Law, Justice and Jury Waiver Procedure in the Ohio Supreme Court

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LAW, JUSTICE AND JURY WAIVER PROCEDURE IN THE OHIO SUPREME COURT

The history of American freedom is, in no small measure, the history of procedure.

Justice Felix Frankfurter

I. INTRODUCTION

The Ohio Supreme Court has recently dealt with two cases in which it seemingly had a choice—do "justice" to the families of the victims or uphold the law. The lines were clear—brutal murderers, whose guilt have been proven to the satisfaction of the trial courts, stood at the foot of the state high court. Between the defendants and their punishment stood nothing but technicalities—a missing time-stamp on a piece of paper in one case, and the missing paper from the defendant's file in the other. The families of the victims pleaded for the court to hand out justice, but the law seemed clear—the defendants would have to be given another trial. Faced with these decisions, the court waffled. In State ex rel. Larkins v. Baker, the court refused the defendant's plea and upheld the conviction, holding that although Larkins's form that waived his right to a jury trial had not been made a part of the record, this did not deprive the trial court of jurisdiction to hear the case without a jury. In State v. Pless, however, the court chose the opposite route, granting a new trial to Carroll Dean

2. 653 N.E.2d 701 (Ohio 1995).
Pless, who had been convicted for shooting his former girlfriend in a case that caused such outrage that it inspired the state's anti-stalking law. The latter decision was based on the fact that Pless's jury waiver form, which clearly had been signed, had not been filed or made part of the record of the case.

This Comment takes the position that the majority's attempt in Pless to reconcile the two decisions was in vain. However, it also will argue that the Pless decision was still correct because in that case, the court clearly upheld the letter of the law regardless of the price of its decision. This stand may have been unpopular, but it was the only correct decision that could have been made. Reversing Pless's conviction and ordering a new trial was the right decision: the statute at issue in the case clearly required the trial court to make Pless's waiver of his right to a jury trial a part of the case's record; a substantial compliance reading of the statute would lead to an improper role for the courts; Ohio precedent supported the Pless decision; and a contrary decision could cause uncertainty for appellate courts as to whether a waiver had been withdrawn. Thus, Pless was a better-reasoned decision than Larkins despite the Pless court's unwillingness to recognize the fact that the two cases are indistinguishable.

II. BACKGROUND

A. Ohio Revised Code § 2945.05

Both the United States Constitution and Ohio's constitution guarantee a criminal defendant the right to a jury trial in cases involving serious offenses. However, defendants often believe it is in their best interest to waive that right and have the case tried before a judge or panel of judges. Neither the federal nor the

4. T.C. Brown, Stalking Murderer Seeks New Trial, PLAIN DEALER (Cleveland), Oct. 25, 1995, at 4-B.
5. See Pless, 658 N.E.2d at 767-68.
6. U.S. CONST. art. III, § 2, cl. 3 (requiring that the trial of all crimes be by jury except in cases of impeachment); id. amend. VI (assuring the right of a trial by jury "[i]n all criminal prosecutions"); Frank v. United States, 395 U.S. 147 (1968) (holding that cases involving petty offenses may be tried without a jury).
7. OHIO CONST. art. I, § 10 (assuring the right to a jury trial for capital offenses and where conviction can result in imprisonment); id. art. I, § 5 (stating that "[t]he right of trial by jury shall be inviolate").
state constitutional provisions preclude defendants from waiving the right to a jury trial9 nor the legislature from proscribing the manner in which that waiver is to take place.10 Thus, the Ohio legislature in 1953 enacted Ohio Revised Code § 2945.05, the statute at issue in Larkins and Pless. It states as follows:

In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. . . .

Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial.11

Ohio Rule of Criminal Procedure 23(A) generally allows a waiver of the right to a jury trial in “serious offense cases” so long as the defendant “knowingly, intelligently, and voluntarily waive[s] in writing his right to trial by jury.”12 It also allows a waiver during a trial so long as the court and prosecutor approve.13 To the extent that this rule is inconsistent with § 2945.05, though, the statute supersedes the rule.14 Thus, while

9. See Patton v. United States, 281 U.S. 276, 298 (1930) (holding that a defendant’s waiver of a jury trial does not violate Article III, § 2 of the U.S. Constitution); State ex rel. Warner v. Baer, 134 N.E. 786, 793-94 (Ohio 1921) (holding that the state constitution’s guarantee of the right to a jury trial did not prohibit a defendant from agreeing to proceed with fewer than twelve jurors because the constitutional protections may be waived).
10. State v. Brown, 28 Ohio Op. 536, 537-38 (C.P. 1944) (upholding the power of the legislature “to make failure to demand a jury a waiver of the right to trial by jury”).
11. OHIO REV. CODE ANN. § 2945.05 (Baldwin 1995). The statute also proscribes the language of the written waiver form:

   It shall be entitled in the court and cause, and in substance as follows: “I ______, defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury.”

Id.
13. Id.
Rule 23(A) does not require the waiver to be filed and made part of the defendant’s case, these steps are nonetheless required by the statute. In order to waive the right to a jury trial, the statute’s procedure must be followed.

The requirements for waiving the right to a jury trial are supplemented by § 2945.06, which provides that where “a defendant waives his right to trial by jury and elects to be tried by the court under [§ 2945.05], any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and in like manner as if the cause were being tried before a jury.” The two statutes are to be read together—§ 2945.06 limits a court’s jurisdiction to try cases without a jury to those in which the waiver complies with § 2945.05.

