

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO, : Case No. 2013-0351  
Plaintiff-Appellant, : On Appeal from the Montgomery  
v. : County Court of Appeals, Second  
KEVIN D. TOLLIVER, : Appellate District  
Defendant-Appellee. : Court of Appeals Case No. 24716

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**BRIEF OF AMICUS CURIAE  
OFFICE OF THE OHIO PUBLIC DEFENDER  
IN SUPPORT OF APPELLEE KEVIN D. TOLLIVER**

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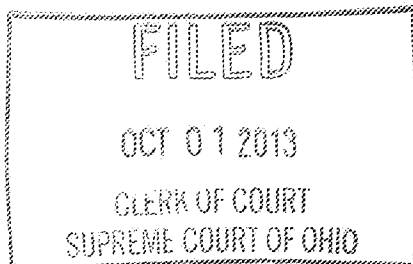
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## **STATEMENT OF THE CASE AND FACTS**

Amicus curiae adopts by reference the statement of the case and facts stated in the court of appeal's opinion, *State v. Tolliver*, 2d Dist. No. 24716, 2013-Ohio-115. Amicus curiae notes that this case does not involve the validity of the indictment, because the indictment properly included the mens rea element of recklessness when charging Mr. Tolliver with violating R.C. 2911.02(A)(3). *Tolliver*, 2013-Ohio-115, ¶ 8. Rather, the question presented to the court of appeals was whether the trial court erred in refusing to instruct the jury as to the required mens rea of recklessness. *Id.* at ¶ 15. So this case does not implicate the aspects of this Court's holdings in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885, N.E.2d 917 (*Colon I*), and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 (*Colon II*), relating to the sufficiency of an indictment.

## **INTEREST OF AMICUS CURIAE**

The Office of the Ohio Public Defender submits this amicus curiae brief in support of Appellee Kevin D. Tolliver because clarifying the law controlling the imputation of mens rea under R.C. 2901.21(B) will assist its present and future clients. This will advance the essential mission of the Ohio Public Defender, i.e., to provide quality representation to indigent defendants in the State of Ohio. R.C. 120.06(A)(3). Additionally, the Ohio Public Defender endeavors to assist this Court when the Court is considering matters in which the office has specialized knowledge and expertise. The office has unique perspectives and insights to bring to bear on the issue before this Court based upon its experience in representing indigent persons in trial and appellate courts throughout the State.

## ARGUMENT

### THE STATE'S PROPOSITION OF LAW

Applying the analysis in *State v. Wac*, 68 Ohio St.2d 84, 428 N.E.2d 428 (1981), and *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242, to robbery as described in R.C. 2911.02(A)(3), indicates that the use-of-force element of the robbery statute does not require a mens rea; robbery, therefore, in violation of R.C. 2911.02(A)(3), is a strict-liability offense.

### RESPONSE OF AMICUS CURIAE TO THE STATE'S PROPOSITION OF LAW

When applying R.C. 2901.21(B), a court must analyze the section that defines the offense in question to determine whether that section specifies a culpable mental state and, if not, whether that section plainly indicates a purpose to impose strict liability. Recklessness, not strict liability, is the default mens rea absent a clear indication that strict liability is intended. R.C. 2901.21(B) applied.

**I. The Court should reject the State's proposition of law because it contradicts the General Assembly's explicit rejection of strict liability as the default mens rea when the section defining an offense provides no mens rea.**

**A. When it enacted the current version of R.C. 2901.21(B), the General Assembly repudiated strict liability as the default mens rea when the section defining an offense provides no mens rea.**

Adopting the State's proposition of law would return this Court's mens rea analysis to that which existed before 1974, when the General Assembly enacted the current version of R.C. 2901.21(B). Before that enactment, strict liability was the default mens rea when a statute was silent as to culpability. *State v. Lisbon Sales Book Co.*, 176 Ohio St. 482, 200 N.E.2d 590 (1964); also see *State v. Clay*, 120 Ohio St.3d 528, 2008-Ohio-6325, 900 N.E.2d 1000, ¶ 16, and *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, 916 N.E.2d 1038, ¶ 44 (Lanzinger, J., concurring in judgment only). But when it enacted R.C. 2901.21(B), the General Assembly unambiguously expressed its intent that recklessness be the default level of culpability when a statute defining an offense is silent as to a mens rea. The General

Assembly's repudiation of strict liability in favor of recklessness as the default mens rea should anchor this Court's construction and application of R.C. 2901.21(B).

