

**IN THE SUPREME COURT OF OHIO  
2011**

STATE OF OHIO,

Case No. 2011-0599

Plaintiff-appellant

v.

DONALD EAFFORD,

On Appeal from the  
Cuyahoga County Court

Defendant-appellee.

of Appeals, Eighth Appellate  
District,

Court of Appeals  
Case No. 94718

**BRIEF OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTING  
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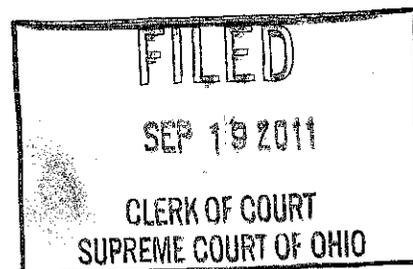
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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

STATEMENT OF AMICUS INTEREST ..... 1

STATEMENT OF THE CASE AND FACTS ..... 1

PROPOSITION OF LAW NO. ONE: ..... 1

    WHERE A DEFENDANT IS CONVICTED OF THE LOWEST FORM  
    OF THE OFFENSE, STATE V. PELFREY, 112 OHIO ST.3D 422, 2007-  
    OHIO-256, HAS NO APPLICATION. .... 1

CERTIFICATE OF SERVICE ..... 13

## TABLE OF AUTHORITIES

### Cases

<i>Apprendi v. New Jersey</i> (2000), 530 U.S. 466.....	5, 6, 7, 11
<i>Eldredge v. State</i> (1881), 37 Ohio St. 191 .....	4
<i>Ellars v. State</i> (1874), 25 Ohio St. 385 .....	4
<i>Griffin v. United States</i> (1991), 502 U.S. 46.....	4
<i>Johnson v. United States</i> (1997), 520 U.S. 461 .....	12
<i>Norman v. State</i> (1924), 109 Ohio St. 213.....	5, 9
<i>Pratts v. Hurley</i> , 102 Ohio St.3d 81, 2004-Ohio-1980 .....	12
<i>Schad v. Arizona</i> (1991), 501 U.S. 624.....	4
<i>State v. Gardner</i> , 118 Ohio St.3d 420, 2008-Ohio-2787 .....	4
<i>State v. Hawkins</i> (1997), 120 Ohio App. 3d 277 .....	8
<i>State v. Holloway</i> (2000), 10th Dist. No. 99AP-1455 .....	8
<i>State v. Lampkin</i> (1996), 116 Ohio App.3d 771 .....	5
<i>State v. Martin</i> , 2nd Dist. No. 22744, 2009-Ohio-5303 .....	5
<i>State v. McNicol</i> (1944), 143 Ohio St. 39.....	5
<i>State v. Middlebrooks</i> , 5th Dist. No. 2010 AP 0027, 2011-Ohio-4574 .....	2, 3
<i>State v. Moore</i> , 188 Ohio App.3d 726, 2010-Ohio-1848.....	2
<i>State v. Pace</i> , 10th Dist. No. 10AP-547, 2011-Ohio-320.....	1, 2
<i>State v. Park</i> (1962), 174 Ohio St. 81 .....	8, 10
<i>State v. Payne</i> , 114 Ohio St.3d 502, 2007-Ohio-4642.....	11
<i>State v. Pelfrey</i> , 112 Ohio St.3d 422, 2007-Ohio-256 .....	1
<i>State v. Rakes</i> (1997), 3rd Dist. No. 11-97-9.....	7, 8
<i>State v. Reynolds</i> , 5th Dist. No. 09-CA-13, 2009-Ohio-3998.....	12
<i>State v. Ridgeway</i> (1972), 35 Ohio App. 2d 254 .....	8