B. Precedent

In 1979, the Ohio Supreme Court issued its first major decision as to the flexibility of the § 2945.05 requirements. In State v. Tate, the defendant had been charged with complicity in criminal damaging in connection with a teachers’ strike, and his attorney had properly filed a written demand for a jury trial. While there was some evidence that Tate’s attorney had orally waived Tate’s right to a jury trial, no oral or written waiver appeared on the record. Tate was found guilty by the trial judge, and on appeal argued that he had never waived his right to a jury trial.

The Ohio Supreme Court reversed Tate’s conviction because the trial court had not complied with § 2945.05. Rejecting the state’s argument that Tate had waived his jury trial right by silently acquiescing to a bench trial, the court held that “it must appear of record that [the] defendant waived this right in writing in the manner provided by R.C. 2945.05, in order for the trial court to

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15. See id.
17. OHIO REV. CODE ANN. § 2945.06 (Baldwin 1995).
20. Id. at 738. The requirements of a demand for a jury trial are set forth in OHIO R. CRIM. P. 23(A).
21. The state appellate court had been presented with affidavits that the attorney had orally waived the right to a jury trial during a discussion with the judge. Tate, 391 N.E.2d at 739 n.1.
22. Id. at 739.
23. Id. at 740.
have jurisdiction to try the defendant without a jury."  
However, the Tate decision left open the question whether strict compliance with all the requirements of § 2945.05 is actually necessary for a defendant to validly waive his or her right to a jury trial. Lower courts are split on the issue; some courts uphold convictions that were tried without a jury even though the defendant had not actually met a requirement such as executing the waiver in open court, while other courts insist on strict compliance with the terms of the statute.

Fifteen years after Tate, the Ohio Supreme Court took the rationale of Tate one step further in State ex rel. Jackson v. Dallman. The defendant in that case signed a written waiver form; however, the waiver was never filed or made part of the record. The state appellate court denied the defendant’s writ for habeas relief, finding that § 2945.05 had been complied with, but the Ohio Supreme Court reversed. The majority’s opinion supplied strong language that the court would not tolerate deviations from the requirements of § 2945.05: “There must be strict compliance with R.C. 2945.05 for there to be a waiver of a right to a jury trial; where the record does not reflect strict compliance, the trial court is without jurisdiction to try the defendant without a jury.”

The court thus granted the defendant habeas relief, as the trial court had been without jurisdiction to try him without a jury. The law after Dallman thus seemed clear—nothing less than strict compliance with § 2945.05 would waive a defendant’s right to a jury trial.

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24. Id. at 738.
27. 638 N.E.2d 563 (Ohio 1994).
28. See id. at 564 (reviewing the court of appeal’s determination that despite the defendant Jackson’s claim that he had never signed a waiver form, the evidence indicated that he had done so.)
29. Id. at 565.
30. Id.
C. The Cases at Issue

1. State ex. rel Larkins v. Baker

The bright lines the court had seemingly drawn became blurred, however, in Larkins. Ronald Larkins, or "Road Dog," was indicted in 1981 for the aggravated murder of Lawrence Botnick and the attempted murder of Botnick's son while robbing the Botnicks' pawn shop. Larkins signed a written waiver of his right to a jury trial in open court, and the waiver was physically placed in his case file. However, according to the trial judge's normal practice, the document was not stamped as being "Received for Filing" by the trial court clerk, nor was it reflected in the criminal docket. The trial judge heard the case without a jury, found Larkins guilty, and sentenced him to life imprisonment.

Larkins later sought habeas relief, claiming that the trial court judge had been without jurisdiction to try him because the waiver did not strictly comply with § 2945.05. The court of appeals granted him a writ of habeas corpus, holding that Larkins's waiver did not strictly comply with § 2945.05, as required by Dallman. The appellate court ruled that the document's "mere physical presence in the case file does not meet the requirement of being filed and made a part of the record." Thus, as in Dallman, the trial court did not have jurisdiction to hear the case without a jury.

The Ohio Supreme Court reversed and stated that while the trial court did not strictly comply with the statute, the "extraordinary relief in the nature of habeas corpus is not warranted. The failure to strictly comply with R.C. 2945.05 under the circumstances here is neither a jurisdictional defect nor an error for which no adequate remedy at law exists." The court relied on § 2945.06 in reaching this decision, holding that under that statute Larkins did in fact "waive[] his right to trial by jury and elect[ed] to be tried.

33. Id.
34. Id. at 701-02.
36. Id. at *2.
37. Id. at *3.
38. Larkins, 653 N.E.2d at 702.
by the court.”

Thus, while Larkins did not technically comply with the requirements for a jury waiver under § 2945.05, the court held he did nonetheless meet the requirements of § 2945.06 because he waived his right to a jury trial and elected to be tried by the court under § 2945.06. The trial court’s error in failing to time stamp the waiver did not change this fact and thus the trial court had jurisdiction to try Larkins, even though the requirements of § 2945.05 had not been met. Because the trial court had jurisdiction, the Ohio Supreme Court would not grant habeas relief.

The Larkins court also tried to distinguish the case at bar from Tate and Dallman on the “unique” facts before it. Unlike Dallman, Larkins’s signed waiver had actually been placed in the file and Larkins had stipulated that he had signed the waiver. Unlike Tate, the relief requested in Larkins was habeas corpus, rather than a direct appeal. Thus, the court decided to “limit” the holdings in Tate and Dallman rather than to “force the victims of Larkins’s crimes ‘to suffer through a new trial more than eight years after the matter was closed.’”

