ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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

JULIA R. BATES (0013426)
Lucas County Prosecutor
DAVID F. COOPER (0006176)**
Assistant Lucas County Prosecutor
700 Adams St.
Toledo, Ohio 43604
(419) 213-4700
(419) 213-4595 – Fax

COUNSEL FOR APPELLEE, STATE OF OHIO

RON O'BRIEN (0017245)
Franklin County Prosecuting Attorney
STEVEN L. TAYLOR (0043876)**
Assistant Prosecuting Attorney
373 South High Street – 13th Floor
Columbus, Ohio 43215
614-462-3555
614-462-6103 - Fax
sltaylor@franklincountyohio.gov

COUNSEL FOR AMICUS CURIAE, FRANKLIN COUNTY PROSECUTOR

JOHN F. POTTS (0033846)

405 Madison Ave, Ste. #1010
Toledo, Ohio 43604
(419) 255-2800
(419) 255-1105 – Fax

COUNSEL FOR APPELLANT, GREGORY HORNER

SPENCER CAHOON (0082517)
Assistant State Public Defender

OFFICE OF THE OHIO PUBLIC DEFENDER
250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
spencer.cahoon@opd.ohio.gov

COUNSEL FOR AMICUS CURIAE, OHIO PUBLIC DEFENDER

**** denotes counsel of record**

FILED
MAR 01 2010
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES ii

Responsive Proposition of Law No. 1: The term "section" as used in R.C. 2901.21(B) refers to offenses, instead of an entire numerical section, because of the context of its use. Consequently, an offense may still have the mens rea of recklessness imputed under R.C. 2901.21(B), despite the existence of a mens rea element in a subsection defining the same statutory section. 1

The term "section" as used in R.C. 2901.21(B) refers to offenses, instead of an entire numerical section, because of the context of its use. 1

***State v. Wac* and its progeny inherently held that the existence of mens rea in a different part of a clause or subsection does not constitute a mens rea for the section defining the offense.** 3

"Theft offense" contained in R.C. 2911.01(A) does not incorporate the mens rea of the underlying offense by reference, because the mens rea is not contained within the section defining the offense of aggravated robbery. 4

The enhanced risk of harm attendant with an aggravated robbery involving serious physical harm is irrelevant to whether the legislature intended the offense to be strict liability. 5

Responsive Proposition of Law No. 2: Where an indictment fails to include the mens rea element of a charge, a defendant's failure to make a timely objection forfeits all but plain error unless (1) there was no evidence to show that the defendant had notice of the mens rea element, (2) there was no evidence that the State argued that the defendant's conduct satisfied the required mens rea, (3) the trial court failed to instruct the jury on the required mens rea, and (4) in closing argument the State treated the improperly indicted charge as strict liability. When all four requirements are met the error permeated the proceedings, and is structural in nature. 5

Stare decisis mitigates against overruling this Court's recent holdings in other cases. 6

The wrongly decided prong cannot be met in this case, since no new argument was advanced. 7

The lack of conflicting decisions in the appellate courts demonstrates that *Colon II* is workable. 7

CONCLUSION 9

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

Page No.

CASES:

In re Estate of Holycross, 112 Ohio St.3d 203, 2007-Ohio-1, 858 N.E.2d 805 7

State v. Colon, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 ..... *passim*

State v. Colon, 119 Ohio St.3d 204, 2008-Ohio-3479, 893 N.E.2d 169 ..... *passim*

Pandelli v. United States (C.A.6, 1980), 635 F.2d 533 3

State v. O'Brien (1987), 30 Ohio St.3d 122, 30 OBR 436, 508 N.E.2d 144 6

State v. Porterfield, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690 2

State v. Smith, 117 Ohio St.3d 447, 2008-Ohio-1260, 884 N.E.2d 595 3

State v. Wac (1981) 68 Ohio St.2d 84, 428 N.E.2d 428 3,4

State v. Wamsley, 117 Ohio St.3d 388, 2008-Ohio-1195, 884 N.E.2d 45 6

State v. Wozniak (1961), 172 Ohio St. 517, 18 O.O.2d 58, 178 N.E.2d 800 6

State v. Zima, 102 Ohio St. 3d 61, 68, 2004-Ohio-1807, 806 N.E.2d 542 2,3

Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256 7

REVISED CODES:

R.C. 2901.21 ..... *passim*

R.C. 2911.01 ..... *passim*

R.C. 2911.02 1,5

R.C 2915.02 4

R.C. 2915.03 4

R.C. 2953.08 2

RULES:

Crim.R. 7 7

ARGUMENT

As an initial matter, this Court's entry on October 13, 2009 requested that the parties brief the question:

> Whether the holdings of *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, [*Colon I*] and *State v. Colon*, 119 Ohio St.3d 2004, 2008-Ohio-3749, [*Colon II*] are applicable to the offense of aggravated robbery in violation of R.C. 2911.01(A)(3) or only to the offense of robbery, a violation of R.C. 2911.02(A)(2).[1]

Instead of responding to this question, the State spends the majority of its brief asking this Court to overrule *Colon I* and *II*. The scant two pages of the State's brief that directly address this Court's question provide a very limited treatment for this Court.[2]

> **Responsive Proposition of Law No. 1: The term "section" as used in R.C. 2901.21(B) refers to offenses, instead of an entire numerical section, because of the context of its use. Consequently, an offense may still have the mens rea of recklessness imputed under R.C. 2901.21(B), despite the existence of a mens rea element in a subsection defining the same statutory section.**

The term "section" as used in R.C. 2901.21(B) refers to offenses, instead of an entire numerical section, because of the context of its use.

Revised Code Section 2901.21(B) applies to "the section defining an offense." Under this Court's precedent multiple distinct offense can be contained within one section, so the "section defining an offense" is more limited than "section" alone. The State argues that R.C. 2901.21(B) (imputing the mens rea of recklessness to offenses lacking mens rea) does not apply to R.C. 2911.01 (aggravated robbery) because R.C. 2911.01(B) contains the mens rea of knowingly.[3] The State interprets "section," as used in R.C. 2901.21(B), to refer to R.C. 2911.01 as a whole, so the State reasons that recklessness cannot be imputed because, as a whole, the

---

[1] Entry, *State v. Horner*, 2009-0311, Oct. 13, 2009.
[2] See Merit Brief of Plaintiff-Appellee, State of Ohio, at 14-15.
[3] See Merit Brief of Plaintiff-Appellee, State of Ohio, at 4-5.

"section" does include a mens rea: the mens rea found in R.C. 2911.01(B).[4] While the word "section" is often used to refer to an entire numeric section, in the context of R.C. 2901.21(B), the word "section" addresses specific offenses. The State cites *State v. Porterfield* for the proposition that "section" means numeric sections only. In *Porterfield*, this Court held that the word "section" applied to numeric sections because the statutory language in question was unambiguous.[5] *Porterfield* dealt with R.C. 2953.08(D), which stated:

> A sentence imposed for aggravated murder or murder pursuant to section 2929.02 to 2929.06 of the Revised Code is not subject to review under this section.[6]

Based upon that unambiguous language, this Court held that "this use of 'sections' indicates that 'section' identifies a decimal-numbered statute as a whole rather than a lettered paragraph contained therein."[7] Revised Code Section 2901.21(B) covers imputing mens rea when none is provided. It states:

> 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.[8]

Unlike *Porterfield*, R.C. 2901.21(B) does not say "section" and then list a number of statutes. It, instead, states "section defining an offense."[9] A number of distinct offenses are defined under R.C. 2911.01 as distinct types of aggravated robbery. This Court held in *State v. Zima* that in "a statute containing alternative elements, each statutory alternative should be construed as

---

[4] Id.
[5] *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, at ¶17.
[6] Id.
[7] Id. at ¶13.
[8] R.C 2901.21(B).
[9] R.C. 2901.21(B).

constituting a separate offense and analyzed accordingly."[10] In that case, this Court cited to *Pandelli v. United States*,[11] for the proposition that "a criminal statute written in the alternative creates a separate offense for each alternative." That same concept was recently reiterated by this Court when it held that when comparing offenses to determine if one is a lesser included offense of the other, a court must compare statutes phrased in the alternative by comparing each alternative method to the offense claimed to be lesser included.[12] That treatment implicitly recognizes that an offense is defined by a specific statute with one of the possible alternatives instead of all of the possible alternatives. Consequently, the fact that R.C. 2911.01(B) (aggravated robbery by disarming a police officer) contains a mens rea is irrelevant to the application of R.C. 2901.21(B) to R.C. 2911.01(A)(3) (aggravated robbery by inflicting serious physical harm), since they constitute separate offenses. Instead, R.C. 2901.21(B) must look at each offense, which is in keeping with this Court's analysis in *Colon*.