<i>State v. Woods</i> (1982), 8 Ohio App. 3d 56 .....	8
<i>United States v. Cotton</i> (2002), 535 U.S. 625 .....	12
<i>v. Conway</i> , 108 Ohio St.3d 214, 2006-Ohio-791 .....	11
<i>Woodford v. State</i> (1853), 1 Ohio St. 427 .....	5
<b>Statutes</b>	
R.C. 2925.11(C)(2)(a) .....	7
R.C. 2925.11(C)(4) .....	7
R.C. 2925.11(C)(4)(1) .....	6
R.C. 2945.75 .....	6
R.C. 2945.83(E) .....	14
<b>Rules</b>	
Crim.R. 52 .....	14
Crim.R. 52(A) and (B) .....	14
Crim.R. 52(B) .....	14
<b>Constitutional Provisions</b>	
Article IV, Section 5(B), Ohio Constitution .....	14

## STATEMENT OF AMICUS INTEREST

The Office of the Franklin County Prosecuting Attorney prosecutes thousands of felony drug cases every year. Current Franklin County Prosecutor Ron O'Brien therefore has a strong interest in issues related to preserving those convictions. In the interest of aiding this Court's review of the Cuyahoga County Prosecuting Attorney's appeal, Franklin County Prosecutor Ron O'Brien offers the following amicus brief in support of the State of Ohio.

### STATEMENT OF THE CASE AND FACTS

Amicus Curiae accepts the statement of the case and facts set forth in Plaintiff – Appellant, State of Ohio's brief.

### PROPOSITION OF LAW NO. ONE:

WHERE A DEFENDANT IS CONVICTED OF THE LOWEST FORM OF THE OFFENSE, STATE V. PELFREY, 112 OHIO ST.3D 422, 2007-OHIO-256, HAS NO APPLICATION.

In reducing defendant Eafford's conviction from a fifth-degree felony to a third-degree misdemeanor<sup>1</sup>, the Eighth District Court of Appeals misapplied *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256. As the Tenth District held in *State v. Pace*, 10th Dist. No. 10AP-547, 2011-Ohio-320, *Pelfrey* is not implicated in a fifth-degree felony possession of cocaine case because the named drug is not an additional element but an essential element of the charge, and fifth-degree felony is the lowest form of the offense.

The Eighth District's decision was based on its belief that *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, and its progeny should apply to fifth-degree felony possession of cocaine convictions. *Pelfrey* involved a defendant being convicted of a greater degree felony without

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<sup>1</sup> Eafford was indicted on August 6, 2009. Even if you assume that he can be convicted for possession of a schedule III, IV or V drug under R.C. 2925.11(C)(2)(a) as the Fourth District

the verdict form having the degree of the offense or a statement of the aggravating circumstances. The remedy in cases like *Pelfrey* was to reduce the conviction to the lowest level of the offense charged. Here, defendant Eafford was charged with and convicted of fifth-degree felony cocaine possession, the lowest offense level for cocaine possession. R.C. 2925.11(C)(4)(1)<sup>2</sup>.

R.C. 2945.75(A)(2) provides:

A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

The Eighth District cited *State v. Moore*, 188 Ohio App.3d 726, 2010-Ohio-1848, in support of its decision. In addition to *Moore*, the Fourth District has issued at least three other decisions with the same reasoning. The cases from the Fourth District fail to address or analyze the issues thoroughly and are wrongly decided. This Court, should, instead adopt the Tenth and Fifth Districts' analysis in *State v. Pace*, 10th Dist. No. 10AP-547, 2011-Ohio-320, ¶21 and *State v. Middlebrooks*, 5th Dist. No. 2010 AP 0027, 2011-Ohio-4574, ¶32-34.

The courts in the Fourth and Eighth District cases improperly assume that the type of drug involved is an additional element under R.C. 2945.75, which then requires that it be included in the verdict form. The type of drug is not an additional element but a necessary element in order for a crime to be charged at all. If there were no drug named in the indictment, there would be no offense charged. The additional element in drug cases is the weight for each specific drug, not the drug itself. There is no generic charge for possession of drugs or "catch

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cases do, the lowest level of that offense for a crime committed after September 30, 2008 is a first degree misdemeanor.

<sup>2</sup> House Bill 86 goes into effect October 1, 2011 and eliminates distinctions between crack cocaine and powder cocaine. Those changes have no bearing on the argument here as the lowest level of offense for possession of cocaine remains a fifth-degree felony.

all” provision under R.C. 2925.11, only possession of a specific drug, each with its own weight threshold. *Middlebrooks*, supra at ¶32.

