

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	Case No. 09-0311
)	C.A. Case No. CL-07-1224
Plaintiff-Appellee,)	C.P. Case No. CR06-3208
-vs-)	APPEAL FROM THE LUCAS
GREGORY HORNER,)	COUNTY COURT OF APPEALS,
)	SIXTH APPELLATE DISTRICT
Defendant-Appellant.)	

REPLY MERIT BRIEF OF DEFENDANT-APPELLANT, GREGORY HORNER

JULIA R. BATES, #0013426, Prosecuting Attorney
 Lucas County, Ohio
DAVID F. COOPER #0006176
 Assistant Prosecuting Attorney
 711 Adams Street
 Toledo, OH 43624
 Phone No.: 419-213-2061
 Fax No.: 419-213-2011
 E-Mail: dcooper@co.lucas.oh.us

JOHN F. POTTS #0033846
 405 Madison Ave., Ste. 1010
 Toledo, OH 43604
 Phone No.: 419-255-2800
 Fax No.: 419-255-1105
 E-Mail: jfplaw@ameritech.net

RON O'BRIEN #0017245
 Franklin County Prosecuting Attorney
STEVEN L. TAYLOR #0043876
 Assistant Prosecuting Attorney
 373 S. High St.-13th Floor
 Columbus, OH 43215
 Phone No.: 614-462-3555
 Fax No.: 614-462-6103
 E-Mail: sltaylor@franklincountyohio.gov
 Counsel for Amicus Curiae Franklin
 County Prosecutor Ron O'Brien

TIMOTHY YOUNG #0059200
 Ohio Public Defender
SPENCER CAHOON #0082517
 Assistant State Public Defender
 250 E. Broad St., Ste. 1400
 Columbus, OH 43215
 Phone No.: 614-466-5394
 Fax No.: 614-753-5167
 E-Mail: spencer.cahoon@
 opd.ohio.gov
 Counsel for Amicus Curiae
 Ohio Public Defender

FILED
 MAR 01 2010
 CLERK OF COURT
 SUPREME COURT OF OHIO

On Behalf of Plaintiff-Appellee

On Behalf of Defendant-Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii, iii
STATEMENT OF THE FACTS	1
<u>PROPOSITION OF LAW</u> : The culpable mental state for the offense of Aggravated Robbery in violation of R.C. 2911.01 (A)(3) is recklessness, which constitutes an essential element of that offense	1
CONCLUSION	12
CERTIFICATION	12

TABLE OF AUTHORITIES

CASES:

<u>Brennaman v.s R.M.I. Co.</u> , 70 O.St.3d 460, 1994-Ohio-322	8
<u>State ex rel. Leis vs. Gusweiler</u> , 65 O.St.3d 65 (1981)	7
<u>State ex rel. Stern vs. Mascio</u> , 75 O.St.3d 422, 1996-Ohio-93	7
<u>State vs. Adams</u> , 53 O.St.3d 223 (1975)	8
<u>State vs. Bird</u> , 81 O.St.3d 582, 1998-Ohio-606	7
<u>State vs. Clay</u> , 120 O.St.3d 528, 2008-Ohio-6325	4, 5, 6
<u>State vs. Colon</u> , 118 O.St.3d 26, 2008-Ohio-1624	5, 8, 9, 10, 11, 12
<u>State vs. Colon</u> , 119 O.St.3d 204, 2008-Ohio-3749	9
<u>State vs. Collins</u> , 59 O.St.3d 524, 2000-Ohio-231	4
<u>State vs. Corsillo</u> , 114 O.St.3d 295, 2007-Ohio-423	8
<u>State vs. Fairbanks</u> , 117 O.St.3d 543, 2008-Ohio-1470	1, 4, 5
<u>State vs. Gingell</u> , 7 O.App.3d 364 (1986)	8
<u>State vs. Jordan</u> , 89 O.St.3d 488, 2000-Ohio-225	5, 6
<u>State vs. Lozier</u> , 101 O.St.3d 161, 2004-Ohio-732	2, 5, 6
<u>State vs. Maxwell</u> , 95 O.St.3d 254, 2002-Ohio-1470	1, 3, 5
<u>State vs. Roe</u> , Tenth District Case No. 86-AP-59 (Aug. 25, 1987), 1991 WL 16174	8
<u>State vs. Schlosser</u> , 79 O.St.3d 329, 1998-Ohio-706	4
<u>State vs. Thorpe</u> , 9 O.App.3d 1 (1983)	7
<u>State vs. Wac</u> , 68 O.St.2d 84 (1981)	1, 3
<u>State vs. Wharf</u> , 86 O.St.3d 375, 1999-Ohio-112	5, 6, 12
<u>Westfield Insurance Company vs. Galatis</u> , 100 O.St.3d 216, 2003-Ohio-5849	9