Contrary to the General Assembly's repudiation of strict liability as the default, the State's proposition of law explicitly provides that strict liability is the default mens rea for robbery under R.C. 2911.02(A)(3). The State proposes that, "the use-of-force element of the robbery statute does not require a mens rea; robbery, therefore, in violation of R.C. 2911.02(A)(3), is a strict-liability offense." State's Brief, p. 3. In short, simply because the section includes no mens rea, strict liability applies. But this proposition directly contradicts the General Assembly's explicit rejection of strict liability as the default mens rea. Revised Code section 2901.21(B) requires the application of recklessness as the mens rea unless R.C. 2911.02(A)(3) plainly demonstrates a legislative purpose to impose strict liability.

**B. The Court should adopt an approach to applying R.C. 2901.21(B) that more effectively honors the General Assembly's repudiation of strict liability as the default when a statute defining an offense provides no mens rea.**

This case provides the Court an opportunity to realign its analysis with the General Assembly's rejection of strict liability as the default mens rea. The State can assert a proposition of law that so directly contradicts the General Assembly's intent only because some of this Court's precedent has not been faithful to the General Assembly's repudiation of strict liability as the default mens rea, as demonstrated below. This precedent has eroded adherence to the legislative intent and resulted in an overly broad application of strict liability. It is the General Assembly's function, not that of the courts, to "determine what acts must be done with some degree of culpability and what acts require no guilty mind at all but are offenses for which a person is strictly liable." *Lester*, 2009-Ohio-4225, ¶ 50 (Lanzinger, J., concurring in judgment only). This case presents an opportunity to more

closely align the Court's construction and application of R.C. 2901.21(B) with the General Assembly's intent by limiting or disavowing the offending precedent and reaffirming the holdings that more faithfully apply the General Assembly's intent.

To effectuate the legislative intent of R.C. 2901.21(B), this Court should, first, focus the analysis on the plain language of the "section defining an offense." Reinforcing that focus will help avoid an overly broad application of strict liability as the default mens rea. The General Assembly's intent is most at risk when a court resorts to matters outside the language of the definitional section in order to find a plain legislative purpose to impose strict liability. *See, e.g., State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, ¶ 50. Considering matters outside the definitional section is appropriate in some circumstances, as indicated below. But, the Court should ensure that the exceptions do not swallow the rule. This Court should instruct that, when finding a plain legislative purpose to impose strict liability would require a court to consider matters outside the definitional section, recklessness should be imputed absent an affirmative legislative indication to the contrary.

Second, and more importantly, the Court should require strict adherence to the statutory mandate that strict liability applies only if the language of the definitional section plainly demonstrates a legislative intent to that effect. Specifically, the absence of a mens rea in the section defining the offense, alone, is not sufficient to demonstrate a strict-liability offense.

- 1. Focusing the analysis on the plain language of the section defining the offense will promote closer adherence to the General Assembly's rejection of strict liability as the default mens rea.**

Revised Code section 2901.21(B) focuses on the "section defining an offense." This Court can avoid an overly broad application of strict liability as the default by refocusing its jurisprudence on the language of the section defining the offense. The General Assembly's intent is often frustrated when a court resorts to matters outside the language of the definitional section in order to find a plain legislative purpose to impose strict liability. *See, e.g., State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, ¶ 50 (finding a legislative purpose to impose strict liability for serious-physical-harm aggravated robbery based on the mens rea appearing in the definition of an entirely different offense, i.e., removing a deadly weapon from the person of a law enforcement officer).