Two justices dissented, claiming that the majority interpreted § 2945.06 in a way “which appears to be at war with its terms.” The dissenters argued that § 2945.05 sets forth the requirements for a valid waiver of the right to a jury trial; § 2945.06 merely states that once these requirements are met, the trial judge may hear, try, and decide the case as if it were being tried to a jury. Stating that “[t]he right to a trial by jury is a fundamental tenet of our justice system” and that “courts should indulge every reasonable presumption against a waiver of that right,” the dissenters thus reasoned that the majority had provided no sufficient justification for essentially eliminating the requirements that the waiver be filed and made part of the record of the case.

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39. Id. at 703.
40. Id.
41. Id.
42. Id.
44. Id. at 704 (Wright, J., dissenting).
45. Id.
46. Id. at 705.
2. State v. Pless

On July 11, 1991, Pless shot and killed Sherry Lockwood after repeatedly stalking her. He went to her home, beat Lockwood, and dragged her by her hair. Lockwood broke free and tried to run out her front door, but Pless fired two shots into her head at close range before she could escape. Pless then reportedly calmly walked away with an "odd smile" on his face. Pless was indicted eleven days later on six counts, including two counts of aggravated murder.

Pless then appeared in open court and voluntarily signed a written waiver of his right to a jury trial. Trial judge Janet Burnside questioned Pless extensively to ensure that Pless knew the consequences of the waiver, that he had discussed it with his attorneys, and that he had signed the waiver voluntarily. Judge Burnside read the waiver to Pless, and the transcript indicates that Pless signed the form. Burnside, however, did not make the waiver an official court order because she believed Ohio law only required the proceedings to make note of the defendant signing the waiver. A three-judge panel convicted Pless of aggravated murder, aggravated burglary, kidnapping, intimidation of a witness, and a firearm violation. The panel sentenced Pless to death.

At the court of appeals, Pless raised nineteen assignments of error. The court rejected each of them, and upheld Pless's conviction and sentence. On appeal to the Ohio Supreme Court, Pless raised a twentieth contention—that the three-judge panel had no jurisdiction to try him because the written waiver of his right to a jury trial was never filed and made part of the record of the case.

Five justices on the seven-member court agreed with this argu-
ment. The majority opinion, authored by Justice Andrew Douglas, saw § 2945.05 as a clear and explicit requirement for a waiver of the right to a jury trial to be effective, and reasoned that since the requirement of making the written waiver part of the record was not met in Pless's case, the panel was without jurisdiction to try and convict him. “Absent strict compliance with R.C. 2945.05,” Justice Douglas wrote, "a trial court lacks jurisdiction to try the defendant without a jury.”

The majority saw Tate and Dallman as clear precedent for the proposition that strict compliance with § 2945.05 is necessary for a waiver to be effective. Larkins, according to the majority, created a limited exception to the strict compliance rule, but that exception was limited to habeas corpus situations. In addition, the court held that Larkins presented “unique circumstances” of a waiver that had actually been physically included in the case file, whereas in Pless the written document had never been included in the file. Thus, because of the plain language of the statute and precedent requiring strict compliance with the statute, the majority stated it had no choice but to reverse Pless's conviction.

The majority however did not do so without expressing some regret. It acknowledged that “our decision today might not be well received,” and that Pless “is a brutal killer.” In a statement to the media after the decision, Justice Douglas acknowledged that the decision was not easy: “Had there been any room for interpretation in that statute I would have done so. My heart goes out to the family [of Lockwood]. There is no question in my mind [Pless] is a brutal killer who should never be released from confinement.”

Justice Douglas and the majority held fast to the “plain language” of § 2945.05, though, because “[i]f we were to ignore this statute, as some would have us do, then, henceforth, no clear and unambiguous statute would be safe from a ‘substantial compliance’ interpretation.” Thus, the court was “constrained to enforce the statute as written.”

57. Id. at 770.
58. Id.
59. Id.
60. Id.
61. Id. at 770.
62. Id.
63. Brown, supra note 48, at 4B.
64. Pless, 658 N.E.2d at 770.
65. Id.
In her concurrence joined by four justices from the majority, Justice Alice Robie Resnick agreed that § 2945.05 is clear and required a reversal of Pless’s conviction, but also focused on the potential abuses that could occur should the court allow anything less than strict compliance with the statute. Since a defendant may withdraw a waiver of the right to a jury trial, Justice Resnick stated that the requirement of the written document in the file is necessary to make sure a defendant did not change his mind. An indication on a transcript of the waiver cannot be sufficient, Justice Resnick stated, because “we cannot be absolutely sure that, after the court had taken the signed waiver form from appellant and written out the journal entry and after the court reporter had packed up and left, appellant did not change his mind and ask that the waiver form be destroyed or returned to him.”

Justice Resnick also stressed the concern of the majority that should an exception to the statute be allowed in this case, many more exceptions would arise in the future because of overcrowded dockets and overworked court personnel. Should the court sanction such a “shortcut,” Justice Resnick reasoned, the practice “will be taken more and more as acceptable practice and without following the requirements that the General Assembly wrote into the law.” In addition, Justice Resnick wrote that protecting Pless’s rights were particularly important because he was sentenced to death.