STATUTES:

R.C. 2901.04(A)	5
R.C. 2901.21(A)(2)	6
R.C. 2901.21(B)	1, 2, 3, 4, 5, 6
R.C. 2911.01 (A)(1)	12
R.C. 2911.01 (A)(2)	12
R.C. 2911.02(A)(3)	1, 11, 12

COURT RULES:

Crim.R. 11(C)	7
Crim.R. 11(B)(1)	7
Crim.R. 11(B)(2)	1, 7
Crim.R. 12(C)(2)	10
Crim R. 51	10

CONSTITUTIONAL PROVISIONS

Article I, Section 10 of the Ohio Constitution	8
--	---

MISCELLANEOUS

4 <u>Ohio Jury Instructions</u> Section 511.01(A)(3)	11
--	----

STATEMENT OF THE FACTS

Defendant was convicted upon plea of no contest. A no contest plea "is not an admission of Defendant's guilt, but is an admission of the truth of the facts alleged in the indictment..." Crim.R.11(B)(2). Accordingly, Defendant's plea of no contest did not operate to adjudicate any facts other than those appearing in the counts of the Indictment to which his plea was entered.

This being so, the "facts" set forth in the Merit Brief of Plaintiff-Appellee, State of Ohio, are simply a summary of the State's version of events as described in police reports, and do not constitute facts adjudicated or proven in the proceedings below.

Moreover, whatever the State's factual summary may have been, the statements made by the prosecution during the plea colloquy have no bearing upon the questions of law presented for review in the appeal, the proper determination of which is not dependent upon a consideration of the conduct which is alleged to constitute the offenses of conviction.

PROPOSITION OF LAW: The culpable mental state for the offense of Aggravated Robbery in violation of R.C. 2911.01 (A)(3) is recklessness, which constitutes an essential element of that offense

In its FIRST PROPOSITION OF LAW, Plaintiff-Appellee, State of Ohio (hereinafter referred to as "Appellee" or the "State") contends that R.C. 2901.21(B) has no application if a section of the Revised Code specifies a culpable mental state in any of its provisions, citing State vs. Wac, 68 O.St.2d 84 (1981); State vs. Maxwell, 95 O.St.3d 254, 2002-Ohio-1470; and State vs. Fairbanks, 117 O.St.3d 543, 2008-Ohio-1470. In this regard, the State notes that a "Section" of the Revised Code is often comprised of different "divisions" or "subsections" (as such "divisions" were referred to in State vs. Wac, *supra*, and State vs.

Lozier, 101 O.St.3d 161, 2004-Ohio-732 at ¶40). The State argues that even though a particular division of a section defining a criminal offense may not specify a culpable mental state, R.C. 2901.21(B) does not apply if any other division of the section specifies a culpable mental state.

The State's argument elevates form over substance. Some sections of the Revised Code which define an offense are not divided into divisions. Other sections define the elements of a single offense in different divisions of the same section. Some sections set forth the elements of a single offense in a single division, and other sections that are comprised of different divisions may set forth the elements of different offenses in different divisions or sometimes set forth different or alternative elements for an offense in disjunctive provisions of the same division. But, whether a particular section includes multiple divisions, the relevant consideration is the defining of a particular criminal offense. There is no justification in law or logic to hold that the presence of a specified degree of culpability in one division of a Section *ipso facto* renders R.C. 2901.21(B) wholly inapplicable to a determination of whether an offense defined in a different division of that Section is or is not a strict liability offense

The prior decisions of this court have applied R.C. 2901.21(B) with reference to the presence of an offense of a specified degree of culpability in the provisions of a section that defined the elements of a particular offense, without regard to whether those definitional provisions are set forth in the same or different divisions (or subsections) of that particular section. In this regard, the controlling consideration has been the definition of the elements of a particular offense, not whether the section that includes that definition is parsed into multiple divisions. Such an approach is consistent with the language of R.C. 2901.21(B):

When a 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 supplied]

This is not to say that the specification of a degree of culpability in one part of a statute is irrelevant to a consideration of how Section 2901.21(B) should be applied in interpreting that statute. See, State vs. Maxwell, 95 O.St.3d at 257, 2002-Ohio-2121 at 24-

30:

In *State v. Wac* (1981), 68 Ohio St.2d 84, 22 O.O.3d 299, 428 N.E.2d 428, we found plain indications that the General Assembly meant to impose strict criminal liability. In that case, the appellant argued that recklessness was an element of bookmaking because R.C. 2915.02(A)(1) did not specify a culpable mental state for bookmaking. It provided:

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

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

We rejected appellant's position. Noting that "the General Assembly included the culpable mental state of 'knowingly' as an element of *facilitating* bookmaking," we held that because "there is no such requirement in the same subsection for bookmaking *per se*," the "exclusion 'plainly indicates a purpose to impose strict criminal liability * * *,' R.C. 2901.21(B)." (Emphasis sic.) *State v. Wac*, 68 Ohio St.2d at 86, 22 O.O.3d 299, 428 N.E.2d 428.

We recognized that the clause "or knowingly engage in conduct that facilitates bookmaking" was a discrete clause and that the knowledge required by that clause could not be inserted into the previous clause, "engage in bookmaking." R.C. 2901.21(B)

Similarly, in R.C. 2907.321(A), knowledge is a requirement only for the discrete clause within which it resides: "with knowledge of the character of the material or performance involved." Thus, the state must prove that appellee knew the character of the material at issue. The state is not required to prove that appellee knew that in downloading files via American Online he was also transmitting those files from Virginia into Ohio.

There are other indications outside the statute that plainly indicate a purpose to impose strict liability. The decision in *Wac* demonstrates that a crime may have different degrees of mental culpability for different elements. The General Assembly has assumed a strong stance against sex-related acts involving minors, as evidenced by the numerous statutes in the Ohio Revised Code providing for criminal liability for those acts. Therefore, it is reasonable to presume that the inclusion of a knowledge requirement regarding the character of the material and the absence of a mental element elsewhere in R.C. 2901.321 reflect legislative intent to impose strict liability for the act of bringing child pornography into the state of Ohio.

Thus, it is each discrete definition of a particular offense to which R.C. 2901.21(B) applies. The existence of different divisions within a statute that defines an offense (or offenses) may be relevant to how R.C. 2901.21(B) is applied. See, e.g., *State vs. Fairbanks*, 117 O.St.3d 543 at 547, 2008-Ohio-147 at ¶ 4, but is not determinative of whether R.C. 2901.21(B) is applicable. R.C. 2901.21(B) necessarily requires a determination of whether or not there was a plain indication of legislative purpose to impose strict criminal liability, *State vs. Collins*, 59 O.St.3d 524 at 530, 2000-Ohio-231; *State vs. Clay*, 120 O.St.3d 528 at 331, 2008-Ohio- 6325 at ¶16. *State vs. Schlosser*, 79 O.St.3d 329 at 331-332, 1998-Ohio-706. It is of no legal significance whether the section defining the offense in question is subdivided into divisions.

While the existence of multiple divisions within a section (and the particular language set forth in those provisions) may be relevant to a determination of legislative purpose, the existence of multiple divisions within a section does not exclude R.C. 2901.21(B) from operation just because there may be a reference to a culpable mental state in one of those divisions. Such a formalistic and mechanical rule would be inconsistent with the language of R.C. 2901.21(B) which directs courts to focus on the discrete provisions of a section "defining an offense". The inquiry to be made must necessarily be focused upon the elements of the defined offense.

Different elements of a particular offense may have a different culpable mental state. State vs. Jordan, 89 O.St.3d 488 at 493, 2000-Ohio-225; State vs. Fairbanks, *supra*. There are situations in which a particular division of a section defining an offense may specify a degree of culpability while another division (or provision with the same division) does not. See, e.g., State vs. Lozier, 101 O.St.3d 161, 2004-Ohio-732 and State vs. Clay, 120 O.St.3d 528, 2008-Ohio-6325. Confronted with such statutes, under R.C.2901.21(B) it is incumbent upon a Court to determine whether there is a plain indication of legislative purpose to impose strict liability with respect to the particular element of the offense in question. State vs. Jordan; State vs. Lozier; State vs. Clay, *supra*. In making such a determination, statutes defining criminal offenses must be strictly construed against the State and liberally construed in the favor of the accused. R.C. 2901.04(A); State vs. Jordan, *supra*.

Different offenses defined in different divisions of a section that do not specify any degree of culpability may be properly found to have different culpable mental states. Compare, State vs. Colon, 118 O.St.3d 26, 2008-Ohio-1624 ("Colon I") with State vs.