To remain faithful to the General Assembly's repudiation of strict liability as the default, resort to matters outside the language of the section defining the offense should be the exception rather than the rule. Considering matters outside the definitional section is appropriate in some circumstances. *See, e.g., State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, 803 N.E.2d 770; and *State v. Wac*, 68 Ohio St.2d 84, 428 N.E. 2d 428, at 87 ("The General Assembly included recklessness as an element of permitting gambling on one's premises in subsection (2). Subsection (1), however, does not contain a comparable standard. This exclusion "plainly indicates a purpose to impose strict criminal liability" [.] (internal citation omitted). But, the exceptions should not swallow the rule. The Court should instruct that, when finding a plain legislative purpose to impose strict liability would require a court to consider matters outside the definitional section, recklessness should be imputed absent an affirmative legislative indication to the contrary.

In addition, this Court should limit or disavow those portions of its precedent that fail to anchor its analysis to the language of the section defining the offense. Specifically, the second syllabus of *Horner*, 2010-Ohio-3830, is flawed because the Court relied on the inclusion of “knowingly” in R.C. 2911.01(B) (aggravated robbery by removing a deadly weapon from a police officer) to determine whether R.C. 2911.01(A)(3) (serious-physical-harm aggravated robbery) plainly states a purpose to impose strict liability. *Horner*, ¶ 50, 53. That is, the Court applied the statutory maxim, “expressio unius est exclusio alterius,” i.e., “the expression of one thing is the exclusion of the other.” *Thomas v. Freeman*, 79 Ohio St.3d 221, 224, 1997-Ohio-395, 680 N.E. 2d 997; accord, *Summerville v. City of Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E. 2d 522, at ¶ 34. Based on that analysis, the Court concluded that R.C. 2911.01(A)(3) is a strict-liability offense.

But this analysis is inconsistent with the focus of R.C. 2901.21(B) on the “section defining an offense.” The definitional section at issue in *Horner*, R.C. 2911.01(A)(3), included neither a mens rea, nor a plain indication of a purpose to impose strict liability. Considering the mens rea element in R.C. 2911.01(B) was improper because that section defines an entirely different offense, i.e., aggravated robbery by removing a deadly weapon from a police officer. The mens rea for that offense is irrelevant to the mens rea for serious-physical-harm aggravated robbery because it is attached to an element that is not included in the other forms of aggravated robbery defined in R.C. 2911.01. Although the identity of the victim of under R.C. 2911.01(B) is an element of that offense, the identity of the victim is not an element under R.C. 2911.01(A)(1), (A)(2), or(A)(3). “Because the definition of the offense is found solely in R.C. 2911.01(A), the language of R.C. 2911.01(B) is inapplicable to the question of whether the General Assembly has plainly indicated a purpose to impose

strict criminal liability for the offense defined in (A).” *Horner*, 2010-Ohio-3830, ¶ 60 (Lanzinger, J., dissenting).

The Court erred in applying the canon *expressio unius est exclusio alterius* because the offense defined in R.C. 2911.01(B) is different from those defined in R.C. 2911.01(A). This Court previously instructed that:

The canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an associated group or series justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.

(Internal quotation marks omitted.) *Summerville*, 2010-Ohio-6280, at ¶ 35 (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168, 123 S.Ct. 748 (2003)). “The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded.” *Summerville*, 2010-Ohio-6280, at ¶ 36 (quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81, 122 S.Ct. 2045 (2002)).

The offense defined in R.C. 2911.01(B) is sufficiently different from those defined in R.C. 2911.01(A) to defeat the inference that the element of knowledge was deliberately omitted from the R.C. 2911.01(A) offenses. The R.C. 2911.01(A) offenses are generic aggravated robbery offenses, the gist of which is the commission or attempt to commit a theft offense while having a dangerous weapon or dangerous ordnance, or while inflicting or attempting to inflict serious physical harm. The identity of the victim is irrelevant, and the General Assembly reasonably did not include a knowledge *mens rea*. But the gist of the R.C. 2911.01(B) offense is entirely different. Unlike subsection (A), the preamble of this subsection makes no reference to “a theft offense.” Rather, the gist of this offense is removing a deadly weapon from a law enforcement officer or depriving an officer of a

deadly weapon. R.C. 2911.01(B). That is, the offense is premised upon the victim's status as a law enforcement officer who is acting in the course and scope of the officer's duties. R.C. 2911.01(B)(1), (2).