In reducing the convictions to third-degree misdemeanors, the Fourth District referred to R.C. 2925.11(C)(2)(a) as the section that contained the appropriate charge, while the Eafford court did not indicate which section of R.C. 2925.11 it relied on to reduce the charge. R.C. 2925.11(C)(2)(a) states, in pertinent part:

If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule III, IV or V, whoever violates division (A) of this section is guilty of possession of drugs. \*\*\* (a) Except as otherwise provided in division (C)(2)(b),(c) or (d) of this section, possession of drugs is a misdemeanor of the first degree or \*\*\*.<sup>3</sup>

Cocaine is not a schedule III, IV or V drug. In reducing the convictions to third degree misdemeanors, the court presumably read subdivision (a) of R.C. 2925.11(C)(2) as standing alone but subsection (a) has no meaning outside of (C)(2). The subdivision that provides for conviction for possession of cocaine is R.C. 2925.11(C)(4), not (C)(2). The possession of drugs statute is one that contains different ways to commit the crime, but the fact that the statute contains different levels of offense does not make it subject to R.C. 2945.75.

The Fourth and Eighth Districts position further fails to explain how a defendant charged with possession of cocaine can be convicted of possession of a schedule III, IV or V drug. None of the defendants involved were indicted under R.C. 2925.11(C)(2) and there was no evidence to indicate that the drugs involved were not, in fact, cocaine but were instead a schedule III, IV or V drug. That result goes against the most basic tenets of criminal law that require that a defendant have notice of the charges against him and that he only be held to answer for crimes he actually committed. The courts failed to consider this untenable result in their attempts to apply

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<sup>3</sup> R.C. 2925.11 was amended in 2008. Prior to September 30, 2008, the lowest level of the offense of possession of schedule III, IV or V drugs was a third-degree misdemeanor.

*Pelfrey* to these possession of cocaine cases. The proper result would have been to find the defendants guilty of the lowest level offense involving cocaine, not the lowest possible level of the offense involving any drug.

Should this court determine that *Pelfrey* does apply to these fifth-degree felony cocaine possession cases, Amicus submits that this court should revisit the *Pelfrey* decision and should decide that it was wrongly decided. What follows is a discussion of why *Pelfrey* was wrongly decided.

A.

Initially, it must be noted that there is no constitutional right to a special jury verdict reciting the elements of the offense. General verdicts are the norm, and they have been accepted since the time of English common law. *Griffin v. United States* (1991), 502 U.S. 46, 49-51 (discussing long history of upholding general verdicts). General verdicts are acceptable even when multiple theories of guilt were submitted to the jury under a single count and the general verdict does not specify which of the theories the jury relied upon. *Id.*; at 49-51; *Schad v. Arizona* (1991), 501 U.S. 624, 645 (plurality – Constitution does not command greater verdict specificity); *Id.* at 650-51 (Scalia, J., concurring -- constitutional “norm” to submit charge of murder to jury under multiple theories); *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787.

The use of “as charged” language in a general verdict complies with constitutional standards. “[A] general verdict of guilty, covers all the averments constituting the crime charged, \* \* \*.” *Ellars v. State* (1874), 25 Ohio St. 385, 389. A general verdict of guilty “as charged” supports conviction on the charge. *Eldredge v. State* (1881), 37 Ohio St. 191, syllabus. “Verdicts are to have a reasonable intendment and to have a reasonable construction and are not to be avoided unless from necessity originating in doubt of their import or irresponsiveness to the

issues submitted, or unless they show a manifest tendency to work injustice. A verdict is sufficient in form if it decides the question in issue in such a way as to enable the court intelligently to base a judgment thereon.” *Norman v. State* (1924), 109 Ohio St. 213, paragraph one of the syllabus. An “as charged” general verdict is “clear, concise, and readily understandable,” and is “undoubtedly responsive to the issues submitted to it \* \* \*.” *Id.* at 237 (upholding “as he stands charged” general verdict); see, also, *State v. McNicol* (1944), 143 Ohio St. 39, 44-45; *Woodford v. State* (1853), 1 Ohio St. 427, 430 (upholding general verdict of guilty “as he stands charged in the seventh and eight counts”).