Justices Cook and Pfeifer dissented, reading Ohio precedent differently than the majority. The dissenters argued that *Dallman* and *Tate* were not controlling because in neither of those cases did the trial court record affirmatively reflect that the defendant voluntarily waived the right to a jury trial. In the dissent’s view, *Larkins* governed this situation because it rejected a strict compliance interpretation of § 2945.05. Unlike the majority, the dissent did not see that *Larkins* was “limited to habeas corpus actions or that the result in *Larkins* was dictated by the written waiver’s

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66. See *Ohio Rev. Code Ann.* § 2945.05 (Baldwin 1995) ("Such waiver may be withdrawn by the defendant at any time before the commencement of the trial.").
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* (Cook, J., dissenting).
72. *Id.*
presence in the trial court's case file."\textsuperscript{73} Thus, just as Larkins's missing time-stamped copy of his waiver was not fatal in that case, according to the dissenters, neither should Pless's missing copy of his written waiver be fatal.\textsuperscript{74}

\section*{III. The Two Cases Are Irreconcilable}

In requiring strict compliance with the requirements of § 2945.05, the Pless court had the right approach, but it failed to acknowledge the significance of the track it chose. The Larkins and Pless decisions are simply not reconcilable because the former clearly allows a "substantial compliance" exception to the application of § 2945.05, while the latter does not. Thus, the Pless decision rejects the court's holding in Larkins just one year earlier, and represents a bold step toward strict compliance.

Larkins, as explained above,\textsuperscript{75} rested on two issues. First, the Larkins court held that while strict compliance with § 2945.05 was required under Tate and Dallman, failure of the trial court to file a waiver and make it part of the record does not affect its jurisdiction to hear the case.\textsuperscript{76} The rationale for this holding was that the defendant in such an instance has "waived" his right to a jury trial under § 2945.06 despite the court's failure to comply with § 2945.05.\textsuperscript{77} Second, the Larkins court stated that it was dealing with "unique circumstances" because a written waiver had physically been placed in the record (although it had not been time-stamped) and the case involved habeas review rather than a direct appeal.\textsuperscript{78} To whatever extent Tate and Dallman remained inconsistent with the Larkins decision, the Pless court "limited" those holdings.\textsuperscript{79}

Larkins and Pless are hopelessly inconsistent, and the Pless court's efforts to distinguish the two are not persuasive. The Pless court asserted that "the sole proposition for which Larkins stands is that a violation of R.C. 2945.05 is not the proper subject for habe-

\begin{itemize}
  \item \textsuperscript{73} Id. at 772.
  \item \textsuperscript{74} Id.
  \item \textsuperscript{75} See supra notes 38-43 and accompanying text.
  \item \textsuperscript{76} Larkins, 653 N.E.2d at 702 (holding additionally that Larkins could have raised the trial court's error on direct appeal).
  \item \textsuperscript{77} Id. at 703.
  \item \textsuperscript{78} Id.
  \item \textsuperscript{79} Id.
\end{itemize}
as corpus relief." However, nothing within the Larkins decision supports such a limited reading of the case. The Larkins court held that despite the trial court's failure to strictly comply with the mandates of § 2945.05, the trial court nonetheless had jurisdiction to hear the case because the defendant had attempted to waive his right to a jury trial, giving the trial court jurisdiction under § 2945.06. "Jurisdiction" cannot be used in one way for the basis of a habeas corpus ruling, yet remain intact for all other purposes. Either the trial court has jurisdiction even if it fails to comply with § 2945.05, or it does not. If it does, both defendant's habeas and direct appeals should fail. If it does not, both proceedings should succeed, and defendants should be given new trials. Thus, Larkins must apply in all cases, whether they involve a direct appeal or a habeas corpus petition.

The "unique circumstances" of Larkins do not distinguish it from Pless. The presence of the written document in Larkins is not different than the transcript's indication that a waiver was signed in Pless. Both situations involve violations of § 2945.05's third and fourth requirements—that the waiver form be filed and made part of the record of the case. If Larkins is the law, then either Pless's conviction should have been allowed to stand on the same "substantial compliance" grounds, or the court should have stated that Pless's situations did not meet the substantial compliance exception. Instead, the court explicitly endorsed Dallman's strict compliance requirement. Substantial compliance and strict compliance cannot both be the law, thus, the Larkins and Pless decisions are inconsistent.

80. Pless, 658 N.E.2d at 770 (emphasis in original).
81. It is true that a court generally will not grant a writ of habeas corpus unless (1) the trial court violated the defendant's rights in a manner that is not otherwise remedial at law and (2) the violation of the defendant's rights are so great as to deprive the trial court of jurisdiction to try and sentence the case. State v. Perry, 226 N.E.2d 104, 107 (Ohio 1967). In this manner, the Larkins court may have used "jurisdiction" to refer to the seriousness of the violation of the defendant's rights, rather than the term as it is normally used. However, nothing in the Larkins decision explicitly supports such a limited view of the term "jurisdiction," and thus it must be assumed that the Larkins court meant that a trial court had jurisdiction to hear a case despite the lack of strict compliance with § 2945.06.
IV. STRICT COMPLIANCE IS THE BETTER APPROACH

Although *Pless* was not supported by *Larkins*, the *Pless* court nevertheless reached the better conclusion. The *Pless* majority was clearly inclined to deny Pless's appeal if the law could be construed so as to support the state's position, but it found four insurmountable obstacles to this outcome. First, the court believed the plain language of § 2945.05 left no such loophole available. Second, because the language of the statute was clear, the court believed that it should not ignore or rewrite the statute's requirements. In addition, the court rested its decision on Ohio precedent as set forth in *Tate* and *Dallman*. Finally, the court (as reflected in Justice Resnick's concurring opinion) was concerned about the problem of how to determine whether a defendant had withdrawn his or her waiver if no written waiver had been made part of the record.

The *Pless* decision was correct because of the four justifications set forth by the court.\(^8\) In addition, even if the court could have legally justified the decision, "justice" did not clearly demand upholding Pless's conviction. Thus, the decision, while understandably disappointing to Sherry Lockwood's family, was the right one to be made.