Wharf, 86 O.St.3d 375, 1999-Ohio-112. Likewise, a section defining an offense may specify a degree of culpability for certain elements of that offense in one division, but fail to specify a degree of culpability for another element that is defined in another division. Under such circumstances, R.C. 2901.21(B) requires a court to make an element-by-element determination as to whether the unspecified degree of culpability is recklessness or whether the legislature plainly indicated a purpose to impose strict liability. State vs. Lozier and State vs. Clay, *supra*. See also, State vs. Jordan, *supra*.

The existence of a specified degree of culpability in one division of a section does not render R.C.2901.21 (B) inapplicable, as the State contends. "The mental state of the offender is a part of every criminal offense in Ohio except for those plainly imposing strict liability. R.C. 2901.21 (A)(2)." State vs. Lozier, 101 O.St.3d at 163, 2004-Ohio-732 at ¶18. Since different elements of the same offense may have different degrees of culpability, R.C. 2901.21 (B) applies whenever a section defining a criminal offense does not specify a degree of culpability for a particular element of that offense, and this remains so regardless of whether a degree of culpability is specified for some other element of that offense in another division of that section. To hold otherwise would have the effect of abrogating R.C. 2901.21(B), which would constitute an infringement upon legislative authority.

In its SECOND PROPOSITION OF LAW, the State contends, *inter alia*, that a plain error standard of review is applicable in this case. Defendant contends that the question of whether Counts One and Two of the Indictment were sufficient to state an offense was directly presented to the trial court for determination when Defendant entered his plea of No Contest. Once the trial court made a finding of guilty, under Crim.R.51, no further

action was required to preserve this question for appellate review. Therefore, this is not a case where review under the plain error standard is appropriate.

Assuming the plea is voluntary and the plea colloquy complies with Crim.R.11(C), the sole criteria for making a finding of guilty or a no contest plea in a felony case is whether the indictment "contains sufficient allegations to state a felony offense." State vs. Bird, 81 O.St.3d 582, 1998-Ohio-606, *Syllabus*. See also, State ex rel. Stern vs. Mascio, 75 O.St.3d 422 at 423-424, 1996-Ohio-93:

While a plea of guilty is a complete admission of the defendant's guilt, a plea of no contest is not an admission of guilty, but is an admission of the truth of the facts alleged in the indictment, information, or complaint. Crim.R.11(B)(1) and (2). The trial court thus possesses discretion to determine whether the facts alleged in the indictment, information, or complaint are sufficient to justify conviction of the offense charged. State vs. Thorpe, (1983), 9 Ohio App.3d 1, 3, 9 OBR 1, 3 457 N.E.3d 912, 915 (Markus, J., concurring). If the court determines that the alleged facts are insufficient to state the charged offense, it may find the defendant guilty of a lesser included offense, State ex rel. Leis vs. Gusweiler, (1981), 65 Ohio St.3d 60, 61, 19 O.O.3d 257, 418 N.E.2d 397, 398, or dismiss the charge.

[footnote omitted]

When Defendant's plea of No Contest was entered, the obligation of the trial court was to determine whether each respective count of the Indictment as to which the No Contest plea had been entered contained sufficient allegations to state an offense. As a matter of law, Counts One and Two do not. Accordingly, it constituted error for the trial court to have entered a finding of guilty as to those counts. Instead, the proper judicial response should have been to dismiss those counts. State ex rel. Stern vs. Mascio, supra.

Thus, Defendant's plea of No Contest squarely presented the question of whether the allegations of Counts One and Two of the Indictment were sufficient to state an

offense. Pursuant to Crim.R. 51, no further objection or exception was necessary. The question presented was adequately preserved for appellate review and is a question of law. Accordingly, the applicable standard of review is *de novo* State vs. Corsillo, 114 O.St.3d 295 at 297, 2007-Ohio-423 at ¶8; Brennaman vs. R.M.I. Co., 70 O.St.3d 460, 1994-Ohio-322.

In determining whether a particular count of a multi-count indictment states an offense, the inquiry is whether all elements of the offense sought to be charged are alleged in that count, State vs. Colon, 118 O.St.3d at 32, 2008-Ohio-1624 at ¶28. In this regard, each count of an Indictment is independent of every other count, as if every count was an individual indictment. State vs. Adams, 53 O.St.3d 223 (1975), *Syllabus* ¶2, *vacated on other grounds*, 439 U.S. 811. Accordingly, unless the allegations of one count are expressly incorporated by reference into another count, the insufficiency of the allegations set forth in a particular count to state an offense cannot be cured by looking to allegations set forth in a different count. See, State vs. Roe, Tenth District Case No. 86-AP-59 (August 25, 1987) 1987 WL 16174 at *24. Neither can the availability of a Bill of Particulars cure defects in an indictment. State vs. Gingell, 7 O.App.3d 364 at 367 (1986).

