

IN THE SUPREME COURT OF OHIO

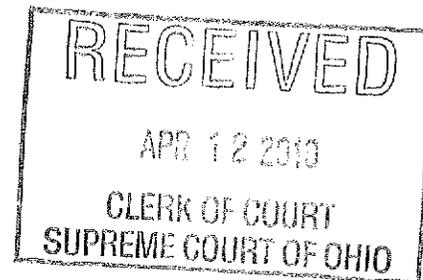
STATE OF OHIO,)	Case No. 2009-0678
)	
Plaintiff-Appellant,)	On Appeal from the
)	Lake County Court of Appeals,
v.)	Eleventh Appellate District
)	
JOSEPH PEPKA,)	
)	Court of Appeals Case No. 2008-L-016
Defendant-Appellee.)	

RESPONSE TO MOTION FOR RECONSIDERATION

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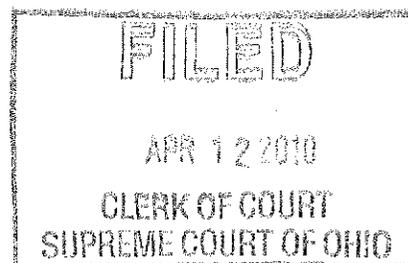
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Now comes the State of Ohio, by and through Charles E. Coulson, Lake County Prosecuting Attorney, and Joshua S. Horacek, Assistant Prosecuting Attorney, and respectfully requests that this Court deny Joseph Pepka's motion for reconsideration. As outlined below, Pepka has failed to establish any reason why this case should be reconsidered by this Court.

I. This Court's decision is based on the application of prior precedent, and Pepka has not demonstrated any issue that requires reconsideration of that application, but rather attacks the prior precedent.

This Court reached its decision in this case through the application of *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, 903 N.E.2d 609, and *State v. O'Brien* (1987), 30 Ohio St.3d 122, 508 N.E.2d 144. Pepka seeks to have this Court reconsider its decision in this case, but a different conclusion in this case would require the reconsideration of *Davis* and *O'Brien* as well.

A. Pepka's reliance on this Court's 1857 decision in *Fouts v. State* is misplaced.

As grounds for reconsideration Appellant claims that this Court's decision in this case is contrary to this Court's decision in *Fouts v. State* (1857), 8 Ohio St. 98. Though Pepka did not raise *Fouts* during briefing or argument, the assertion he makes based on *Fouts* was considered by this Court and rejected. Specifically, Appellant claims that the language in the indictment indicating that Pepka was charged with a felony of the third degree was a legal conclusion and should not be considered. This Court found Pepka's argument lacking:

Pepka argues that the indictment was insufficient because the statement in the indictment-"This act, to wit: Endangering Children, constitutes a Felony of the Third degree * * *" -is a conclusion of law, whereas a grand jury's role

is to find the material and essential facts constituting an offense. The assertion is not persuasive.

Pepka at ¶22. *Pepka* now seeks to have his argument reconsidered, though it was clearly considered when this Court arrived at a decision in this case.

This case sits at the intersection of two areas of law: sufficiency of the indictment and the amendment of the indictment. *Fouts* deals solely with the sufficiency of the indictment. *Fouts* may be relevant to the question of whether the state could have secured a conviction for third-degree felony endangering children on the original indictment that did not include serious physical harm. But that was not the question presented in this case. In this case, the indictment was amended prior to trial to include the omitted element, thus the interplay of *O'Brien* and *Davis*.

O'Brien allows the state to amend an indictment “which does not contain all the essential elements of an offense” to include the omitted element. Additionally, as this Court noted that “[t]he fact that the grand jury returned an indictment for third-degree-felony child endangering under R.C. 2919.22(A) against *Pepka* means that it made the necessary factual finding of serious physical harm. That return was sufficient to give *Pepka* the notice required by the Ohio Constitution.” *Pepka* at ¶23. Thus, despite *Pepka*’s desire to focus on the sufficiency of the original indictment alone, the issue in this case is settled not by the sufficiency of the indictment alone, but upon whether the original indictment was sufficient enough to allow the amendment. This Court adequately addressed the question, and there is no need for reconsideration.

B. *This Court's treatment of State v. Wozniak was derived from, and is consistent with, prior precedent.*

Pepka objects to this Court's treatment of *State v. Wozniak* (1961), 172 Ohio St. 517, 178 N.E.2d 800. This Court noted that *Wozniak* is "a case that was decided prior to the enactment of Crim.R. 7(D) and that is therefore not controlling." *Pepka* at ¶23. But this view of *Wozniak* is not new to this case. In *O'Brien*, this Court noted that *Wozniak* was "a pre-Criminal Rule case interpreting R.C. 2941.30." *Id.* at fn5. This Court further found that, "[w]hile acknowledging that Crim.R. 7(D) is, in all essential respects, the same as R.C. 2941.30, we find that *Wozniak*, as a pre-rule case, is not controlling." *Id.* Thus, this Court's treatment of *Wozniak* was consistent with prior precedent. While Pepka may not agree with this Court's treatment of *Wozniak*, reconsideration of this issue would actually require reconsideration of *O'Brien*.