***State v. Wac*[13] held that the existence of mens rea in a different part of a clause or subsection does not constitute a mens rea for the section defining the offense.**

The State discusses *State v. Wac* and its progeny extensively.[14] *Wac* utilizes the mens rea contained in other subsections or clauses of a statute to determine if the legislature plainly intended to impose strict liability, but does not hold that the existence of mens rea in any subdivision or clause within a section forecloses the imputation of recklessness under R.C. 2901.21(B).[15] Revised Code Section 2901.21(B) addresses both the imputation of recklessness

---

[10] *State v. Zima*, 102 Ohio St.3d 61, 68, 2004-Ohio-1807, 806 N.E.2d 542.
[11] *Pandelli v. United States* (C.A.6, 1980), 635 F.2d 533, 537
[12] *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260, 884 N.E.2d 595, at ¶27.
[13] *State v. Wac* (1981) 68 Ohio St.2d 84, 428 N.E.2d 428.
[14] Merit Brief of Plaintiff-Appellee, State of Ohio, at 4-13; *Wac*, 68 Ohio St.2d at 84.
[15] Compare *Wac*, 68 Ohio St.2d 84, with Merit Brief of Plaintiff-Appellee, State of Ohio, at 7.

and the application of strict liability. The requirements for strict liability under R.C. 2901.21(B) are that (1) the section defining an offense does not specify any degree of culpability **and** (2) the section plainly indicates a purpose to impose strict liability.[16] In finding that strict liability applied in *Wac*, the Court inplicitly found that the sections discussed did not specify any degree of culpability. Such a finding was necessary under R.C. 2901.21(B) for this Court to apply strict liability. While it is certainly true that *Wac* analyzed the mens rea included in other clauses and subsections to determine if the sections in question, R.C 2915.02(A)(1) and R.C. 2915.03(A)(1), plainly indicated a purpose to impose strict liability, that analysis of only the second prong of the strict liability test in R.C. 2901.21(B) would have been insufficient to satisfy the two-part, conjunctive test. Again, this shows that by applying strict liability under R.C. 2901.21(B), this Court found that the sections analyzed in *Wac* did not specify a degree of culpability. Consequently, contrary to the State's claims, *Wac* accepts that a "section defining an offense" can lack a mens rea despite the existence of mens rea in other clauses or subsections.

"Theft offense" contained in R.C. 2911.01(A) does not incorporate the mens rea of the underlying offense by reference, because the mens rea is not contained within the section defining the offense of aggravated robbery.

A key difference between aggravated robbery and other sections defining offenses is that the mens rea is not contained directly within the **section defining the offense** for aggravated robbery, since the **section defining the offense** for aggravated robbery involving serious physical harm merely states "theft offense."[17] The State argues that the statement "theft offense" within the aggravated robbery statute incorporates the mens rea of the underlying offense by reference. None of this Court's prior case law cited by the State has directly addressed this issue,

[16] R.C. 2901.21(B).

though the *Colon* case would reject the State's argument by implication. Additionally, holding that "theft offense" does incorporate the separate mens rea from that offense's section would necessarily require this Court to overrule the *Colon* cases. As the *Colon I* was recently decided by this Court and upheld on reconsideration, overruling *Colon* risks harm to the principle of stare decisis.

The enhanced risk of harm attendant with an aggravated robbery involving serious physical harm is irrelevant to whether the legislature intended the offense to be strict liability.

The State suggests that this Court can rely on the enhanced risk of harm attendant with an aggravated robbery in determining that the legislature clearly intended to impose strict liability.[18] In so arguing, the State confuses clear intent regarding mens rea with the greater level or risk of harm that is always attendant with a higher degree of felony. Certainly the legislature realized the greater risk of harm or greater actual harm present when a crime meets the elements of an aggravated robbery, and that is why aggravated robberies are punished as felonies of the first degree, instead of felonies of the second or third degree, as applies to robberies.[19] That information, in isolation, is irrelevant to determining legislative intent regarding mens rea.

---

[17] R.C. 2911.01(A).
[18] Merit Brief of Plaintiff-Appellee, State of Ohio, at 14-15.
[19] Compare R.C. 2911.01, with R.C. 2911.02.

