

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2008-2047
Plaintiff-Appellant,	:	
v.	:	On Appeal from the Hamilton
	:	County Court of Appeals
TOBY PALMER,	:	First Appellate District
	:	
Defendant-Appellee.	:	Court of Appeals
	:	Case No. C010583

TOBY PALMER'S MEMORANDUM IN OPPOSITION OF JURISDICTION

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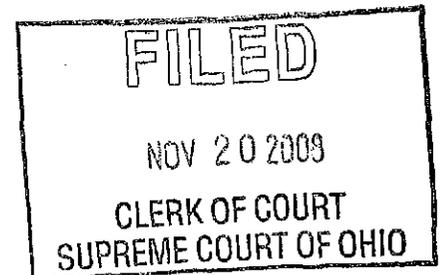


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**EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR
GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

The State's appeal fails to present any issues that this Court has not previously addressed. In its attack upon the Court of Appeals decision, the State's memorandum includes only the first of two entries issued by the Court of Appeals in this case. The second entry, filed in response to the State motion to reconsider the appellate court's decision granting Palmer relief, is appended to this response. A thorough reading of both of the Court of Appeals' entries pertinent to Palmer's reconsideration motion indicates that the appellate court followed the appellate rules when it granted Palmer relief.

The law proposed by the state pertaining to retroactivity is well-established. And contrary to the State's assertion, the procedural history of this case is extraordinary because a similar scenario is unlikely to be repeated with any regularity. The case is peculiar to its facts. Accordingly, the first proposition of law is not of great general interest and it does not involve a substantial constitution question.

This Court also resolved the second proposition of law in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625 at ¶¶17, 21, 26, and 27. The *Cabrales* decision expressly states that the original appellate decision in Palmer's case wrongly applied R.C. 2941.25. *Id.* Accordingly, the second proposition of law, as it relates to Palmer's case, has already been resolved by this Court.

This Court requires more than a simple allegation of appellate court error to justify a grant of jurisdiction. The Court should decline jurisdiction and dismiss the State's appeal.

STATEMENT OF THE CASE AND THE FACTS

In August, 2001, the Hamilton County Common Pleas Court convicted Toby Palmer of one count of aggravated robbery in violation of R.C. 2911.01(A), including a firearm specification, and one count of robbery in violation of R.C. 2911.02(A)(2). The trial court sentenced Palmer to serve consecutive terms of incarceration of 10 years for the aggravated robbery conviction, 8 years on the robbery conviction, and 3 years on the firearm conviction.

Palmer challenged the imposition of multiple sentences for allied offenses of similar import on statutory and constitutional grounds. The Hamilton County Court of Appeals affirmed Palmer's sentences, finding that aggravated robbery and robbery were not allied offenses of similar import. *State v. Palmer*, 148 Ohio App.3d 246, ¶13, 2002-Ohio-3536, 772 N.E.2d 726. In so holding, the appellate court relied upon its interpretation of *State v. Rance*, 85 Ohio St. 3d 632, 636, 710 N.E.2d 699 (1999). The Court of Appeals did so grudgingly, observing that although "*Rance* has been criticized as repealing the Double Jeopardy Clauses of the Ohio and the United States Constitutions, it is the law we must apply." *Id.*

Palmer contested his sentence throughout state and federal court. Ultimately, the Sixth Circuit Court of Appeals affirmed that Palmer could not obtain federal relief because the federal court was obliged to defer to the state appellate court's interpretation of state law. *Palmer v. Haviland* (6th Cir. April 9, 2008), No. 06-3857, slip op. at 1. Accordingly, on April 9, 2008, the Sixth Circuit Court of Appeals affirmed the district court's dismissal of Palmer's petition for writ of habeas corpus.

On the same day that the Sixth Circuit issued its decision, this Court announced that *State v. Palmer* was wrongly decided, holding that aggravated robbery and robbery are allied offenses of similar import. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625 at ¶¶17, 21, 26, and 27.

Palmer immediately asked the federal appellate court for a panel rehearing based upon *Cabrales*. The panel declined rehearing and the federal court issued its mandate on June 26, 2008.

Palmer then moved the Hamilton County Court of Appeals to enlarge the time pursuant to App.R. 14(B) to file an application for reconsideration under App.R. 26(A). The appellate court granted the enlargement and allowed Palmer to file his application instantner. While the Court of Appeals reaffirmed two of Palmer's assignment's of error, the appellate court agreed that the trial court improperly sentenced Palmer for aggravated robbery and robbery in violation of R.C. 2941.25. *State v. Palmer*, Hamilton App. C-010583, September 12, 2008 Judgment Entry.

The State asked the Court of Appeals to reconsider its decision to vacate Palmer's original sentences, or, alternatively, to certify a conflict with the Sixth Appellate District. The appellate court issued a second entry denying both requests. *Id.*, October 8, 2008 Judgment Entry.

RESPONSE TO STATE'S FIRST PROPOSITION OF LAW

In the Court of Appeals, the State argued that the appellate court did not have jurisdiction to consider Palmer's reconsideration motion and that this Court's denial of Palmer's appeal in 2002 served as a bar to review based upon the doctrine of res judicata. Having lost on those grounds in the appellate court, the State now seeks review of a Court of Appeals' decision that is based upon the peculiar procedural history of Palmer's case.

The law governing retroactivity is well-established and the State's argument essentially is that the court of appeals failed to properly apply well-settled law. As one commentator has noted, "[t]ime and resources are too limited for the Court to micromanage the law in every case of error correction. Instead, the Court must pick and choose, so that resolving one 'good' case will provide the resolution for numerous other cases." Shawn Judge, *Convince the Court to Hear Your Case: A Pragmatic Approach to Jurisdictional Memoranda*, LITIGATION NEWS, Vol. 11, Issue 1, Spring 2005, at 4. Accepting this case—regardless of the ultimate result—would provide a resolution for this case and for these parties. Beyond that, the case would have little impact upon Ohio appellate practice. For that reason alone this Court should decline to grant jurisdiction.

RESPONSE TO STATE'S SECOND PROPOSITION OF LAW

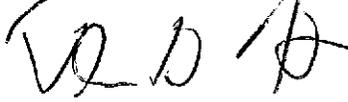
This Court rejected the State's second proposition of law in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶¶17, 21, 26, and 27, expressly stating that *State v. Palmer* misapplied *Rance*. The State's second proposition of law merely restates the incorrect holding. Accordingly, the second proposition offered by the State's appeal has already been resolved by this Court. The Court should decline to grant jurisdiction over the State's appeal.

CONCLUSION

For the foregoing reasons, Toby Palmer respectfully asks that this Court decline to accept jurisdiction, and dismiss the State's appeal.

Respectfully submitted,

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CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing TOBY PALMER'S MEMORANDUM IN OPPOSITION OF JURISDICTION was forwarded by regular U.S. Mail, postage prepaid to the office of Scott Heenan, Assistant Hamilton County Prosecutor, Suite 4000, 230 E. 9th Street, Cincinnati, Ohio 45202 this 20th day of November, 2008.



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**APPENDIX TO
TOBY PALMER'S MEMORANDUM IN OPPOSITION OF JURISDICTION**