A. Plain Language

The language of O.R.C. § 2945.05, as the majority in *Pless* recognized, is clear as to what is required to waive a right to a jury trial, and, as Justice Resnick noted, it "does not provide for substantial compliance."\(^9\) The statute explicitly states that a waiver of a right to a jury trial shall be (1) in writing, (2) signed by the defendant, (3) filed in said cause, and (4) made a part of the record of the case. Additionally, it states that the waiver must be made in open court after the defendant has been arraigned and has had the chance to meet with his or her attorney. It contains no other language to indicate that some other method of waiver would be effective, or that a waiver need not meet all the requirements of the statute.

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\(^8\) An additional justification exists for the court's decision in *Pless*, but while important, does not merit extensive consideration. As Justice Resnick's concurrence observed, Pless was sentenced to the death penalty. Thus, it is especially important that his right to a jury trial be protected. *Pless*, 658 N.E.2d at 771 (Resnick, J., concurring).

\(^9\) *Id.*
The waiver in *Pless* did not comply with the plain language of the statute. Pless’s written waiver form was neither “filed” nor “made a part of the record” of the case. An indication on a transcript is not the same as filing the actual form and making it part of the record, and the statute does not say that statements about the waiver may be filed and made part of the record through the court’s transcript; it says that the waiver itself must be filed. Thus, the trial court did not comply with the plain language of § 2945.05.

Those opposed to the *Pless* decision may argue that although the statute does establish requirements for a waiver, the statute does not prohibit other methods for compliance. In fact, some federal appellate courts have reached this conclusion. In *United States v. Saadya*, for example, the Ninth Circuit held that while Federal Rule of Criminal Procedure 23(a) requires a waiver of the right to a jury trial to be in writing, an exception to this requirement exists where the defendant personally gave express, knowing, and intelligent consent to the waiver in open court.

This argument, though, is not persuasive under Ohio law. The Ohio statute does not hint that alternative methods of waiver may be valid; rather, it states that “[i]n all criminal cases pending in courts of record in this state,” a defendant may waive the right to a jury trial, and that such waiver “shall” meet the four requirements set forth above. “Shall” is not a discretionary term; by its general meaning it is “used in laws, regulations, or directives to express what is mandatory.” The federal cases did not have the benefit of a statute clearly spelling out what steps are necessary to effectively waive the right to a jury trial. Thus, the statute mandates that waivers be by the method it sets forth. The federal cases allowing waivers by alternate methods than those proscribed, apart from their lack of binding precedential value, deal not with a statute, but with a rule of procedure providing less clear guidelines; Federal Rule 23(a) states only that defendants shall be tried by a jury unless the right to a jury trial is waived in writing. Thus, the

84. *Id.* at 769.
86. 750 F.2d 1419 (9th Cir. 1985).
87. *Id.* at 1420.
lack of a clear legislative mandate distinguishes the few federal cases that have allowed an alternate means of waiver from the situation in *Pless*.

Another possible argument against the "plain language" rationale for the *Pless* decision could be that the waiver in that case met the spirit, although not the letter, of § 2945.05. The requirement that a defendant sign a written waiver exists to ensure that the defendant's waiver is knowing, intelligent, and voluntary. Thus, in this case it could be argued that despite the technical noncompliance with the statute's requirements, *Pless*'s conviction should be allowed to stand because the transcript of the questioning by the trial judge, combined with the undisputed fact that *Pless* actually did sign a waiver, prove that his waiver was intelligent, voluntary, and knowing.

The response to this argument is that it is the legislature that is assigned the task of establishing our policy goals that comply with broad constitutional mandates. Thus, since the Ohio legislature chose to ensure the intelligence, voluntariness, and knowingness of jury waivers by the four requirements of § 2945.05, it is not for the courts to second-guess that decision unless the statute is unconstitutional. The fact that a statute provides more hurdles than a rule of criminal procedure or the Constitution requires does not make it discretionary. The "spirit" of § 2945.05 was in its language. Because it clearly intended all four requirements to be met in order for a waiver to be valid, general rules of statutory interpretation required the court to honor their plain meaning. *Pless* correctly did so.

*Larkins*, on the other hand, twisted the plain language of both § 2945.05 and § 2945.06. By holding that the latter statute grants a trial court jurisdiction to hear a case without strict compliance

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90. At least one circuit court has in fact expressly disallowed alternate means of waiving the right to a jury trial. See United States v. Garrett, 727 F.2d 1003, 1012 (11th Cir. 1984), affd, 471 U.S. 773 (1985).
92. In Dr. John Bell & Sir George Engle, *Statutory Interpretation* (2d ed. 1987), the authors quote the classical statement of the "plain meaning" or "literal" rule from Justice Tindal's advice to the English House of Lords:

> If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.

*Id.* at 14.
with § 2945.05, the Larkins court ignored not only the plain language of § 2945.05 but an explicit line of precedent requiring the two statutes to be read in pari materia. Although the Larkins dissent noted that the two statutes are to be read together, the majority did not even address the issue. In addition, the Larkins court’s use of the fact that the words “shall have jurisdiction” had been eliminated from § 2945.06 was not a valid reason for departing from § 2945.05’s clear requirements. The newer version of § 2945.06 still requires compliance with § 2945.05 for the trial judge to hear the case. Thus, as the Larkins dissent realized, the Larkins majority “relie[d] on an interpretation of R.C. 2945.06 which appears to be at war with its terms.”