II. The decision in this case is soundly supported by the prior holdings of this Court.

Pepka asserts the decision in this case may be subject to federal court review. The state submits that the possibility of federal court review is not sufficient grounds for this Court to reconsider its decision in this case. Moreover, Pepka's alleged grounds for federal review are without merit.

Pepka claims this the holding in this case is "unforeseeable and unsupported" because "it is at odds with recent, *State v. Davis*, 121 Ohio St.3d 239, and multiple consistent prior cases referred to throughout the briefing." (sic.) (Appellee's Mot. for Reconsideration at 6). Specifically, Appellant claims that "[a]ll of our cases have held any amendment that raises the penalty or degree is invalid, and now this [C]ourt has

unexpectedly held this amendment from a misdemeanor to a third-degree-felony is permissible.” *Id.*

Pepka dramatically misconstrues the holding of this Court in this case. Far from being at odds with *Davis* and other prior cases, this Court actually relied on *Davis* and arrived at this holding through the application of *Davis*. *Pepka* at ¶13. This Court never held that an amendment from a misdemeanor to a felony is permissible, and the rule of *O’Brien*, as reaffirmed in *Davis*, remains intact:

An indictment, which does not contain all the essential elements of an offense, may be amended to include the omitted element, if the name or the identity of the crime is not changed, and the accused has not been misled or prejudiced by the omission of such element from the indictment.

O’Brien at paragraph two of syllabus.

What this Court actually held in this case was that the original indictment charged a third-degree felony, and thus, the amendment of the indictment did not change the name or identity of the crime charged: “An indictment that charges a defendant with child endangering in violation of R.C. 2919.22(A) as a third-degree felony but does not contain language that the victim suffered serious physical harm adequately informs the defendant of the charge against which he must defend and is sufficient.” *Pepka* at syllabus. This holding is based on the sound analysis of prior precedent and is not “unforeseeable and unsupported.”

In determining that the original indictment was sufficient to charge Pepka with a third-degree felony, this Court outlined the purpose and requirements of an indictment:

The purposes of an indictment are to give an accused adequate notice of the charge, and enable an accused to protect himself or herself from any future prosecutions for the same incident.” *State v. Buehner*, 110 Ohio St.3d 403,

2006-Ohio-4707, 853 N.E.2d 1162, ¶ 7. “An indictment meets constitutional requirements if it “first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.” ’ ” Id. at ¶ 9, 853 N.E.2d 1162, quoting *State v. Childs* (2000), 88 Ohio St.3d 558, 564-565, 728 N.E.2d 379, quoting *Hamling v. United States* (1974), 418 U.S. 87, 117-118, 94 S.Ct. 2887, 41 L.Ed.2d 590.

Pepka at ¶20. Clearly, this Court’s determination that the indictment in this case was sufficient is not novel. It is based on the analysis of 35 years of caselaw.

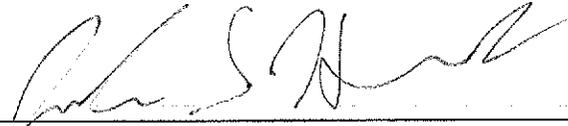
III. Pepka has not demonstrated any reason why this case should be reconsidered.

The permissible amendment of the indictment in this case rests squarely on the rules of law set forth by this Court in *O’Brien* and running through *Davis*. *Pepka* claims that “Ohio courts will now be besieged with variation of the amendment dilemma, some relying on pre-*Pepka* doctrine and other on irreconcilable post-*Pepka* charging ingenuity.” (Appellee’s Mot. for Reconsideration at 7). But this case did nothing to expand, modify, or alter the requirements for amending an indictment. The rules of *O’Brien* and *Davis* remain as clear as ever.

Moreover, this Court’s determination that the amendment in this case did not alter the name or identity of the crime charged is soundly rooted in prior precedent. Based on *Buehner*, *Childs* and *Hamling*, this Court determined that the return of the grand jury in this case “was sufficient to give *Pepka* the notice required by the Ohio Constitution.” Thus, when the state amended the indictment, it did not change the name or identity of the offense. This analysis is based on the sound application of this Court’s prior decisions, and *Pepka* has not demonstrated why this decision should now be reconsidered.

Based on the foregoing, the State of Ohio, Plaintiff-Appellant herein, respectfully requests this Honorable Court deny Pepka's Motion for Reconsideration in the above captioned case.

Respectfully submitted,
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JSH/klb

PROOF OF SERVICE

A copy of the foregoing Response to Application for Reconsideration was sent by regular U.S. Mail, postage prepaid, to counsel for the appellee, Mr. Albert L. Purola, Esquire, 38108 Third Street, Willoughby, Ohio 44094, on this 9th day of April, 2009.



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