

IN THE SUPREME COURT OF OHIO

CASE NO. 2008-0363

STATE OF OHIO	:	
Appellant	:	
-vs-	:	On Appeal from the
	:	Cuyahoga County
	:	Court of Appeals,
TIMOTHY EVANS	:	Eighth Appellate
Appellee	:	District Court of
	:	Appeals
	:	CA: 89057

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**APPELLEE'S MERIT BRIEF**

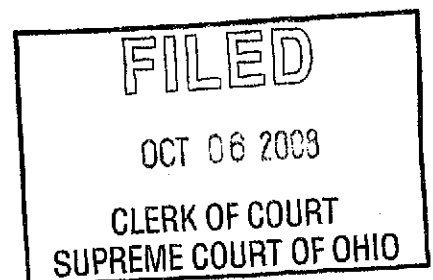
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<b>Because an offense should be considered a lesser-included offense after analyzing the facts and circumstances of each case, rather than from simply analyzing the statutory elements in a vacuum, robbery under R.C. 2911.02(A)(2) may be considered a lesser-included offense of aggravated robbery under 2911.01(A)(1).</b>	
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## SUMMARY OF ARGUMENT

The State of Ohio asks this Court to depart from its established precedent and hold that robbery under R.C. 2911.02(A)(2) (“[i]nflict, attempt to inflict or threaten to inflict physical harm on another” in attempting or committing a theft offense) is a lesser-included offense of aggravated robbery under R.C. 2911.01(A)(1) (“[h]ave a deadly weapon on or about the offender’s person or under the offender’s control and either display the weapon, brandish it, indicated that the offender possesses it, or use it.”). In order to adopt the State’s proposition of law, this Court will be required to overrule its longstanding precedent regarding how greater and lesser included offenses are defined.

The Court’s precedent in this regard is founded upon an interpretation of the Revised Code and Criminal Rules that has never been subsequently overridden by the General Assembly or the rulemaking authority of this Court. This is not surprising because the Court’s interpretation of greater and lesser-included offenses is grounded not only on principles of statutory construction but on the Ohio constitution’s right to indictment.

The State’s proposition of law will interject uncertainty and unpredictability into the determination of when offenses are greater and lesser included offenses of one another. In the process, courts will be unable to adequately and efficiently determine when a defendant has already been placed in jeopardy in a prior proceeding, and litigants will be hampered in effectively preparing for trial.

Finally, with respect to Mr. Evans personally, even if this Court adopts the State’s proposition of law, it cannot be applied to Mr. Evans’ case, which was tried under the Court’s current interpretation of what constitutes a greater and lesser-included offense. To apply a new

rule of law to Mr. Evans would deny him due process under the Fourteenth Amendment to the United States Constitution.

### STATEMENT OF THE CASE AND FACTS

For purposes of this brief, it is unnecessary for Mr. Evans to submit a statement of the case and facts that deviates from that set forth in the Appellant's brief, other than to note the following. At no time prior to announcing his verdict did the trial judge ever indicate that a conviction for robbery was a possible verdict in the case. (T. passim). Neither party ever addressed robbery under R.C. 2911.02 as a possible lesser-included offense in this case. *Id.* The first mention of robbery as a possible verdict in this case was made when the trial judge stated that he was finding Mr. Evans guilty of robbery as the verdict was announced. (T. 104-05).

### ARGUMENT

#### *In Response to Proposition of Law (as posited by the State of Ohio)*

**Because an offense should be considered a lesser-included offense after analyzing the facts and circumstances of each case, rather than from simply analyzing the statutory elements in a vacuum, robbery under R.C. 2911.02(A)(2) may be considered a lesser-included offense of aggravated robbery under 2911.01(A)(1).**

#### **This Court's Precedent is Contrary to the State's Proposition**

This Court's definition of lesser-included offenses is long-established and is contrary to the State's Proposition of Law:

Pursuant to R.C. 2945.74 and Crim. R. 31(C), a jury may consider three groups of lesser offenses on which, when supported by the evidence at trial, it must be charged and on which it may reach a verdict: (1) attempts to commit the crime charged, if such an attempt is an offense at law; (2) inferior degrees of the offense; or (3) lesser included offenses.