For an indictment to contain allegations sufficient to state a felony offense the indictment must "include all the essential elements of the offense charged." State vs. Colon, *supra*. This requirement is mandated by Article I, Section 10 of the Ohio Constitution. *Id.*, 118 O.St.3d at 31, 2008-Ohio-1624 at ¶24. This constitutional requirement that an indictment actually set forth the essential elements of the offense against which the accused is being required to defend does not place any unreasonable burden on the prosecution. Indeed, such a requirement has the mutually salutatory effect

of ensuring that the prosecution specifies the elements it is required to prove while providing the accused with adequate notice of the nature of the charge against which he is being required to defend. This by no means is such an impractical or unworkable procedure as the State appears to suggest.

While the structural error analysis set forth in Colon I may have engendered some uncertainty, such concerns were ameliorated by this Court's decision on reconsideration State vs. Colon, 119 O.St.3d 204, 2008-Ohio-3749 ("Colon II"). Be that as it may, the substantive holding in Colon I that Article I, Section 10 of the Ohio Constitution requires that an Indictment contain all essential elements of the offense charged is by no means impractical, unworkable or prone to create uncertainty.

There is no reason to overrule Colon I. It cannot be said that the substantive holding of Colon I was wrongfully decided or that any changed circumstance makes continued adherence to that decision unjustified. Nor can it be said that decision defies practical workability. To abandon a decision that requires adherence to a fundamental constitutional guarantee not only has potential to not only create undue hardship for those accused of a felony offense, but also carries the potential for deleterious consequences to society as a whole. Thus, the criteria for overruling a decision set forth in Westfield Insurance Company vs. Galatis, 100 O.St.3d 216 at 228, 2003-Ohio-5849 at ¶48 are not met with respect to the substantive holding of Colon I.

In its Merit Brief, the State discusses the matter of structural error at great length. However, Defendant does not contend that the case *sub judice* involves structural error. It is Defendant's position that this appeal presents a question of law that was properly preserved for appellate review and with respect to which a *de novo* standard of review is

applicable. Upon tender of Defendant's plea of No Contest to Counts One and Two of the Indictment, the trial court was required to determine whether Counts One and Two contained allegations sufficient to state a felony offense. The trial court should properly have dismissed these counts because they failed to state an offense due to omission of any allegations setting forth the *mens rea* element of recklessness. This is not a case involving structural error, nor is this a case where a plain error standard of review should be applied. The question of whether Count One and Two each contained allegations sufficient to state an offense was squarely presented to the trial court when Defendant entered his plea of No Contest, and the trial court erred in not dismissing those counts for insufficiency.

Once the trial court made a finding of guilty, under Crim.R. 51 no further steps had to be taken to preserve the matter for appellate review. Nor was a challenge to the sufficiency of those counts required to have been made by pretrial motion because, pursuant to Crim.R.12(C)(2), the failure of an Indictment to state an offense "shall be noticed by the court at any time during the pendency of the proceedings." The error complained of has been properly preserved for appellate review, and not forfeited. Therefore, the Court of Appeals erred when it applied a plain error standard of review in the proceedings below.

In its Merit Brief at 20, the State contends that "Ensuring an indictment does not omit an element of a crime is difficult in instances, such as Colon I and in this case, where a mens rea element is judicially determined *after* the Indictment is drawn" [emphasis in original]. Be that as it may, it is no less difficult for the accused to defend himself against an Indictment that does not provide fair notice of all the elements of the offense that is

sought to be charged. The practical effect of Colon I is to have the State figure out what it has to prove in order to convict the accused of a particular crime so that the accused can be provided with reasonable and adequate notice of the charge against which he is being required to defend. Such a requirement is not one that is fraught with extreme difficulty. That the prosecution may occasionally find it inconvenient to bring a prosecution in a manner that comports with the requirements of our constitution is not a compelling justification for abandoning fundamental constitutional rights. Indeed, the State is in a better position to identify the elements of an offense it is required to prove beyond a reasonable doubt than the accused would be in having to guess about what elements comprise the offense against which he is being required to defend. In this regard, the substantive holding in Colon I is legally, logically and constitutionally sound, and there is no justification for overruling the substantive decision in that case.

