroin. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(6)(b), (c), (d), (e), (f), or (g) of this section, trafficking in heroin is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(6)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds ten unit doses but is less than fifty unit doses or equals or exceeds one gram but is less than five grams, trafficking in heroin is a felony of the fourth degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds fifty unit doses but is less than one hundred unit doses or equals or exceeds five grams but is less than ten grams, trafficking in heroin is a felony of the third degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the second degree, and there is a presumption for a prison term for the offense.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one hundred unit doses but is less than five hundred unit doses or equals or exceeds ten grams but is less than fifty grams, trafficking in heroin is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds five hundred unit doses but is less than two thousand five hundred unit doses or equals or exceeds fifty grams but is less than two hundred fifty grams and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(g) If the amount of the drug involved equals or exceeds two thousand five hundred unit doses or equals or exceeds two hundred fifty grams and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(7) If the drug involved in the violation is hashish or a compound, mixture, preparation, or substance containing hashish, whoever violates division (A) of this section is guilty of trafficking in hashish. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(7)(b), (c), (d), (e), or (f) of this section, trafficking in hashish is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(7)(c), (d), (e), or (f) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds ten grams but is less than fifty grams of hashish in a solid form or equals or exceeds two grams but is less than ten grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in hashish is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds fifty grams but is less than two hundred fifty grams of hashish in a solid form or equals or exceeds ten grams but is less than fifty grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in hashish is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the second degree, and there is a presumption that a prison term shall be imposed for the offense.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds two hundred fifty grams but is less than one thousand grams of hashish in a solid form or equals or exceeds fifty grams but is less than two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in hashish is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the second degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one thousand grams of hashish in a solid form or equals or exceeds two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in hashish is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree. If the amount of the drug

involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the first degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(D) In addition to any prison term authorized or required by division (C) of this section and sections 2929.13 and 2929.14 of the Revised Code, and in addition to any other sanction imposed for the offense under this section or sections 2929.11 to 2929.18 of the Revised Code, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section shall do all of the following that are applicable regarding the offender:

(1) If the violation of division (A) of this section is a felony of the first, second, or third degree, the court shall impose upon the offender the mandatory fine specified for the offense under division (B)(1) of section 2929.18 of the Revised Code unless, as specified in that division, the court determines that the offender is indigent. Except as otherwise provided in division (H)(1) of this section, a mandatory fine or any other fine imposed for a violation of this section is subject to division (F) of this section. If a person is charged with a violation of this section that is a felony of the first, second, or third degree, posts bail, and forfeits the bail, the clerk of the court shall pay the forfeited bail pursuant to divisions (D)(1) and (F) of this section, as if the forfeited bail was a fine imposed for a violation of this section. If any amount of the forfeited bail remains after that payment and if a fine is imposed under division (H)(1) of this section, the clerk of the court shall pay the remaining amount of the forfeited bail pursuant to divisions (H)(2) and (3) of this section, as if that remaining amount was a fine imposed under division (H)(1) of this section.

(2) The court shall suspend the driver's or commercial driver's license or permit of the offender in accordance with division (G) of this section.

(3) If the offender is a professionally licensed person, the court immediately shall comply with section 2925.38 of the Revised Code.

(E) When a person is charged with the sale of or offer to sell a bulk amount or a multiple of a bulk amount of a controlled substance, the jury, or the court trying the accused, shall determine the amount of the controlled substance involved at the time of the offense and, if a guilty verdict is returned, shall return the findings as part of the verdict. In any such case, it is unnecessary to find and return the exact amount of the controlled substance involved, and it is sufficient if the finding and return is to the effect that the amount of the controlled substance involved is the requisite amount, or that the amount of the controlled substance involved is less than the requisite amount.

(F) (1) Notwithstanding any contrary provision of section 3719.21 of the Revised Code and except as provided in division (H) of this section, the clerk of the court shall pay any mandatory fine imposed pursuant to division (D)(1) of this section and any fine other than a mandatory fine that is imposed for a violation of this section pursuant to division (A) or (B)(5) of section 2929.18 of the Revised Code to the county, township, municipal corporation, park district, as

created pursuant to section 511.18 or 1545.04 of the Revised Code, or state law enforcement agencies in this state that primarily were responsible for or involved in making the arrest of, and in prosecuting, the offender. However, the clerk shall not pay a mandatory fine so imposed to a law enforcement agency unless the agency has adopted a written internal control policy under division (F)(2) of this section that addresses the use of the fine moneys that it receives. Each agency shall use the mandatory fines so paid to subsidize the agency's law enforcement efforts that pertain to drug offenses, in accordance with the written internal control policy adopted by the recipient agency under division (F)(2) of this section.

(2) (a) Prior to receiving any fine moneys under division (F)(1) of this section or division (B) of section 2925.42 of the Revised Code, a law enforcement agency shall adopt a written internal control policy that addresses the agency's use and disposition of all fine moneys so received and that provides for the keeping of detailed financial records of the receipts of those fine moneys, the general types of expenditures made out of those fine moneys, and the specific amount of each general type of expenditure. The policy shall not provide for or permit the identification of any specific expenditure that is made in an ongoing investigation. All financial records of the receipts of those fine moneys, the general types of expenditures made out of those fine moneys, and the specific amount of each general type of expenditure by an agency are public records open for inspection under section 149.43 of the Revised Code. Additionally, a written internal control policy adopted under this division is such a public record, and the agency that adopted it shall comply with it.

