

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case Nos. 2025-0952, 2025-0962
	:	
Appellant,	:	On Appeal from the
	:	Muskingum County
v.	:	Court of Appeals,
	:	Fifth Appellate District
SCOTT BURRELL,	:	
	:	Court of Appeals
Appellee.	:	Case No. CT2025-0022

**BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL
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INTRODUCTION

This case asks: When a trial court amends a criminal indictment to eliminate an essential element—changing the charge from a more serious third-degree felony to a lower fourth-degree felony—has the court “dismiss[ed]” “any part” of the original indictment within the meaning of R.C. 2945.67(A)? The answer is “Yes.” By excising an essential element that, in turn, changes the degree of the charge and reduces the potential punishment, the trial court effectively dismisses the higher-level charge *and* injects a new, lower-level charge into the case. Through that two-step move, the trial court functionally dismisses part of the first indictment.

Recognizing the effect of amendments has important appellate consequences. Because such amendments “dismiss” a “part” of the indictment, prosecutors may appeal as of right under R.C. 2945.67(A). And in this Court’s words, when the trial court’s deletion “effectively dismisses that part of the indictment,” the State can appeal under R.C. 2945.67(A). *State v. Hayes*, 25 Ohio St.3d 173, 175 (1986) (*per curiam*). That conclusion stands firm no matter how a motion or ruling is styled.

These principles resolve this appeal. Defendant Scott Burrell faced a third-degree felony domestic-violence charge based, in part, on two prior convictions. But after determining that Burrell did not have adequate representation in one prior conviction, the trial court eliminated that prior conviction from the indictment. The court then ordered that the “Indictment shall be amended to delete the reference to the afore-mentioned case, making Count One Domestic Violence, a fourth degree felony.” Judgment Entry 5, No. CR2024-0635 (Feb. 4, 2025) (“Reduction Order”). Burrell thus

no longer faced a third-degree domestic-violence charge. Instead, because the Indictment now contained only *one* prior conviction (rather than two), Burrell faced a new charge of *fourth*-degree domestic violence.

That was no small change. It eliminated an essential element of the charge. *See State v. Allen*, 29 Ohio St.3d 53, 54 (1987). And, as a result, it changed the degree of the crime and reduced the potential punishment. “[A]mending the indictment to change the penalty or degree,” as the trial court did here, “change[d] the identity of the offense.” *State v. Davis*, 2008-Ohio-4537, ¶9. By effectively dismissing one charge and replacing it with another, the trial court paved the way for the State to appeal as of right under R.C. 2945.67(A).

STATEMENT OF AMICUS INTEREST

The Attorney General is Ohio’s chief law officer and “shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested.” R.C. 109.02. He is interested in the correct interpretation, and proper application, of procedural laws governing the criminal-appeal process, including the correct application of the State’s right-to-appeal statute, R.C. 2945.67. The Attorney General also sometimes serves as special counsel in cases of significant importance.

STATEMENT OF THE CASE AND FACTS

I. After the State indicted Burrell, the trial court changed the Indictment to a lesser offense.

The State indicted Defendant-Appellee Scott Burrell on one count of domestic violence, in violation of R.C. 2919.25, and one count of child endangerment. *See*

Judgment Entry 1, CT2025-0022 (5th Dist. June 4, 2025) (“App.Op.”). The domestic-violence count was raised to a third-degree felony, as Burrell had two prior convictions for domestic violence. App.Op. at 1.

Burrell moved to dismiss or amend the Indictment by deleting the reference to one of his two prior convictions. He argued that his 2011 conviction could not be used as a prior conviction to elevate his felony level (from a fourth-degree felony to a third-degree felony) because he was unrepresented in that case and had served only 15 days in jail. *Id.*

The trial court granted the motion, and it ordered the State to amend the Indictment to remove all reference to Burrell’s 2011 prior conviction. *Id.* at 1–2; *see also* Reduction Order at 5 (ruling that the “Indictment shall be amended to delete the reference to the afore-mentioned case.”). As a consequence of that amendment, the court further ordered that the domestic-violence charge be reduced from a third-degree felony to a less-serious fourth-degree felony. App.Op. at 2.

II. The State appealed by right, but the appeals court dismissed the appeal.

The State appealed as of right to the Fifth District under R.C. 2945.67(A). Burrell moved to dismiss the appeal for lack of a final, appealable order, which the Fifth District granted. *Id.* at 2–3. The appellate court said that “the trial court did not dismiss any part of the indictment. Rather, the trial court ordered the ‘Indictment shall be amended to delete the reference to the [2011] case, making Count One Domestic Violence, a fourth-degree felony.’” *Id.* at 2 (quoting Reduction Order).