B. The Problem with Substantial Compliance

Because the language of § 2945.05 was clear, the court was bound to enforce it. Once this was established, though, the Pless court could have fallen into a different but related trap—to what extent it should enforce the language of the statute. To put the issue differently, should the court follow Larkins and allow for substantial compliance to satisfy the provisions of § 2945.05? The Ohio Supreme Court answered this questions with a firm “no,” and this answer was the correct one. Reading a “substantial compliance” loophole into the statute, as the court had done in Larkins, would have thrust Ohio courts into an area in which they do not belong, and would have given courts free reign to ignore the express will of the Ohio legislature. The Ohio Supreme Court was wise to avoid this trap.

“Substantial compliance” is a phrase in vogue with many courts. It allows a court to decide that a statute or contract has been complied with when the “essential requirements” of the statute or contract have been met. Courts have used the rule frequently in areas such as tax law, commercial law, and probate law to validate actions that do not technically meet all the re-

94. Larkins, 653 N.E.2d at 704 (Wright, J., dissenting).
98. See UNIFORM PROBATE CODE § 2-503 (1990) (allowing writings intended as wills
quirements of a statute.

Allowing Pless's conviction to stand because his waiver substantially complied with § 2945.05's requirements, however, would be disastrous because it would force Ohio's courts to enter an area in which it does not belong—rewriting legislation. Professor Frederick Schauer gave this line of reasoning a name, calling it an "argument from added authority." The rationale is this: a court should be careful about deciding a given issue, because once the power to decide that issue is granted, it is possible the court could decide another case against the position for which one argues. Thus, everyone has an incentive to try to keep courts from deciding the issue, because if the courts do not decide the issue, they cannot decide it adversely to one's interests. Here, the Ohio Supreme Court was unwilling to grant itself the power to read a substantial compliance loophole into § 2945.05 because, as Justice Douglas's majority opinion argued, "then, henceforth, no clear and unambiguous statute would be safe from a 'substantial compliance' interpretation." The implicit problem is that under such a system no one would be able to tell exactly what "the law" requires. Thus, the court was making an "argument from added authority" because it "proceeds from the assumption that even the unlikely becomes more likely once jurisdiction is granted than it would have been without that jurisdiction."

The Pless approach was wise because even though it is unlikely that anything "bad" would happen (i.e. upholding a waiver that truly was not voluntary, knowing, intelligent, or even actually made) if the court assumed the power to read a substantial compliance loophole into § 2945.05, the Pless court was unwilling to take that chance. Nor should it have been. Pless did not involve a tax, commercial, or probate statute, areas where the substantial compliance doctrine is invoked frequently. This was a situation in which constitutional liberties, and a life, were at stake. The importance of a jury trial has led Ohio courts to provide that "every reasonable presumption should be made against the waiver, espe-

to be effective despite noncompliance with the statute's formal requirements).

100. Id.
101. Pless, 658 N.E.2d at 770.
102. Schauer, supra note 99, at 368.
103. See supra notes 96-98 and accompanying text.
cially when it relates to a right or privilege deemed so valuable as to be secured by the Constitution.”104 In such an instance, “substantial compliance” with the means the state legislature chose to ensure a defendant’s rights hardly grants the defendant “every reasonable presumption” against the waiver.

Procedural rules do not exist simply for their own sake. As the opening quote from Justice Frankfurter indicates,105 procedure exists so that society has some means by which to determine the rights of citizens. Where such procedure is clear, it must be followed because, among other reasons, the legitimacy of the state itself is at stake.106 Achieving equality is also another important goal of the criminal justice process, and this is accomplished in part by ensuring that criminal procedure requirements apply to all defendants.107 If courts were to become involved in varying procedural requirements ex post facto to fit individual situations, the legitimacy of the state would be compromised.

Criminal procedure in state courts is a matter generally left to state legislatures.108 Here, the Ohio legislature has chosen to ensure that jury waivers are made knowingly, voluntarily, and intelligently, by providing strict and extensive requirements for the procedure of such waiver. These requirements are not unreasonable, given the central role the right to a jury trial plays in our society.109 The best way to ensure that the safeguards built into § 2945.05 function is to enforce them, not to let the court pick and choose which requirements to enforce in a given situation.

_Larkins_ fell into the substantial compliance trap, and the results could have created confusion if the court had not subsequently decided _Pless_. While _Larkins_ stated that its holding was limited to the “unique circumstances” of that case, it left unclear exactly how

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105. See _supra_ note 1 and accompanying text.
106. See, _e.g._, WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 1.6(g) (2d ed. 1992) (“[E]nsuring respect for individual dignity is viewed as essential in obtaining public acceptance of the process and in promoting respect for the law it enforces.”).
107. _Id._ § 1.6(i).
108. See _id._ § 1.5(c) (“In most states, for most subjects, statutory provisions are the dominant source of state law regulating the criminal justice process.”).
109. See, _e.g._, Duncan v. Louisiana, 391 U.S. 145, 149-50 n.14, 156 (1968) (stating that the right to a jury trial is “necessary to the Anglo-American regime of ordered liberty” because “[p]roviding an accused with the right to be tried by a jury of his peers [gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge”).
unique the case must be for a waiver to be sufficient to grant the trial court jurisdiction to hear the case without a jury. Thus, as Justice Wright's dissent in *Larkins* notes the case "leaves defendants, lawyers, and the courts of this state with no meaningful test for determining what errors with respect to jury trial waivers constitute jurisdictional defects. . . . [T]he majority's opinion, in essentially rewriting R.C. 2945.06 . . ., embodies the very essence of judicial legislation."\(^{110}\)

### C. Precedent

The Ohio Supreme Court in *Pless* correctly read Ohio precedent before *Larkins* as requiring Pless's conviction to be overturned. The case law clearly stated that strict compliance with § 2945.05's requirements is necessary for a waiver to be valid.