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An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as

statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense. (*State v. Kidder* [1987], 32 Ohio St.3d 279, 513 N.E.2d 311, modified.)

*State v. Deem* (1988), 40 Ohio St.3d 205, syllabus, pars. 1, 3.

*Deem* remains this Court's leading case for determining if a particular offense is a lesser-included of another. *State v. Fairbanks* (2008) 117 Ohio St.3d 543, 2008-Ohio-1470 (applying *Deem*); *State v. Barnes* (2002), 94 Ohio St.3d 21, 26 (citing *Deem* and concluding that an offense is a lesser-included offense if, "the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed..."); *State v. Smith*, 117 Ohio St.3d 447, 2008 Ohio 1260 (citing *Deem* and noting that the "evidence presented in a particular case is irrelevant to the determination of whether an offense, as statutorily defined, is necessarily included in a greater offense."). *Deem* is indistinguishable from the test employed by the United States Supreme Court for determining when federal offenses are greater and lesser included offenses. *Blockburger v. United States* (1931) 284 U.S. 299.<sup>1</sup>

Applying *Deem* to the instant case reveals that robbery under R.C. 2911.02(A)(2) is not a lesser-included offense of aggravated robbery under R.C. 2911.01(A)(1). The lesser offense, robbery, includes the element of actual, attempted or threatened infliction of physical harm. The greater offense, aggravated robbery, includes the elements of possessing a deadly weapon and either displaying, brandishing or indicating possession of that weapon. "[A]s statutorily defined,"<sup>2</sup> one can commit the greater offense of aggravated robbery by possessing and either

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<sup>1</sup> As discussed *infra*, the Supreme Court later reversed *Blockburger*, only to reinstate its holding in *United States v. Dixon* (1993), 509 U.S. 688.

<sup>2</sup> *Deem*, syllabus, par. 3.

displaying, brandishing or indicating possession of a weapon without ever inflicting, attempting to inflict or threatening to inflict physical harm.

The State maintains that it is “unable to grasp” (Appellant’s Brief at 8) how one could indicate he or she possesses a deadly weapon yet not threaten physical harm against the victim. This Court need consider but one scenario to realize that the State’s concerns are misplaced and that robbery “as statutorily defined” is not nested within aggravated robbery as statutorily defined. *Deem*. For example, assume the defendant is a shoplifter in a hardware/sporting goods store who purchases a hunting knife at the same time he is shoplifting a bag of nails that he has placed in his pocket. After paying for the knife, he exits the store. Thus, he has committed a theft offense while indicating that he possesses the newly purchased weapon. This is aggravated robbery under R.C. 2911.01(A)(1), because the General Assembly is concerned about what would happen if the armed thief were then to react to store security trying to thwart the shoplifting. However, the thief has never made either a direct or even implicit threat of harm and thus did not commit robbery under R.C. 2911.02(A)(2).

While this Court has never specifically decided that robbery under the present version of R.C. 2911.02(A)(2) is a lesser included offense of aggravated robbery under R.C. 2911.01(A)(1), this Court has examined the relationship between earlier versions of R.C. 2911.01(A)(1) and R.C. 2911.02’s definition of robbery as a theft offense accompanied by use or threat of force. The prior version of R.C. 2911.01(A)(1) prohibited the commission of a theft offense while having a deadly weapon on or about one’s person or under one’s control. Applying the same test later enunciated in *Kidder* and *Deem*, this Court held that theft via the infliction of force or threat

of imminent force was not a lesser-included offense of this form of aggravated robbery. *State v. Merriweather* (1980), 64 Ohio St.2d 57, 58-59.<sup>3</sup>

In *Merriweather*, this Court specifically eschewed reliance on the very legislative history cited by the State in its merit brief at 10-11.