On the other hand, special verdicts referencing the elements are discouraged. “There is no requirement that the statutory definition of an offense be included on the verdict form. To the contrary, the inclusion of statutory definitions on a verdict form invites confusion and error.” *State v. Martin*, 2nd Dist. No. 22744, 2009-Ohio-5303, ¶ 8. In *State v. Lampkin* (1996), 116 Ohio App.3d 771, the court *reversed* the conviction *because* the trial court had used the “novel approach” of including a description of most, but not all, of the elements of the offense in the verdict. The court noted that “[w]e can find nothing which requires or suggests that the statutory definition of an offense be included on a jury verdict form. \* \* \* In fact, we highly disapprove and do not condone such inclusion of the statutory definition as it simply invites confusion and error.” *Id.* at 774 n. 1.

## B.

The decisions in *Apprendi v. New Jersey* (2000), 530 U.S. 466, and *Blakely v. Washington* (2004), 542 U.S. 296, do not require a special verdict form stating one or more of the elements. In *Apprendi*, the Court held:

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must

be submitted to a jury, and proved beyond a reasonable doubt.

*Apprendi*, 533 U.S. at 490.

In *Blakely*, the Court applied the *Apprendi* principle to state sentencing guidelines. The defendant pleaded guilty in Washington state to second-degree kidnapping involving domestic violence and use of a firearm. As a class B felony, the maximum for the offense was ten years. But the Washington guideline scheme set a sentencing guideline range of 49-53 months, taking into account the seriousness level, the “offender score,” and a 36-month enhancement for use of a firearm. The Washington scheme allowed downward or upward departure only for compelling reasons and only by considering facts other than those facts that were used in computing the standard range sentence for the offense.

In *Blakely*, the trial judge engaged in an upward departure based on the fact that the defendant had acted with “deliberate cruelty.” The court imposed a sentence of 90 months, which was over three years longer than the standard guideline range, but much less than the 10-year maximum for such offenses.

Writing for the five-member majority, Justice Scalia concluded that the “statutory maximum” for *Apprendi* purposes was the 49-53 month standard guideline range, not the 10-year maximum available for class B felonies generally. The Court stated, as follows:

Our precedents make clear, however, that the “statutory maximum” for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* \* \* \* In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. (emphasis *sic*; citations omitted).

“As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment.” *Id.* (emphasis *sic*).

*Apprendi* and *Blakely* are satisfied by a general verdict “as charged in the indictment.” The elements of the crime were submitted to the jury, and the jury was instructed that it could only find defendant guilty if every element was proven beyond a reasonable doubt. The general verdict of guilty therefore demonstrates that the jury had found every essential element beyond a reasonable doubt. Nothing in *Apprendi* or *Blakely* requires a special verdict form. General verdicts are sufficient to comply with *Blakely*, so long as the essential elements were submitted to the jury as part of the court’s jury instructions.

C.

R.C. 2945.75(A)(2) constitutes a limited exception to the general rule that general verdicts are sufficient. Under that statute, if a crime includes an “additional element” that serves to raise the offense by one or more degrees, the verdict shall reflect either the degree of the offense or shall indicate in some way that the additional element is present. As stated earlier, however, the nature of the drug is not a degree-raising “additional element” but, rather, an essential element of the least degree of the offense charged. The statute was not violated when the verdict in the present case failed to state the nature of the drug involved.

D.

Even if the statute had been violated, however, reversal would have been unwarranted because the decision in *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, was wrongly decided.