*Tate* held that once a defendant has the right to a jury trial and demands a jury, the trial court does not have jurisdiction to try the defendant without a jury unless the record reflects that "such defendant waived this right in writing in the manner provided by R.C. 2945.05."\(^{111}\) Whatever room for ambiguity this statement left open was subsequently closed. *Dallman* explicitly stated that "[t]here must be strict compliance with R.C. 2945.05 for there to be a waiver of a right to a jury trial; where the record does not reflect strict compliance, the trial court is without jurisdiction to try the defendant without a jury."\(^{112}\) It would be hard to state the rule any clearer than this. Strict compliance alone satisfies the requirements of § 2945.05.\(^{113}\)

The factual differences in *Pless, Dallman,* and *Tate* do not lessen their precedential value, contrary to the *Pless* dissenters' opinion. It is true that in neither *Dallman* nor *Tate* did the trial court transcript specifically reflect that the defendant knowingly, intelligently, and voluntarily signed a written waiver.\(^{114}\) However,

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111. *Tate*, 391 N.E.2d at 740 (emphasis added).
113. Other cases provide similar support. See, e.g., *State v. Harris*, 596 N.E.2d 563, 568 (Ohio Ct. App. 1991) ("The rule today is, as expressed in R.C. 2945.05, that a right to jury trial may be waived and an accused may submit to a trial by the court, but only when very specific strict procedures are followed. There must be strict compliance with R.C. 2945.05 for there to be a waiver of a right to jury trial."); *State v. Fife*, 137 N.E.2d 429, 431 (Ohio Ct. App 1954) ("[A trial court has jurisdiction] to try the defendant without a jury only through a compliance with the statute requiring a written waiver, signed by the defendant, filed in the cause, and made a part of the record.") (emphasis in original).
114. In *Tate*, the court was presented with affidavits that Tate's attorney orally waived
these facts are not sufficient to undermine Ohio precedent's support for the Pless decision. While the defects in the Dallman and Tate cases were more striking than those in Pless, the trial court's procedure in Pless still was defective—the written waiver was never filed and made part of the record of the case. Because Dallman and Tate require strict compliance with the requirements of § 2945.05, and because the trial court in Pless did not strictly comply with the provisions of the statute, Dallman and Tate control, and required the result in Pless.¹¹⁵

Larkins failed to give proper weight to the Dallman and Tate decisions. The court's effort to distinguish its situation from Dallman on the grounds that Larkins involved a writ for the "extraordinary relief" of habeas corpus was misguided, as Dallman also was a habeas case. The fact that the defect in Larkins was "unique"—the waiver in Larkins was physically placed in the file but not filed with the clerk or made part of the record—also did not distinguish it from Dallman any more than it distinguished it from the situation in Pless. The requirements of § 2945.05 had not been met in Larkins, and the "uniqueness" should be irrelevant.

The Larkins court's efforts to distinguish its decision on § 2945.06 was equally unpersuasive. Larkins, as explained above,¹¹⁶ rested partly on the rationale that the noncompliance with § 2945.05 caused by the trial court was not sufficient to deprive the court of jurisdiction, as the term is used in § 2945.06.

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¹¹⁵. Some lower Ohio courts had decided that, on similar facts to those in Pless, the convictions could stand. These courts based their decisions on the factual differences between the facts in Tate and Dallman, and on the Larkins decision. See State v. Loesser, No. 66762, 1995 Ohio App. LEXIS 4607 (Ohio Ct. App. Oct. 19, 1995) (upholding conviction where defendant's waiver form was never filed); State v. Goodwin, No. 66951, 1995 Ohio App. LEXIS 2540 (Ohio Ct. App. June 15, 1995) (distinguishing a situation in which a defendant did not dispute signing a waiver from Dallman (Larkins had not yet been decided)). However, although these decisions were not binding on the Supreme Court of Ohio, their persuasiveness was diluted by the fact that at least one state appellate court had followed the position adopted by Pless. See State v. McDonald, No. CA-9033, 1993 WL 271169 (Ohio Ct. App. July 6, 1993) (finding no trial court jurisdiction to try defendant without a jury when defendant's waiver was never time-stamped and filed with the clerk's office as part of the record). Thus, the lower court opinions siding with the Larkins decision do not provide persuasive authority that the Pless decision was wrong.

¹¹⁶. See supra notes 38-43 and accompanying text.
Yet, Dallman and Tate were well aware of the existence and language of § 2945.06, and still required strict compliance with § 2945.05’s requirements for a valid waiver. The fact that the jurisdiction issue was viewed in a habeas proceeding in Larkins also does not matter, because the Larkins court did not limit its holding to habeas review. In addition, Dallman involved a habeas corpus proceeding as well, and the court had not viewed § 2945.06 as having vested the trial court with jurisdiction in that case. Thus, Pless is more consistent with Ohio precedent than Larkins.

D. The Withdrawal Problem

Justice Resnick’s opinion expressed not only a concern with the plain language and subsequent interpretation of § 2945.05, but also with a practical problem should the court have allowed a substantial compliance reading of the statute. That concern focused on how an appellate court would be able to conclusively determine whether a defendant had waived his or her right to a jury trial if no written waiver had ever been made part of a case’s record. Because the requirements of § 2945.05 were not strictly enforced in Pless’s case, Justice Resnick reasoned, the court had no way to know if Pless asked for his waiver to be withdrawn after the exchange recorded on the transcript. By requiring strict compliance with § 2945.05’s requirements, an appellate court will be more likely to determine whether a defendant did withdraw his or her waiver of the right to a jury trial. By allowing the waiver to be effective under the Pless facts, the appellate court would have been unable to determine if, after the court reporter had left, the defendant had changed his mind and asked for the waiver form to be destroyed or returned to him.