Further, the state argues that the General Assembly intended robbery to be a lesser-included offense as evidenced by the Legislative Service Commission Note to R.C. 2911.02. This court is bound by the language of criminal provisions, not unofficial Legislative Service Commission Notes. Additionally, this court is required to construe such criminal provisions "strictly \* \* \* against the state, and liberally \* \* \* in favor of the accused." R.C. 2901.04(A). Accord *Harrison v. Ohio* (1925), 112 Ohio St. 429. *State, ex rel. Moore Oil Co., v. Dauben* (1919), 99 Ohio St. 406.

*Merriweather*, 64 Ohio St.2d at 59.

#### **The *Deem* Test Should Not Be Disturbed**

There is no reason to disturb *Deem* and its progeny. The issue presented by the State in this case is similar to an issue raised in *State v. Zima* (2004), 102 Ohio St.3d 61, where this Court unanimously declined to establish a rule of law akin to the State's Proposition of Law. This Court should decline the State's invitation to reverse well-established precedent. The State's proposition fails to adequately appreciate the right to a grand jury indictment guaranteed by the Ohio Constitution. The upheaval proposed by the State would create a system where neither trial courts, prosecutors nor defense attorneys would be able to know prior to trial what lesser-included offenses will be available at trial.

#### **The Right to Indictment is Violated By the State's Proposition**

As a constitutional matter, expanding the law of lesser-included offenses to include those offenses which fall outside the elemental-comparison test invites convictions never contemplated by

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<sup>3</sup> The version of R.C. 2911.01(A)(1) that was effective when *Merriweather* was decided has since been amended as part of the legislative reform of the criminal code in 1996.

the grand jury, or even considered and rejected by the grand jury. The State's proposition thus unconstitutionally diminishes the role of the grand jury. This Court has long recognized that the Ohio Constitution's right to indictment guarantees that a defendant will be tried upon the same essential facts upon which the grand jury found probable cause. *State v. Headley* (1983), 6 Ohio St.3d 475. The elemental comparison employed by *Deem* ensures that the grand jury's indictment defines the parameters of the case because, by having found probable cause for every element of the greater offense, the grand jury has necessarily also found probable cause for every element of the lesser-included offense which is nested within the greater offense. But the State's proposed factual-circumstance test will destroy this kind of uniformity and allows a petit jury to consider elements of "lesser-included" offenses that may well exceed or even contradict the prior contemplation of the grand jury.

In this case, it may be that the grand jury considered the offense of robbery and declined to return a true bill. On the other hand, the State, either mistakenly or as a matter of tactics, may never have presented to the grand jury the possibility of a second count for robbery and the grand jury may have not considered a second count on its own. In either event, there is one person who had no ability to influence the charging decision – Mr. Evans. He should not be penalized because the State, having lost at trial, now seeks to hedge its bet on conviction. For the State to suggest that *Deem* has enabled Mr. Evans to "walk away from [his] crime[ ],"<sup>4</sup> is to ignore the clear opportunity the State had to indict Mr. Evans for robbery from the beginning.

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<sup>4</sup> Brief of Appellant at 4, citing *State v. Barnes*, 94 Ohio St.3d 21, 30-31 (Lundberg Stratton, J., concurring).

## **The State's Proposition is Impractical**

The State's Proposition of Law is impractical. Under the *Deem* test, whether an offense is or is not a lesser-included of another is predictable: the elements of the two offenses are compared in the abstract and, if the offense carrying a greater penalty cannot be committed without also committing the offense with a lesser penalty, then the less-serious offense is also a "lesser-included" offense.

But the State's Proposition of Law will replace the *Deem-Blockburger* standard with a fact-based test that will cause lesser-included offenses to be defined, not in the abstract, but by looking at the individual circumstances of offenses on a case-by-case basis. Thus, depending upon how the evidence at trial develops, the less-serious offense may or may not be a "lesser-included" offense. Such a test will frustrate efforts to resolve cases or even to develop a coherent trial strategy. Defendants and prosecutors who are not certain as to how the evidence will develop at trial will be unable to determine what offenses will or will not eventually be considered by the fact-finder, whether it be a judge sitting alone or a jury. Without such information, it becomes difficult, if not impossible, to handicap the likelihood of what verdict the jury will reach. Plea bargaining will be hampered. Moreover, without predictability, prosecutors and defense counsel will find themselves unable to know what offenses the fact-finder will eventually be considering, which hampers the ability to make intelligent tactical decisions on the basis of the evidence being presented.

