IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,
Plaintiff,
v.

BRYANT B. BAKER,
Defendant.

Case No. 17CR 006174

DEFENDANT'S MOTION TO DISMISS INDICTMENT
OHIO RULE Cr. P. 48(B)

COMES the Defendant in the above-entitled action, Bryant B. Baker, and moves this Court to dismiss the indictment against him for any and several of the following reasons:

1. Franklin County, Ohio, discriminates against men in enforcement of Ohio Revised Code § 2919.21.

2. To a layman it would appear that Defendant's time spent in jail already would implicate double jeopardy.

3. The indictment fails to provide sufficient notice and is void for vagueness.

See Memorandum of Law in Support, attached hereto.

Wherefore, Defendant Bryant B. Baker, moves this Court to DISMISS the indictment against him, *with prejudice.*

Respectfully submitted,

Date: January 10, 2018

Bryant Baker
PO Box 340741
Columbus, OH 43234

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,
Plaintiff,
v.

BRYANT B. BAKER,
Defendant.

Case No. 17CR 006174

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS INDICTMENT OHIO RULE Cr. P. 48(B)

COMES the Defendant in the above-entitled action, Bryant B. Baker, and would show this Court the following in support of his Motion to Dismiss Indictment.

1. Franklin County, Ohio discriminates against men in enforcement of Ohio Revised Code § 2919.21.

> R.C. 3113.06 is analogous to R.C. 2919.21, non-support of dependents. R.C. 2919.21(B) specifically designates lack of ability to support as an affirmative defense. The obvious intent of making it a specifically designated affirmative defense is that the defendant's lack of ability to pay is within his knowledge and not the state's.
>
> *State v. Wright*, 4 Ohio App.3d 291, 294 (Ohio App. 1982).
>
> Finally, the appellant maintains that the statute in question is unconstitutional in that it imposes a lesser standard of conduct on women than on men. We hold this matter should not be reviewed by this court as it was not raised at the trial of this case or at either pre-trial or post-trial hearings. The issue of the constitutionality of the statute was first raised at the appellant's motion for a directed verdict at the close of the evidence. At no point during that argument was the question of sex discrimination raised, nor was the trial court given an opportunity to rule on that question. The general rule in Ohio is that a reviewing court will only consider such errors

> in the lower court as were preserved by objection, ruling, or otherwise. 4 Ohio Jurisprudence 3d, Appellate Review, Section 137, and fn. 15.
>
> *Id.* at 293-294.

Which is not the case here.

Defendant suspects that an evidentiary hearing is the only way to address this issue as he also suspects that the evidence of this is voluminous.

2. To a layman it would appear that Defendant's time spent in jail already would implicate double jeopardy.

Defendant is aware that the "case law" is against him, however:

> It does not appear that the United States Supreme Court has addressed the precise issue presented by the appeal herein. In considering this issue, this court has come to appreciate Justice Rehnquist's observation that "* * * the decisional law in the area [of the Double Jeopardy Clause] is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator * * *." *Albernaz v. United States* (1981), 450 U.S. 333, 343.
>
> *State v. Calhoun*, 18 Ohio St.3d 373, 375, 481 N.E.2d 624 (Ohio 1985).

Let alone a pro se litigant.

3. The indictment fails to provide sufficient notice and is void for vagueness.

> "It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,—it must descend to particulars.'" *United States v. Cruikshank*, 92 U.S. 542, 558. An indictment not framed to apprise the defendant "with reasonable certainty, of the nature of the accusation against him . . . is defective, although it may follow the language of the statute." *United States v. Simmons*, 96 U.S. 360, 362. "In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; . . . " *United States v. Carll*, 105 U.S. 611, 612.

> "Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *United States v. Hess*, 124 U.S. 483, 487. *See also Pettibone v. United States*, 148 U.S. 197, 202-204; *Blitz v. United States*, 153 U.S. 308, 315; *Keck v. United States*, 172 U.S. 434, 437; *Morissette v. United States*, 342 U.S. 246, 270, n. 30. *Cf. United States v. Petrillo*, 332 U.S. 1, 10-11.
>
> *Russell v. United States*, 369 U.S. 749, 765, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (footnote omitted).

This the indictment utterly fails to do.

The indictment purports to charge a violation of Ohio Revised Code 2919.21 (F5)

The first problem:

> We also decline to adopt the government's position, because it presumes Rojo's knowledge of the facts charged and thereby also presumes his guilt.
>
> *United States v. Rojo*, 727 F.2d 1415, 1419 n. 3 (9th Cir. 1983).