The Fifth District cited its own precedent dismissing an appeal in a “nearly identical situation.” *Id.* (citing *State v. Clements*, 2008-Ohio-30 (5th Dist.)). *Clements* also involved a trial-court order that amended an indictment to delete a reference to a prior conviction, thus reducing a third-degree felony to a fourth-degree one. 2008-Ohio-30 at ¶5. The panel below followed *Clements* and dismissed the appeal. App.Op. at 2–3.

Judge Gormley concurred in the dismissal, but he wrote separately to note that he did “so with some reluctance.” *Id.* at 4 (Gormley, J., concurring). He explained that *Clements* and *stare decisis* bound the court, and that this case was not one that warranted overcoming *stare decisis* to discard precedent. *Id.* at 4–5. But, he said, if the court were “addressing this issue for the first time” or hearing it *en banc*, he “might very well be inclined to embrace the contrary view adopted by the Eighth District.” *Id.* at 4 (citing *State v. Skala*, 2002-Ohio-2962, ¶11 (8th Dist.)).

III. The appeals court certified a conflict, and this Court accepted the State’s proposition of law.

On the State’s motion, the Fifth District certified a conflict. The court noted, as Judge Gormley had in the earlier dismissal order, that the Eighth District reached a contrary view in *Skala*, 2002-Ohio-2962. Judgment Entry 2–3, CT2025-0022 (5th Dist. July 7, 2025). The court therefore certified a question asking whether the State may appeal as of right a trial court’s pretrial order striking language from an indictment that lowers the offense level. *Id.* at 2. The court also granted the State’s motion to stay the judgment pending appeal. *Id.* at 3. This Court determined that a conflict existed. *See 10/1/25 Case Announcements*, 2025-Ohio-4537.

The State also filed a discretionary appeal. And this Court accepted a related proposition of law asking whether the State may appeal as of right under R.C. 2945.67 when a trial court amends an accusatory instrument to delete any language, especially text that would delete a charge and replace it with another new lesser-penalty charge. This Court consolidated the case with the certified conflict. See *10/1/25 Case Announcements, 2025-Ohio-4537*.

ARGUMENT

Appellant State's Proposition of Law:

When a trial court amends an accusatory instrument in a criminal case, and that amendment in effect deletes any language, especially when it deletes a charge and replaces that charge with a new lesser-penalty charge, a prosecutor can appeal as of right under R.C. 2945.67.

Certified conflict:

When the prosecution wants to challenge in an immediate appeal a trial court's pretrial order striking from a criminal complaint or from an indictment or a bill of information a prior conviction or other allegation that would have elevated the offense level of the underlying criminal charge, may the prosecution file an appeal of right under R.C. 2945.67 or must the prosecution seek permission to appeal under App.R. 5?

When a court “amends” an indictment to eliminate one charge and replace it with another, it effectively dismisses the initial charge, so the State can appeal as of right. Plain statutory text establishes that removing a prior conviction that forms the predicate for a more-serious offense, thus reducing it to a less-serious offense of a different degree, is “dismiss[al]” of a “part of” the Indictment within the meaning of R.C. 2945.67(A). This Court’s precedent in *Hayes* makes that clear. The Fifth District erred in concluding otherwise.

I. The State may appeal as of right a dismissal of any part of an indictment, which occurs when a court orders an amendment that changes the degree of the charge.

Although the State can typically appeal only final orders, the General Assembly has made an exception: the State “may appeal as a matter of right any decision” that “grants a motion to dismiss all or any part of an indictment, complaint, or information.” R.C. 2945.67(A). When a trial court amends an accusatory indictment to change any charge, that effectively “dismiss[es]” a “part of” the indictment, specifically the original charge, and replaces it with a new charge. The Fifth District erred in holding otherwise.

A. Facts that affect the degree or punishment of the crime are relevant parts of the indictment.

Facts that affect the degree of a charge in the indictment, are a “part of” the indictment within the meaning of R.C. 2945.67(A). To see why, begin with the statute, which says, in relevant part, that the State “may appeal as a matter of right any decision of a trial court in a criminal case, or any decision of a juvenile court in a delinquency case, which decision grants a motion to dismiss all or *any part of an indictment*, complaint, or information.” R.C. 2945.67(A) (emphasis added). Because the text allows appeals of dismissals of “any part of an indictment” the State may appeal when a *portion* of an indictment is dismissed.