The inclusion of the knowledge element in R.C. 2911.01(B) was necessary to fully define the offense. But the General Assembly's decision to include that element does not reasonably support an inference that, in doing so, the General Assembly deliberately omitted a mens rea element from the R.C. 2911.01(A) offenses. Notwithstanding that R.C. 2911.01(A)(3) and R.C. 2911.01(B) are included in the same section of the Revised Code, the language of R.C. 2911.01(B) provides no information to support inferences regarding the General Assembly's intent regarding R.C. 2911.01(A)(3).

The error in applying the "expressio unius" canon and relying on R.C. 2911.01(B) becomes apparent when one considers the fact that R.C. 2911.01(B) was enacted decades after R.C. 2911.01(A). As this Court observed in *Summerville*, given the nearly two-decade span between the enactments at issue in that case, "[t]he legislature did not specifically exclude R.C. 2744.02(C) from the prohibition of R.C. 2744.09(E), because the provision did not yet exist." *Summerville*, 2010-Ohio-6280, at ¶ 37. A similar analysis applies here. The enactment of R.C. 2911.01(B) long after the enactment of R.C. 2911.01(A) cannot support an inference that the General Assembly intended to omit a mens rea from the R.C. 2911.01(A) offenses when it enacted R.C. 2911.01(B).

Furthermore, this Court long ago held that "[t]he doctrine of *expressio unius est exclusio alterius* . . . should not be applied to defeat legislative intent." *State ex. rel. Wilson v. Preston*, 173 Ohio St. 203, 209, 181 N.E.2d 31 (1962); *Wachendorf v. Shaver*, 140 Ohio St. 231, 241, 78 N.E.2d 370 (1948) ("Like other canons of statutory construction it is only an aid in the

ascertainment of the meaning of the law and must yield whenever a contrary intention on the part of the lawmaker is apparent.”) (quoting *Springer v. Government of Philippine Islands*, 277 U.S. 189, 46 S.Ct. 480 (1928)). The analysis in *Horner* improperly invoked that canon of construction in such a way as to defeat the express intent of R.C. 2901.21(B). Because R.C. 2911.01(A)(3) omits a mens rea, and has done so since its enactment, the General Assembly intended that recklessness would apply through R.C. 2901.21(B). That did not change when R.C. 2911.01(B) was enacted. Thus, *Horner* was wrongly decided.

**2. This Court should limit or disavow its precedent that suggests the absence of a mens rea, alone, is enough to demonstrate a strict-liability offense.**

To realign its analysis with the General Assembly's rejection of strict liability as the default mens rea, the Court should limit or disavow its precedent that suggests that the absence of a mens rea in the defining section, alone, is enough to demonstrate a strict-liability offense. See, *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, syll. 2; *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, 916 N.E. 2d 1038; *State v. Wharf*, 86 Ohio St.3d 375, 1999-Ohio-112, 715 N.E.2d 172; and *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242. The Court should reaffirm that strict liability applies only when the section defining an offense is silent as to the degree of culpability “and plainly indicates a purpose to impose strict criminal liability.” R.C. 2901.21(B); also see, e.g., *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, 803 N.E.2d 770, ¶ 45; *State v. Schlosser*, 79 Ohio St.3d 329, 331, 681 N.E.2d 911 (1997) (when a statute omits a culpability standard for an element of an offense and the statute does not plainly indicate a purpose to impose strict liability, recklessness is sufficient); *State v. Adams*, 62 Ohio St.2d 151, 152-53, 404 N.E.2d 144 (1980); *State v. McGee*, 79 Ohio St.3d 193, 1997-Ohio-156, 680 N.E.2d 975

(and cases cited therein); and *State v. Parrish*, 12 Ohio St.3d 123, 124, 465 N.E.2d 873 (1984) (per curiam).