It follows from the decision in Colon I that the Aggravated Robbery offense defined in R.C. 2911.01(A)(3) has a *mens rea* of recklessness. In Counts One and Two of the Indictment in the instant case, Defendant was charged with Aggravated Robbery in violation of R.C. 2911.01(A)(3). Because Counts One and Two omit to allege the essential element of recklessness, those counts are insufficient to state an offense.

The validity of Defendant's contention in this regard finds support in the Ohio Jury Instruction Committee's May 3, 2000 revision of 4 Ohio Jury Instructions Section 511.01(A)(3) to include recklessness as an essential element of the offense defined in R.C. 2911.01(A)(3). Also, as noted in the BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER, at Footnotes 10 and 11, the Courts of Appeals of eight (8) Ohio Appellate districts have found that the culpable mental state of recklessness is an element

of Aggravated Robbery under R.C. 2911.01(A)(3).

The decision in Colon I establishes that the culpable mental state of recklessness is an essential element of Robbery under R.C. 2911.02(A)(2). The language of that provision is substantially similar to the language of R.C. 2911.01(A)(3). Contrary to the exhortations of the State, in light of the holding in Colon I, there is no reasoned basis to conclude recklessness is not also an essential element of Aggravated Robbery under 2911.01(A)(3).

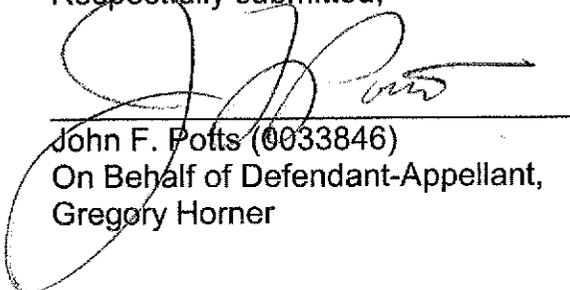
That analogous provisions of the Robbery statute, R.C.2911.02, and the Aggravated Robbery statute, R.C. 2911.01, should be interpreted in a manner consistent with one another is illustrated by the recent decision of this Court in State vs. Lester, 129 O.St.3d 396, 2009-Ohio-4225. In Lester, it was held that the offense of “deadly weapon” Aggravated Robbery, the offense defined under R.C. 2901.01 (A)(1), is a strict liability offense. Likewise, this Court had held the offense of “deadly weapon” Robbery, defined under R.C. 2901.02(A)(1), to be a strict liability offense in State vs. Wharf, supra.

In Colon I, this Court held that the offense of “physical harm” Robbery, defined under R.C. 2911.02(A)(2), has a culpable mental state of recklessness as an essential element. It is respectfully submitted that the culpable mental state of recklessness is likewise an essential element of the offense of “serious physical harm” Aggravated Robbery, defined under R.C.2901.01(A)(3), and there is no basis in law or logic to hold otherwise.

CONCLUSION

For these reasons and the reasons set forth in the Merit Brief of Defendant-Appellant, the Decision and Judgment Entry of the Sixth District Court of Appeals affirming Defendant's convictions on Counts One and Two of the Indictment in this case must be reversed, and this case should be remanded for dismissal of said counts.

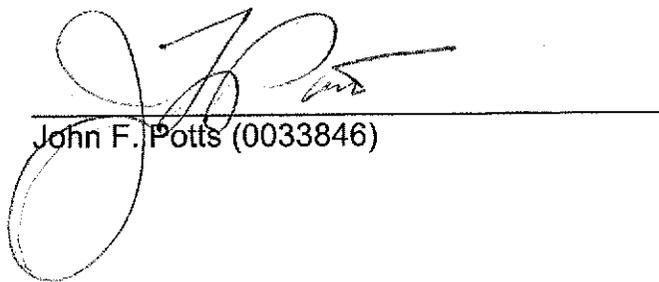
Respectfully submitted,



John F. Potts (0033846)
On Behalf of Defendant-Appellant,
Gregory Horner

CERTIFICATION

This is to certify that a copy of the foregoing was served by ordinary U.S. mail this 27th day of February, 2010, upon: David F. Cooper, Assistant Lucas County Prosecutor, 700 Adams Street, 2nd Floor, Toledo, OH 43604; Steven L. Taylor, Franklin County Prosecuting Attorney, 373 S. High Street, 13th Floor, Columbus, Ohio 43215; and Spencer Cahoon, Assistant State Public Defender, 250 E. Broad Street, Suite 1400, Columbus, OH 43215.



John F. Potts (0033846)