Essential elements of a charged crime, including facts affecting the degree or punishment of the crime, and legal theories amount to relevant “part[s]” of the indictment covered by R.C. 2945.67(A). After all, this Court has held that “[a]n amendment that changes the penalty or degree of the charged offense changes the identity of the

offense.” *State v. Pepka*, 2010-Ohio-1045, ¶15; *State v. Davis*, 2008-Ohio-4537, ¶1 (same). A third-degree crime is not the same as a fourth-degree crime. *See State v. Headley*, 6 Ohio St.3d 475, 479 (1983) (noting that the crimes of different severities are different offenses). And a crime with a one-year sentence differs from a crime with a potential three-year sentence. *Davis*, 2008-Ohio-4537 at ¶13. So charges with different degrees and punishments are different crimes. And when a court amends an indictment to swap out a second-degree charge for a third-degree charge, it has not simply made cosmetic changes to the indictment but has fundamentally altered the identity of the alleged crime. *Id.*

For that reason, this Court has categorically prohibited courts from amending indictments under Criminal Rule 7(D) to increase the degree or punishment associated with the crime. *Id.* A crime is, in part, defined by the degree of the charge. So altering the felony level alters the very crime itself. In sum, information establishing the degree of the crime or the potential punishment are relevant “parts” of the indictment that trigger appeal rights when dismissed.

Precedent confirms this point. As this Court has explained, deleting a particular legal *theory* from an indictment would also give the State right to appeal. *State v. Hayes*, 25 Ohio St.3d 173, 175 (1986) (*per curiam*). In *Hayes*, the State’s indictment charged a defendant with violating a law against sexual conduct with someone other than a spouse when the “offender is the other person’s natural or adoptive parent, or a stepparent, or guardian, custodian or person in loco parentis.” *Id.* at 173. The State prosecuted under the “in loco parentis” prong of the law, but the trial court held that

the language was unconstitutionally vague and deleted the allegations in the indictment regarding *in-loco-parentis* status. *Id.* The trial court, however, did *not* dismiss the entire indictment. The case instead went forward because the State could still prosecute under the other prongs of the statute. This Court held that the State could appeal because a dismissal occurred when the trial court deleted the “in loco parentis” language as it was a “part” of the indictment. *Id.* at 175. Thus, the dismissal fell “squarely within R.C. 2945.67(A).” *Id.*

B. Amending a charging document to erase essential elements or relevant facts effectively dismisses that part of the indictment.

The statute allows the State to appeal when a trial court grants a motion to “dismiss” part of an indictment. Dismiss means to “send (something) away; specif., to terminate (an action or claim) without further hearing, esp. before the trial of the issues involved.” Dismiss, Black’s Law Dictionary (12th ed. 2024). And under this Court’s precedents, orders “effectively” dismiss a portion of an indictment when they eliminate or alter the initial charge. Such orders fall within R.C. 2945.67(A) and may be appealed.

To see why, return to *Hayes*. The trial court ruled that a portion of a statute was unconstitutional and thus prevented the State from prosecuting on that theory. 25 Ohio St.3d at 173. But the trial court did not dismiss the entire indictment. Yet, this Court held that the trial court’s order effectively amounted to a dismissal under R.C. 2945.67(A) because it precluded the State from proceeding under its chosen legal theory in the indictment. *Id.* at 175. And by doing so, the order effectively dismissed “part” of the indictment.

As this Court later explained, the trial court in *Hayes* had “refused to dismiss the indictment” after holding that “in loco parentis” was “unconstitutional.” *State v. Craig*, 2007-Ohio-5752, ¶11. But since the order prevented the State from prosecuting its case, the State could appeal under R.C. 2945.67(A). “Central to our holding in *Hayes*,” the Court noted in *Craig*, “was the plain and unambiguous wording of R.C. 2945.67(A).” *Id.* at ¶13. “The statute clearly affords the state the right to appeal, as a matter of right, *any* decision that grants a motion to dismiss.” *Id.* (emphasis in original). And deleting the indictment’s legal theory amounts to a dismissal under the statute’s plain language.

Hayes alone decides this case, but other cases reinforce the point. Take *In re A.J.S.*, a case where this Court held that R.C. 2945.67(A) allows a State to appeal when a court denies a motion for a mandatory bindover. 2008-Ohio-5307, ¶1. Mandatory bindover would have transferred the case to a common pleas court to prosecute the juvenile as an adult. *Id.* at ¶¶21–22. But the juvenile court denied the State’s motion, which “terminate[d] the state’s ability to secure an indictment for the acts charged.” *Id.* at ¶33. That ruling, too, amounted to a dismissal under R.C. 2945.67(A). *Id.*

The reason was straightforward, and it echoed *Hayes*: “denial of a mandatory transfer is the functional equivalent of the dismissal of an indictment.” *Id.* And because the order effectively “bar[red] the state from prosecuting a juvenile offender as an adult,” the order “constitute[d] a final order from which the state [could] appeal as a matter of right.” *Id.* at ¶1. So even though no indictment—nor any part of

indictment—was technically dismissed, the order precluded the State’s prosecution and was thus appealable as the equivalent of a dismissal.