This Court should re-evaluate its analysis in *Horner* because it violates R.C. 2901.21(B) by holding that the absence of a mens rea, alone, is enough to demonstrate a strict-liability offense. In addition to improperly relying on R.C. 2911.01(B), as argued in Part I(B)(1), above, the Court stated in *Horner* that the mere absence of a mens rea indicates an intent to impose strict liability:

[T]his court has already held that subsection (1) of division (A), which also does not specify a mental element, is a strict-liability offense, based on the court's conclusion that R.C. 2911.01(A)(1) plainly indicates a purpose to impose strict liability. *Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, 916 N.E.2d 1038, ¶ 32. By choosing language in R.C. 2911.01(A)(3) that makes it a crime to merely inflict or attempt to inflict serious physical harm, as opposed to requiring a purpose or intent to injure, the General Assembly similarly has indicated its purpose to impose strict liability.

*Horner*, 2010-Ohio-3830, ¶ 51 (citing *Wharf*, 86 Ohio St.3d at 378; and *Lester*, 2009-Ohio-4225, ¶ 20). In other words, the General Assembly's failure to require a purpose or intent to injure, i.e., a mens rea, indicates its intent to impose strict liability. But that proposition contradicts R.C. 2901.21(B), which allows strict liability to be imputed only when the statute *both* does not specify culpability *and* plainly indicates a purpose to impose strict liability.

Revised Code section 2901.21(B) does not contemplate that the absence of a mens rea can establish a plain purpose to impose strict liability, as *Horner* holds. As Justice Lanzinger pointed out:

[T]he majority rewrites the statute to say that unless there is "specific intent," the default standard is strict liability, and no mental state need be proven. But to "inflict or attempt to inflict serious physical harm," as that phrase is used in R.C. 2911.01(A)(3), implies action on the part of a defendant that requires a mental state of some degree, unless it has been clearly dispensed with. The General

Assembly explicitly provides in R.C. 2901.21(B) that recklessness is the default mens rea, unless there is a clear indication that strict liability is intended.

*Horner* at ¶ 58 (Lanzinger, J., dissenting).

The analysis in *Horner* was grounded, in part, on *State v. Maxwell*, 95 Ohio St.3d 254, 257, 2002-Ohio-2121, 767 N.E.2d 242. *Horner* at ¶ 35-39, 47-53. In *Maxwell*, the Court held that, although R.C. 2907.321(A) includes the mens rea of knowledge as to the obscene nature of the material, no mens rea was included in the statute as to transporting the material into Ohio from another state. *Maxwell*, 2002-Ohio-2121, ¶ 29. Based on the absence of a mens rea as to interstate transportation, the Court concluded that the “state is not required to prove that appellee knew that in downloading files via America Online he was also transmitting those files from Virginia into Ohio.” *Id.* Thus, the Court apparently concluded that this silence was sufficient to show a plain intent to impose strict liability. The Court buttressed that conclusion by considering “other indications outside the statute that plainly indicate a purpose to impose strict liability.” *Id.* at ¶ 30. Those considerations consisted of the General Assembly’s “strong stance against sex-related acts involving minors.” *Id.* This Court concluded:

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. 2907.321 reflect legislative intent to impose strict liability for the act of bringing child pornography into the state of Ohio.

*Id.*

This conclusion is problematic because, before applying strict liability, R.C. 2901.21(B) requires a court to identify in the definitional section a plain indication that the General Assembly intended to impose strict liability. Evaluating the policy considerations for or against imposing strict liability is a legislative function, not a judicial one. The best

indicator of legislative intent is the language of the definitional section. That section was silent as to the mens rea for the transportation element; it also betrays no clear intention to impose strict liability. Revised Code section 2901.21(B) expresses the legislature's intent in that situation, i.e., absent a clear indication otherwise, recklessness should apply. Thus, this aspect of *Maxwell's* analysis allows the mere absence of a mens rea to establish a plain purpose to impose strict liability, as did *Horner*.