Another adverse effect of the State's Proposition of Law is to invite jury compromise. As the number of potential lesser-included offenses expands, based on the facts and circumstances of the individual case, the jury will be tempted to pick and choose lesser offense on the basis of what they believe to be the correct outcome in the case, as opposed to having the jury stay focused on the elements of the crime charged. The State's approach presents a greater likelihood that jurors will go

off on their own tangent and decide cases based on what they believe the law should be. Such an approach is fundamentally unsound.

### **The State's Proposition Will Restrict Subsequent Prosecutions**

Ironically, the State's Proposition will provide increased double jeopardy protection to many criminal defendants. By expanding the definition of "lesser-included" offenses via its fact-and-circumstance approach, the State's Proposition will concomitantly restrict the opportunity the State has to subsequently prosecute a person who has previously been convicted of a less-serious offense that does not fit into the *Deem-Blockburger* standard but which could now nonetheless be considered "lesser-included" under the State's expansive proposition.

### **The State's Proposition Has Been Tried and Rejected in Federal Jurisdiction**

In light of such policy concerns, there is little wonder why this Court and the United States Supreme Court have previously rejected such circumstance-based tests in favor of the elemental-analysis correctly employed by the Eighth District in this case. The United States Supreme Court actually adopted a test similar to that sought by the State, in *Grady v. Corbin*, only to reject that test three years later and return to the Blockburger standard. See, *United States v. Dixon* (1993), 509 U.S. 688, overruling *Grady v. Corbin* (1990), 495 U.S. 508. See also, *Zima*, supra.

### **The State's Proposition Cannot Be Applied Retrospectively to Mr. Evans**

Even if this Court were of the mind to consider this issue, this is not the appropriate case for the issue to be litigated. In *State v. Merriweather* (1980), 64 Ohio St.2d 57, this Court determined that robbery is not a lesser-included offense of a previous version of aggravated robbery. Nonetheless, this Court noted that, even if it were to have concluded that robbery was a lesser-included offense of aggravated robbery, the Court's newly-established precedent might not apply to Mr. Merriweather, who went to trial under the reasonable belief that robbery was not

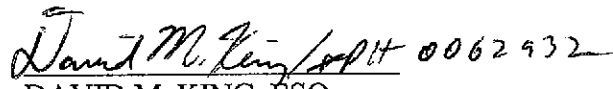
a lesser-included offense. *Id.*, at n. 3. These same concerns would necessarily prevent application of the State's Proposition to Mr. Evans, even if that Proposition were adopted by this Court.

Simply put, Mr. Evans went to trial believing that, if the State did not prove a deadly weapon was involved, then Mr. Evans could only be convicted of misdemeanor theft. Nothing at trial happened to alter this expectation -- the trial court made no mention of robbery as a lesser-included offense until it announced its verdict. To now tell Mr. Evans that he was wrong because the rules have been changed since his trial would deny him due process under the Ohio and United States Constitutions. See generally, *Bouie v. South Carolina* (1964), 378 U.S. 347 (federal due process limits retroactive application of judicial precedent).

### CONCLUSION

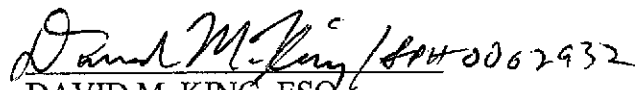
Wherefore this Court should reject the State's argument and affirm the decision of the Eighth District Court of Appeals.

Respectfully submitted,

  
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### SERVICE

A copy of the foregoing Brief of Appellee was sent via U.S. Mail to Matthew Meyer in the office of William D. Mason, County Prosecutor, Justice Center, 9<sup>h</sup> Floor, 1200 Ontario Street. Cleveland, Ohio 44113, this 6<sup>th</sup> day of October, 2008.

  
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