The second problem is the language of the statute itself (printed from internet):

> **2919.21 Nonsupport or contributing to nonsupport of dependents.**
>
> **(A)** No person shall abandon, or fail to provide adequate support to:
>
> **(1)** The person's spouse, as required by law;
>
> **(2)** The person's child who is under age eighteen, or mentally or physically handicapped child who is under age twenty-one;
>
> **(3)** The person's aged or infirm parent or adoptive parent, who from lack of ability and means is unable to provide adequately for the parent's own support.
>
> **(B)** No person shall abandon, or fail to provide support as established by a court order to, another person whom, by court order or decree, the person is legally obligated to support.
>
> **(C)** No person shall aid, abet, induce, cause, encourage, or contribute to a child or a ward of the juvenile court becoming a dependent child, as defined in section 2151.04 of the Revised Code, or a neglected child, as defined in section 2151.03 of the Revised Code.

(D) It is an affirmative defense to a charge of failure to provide adequate support under division (A) of this section or a charge of failure to provide support established by a court order under division (B) of this section that the accused was unable to provide adequate support or the established support but did provide the support that was within the accused's ability and means.

(E) It is an affirmative defense to a charge under division (A)(3) of this section that the parent abandoned the accused or failed to support the accused as required by law, while the accused was under age eighteen, or was mentally or physically handicapped and under age twenty-one.

(F) It is not a defense to a charge under division (B) of this section that the person whom a court has ordered the accused to support is being adequately supported by someone other than the accused.

(G)

(1) Except as otherwise provided in this division, whoever violates division (A) or (B) of this section is guilty of nonsupport of dependents, a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of division (A)(2) or (B) of this section or if the offender has failed to provide support under division (A)(2) or (B) of this section for a total accumulated period of twenty-six weeks out of one hundred four consecutive weeks, whether or not the twenty-six weeks were consecutive, then a violation of division (A)(2) or (B) of this section is a felony of the fifth degree. If the offender previously has been convicted of or pleaded guilty to a felony violation of this section, a violation of division (A)(2) or (B) of this section is a felony of the fourth degree.

If the violation of division (A) or (B) of this section is a felony, all of the following apply to the sentencing of the offender:

(a) Except as otherwise provided in division (G)(1)(b) of this section, the court in imposing sentence on the offender shall first consider placing the offender on one or more community control sanctions under section 2929.16, 2929.17, or 2929.18 of the Revised Code, with an emphasis under the sanctions on intervention for nonsupport, obtaining or maintaining employment, or another related condition.

(b) The preference for placement on community control sanctions described in division (G)(1)(a) of this section does not apply to any offender to whom one or more of the following applies:

> **(i)** The court determines that the imposition of a prison term on the offender is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code.
>
> **(ii)** The offender previously was convicted of or pleaded guilty to a violation of this section that was a felony, and the offender was sentenced to a prison term for that violation.
>
> **(iii)** The offender previously was convicted of or pleaded guilty to a violation of this section that was a felony, the offender was sentenced to one or more community control sanctions of a type described in division (G)(1)(a) of this section for that violation, and the offender failed to comply with the conditions of any of those community control sanctions.
>
> **(2)** If the offender is guilty of nonsupport of dependents by reason of failing to provide support to the offender's child as required by a child support order issued on or after April 15, 1985, pursuant to section 2151.23, 2151.231, 2151.232, 2151.33, 3105.21, 3109.05, 3111.13, 3113.04, 3113.31, 3115.401, or former section 3115.31 of the Revised Code, the court, in addition to any other sentence imposed, shall assess all court costs arising out of the charge against the person and require the person to pay any reasonable attorney's fees of any adverse party other than the state, as determined by the court, that arose in relation to the charge.
>
> **(3)** Whoever violates division (C) of this section is guilty of contributing to the nonsupport of dependents, a misdemeanor of the first degree. Each day of violation of division (C) of this section is a separate offense.

Ohio Revised Code 2919.21

Defendant cannot find an **(F5)** in the statute nor does the indictment explain how Defendant violated **(F5)**. Case law indicates the indictment requires considerably more precision than what this indictment contains.

> {¶ 22} R.C. 2919.21(B) does not specify a degree of intent; however, the Ohio Supreme Court has interpreted the statute to require proof of recklessness. *State v. Collins*, 89 Ohio St.3d 524, 529-530, 2000-Ohio-231, 733 N.E.2d 1118. A person acts "recklessly"

> when, with heedless indifference to the consequences of his actions, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist. R.C. 2901.22(C).

State v. Wiley, 2014-Ohio-27, No. 99576 (Ohio App. Dist. 8 01/09/2014).

{¶7} A person may defend him or herself from a charge under R.C. 2919.21(A) or (B) by proving that he or she "was unable to provide adequate support or the established support but did provide the support that was within the accused's ability and means." R.C. 2919.21(D). It is not a defense to a charge under R.C. 2919.21(B), however, that someone else is supporting the child adequately. See R.C. 2919.21(F).