Strict compliance eliminates this concern. If § 2945.05 had been strictly complied with, the appellate court would have had an easier time doing so, because the trial judge could then either return or destroy the waiver form to acknowledge this request. The absence of the waiver form could then be prima facie evidence that the defendant had withdrawn his or her waiver of the right to a jury trial. In addition, formal compliance with § 2945.05 may lead defense attorneys to be more formal in their attempts to withdraw

117. See supra note 78 and accompanying text.
118. Pless, 658 N.E.2d at 771 (Resnick, J., concurring).
waivers completed under the section, because the presence of a written form may lead defense attorneys to make a formal, written motion to withdraw the waiver and demand a jury trial rather than to make the request orally. Thus, strict compliance with § 2945.05’s requirements will better ensure appellate court’s ability to enforce defendants’ rights under the withdraw provision of § 2945.05.

E. "Justice"

Even given all of the above, the family of Sherry Lockwood must have a difficult time accepting the Pless decision. Even if one accepts that the law was clearly on Pless’s side, overturning his conviction and granting him a new trial could be a tough pill to swallow because it can be seen as an unjust result. The decision was, after all, based on a missing piece of paper, which even the defendant did not deny existed, and the end result is a new trial that will cost the state money and keep the door open on a tragedy Sherry Lockwood’s family undoubtedly would like to close.

But injustice is not an absolute, fixed concept. When viewed differently, the Pless decision does not seem unjust at all, but as the logical outcome of a mistake the trial court and prosecutors made. Pless can be seen as a case of a killer getting away (for the time being) with murder, but it is just as easily understood as a case of a trial judge and prosecutor pleading with the judiciary to cover their mistakes. The language of § 2945.05 explicitly states what is required for a defendant’s waiver of his or her right to a jury trial. Even though Larkins seemingly allowed a “substantial compliance” exception to the statute’s requirements, and Judge Burnside, along with many other Ohio judges, viewed § 2945.05’s

119. This sense of “injustice” was described in Edmond Cahn’s classic work The Sense of Justice:

Here the sense of injustice attaches itself to the notion of desert. The law is regarded as an implement for giving men what they deserve, balancing awards and punishments in the scale of merit. . . . What it cannot stomach is the use of law to raise up the guilty or to punish the innocent.


120. See id. at 26 (“Is the sense of injustice right? Certainly not, if rightness means conformity to some absolute and inflexible standard. There is nothing so easy or mechanical about it.”).
requirements as less strict than Pless’s determination, there is no good excuse for failing to comply with the statute’s clear requirements. Filing the waiver form and making it part of a case’s record should be a simple matter. By failing to do so, the prosecutors and trial judge in Pless ran the risk that Pless’s conviction would be overturned, given the unsettled state of the law after Larkins, Dallman, and Tate. This gamble, not the Ohio Supreme Court, caused the reversal of Pless’s conviction.

In addition, the case does not impose a high price on society and does have some benefits. Pless did not receive his freedom for the prosecutors’ and trial judge’s mistake; he only received a new trial. While Sherry Lockwood’s daughter is understandably apprehensive about testifying against Pless, and a new trial will cost money, it is unlikely Pless will ever be acquitted. Even the court that granted him a new trial stated that Pless “is a brutal killer and there is no question concerning his culpability” in the killing. Pless is valuable for prosecutors and trial judges as well as defendants, because now the requirements for an effective waiver of the right to a jury trial are clearly delineated. Thus, while the decision may seem harsh, it is clearly not “unjust.”

Even if the decision were unjust, however, it was still correct. Our system of criminal justice is not geared to do the victim justice, it is geared to do justice for all—especially the defendant.

IV. CONCLUSION

If it is true that “tough facts make bad law,” then the Ohio Supreme Court should commend itself. While it allowed tough facts to lead it down the wrong road in Larkins, it reversed this trend in Pless. This was a key step toward closing the Pandora’s box of substantial compliance it had opened in Larkins. Substantial compliance has no place in the interpretation of criminal procedure statutes, especially statutes involving a waiver of one of the most important rights criminal defendants have—the right to a jury trial. The substantial compliance rule of Larkins had many problems: it ran directly counter to the waiver statute’s plain language; it would have left those accused of crimes and those who sit on juries with

121. Brown, supra note 48, at 4B.
122. See Brown, supra note 48, at 4B (quoting the victim’s daughter as stating, “I don’t want to have to go through this twice,” and noting that she was scared that if Pless is released, he may try to kill her).
123. Pless, 658 N.E.2d at 770.
no way to know exactly as to when a jury waiver becomes effective; it defied Ohio precedent; and it would have eliminated an important safeguard for defendants seeking to withdraw their waivers.

But the *Pless* court should have gone further and given itself more credit for its decision. The court in *Pless* not only set forth a valuable rule of strict compliance, but it had to contradict a case decided just one year earlier. By not acknowledging that it was in fact sticking to a strict compliance rule and overruling *Larkins*, it left the Pandora's box open just a crack. Future decisions by the Ohio Supreme Court may try to distinguish the cases, and the substantial compliance rule may yet survive. If so, defendants, prosecutors, courts, and society would be the worse for it.

**Jeremy Stone Weber**