Consider next *In re S.J.*, 2005-Ohio-3215. There, “the juvenile court dismissed the murder charge and amended the felony-murder charge on its own motion.” *Id.* at ¶13. Neither party had moved for such dismissal, so arguably there was no decision that “grant[ed] a motion to dismiss” the indictment. R.C. 2945.67(A). Nonetheless, this Court held that the decision amounted to “*the equivalent of a ‘decision granting a motion to dismiss’* under R.C. 2945.67(A).” *In re S.J.*, 2005-Ohio-3215 at ¶13 (alteration accepted, emphasis added). And the State had the right to appeal.

The upshot is that under R.C. 2945.67(A), the State may appeal as of right any “decisions that either dismisses an indictment or are the functional equivalent of a dismissal of an indictment.” *State ex rel. Steffen v. Court of Appeals, First Appellate Dist.*, 2010-Ohio-2430, ¶25 (*per curiam*). So whenever a court precludes the State from moving forward with facts or legal theories charged in the indictment, the State has the right to appeal.

C. By ordering the removal of the prior conviction thus reducing the third-degree charge to a fourth-degree charge, the trial court dismissed the more-serious charge against Burrell.

Applying those principles here confirms that the State may appeal as of right. Altering an indictment to remove reference to a prior conviction—and thus change the degree of the charge against Burrell—is a “dismiss[al]” of a “part of” the Indictment against him within the meaning of R.C. 2945.67(A).

“Any Part.” Deleting a prior conviction from the Indictment alters a “part” of the Indictment under R.C. 2945.67(A). That prior conviction served a critical role in the State’s case. After all, a prior conviction is an essential element of the offense. *See State v. Allen*, 29 Ohio St.3d 53, 54 (1987); *see also State v. Gordon*, 28 Ohio St.2d 45, 46–47 (1971). And deleting the prior conviction changed the charge from third-degree to fourth-degree domestic violence, thus reducing the potential punishment. Doing so replaced the crime that the State wished to prosecute with a new crime altogether. Given the importance of the prior conviction—as an essential element, as a fact that changes the degree of the charge, and as a factor increasing the potential punishment—it counts as a “part” of the Indictment that falls within R.C. 2945.67(A)’s text. It is part and parcel of the State’s case.

“Dismissal.” Removing the prior conviction, thus resulting in a fourth-degree charge against Burrell, dismissed the higher-seriousness offense within the meaning of R.C. 2945.67(A) and created a *new* charge on which the State must proceed. Under *Hayes*, the court dismissed a “part” of the Indictment, and the State can appeal. *Accord In re A.J.S.*, 2008-Ohio-5307 at ¶33. At the very least, the trial court’s order “effectively” dismissed Burrell’s third-degree domestic-violence charge by removing it from the case. The original Indictment no longer exists in the same form—all because of the trial court’s order. That, if nothing else, constitutes a “dismissal” of a “part” of the Indictment.

Nor do labels—here, a motion to *amend*—trump the substance. Removing the more-serious third-degree charge and reindicting on a less serious, fourth-degree

charge is a dismissal. Just last month, this Court made plain that the name of a motion or judgment “does not transform what is substantively a dismissal of an indictment, complaint or information” into something else. *State v. Musarra*, 2025-Ohio-5058, ¶16. In *Musarra*, the Court held “that a decision terminating a prosecution based on insufficient evidence of venue is a decision granting a motion to dismiss the indictment,” giving the State an “appeal as of right under R.C. 2945.67(A).” *Id.* at ¶27. The defendant argued—and a lower court agreed—that the motion fell under Criminal Rule 29(A)’s judgment-of-acquittal language. *Id.* at ¶5. But this Court disagreed, holding that the ruling was “a dismissal of the indictment,” regardless of what the lower court (or defendant) had called it. *Id.* at ¶26. This is consistent with this Court’s approach to “look to the substance than to the form of words made use of.” *Cincinnati v. Gwynne*, 10 Ohio 192, 193 (1840); see *Lingo v. State* 2014-Ohio-1052, ¶38. Here, too, this Court should look to the substance of the court’s action to determine whether R.C. 2945.67(A) applies. *Cf. State v. Davidson*, 17 Ohio St.3d 132, 135 (1985) (explaining that under R.C. 2945.67(A) the court must look to the “type of relief [a motion] seeks to obtain” not “what it is labeled.”).