State v. Turns, 2011-Ohio-1497 (Ohio App. Dist.10 2011)

{¶23} In a few cases, courts also focused on the fact that R.C. 2919.21(A) requires "a determination of the adequacy of support." *Jones*, 1995 WL 367197, *3; *Yacovella*, 1996 WL 38898, *4. In this regard, R.C. 2919.21(A)(2) provides that "no person shall abandon, or fail to provide adequate support to: * * * [t]he person's child who is under age eighteen, or mentally or physically handicapped child who is under age twenty-one." According to the *Jones* court, this requires "evaluation of the surrounding circumstances, including the needs of the child and resources of the custodial parent." 1995 WL 367197, *3.

{¶24} In contrast, R.C. 2919.21(B) says only that "[n]o person shall abandon, or fail to provide support as established by a court order to, another person whom, by court order or decree, the person is legally obligated to support." Thus, R.C. 2929.21(B) does not require any finding about adequacy of support. To the contrary, like the contempt statute, all R.C. 2919.21(B) requires is failure to comply with a court order. As we said, criminal contempt is a lesser included offense of R.C. 2919.21(B). Moreover, the fact that an element was added to increase the non-support charge to a felony does not change the result, since criminal contempt would still be a lesser included offense. In fact, this is consistent with *Deem*, which requires that "some element of the greater offense is not required to prove the commission of the lesser offense." 40 Ohio St.3d 205, 206, paragraph three of the syllabus.

State v. Mobley, 2002-Ohio-5535 (Ohio App. Dist. 2 10/11/2002).

The court of appeals determined that the legislature did not specify a mental element for culpability in R.C. 2919.21, or plainly indicate a purpose to impose strict liability. It concluded that the state therefore had the burden to prove that appellee recklessly failed to provide adequate support to his minor children as mandated by a court order, in order to demonstrate a violation of R.C. 2919.21(B). The court of appeals held contrary to the trial court on this issue, as the trial court expressly struck the word "reckless" from the second count of the indictment, and declined to instruct the jury that recklessness was an element of R.C. 2919.21(B).

State v. Collins, 89 Ohio St.3d 524, 529, 733 N.E.2d 1118 (Ohio 2000).

We acknowledge the convincing public policy arguments presented by the state and *amicus* Ohio Prosecuting Attorneys' Association in support of the proposition that failure to follow a court-ordered child support order should be a strict liability offense. However, the General Assembly itself has established the test for determining strict criminal liability in R.C. 2901.21(B). That statute provides that where a statute defining a criminal offense fails to expressly specify a mental culpability element, e.g., negligence, recklessness, or intentional conduct, proof of a violation of the criminal provision requires a showing of recklessness, absent a plain indication in the statute of a legislative purpose to impose strict criminal liability. R.C. 2901.21(B). It is not enough that the General Assembly in fact intended imposition of liability without proof of mental culpability. Rather the General Assembly must plainly indicate that intention in the language of the statute. There are no words in R.C. 2919.21(B) that do so.

Were we to accept the state's argument that public policy considerations weigh in favor of strict liability, thereby justifying us in construing R.C. 2919.21(B) as imposing criminal liability without a demonstration of any mens rea, we would be writing language into the provision which simply is not there—language which the General Assembly could easily have included, but did not. *Cf. State v. Young* (1988), 37 Ohio St.3d 249, 525 N.E.2d 1363 (violation of R.C. 2907.323[A][3], providing that "[n]o person shall," *e.g.*, possess or view, any material or performance involving a minor who is in a state of nudity, requires showing of recklessness); *State v. McGee* (1997), 79 Ohio St.3d 193, 680 N.E.2d 975 (violation of R.C. 2919.22[A], which provides that "no person, who is the parent * * * of a child under eighteen years of age * * *, shall" endanger that child, requires showing of recklessness). Clearly, society has just as compelling a need to protect children from sexual exploitation and child endangerment as it does to ensure payment of court-ordered child support obligations.

Id. at 529-530.

How Fiona Baker was "endangered" the indictment does not explain.

How Fiona Baker was "recklessly abandoned" the indictment does not explain.

How Defendant did "fail to provide adequate support" the indictment does not explain.

Wherefore, Defendant Bryant B. Baker, moves this Court to DISMISS the indictment against him, *with prejudice.*

Respectfully submitted,

Date: January 10, 2018

Bryant Baker

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10 day of January, 2018, a copy of the document(s) entitled: **DEFENDANT'S MOTION TO DISMISS INDICTMENT OHIO RULE Cr. P. 48(B) and MEMORANDUM OF LAW IN SUPPORT** were mailed to

Ron O'Brien
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