Before Pelfrey, many courts had “found substantial compliance with the requirements of R.C. 2945.75 in verdict forms which refer to the offenses ‘as charged in the indictment’ when the indictment was read to the jury and/or the language of the offense was included in the charge to the jury.” *State v. Rakes* (1997), 3rd Dist. No. 11-97-9. As stated by the Tenth District:

Ohio courts have repeatedly found “substantial compliance with the requirements of R.C. 2945.75 in verdict forms which refer to the offenses ‘as charged in the indictment’ when the indictment was read to the jury and/or the language of the offense was included in the charge to the jury.” *State v. Rakes*, 1997 Ohio App. LEXIS 5825 (Dec. 30, 1997), Paulding App. No. 11-97-9, unreported. See *State v. Woods* (1982), 8 Ohio App. 3d 56, 63, 455 N.E.2d 1289; *State v. Corkran* (1965), 3 Ohio St. 2d 125, 209 N.E.2d 437, paragraph two of the syllabus; *State v. Ridgeway* (1972), 35 Ohio App. 2d 254, 256, 301 N.E.2d 716; *State v. Hawkins*, 120 Ohio App. 3d 277, 697 N.E.2d 1045 (1997).

*State v. Holloway* (2000), 10th Dist. No. 99AP-1455.

Such appellate decisions had support in a prior Ohio Supreme Court decision. *State v. Park* (1962), 174 Ohio St. 81, 84. *Park* had recognized that forfeiture through lack of objection and harmless-error analysis applied to the prior version of R.C. 2945.75, which had required that the verdict recite the value involved in certain offenses.

In *Pelfrey* in 2007, this Court reached a contrary conclusion. It concluded that a verdict referencing “as charged in the indictment” was reversible error, even if the defense failed to object and even if the record showed that any error was harmless. The *Pelfrey* syllabus stated, as follows:

Pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense.

The court also rejected resorting to parts of the record outside the verdict to determine issues of prejudice or waiver:

{¶14} Because the language of R.C. 2945.75(A)(2) is clear, this court will not excuse the failure to comply with the statute or uphold *Pelfrey*’s conviction based on additional circumstances such as those present in this case. The express requirement of the statute cannot be fulfilled by demonstrating additional circumstances, such as that the verdict incorporates the language of the indictment, or by presenting evidence to show the presence of the aggravated element at trial or the incorporation of the indictment into the verdict form, or by showing that the defendant failed to raise the issue of the inadequacy of the

verdict form. We hold that pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense.

The two dissenters would have followed the line of cases applying a substantial-compliance standard and upholding “as charged in the indictment” verdicts.

In the view of the present amicus, though, *Pelfrey* was wrongly decided. A verdict “as charged in the indictment” not only substantially complies with R.C. 2945.75(A)(2); it literally complies with that provision. The statute only requires that the “guilty verdict shall state \* \* \* that such additional element or elements are present.” When the indictment includes the additional element, when the jury is instructed on that element as an essential element of the charge, and when the verdict includes the language “as charged in the indictment,” then the verdict form does in fact “state \* \* \* that such additional element or elements are present.” The statute does not require a direct, special finding. To the extent *Pelfrey* concludes that the statutory language creates a direct special-finding requirement, it is imposing a requirement that is not really there.

The prosecution in *Pelfrey* apparently did not make the threshold argument that the statute had not been violated. But the argument is properly made here: a fully-instructed jury’s verdict of “guilty as charged” of a particular count is sufficient to “state \* \* \* that such additional element or elements are present.” R.C. 2945.75(A)(2) is designed to address the problem of doubtful verdicts, not “as charged” general jury verdicts that are “clear, concise, and readily understandable” and are “undoubtedly responsive to the issues submitted” to the jury. *Norman*, 109 Ohio St. at 237.

E.

An additional point is that *Pelfrey* erred concluding that the issue could not be waived through lack of objection. Criminal Rule 52(B) specifically provides that errors not raised in the trial court are subject to plain-error review. The standards for such review are well settled. Yet, *Pelfrey* does not address Crim.R. 52(B) and does not explain why or how that rule can be overridden or ignored here. The lack of explanation is especially troubling in light of the Supreme Court's decision in *Park*, which addressed the prior version of the statute, and which applied a no-objection and no-prejudice analysis to that statute.