<u>Responsive Proposition of Law No. 2</u>: When an indictment fails to include the mens rea element of a charge, a defendant's failure to make a timely objection forfeits all but plain error unless (1) there was no evidence to show that the defendant had notice of the mens rea element, (2) there was no evidence that the State argued that the defendant's conduct satisfied the required mens rea, (3) the trial court failed to instruct the jury on the required mens rea, and (4) in closing argument the State treated the improperly indicted charge as strict liability. When all four requirements are met, the error permeated the proceedings, and is structural in nature.[20]

The State's second proposition of law reiterates the exact argument that was made to this Court, and rejected in its reconsideration of *Colon I*.[21] The State argues at some length that indictment errors should always be determined under the plain error standard.[22] In support of its claim, the State cites to and discusses *State v. O'Brien*, *State v. Wozniak*, *State v. Wamsley*, and Crim.R. 7.[23] In *Colon*, the State cited and discussed all the same sources in its motion for reconsideration.[24] Though this Court granted reconsideration in that case, it rejected the exact arguments now advanced by the State.[25] This Court recently considered and rejected the exact argument advanced by the State. Nothing has changed to alter that argument or provide it with greater weight now.

Stare decisis mitigates against overruling this Court's recent holdings in other cases.

Stare decisis applies to this Court's prior holdings in *Colon I* and *II*. The State argues that stare decisis does not apply since *Colon* was (1) wrongly decided, (2) defies practical

---

[20] *Colon II*, 119 Ohio St.3d at ¶6-7.
[21] Motion for Reconsideration Submitted Pursuant to S.Ct.R.P. XI, §2, *State v. Colon*, at 2-8, http://www.sconet.state.oh.us/pdf_viewer/pdf_viewer.asp?pdf=620126.pdf.
[22] See Merit Brief of Plaintiff-Appellee, State of Ohio, at 16-21.
[23] *State v. O'Brien* (1987), 30 Ohio St.3d 122, 30 OBR 436, 508 N.E.2d 144; *State v. Wozniak* (1961), 172 Ohio St. 517, 18 O.O.2d 58, 178 N.E.2d 800; *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, 884 N.E.2d 45; Crim.R. 7; Merit Brief of Plaintiff-Appellee, State of Ohio, at 16-21.
[24] Fn. 21, supra.

workability, and (3) overruling *Colon* would not create a hardship for those who have relied upon it.[26] Amicus agrees that the State correctly articulated the standard for changing an opinion despite stare decisis, but disagrees with the State's application of the standard.[27]

The "wrongly decided" prong cannot be met in this case, since no new argument was advanced.

Firstly, without advancing any new or different arguments for why plain error should apply, the State has failed to articulate why the portion of this Court's opinion in *Colon* dealing with plain error and structural error should be overruled. While the State is certainly welcome to disagree with the majority opinion of this Court, reiterating the same argument that this Court previously rejected does not provide a new basis for this Court to decide differently. Consequently, any change in this case based on the first prong necessary to bypass stare decisis would practically eliminate stare decisis as a judicial doctrine, since it would encourage parties to reiterate, ad nauseum, the exact arguments previously rejected by this Court until the reiterating parties received relief. At that point, the parties relying on the newly overruled case would be encouraged to bring up the same arguments from the original case over and over again. Such an exception from stare decisis seriously undercuts the finality and consistency of court decisions.

---

[25] Compare Id., with *Colon II*.
[26] Merit Brief of Plaintiff-Appellee, State of Ohio, at 16-21.
[27] See *In re Estate of Holycross*, 112 Ohio St.3d 203, 2007-Ohio-1, 858 N.E.2d 805, at ¶22; *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, first paragraph of the syllabus.

The lack of conflicting decisions in the appellate courts demonstrates that *Colon II* is workable.

Secondly, this Court's opinions in *Colon I* and *Colon II* have not defied practical workability. By providing a clear test from when an indictment error permeates the proceedings to the point where structural error analysis would apply, this Court has provided workable guidance to lower courts for determining this issue.[28] The State argues that the disincentive to the defense to raise indictment errors in a timely manner renders *Colon* unworkable. The State's argument ignores the fact that errors in indictments are, in all cases, the fault of the prosecution. The State's errors in drafting indictments then lead to one of the concerns underlying *Colon*: the defense is deprived of notice of the mens rea element. Further, given this Court's limitation in *Colon II*, any defense attorney would engage in a high stakes gamble if that attorney ignored mens rea in hopes that the State would not mention it at any point during the proceedings and that the judge would not instruct on it at the end of trial.