Likewise, *Lester* also contradicts R.C. 2901.21(B) by holding that the lack of a mens rea in R.C. 2911.01(A)(1) plainly indicates a purpose to impose strict liability. See *Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, 916 N.E.2d 1038, at ¶ 44-58 (Lanzinger, J., concurring in judgment only). Furthermore, as Justice Lanzinger demonstrates in her concurring opinion in *Lester*, this Court's analysis in *Wharf*, 1999-Ohio-112, is also inconsistent with both the General Assembly's rejection of strict liability as the default mens rea and the Court's prior precedent on the matter. *Lester*, at ¶ 52-58.

Thus, the *Horner* analysis, as well as the portions of *Lester*, *Wharf*, and *Maxwell* upon which it relies, contradicts the General Assembly's rejection of strict liability as the default mens rea. Limiting or disavowing *Horner*, *Lester*, *Wharf*, and *Maxwell* is necessary to harmonize the Court's precedent with the General Assembly's intent in rejecting strict liability as the default mens rea when enacting R.C. 2901.21(B). Amicus curiae asks the Court to limit or disavow that precedent and to reaffirm that recklessness applies where the definitional section lacks a mens rea.

**II. The Court should dismiss this appeal as improvidently allowed because the State's argument relies on the mistaken premise that the mens rea for the underlying theft charge can establish that R.C. 2911.02(A)(3) expresses a clear purpose to impose strict liability, a proposition this Court rejected in *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, ¶ 49.**

In an effort to bring R.C. 2911.02(A)(3) within the reach of the Court's analysis in *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, the State mistakenly argues that the mens rea of the underlying theft offense is relevant to the analysis. State's Brief, pp. 7-8. But this Court unambiguously stated in *Horner* that the mens rea associated with the underlying theft offense does not provide a mens rea for the physical-harm element at issue:

R.C. 2911.01(A) includes the element of attempting or committing a theft offense, which incorporates all the elements of theft, including its mental state. However, that mental state is applicable to the theft aspect in division (A) only, and *its incorporation into division (A) does not provide a mental state for the physical-harm element described in subsection (A)(3).*

(Emphasis added.) *Horner*, 2010-Ohio-3830, ¶ 49 (citing *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242, ¶ 23).

The mens rea of the theft element plays a pivotal role in the State's position. But *Horner* and *Maxwell* demonstrate the fundamental flaw in that argument. Because the State's argument depends on this mistaken premise, amicus curiae asks the Court to dismiss the appeal as improvidently accepted.

## CONCLUSION

For the above reasons, amicus curiae respectfully asks the Court to dismiss this appeal as improvidently accepted, since the State's brief is premised upon the mens rea of the underlying theft offense to prove the clear intention to impose strict liability. *Horner*, 2010-Ohio-3830, ¶ 49, defeats that premise, so the State's argument warrants no further consideration. In the alternative, amicus curiae asks the Court to realign its analysis with the General Assembly's rejection of strict liability as the default mens rea by limiting or disavowing the analysis in *Horner*, 2010-Ohio-3830, *Lester*, 2009-Ohio-4225, *Wharf*, 1999-Ohio-112, and *Maxwell*, 2002-Ohio-2121.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on October 1, 2013, a true copy of the foregoing *Brief of Amicus Curiae Office of the Ohio Public Defender in Support of Appellee Kevin D. Tolliver* was served by regular U.S. mail, upon the following:

MATHIAS H. HECK, JR.  
Montgomery County Prosecutor

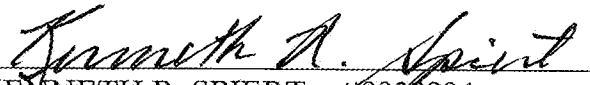
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