Just so here. Burrell filed a motion to amend or dismiss the Indictment, the substantive effect of which was to dismiss the third-degree domestic-violence charge, thereby changing the essential elements of the crime charged and the potential punishment. As explained above, that decision amounted to dismissal of the original charge. Of course, courts may “amend an indictment to provide the necessary information.” *State v. Troisi*, 2022-Ohio-3582, ¶25. But if an amendment alters the degree

or punishment of the crime it has “change[d] ‘the ... identity of the crime charged.’” *Id.* (quoting *Davis*, 2008-Ohio-4537 at ¶1).

Amendments, in other words, allow the court to fix minor inaccuracies or “imperfection” in the original indictment. *Id.* But when a court eliminates one charge and replaces it with another, the original charge has been dismissed, and the State may appeal. “Any other result,” as this Court has explained, “would improperly elevate form over substance and would be unfaithful to the spirit and intent” of the law. *Davidson*, 17 Ohio St.3d at 135. Defendants like Burrell cannot make an end-run around R.C. 2945.67(A)’s plain text and purpose by calling a dismissal something else. Otherwise, the State would be deprived of its appellate rights whenever a court says it “amended” rather than “dismissed” a prior charge. And that would put form over substance, in direct conflict with the law’s plain text.

II. The appellate court’s contrary view is wrong.

The Fifth District’s ruling is unpersuasive. It fails to cite—let alone grapple with—cases like *Hayes*, *In re A.J.S.*, or *Davis*. It overlooks the importance of changing the charge’s degree or potential punishment. And it puts form over substance, in direct conflict with this Court’s holdings.

That is largely because the Fifth District’s prior precedent, *State v. Clements*, 2008-Ohio-30 (5th Dist. 2008), was wrongly decided. In *Clements*, the Fifth District held that no dismissal occurred where the trial court amended the indictment to alter the crime from a third- to fourth-degree felony. *Id.* at ¶13. As here, the defendant in *Clements* argued that a prior conviction did not qualify as a predicate for a third-

degree felony conviction. *Id.* at ¶4. The trial court agreed and changed the indictment to a fourth-degree felony. On appeal, the Fifth District held that “the trial court did not dismiss any or part of the indictment, but rather ordered that the indictment was to be amended.” *Id.* at ¶13.

Clements was wrong and it bound the court below to a wrong decision. For one thing, *Clements* acknowledged that dismissal of part of an indictment occurs “when such dismissal concerns the substantive elements of the charged offense.” *Id.* at ¶11 (quotations omitted). But *Clements* did not recognize that a prior conviction is an essential substantive element of the crime charged. *See Allen*, 29 Ohio St.3d at 54. For another thing, *Clements* improperly used an amendment to “change the penalty or degree” of the charge, which courts cannot do. *Davis*, 2008-Ohio-4537 at ¶9. And on top of that, the *Clements* court did not cite *Hayes* or other cases explaining that orders cannot effectively result in dismissal.

Clements is only one of several incorrect decisions in Ohio’s lower courts. In the Eighth District, for example, *State v. Gordon* held that R.C. 2945.67(A) did not allow a State appeal when the trial court changed the charge from a fifth-degree felony to a first-degree misdemeanor. 2006-Ohio-1732, ¶¶3, 11 (8th Dist.). And in *State v. Cook*, the Twelfth District held that that the “trial court did not dismiss any part of the indictment” but “only amended the charged crime from involuntary manslaughter to negligent homicide.” 35 Ohio.App.3d 20, 22 (1987) (*per curiam*). These cases suffer from some of the same flaws that plague *Clements*. They assume that simply labeling a motion an “amendment” allows a court to erase elements of a charged crime without

allowing the State a corresponding right to appeal. So, in effect, these cases place no limit on what an “amendment” can accomplish. Under that rule, so long as a defendant styles a motion as one for “amendment,” the indictment may be overhauled with no right to appeal for the State. It does not matter that the “amendment” results in a brand new charge or potential penalty—the judge may change anything in an indictment, and the State has no right to appeal.

That is not the law. When a court engages in a judicial redline to change the degree and punishment of the crime charged, it has effectively dismissed a “part” of the indictment, and the State has the right to appeal under R.C. 2945.67(A). Any other result undermines the statute’s clear text and purpose.

CONCLUSION

The Court should reverse the Fifth District’s dismissal of the State’s appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Amicus Curiae Ohio Attorney

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