Similarly, the State cites a number of appellate decisions to suggest that application of *Colon* has been difficult.[29] To the contrary, the fact that the cited appellate courts have applied *Colon I* and *II* without inconsistency among the districts illustrates the workability of *Colon II*. This Court was clear in *Colon II* that structural error is appropriate only in unique cases involving multiple errors, such as *Colon I*.[30] The State itself applies this analysis later in its own brief without any complaint of trouble or ambiguity.[31] This Court's decisions in *Colon I* and *II* have not proved unworkable. Consequently, it cannot be a basis for departing from stare decisis.

---

[28] See *Colon II*.
[29] Merit Brief of Plaintiff-Appellee, State of Ohio, at 22-23.
[30] *Colon II*, 119 Ohio St.3d at ¶6-7.
[31] Merit Brief of Plaintiff-Appellee, State of Ohio, at 24-27.

The treatment of structural error in *Colon* did not provide an unworkable system, despite its differences from federal treatment. The State pointed out that this Court's treatment of structural error in *Colon* is different from the way structural error is treated in the federal courts.[32] The multipart, structural-error test, explained upon reconsideration, was a reasonable balancing of a defendant's rights with the proper reluctance of this Court to apply structural error to new areas. The principle of stare decisis should only be disturbed when there is special justification to do so. Neither *Colon* nor its effect in other cases has raised the sort of problems that would justify departure from stare decisis.

---

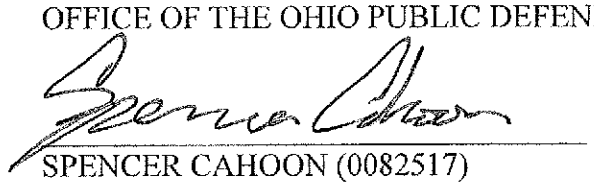
[32] Merit Brief of Plaintiff-Appellee, State of Ohio, at 23.

CONCLUSION

By providing limited treatment of the certified issue and concentrating on issues that have not been accepted by this Court, the State appears to be trying to co-opt Mr. Horner's certified conflict case and convert it into an untimely State's appeal. Even a State's appeal in Mr. Horner's case, however, could not raise the arguments presented by the State and its Amicus, since the court of appeals did not apply *Colon I* or *Colon II* to Mr. Horner's case. Consequently, in addition to the State's propositions being a significant departure from the certified question, the State is also seeking an improper advisory opinion because Mr. Horner's case fails to present the issue. For all these reasons, Amicus asks that this Court reject the State's propositions and apply *Colon II* to aggravated robbery involving serious physical harm under R.C. 2911.01(A)(3).

Respectfully Submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



SPENCER CAHOON (0082517)
Assistant State Public Defender

250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (Fax)
spencer.cahoon@opd.ohio.gov

COUNSEL FOR AMICUS CURIAE,
OHIO PUBLIC DEFENDER

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Brief of Amicus Curiae Office of the Ohio Public Defender in Support of Appellant Gregory Horner** was served by regular U.S. mail, this 1st day of March, 2010, upon the following:

JULIA R. BATES (0013426)
Lucas County Prosecutor

DAVID F. COOPER (0006176)
Assistant Lucas County Prosecutor

700 Adams St.
Toledo, Ohio 43604
(419) 213-4700
Fax No. (419) 213-4595

COUNSEL FOR APPELLEE, STATE OF OHIO

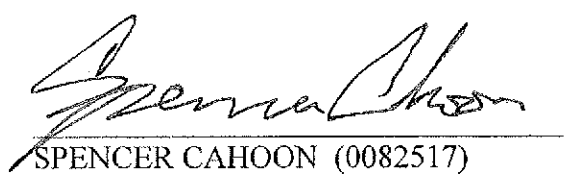
RON O'BRIEN (0017245)
Franklin County Prosecuting Attorney
STEVEN L. TAYLOR (0043876)**
Assistant Prosecuting Attorney
373 South High Street – 13th Floor
Columbus, Ohio 43215
614-462-3555
614-462-6103 - Fax
sltaylor@franklincountyohio.gov

COUNSEL FOR AMICUS CURIAE, FRANKLIN COUNTY PROSECUTOR

JOHN F. POTTS (033846)

405 Madison Ave, Ste. #1010
Toledo, Ohio 43604
(419) 255-2800
(419) 255-1105

COUNSEL FOR APPELLANT, GREGORY HORNER



SPENCER CAHOON (0082517)
Assistant State Public Defender

COUNSEL FOR AMICUS CURIAE, OHIO PUBLIC DEFENDER