(b) Each law enforcement agency that receives in any calendar year any fine moneys under division (F)(1) of this section or division (B) of section 2925.42 of the Revised Code shall prepare a report covering the calendar year that cumulates all of the information contained in all of the public financial records kept by the agency pursuant to division (F)(2)(a) of this section for that calendar year, and shall send a copy of the cumulative report, no later than the first day of March in the calendar year following the calendar year covered by the report, to the attorney general. Each report received by the attorney general is a public record open for inspection under section 149.43 of the Revised Code. Not later than the fifteenth day of April in the calendar year in which the reports are received, the attorney general shall send to the president of the senate and the speaker of the house of representatives a written notification that does all of the following:

(i) Indicates that the attorney general has received from law enforcement agencies reports of the type described in this division that cover the previous calendar year and indicates that the reports were received under this division;

(ii) Indicates that the reports are open for inspection under section 149.43 of the Revised Code;

(iii) Indicates that the attorney general will provide a copy of any or all of the reports to the president of the senate or the speaker of the house of representatives upon request.

(3) As used in division (F) of this section:

(a) "Law enforcement agencies" includes, but is not limited to, the state board of pharmacy and the office of a prosecutor.

(b) "Prosecutor" has the same meaning as in section 2935.01 of the Revised Code.

(G) When required under division (D)(2) of this section or any other provision of this chapter, the court shall suspend for not less than six months or more than five years the driver's or commercial driver's license or permit of any person who is convicted of or pleads guilty to any violation of this section or any other specified provision of this chapter. If an offender's driver's or commercial driver's license or permit is suspended pursuant to this division, the offender, at any time after the expiration of two years from the day on which the offender's sentence was imposed or from the day on which the offender finally was released from a prison term under the sentence, whichever is later, may file a motion with the sentencing court requesting termination of the suspension; upon the filing of such a motion and the court's finding of good cause for the termination, the court may terminate the suspension.

(H) (1) In addition to any prison term authorized or required by division (C) of this section and sections 2929.13 and 2929.14 of the Revised Code, in addition to any other penalty or sanction imposed for the offense under this section or sections 2929.11 to 2929.18 of the Revised Code, and in addition to the forfeiture of property in connection with the offense as prescribed in Chapter 2981. of the Revised Code, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section may impose upon the offender an additional fine specified for the offense in division (B)(4) of section 2929.18 of the Revised Code. A fine imposed under division (H)(1) of this section is not subject to division (F) of this section and shall be used solely for the support of one or more eligible alcohol and drug addiction programs in accordance with divisions (H)(2) and (3) of this section.

(2) The court that imposes a fine under division (H)(1) of this section shall specify in the judgment that imposes the fine one or more eligible alcohol and drug addiction programs for the support of which the fine money is to be used. No alcohol and drug addiction program shall receive or use money paid or collected in satisfaction of a fine imposed under division (H)(1) of this section unless the program is specified in the judgment that imposes the fine. No alcohol and drug addiction program shall be specified in the judgment unless the program is an eligible alcohol and drug addiction program and, except as otherwise provided in division (H)(2) of this section, unless the program is located in the county in which the court that imposes the fine is located or in a county that is immediately contiguous to the county in which that court is located. If no eligible alcohol and drug addiction program is located in any of those counties, the judgment may specify an eligible alcohol and drug addiction program that is located anywhere within this state.

(3) Notwithstanding any contrary provision of section 3719.21 of the Revised Code, the clerk of the court shall pay any fine imposed under division (H)(1) of this section to the eligible alcohol

and drug addiction program specified pursuant to division (H)(2) of this section in the judgment. The eligible alcohol and drug addiction program that receives the fine moneys shall use the moneys only for the alcohol and drug addiction services identified in the application for certification under section 3793.06 of the Revised Code or in the application for a license under section 3793.11 of the Revised Code filed with the department of alcohol and drug addiction services by the alcohol and drug addiction program specified in the judgment.

(4) Each alcohol and drug addiction program that receives in a calendar year any fine moneys under division (H)(3) of this section shall file an annual report covering that calendar year with the court of common pleas and the board of county commissioners of the county in which the program is located, with the court of common pleas and the board of county commissioners of each county from which the program received the moneys if that county is different from the county in which the program is located, and with the attorney general. The alcohol and drug addiction program shall file the report no later than the first day of March in the calendar year following the calendar year in which the program received the fine moneys. The report shall include statistics on the number of persons served by the alcohol and drug addiction program, identify the types of alcohol and drug addiction services provided to those persons, and include a specific accounting of the purposes for which the fine moneys received were used. No information contained in the report shall identify, or enable a person to determine the identity of, any person served by the alcohol and drug addiction program. Each report received by a court of common pleas, a board of county commissioners, or the attorney general is a public record open for inspection under section 149.43 of the Revised Code.

(5) As used in divisions (H)(1) to (5) of this section:

(a) "Alcohol and drug addiction program" and "alcohol and drug addiction services" have the same meanings as in section 3793.01 of the Revised Code.

(b) "Eligible alcohol and drug addiction program" means an alcohol and drug addiction program that is certified under section 3793.06 of the Revised Code or licensed under section 3793.11 of the Revised Code by the department of alcohol and drug addiction services.

(I) As used in this section, "drug" includes any substance that is represented to be a drug.

R. C. 2941.29

§ 2941.29. Time for objecting to defect in indictment

No indictment or information shall be quashed, set aside, or dismissed, or motion to quash be sustained, or any motion for delay of sentence for the purpose of review be granted, nor shall any

conviction be set aside or reversed on account of any defect in form or substance of the indictment or information, unless the objection to such indictment or information, specifically stating the defect claimed, is made prior to the commencement of the trial, or at such time thereafter as the court permits.