To be sure, the prior version did not have the provision indicating that, "Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged." But the question would then resolve into whether this "otherwise" provision serves to impliedly repeal the "no prejudice" principle in R.C. 2945.83(E) as cited in *Park*. Another question would be whether the "otherwise" provision was procedural, in which case it could not override the standards of harmless error and plain error as applicable through Crim.R. 52(A) and (B). See Article IV, Section 5(B), Ohio Constitution. Given the high standard for repeal by implication, see *Lucas County Commrs. v. Toledo* (1971), 28 Ohio St.2d 214, 217, and given that it is unlikely that the General Assembly meant to award a gift of acquittal on the greater charge in the absence of any doubt as to the meaning of the jury's verdicts, the high standard for repeal by implication is not satisfied. Application of a harmless-error or plain-error standard of review under Crim.R. 52 leads to the same conclusion: no reversible error should be found when the "as charged" guilty verdict demonstrates that the jury found the additional degree-raising element.

Insofar as lack of objection is concerned, defendant might contend that the defense had no duty to object to the “as charged” verdict form because the defense could let the verdict form go forward with the assumption that R.C. 2945.75(A)(2) would operate to allow him to be only convicted of the least degree of the offense. Even if that were true, such an argument would not excuse the lack of objection when the court later treated the conviction as greater-degree offenses.

In any event, the “no need to object” argument misses a key point. Given that defendant was charged with a felony-level offense, and given that no lesser included offense was included in the instructions, the defense would have readily understood that the use of the “as charged” form represented the trial court’s *ruling*, then and there, that the “as charged” form was sufficiently compliant to convict defendant “as charged.” There should have been an objection then and there in order to preserve the objection to the supposedly-flawed verdict form that the court by all indications intended to use as a verdict of guilty of the charged felony-level offense, not the third-degree misdemeanor offense which the appellate court reduced the offense to.

F.

Nor can *Pelfrey*’s draconian ruling be justified on the ground that the issue is “structural” or “jurisdictional.” To the extent defendant might rely on *Apprendi* and *Blakely* to justify the *Pelfrey* approach, it is well settled that *Apprendi-Blakely* errors are not structural and do not create a “void” judgment. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642.

Structural error can only apply to issues of constitutional dimension, and even most constitutional errors are not structural. *Id.* ¶ 18; *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶ 55. As stated above, *Pelfrey* at most arises out of a statute alone, as general verdicts are sufficient under constitutional standards.

“Structural error” is subject to plain-error standards anyway. *Johnson v. United States* (1997), 520 U.S. 461, 466. Unobjected-to “structural error” does not result in “automatic reversal” but rather results in plain-error review that may or may not result in reversal. *Id.* at 469-70 (even if “structural,” no reversal); *United States v. Cotton* (2002), 535 U.S. 625, 632-33 (same); *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶ 23,

Nor does the issue rise to the level of being “jurisdictional.” The form of a verdict, and its legal significance, reflect a matter within the trial court’s jurisdiction. The court obtained jurisdiction over the case at the outset, and the form of the verdict was a legal matter occurring within the court’s jurisdiction to decide legal matters for the case. Once a tribunal obtains jurisdiction, its right to hear and determine the case is “perfect[ed]” and, “once conferred, it remains.” *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶¶ 12 and 34. The statute provides a rule of decision in doubtful cases, but that rule would not be jurisdictional, nor more than the form of the jury instructions would be jurisdictional. Claims of *Pelfrey* error are barred by res judicata on collateral review. *State v. Reynolds*, 5th Dist. No. 09-CA-13, 2009-Ohio-3998. This confirms that the issue is not jurisdictional.

## CONCLUSION

For the foregoing reasons, amicus curiae Franklin County Prosecutor Ron O’Brien supports plaintiff-appellant State of Ohio and ask that this Court reverse the judgment of the Eighth District Court of Appeals.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was mailed to Assistant Cuyahoga County Public Defender, David M. King at his office at 310 Lakeside Avneue, 2nd Floor, Cleveland, Ohio, 44113 and T. Allen Regas, Assistant Cuyahoga County Prosecutor, at his office at Cuyahoga County Prosecutor's office, 1200 Ontario Street, Cleveland, Ohio 44113, this 19<sup>th</sup> day of September, 2011.

  
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