

ORIGINAL

NO. 09-0787

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 88147

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STATE OF OHIO

Plaintiff-Appellee

-vs-

OSIRIS ALI

Defendant-Appellant

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**RESPONSE BRIEF TO CLAIMED APPEAL OF RIGHT AFTER DENIAL OF  
REOPENING**

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**THE EIGHTH DISTRICT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S UNTIMELY APPLICATION FOR RE-OPENING PURSUANT TO APP. R. 26(B)**

Appellant initiated the instant appeal after the Eighth District denied his application to reopen his appeal. Appellant presents this Honorable Court with two substantive propositions of law that should not be considered as they are inapplicable to the issue before this Court. The only issue that is properly before this Honorable Court is whether or not the Eighth District abused its discretion when it denied as untimely Appellant's application to reopen his appeal pursuant to App. R. 26(B). The Appellate Court did not reach the merits of Appellant's application to reopen as the Eighth District properly denied Appellant's untimely application, the State of Ohio requests this Honorable Court affirm the lower court's decision.

**STATEMENT OF THE CASE**

On February 22, 2006 the court found Appellant guilty of the following: (1) four counts of rape of a person under 13 years of age with force, in violation of R.C. 2907.02(A)(1)(B); (2) one count of rape without force, in violation of R.C. 2907.02(A)(1)(B); (3) one count of gross sexual imposition, in violation of R.C. 2907.05(A)(4); (4) seven counts of kidnapping with a sexual motivation specification, in violation of R.C. 2905.01(A)(2) and R.C. 2941.147; and (5) seven counts of unlawful sexual conduct with a minor, in violation of R.C. 2907.04(B)(3). The trial court classified Appellant as an sexually oriented offender and sentenced him accordingly.

On July 26, 2007, the Eighth District affirmed the decision of the trial court. *State v. Ali*, Cuyahoga App. No. 88147, 2007-Ohio-3776.

On September 18, 2007, Appellant filed a notice of appeal to this Honorable Court. This Court subsequently dismissed the appeal. *State v. Ali*, 116 Ohio St.3d 1458, 878 N.E.2d 35, 2007-Ohio-6803.

On November 26, 2008, Appellant filed a Motion to Reopen Appeal. The Eighth District denied Appellant's application as it was untimely and Appellant failed to show good cause for the delay. *State v. Ali*, Cuyahoga App. No. 88147, 2009-Ohio-1233.

**ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW**

**APPELLANT'S FIRST PROPOSITION OF LAW:  
INEFFECTIVE ASSISTANCE OF APPELLANT COUNSEL FOR  
FAILING TO RAISE THE ISSUE THAT THE DEFENDANT  
WAS DENIED THE RIGHT TO CONFRONT AND CROSS-  
EXAMINE WITNESSES, A FAIR TRIAL, AND DUE PROCESS  
OF LAW, IN VIOLATION OF THE 5<sup>TH</sup>, 6<sup>TH</sup> AND 14<sup>TH</sup>  
AMENDMENTS OF THE U.S. CONSTITUTION AND ARTICLE  
1, PARAGRAPHS 10 AND 16 OF THE OHIO CONSTITUTION,  
WHEN THE TRIAL COURT IMPROPERLY LIMITED CROSS-  
EXAMINATION TO PRECLUDE EVIDENCE OF PRIOR FALSE  
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THEORY OF THE CASE.**

**APPELLANT'S SECOND PROPOSITION OF LAW:  
INEFFECTIVE ASSISTANCE OF APPELLANT COUNSEL FOR  
FAILING TO RAISE THE ISSUE THAT TRIAL COUNSEL'S  
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WHICH DEPRIVED THE DEFENDANT OF HIS RIGHT TO  
EFFECTIVE ASSISTANCE OF COUNSEL. THE TRIAL COURT  
DENIED DEFENDANT'S DUE PROCESS OF LAW UNDER  
THE 5<sup>TH</sup>, 6<sup>TH</sup>, AND 14<sup>TH</sup> AMENDMENTS OF THE U.S.  
CONSTITUTION AND ARTICLE 1, SECTION 10 OF THE OHIO  
CONSTITUTION WHEN IT IMPROPERLY INSTRUCTED THE  
DEFENDANT ON THE STATUTORY DEFINITION OF  
"FORCE."**

Appellant presents this Honorable Court with two substantive propositions of law that should not be considered as they are inapplicable to the issue before this Court. The only issue that is properly before this Honorable Court is whether or not the Eighth

District abused its discretion when it denied Appellant's application to reopen his appeal pursuant to App. R. 26(B).

App. R. 26(B)(1) requires Appellant file an application for reopening "within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time." The Eighth District, after a proper application of this Court's precedent, found that Appellant had not shown good cause for his untimely filing. Citing *State v. Gumm*, 103 Ohio St.3d 162, 814 N.E.2d 861, 2004-Ohio-4755, the Eighth District stated "[c]onsistent enforcement of the rule's deadline by the appellate courts in Ohio protects on the one hand the State's legitimate interest in the finality of its judgments and ensures on the other hand that any claims of ineffective assistance of appellate counsel are promptly examined and resolved."

Recently, this Honorable Court was presented with a similar situation. In *State v. Keith*, 119 Ohio St.3d 161, 892 N.E.2d 912, 2008-Ohio-3866, a defendant initiated an appeal after the Third District Court of Appeals denied his application for reopening. Rather than discussing the substantive issues, this Honorable Court affirmed the Third District's denial of defendant's untimely application.

The State notes that while the Eighth District did not address the underlying merits of Appellant's application, even if his motion had been timely filed his substantive claims are unfounded. As to Appellant's first "proposition of law", appellate counsel was not ineffective for failing to challenge the constitutionality of Ohio's rape shield statute. Appellant was barred from asserting a violation of his right of confrontation as he did not raise such a challenge in court. *State v. Scheck*, Medina App. No. 05CA0033-M, 2006-Ohio-647. It is well settled that "appellate counsel is not required to raise and argue meritless and/or frivolous assignments of error." *Jones v.*

*Barnes* (1983), 463 U.S. 745, 77 L.E.2d 987, 103 S.Ct. 3308. Further, Appellant was not precluded from producing evidence irrespective of the rape shield statute. On numerous occasions, Appellant was able to elicit witness testimony that the victim had made either prior unsubstantiated claims of rape or allegations against other men. (Tr. 490-91, 493, 496, 499, 736).

In Appellant's second "proposition of law", Appellant argues that appellate counsel was ineffective for failing to raise the issue that trial counsel's failure to object to improper jury instructions deprived him of his right to effective assistance of trial counsel. As the Eighth District noted, the trial court did not modify the definition of force but rather applied the definition of force based on the well established law in the State of Ohio. *State v. Ali*, Cuyahoga App. No. 88147, 2007-Ohio-3776 at ¶25. As each of Appellant's propositions lack merit, this Honorable Court need not consider them in its determination of the issue at hand.

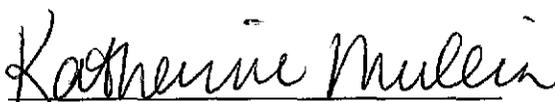
The State of Ohio requests this Honorable Court reach a conclusion similar to *Keith* and affirm the Eighth District's denial of Appellant's application to reopen his appeal.

### **CONCLUSION**

The State of Ohio respectfully requests that this Honorable Court affirm the Eighth District's denial of Appellant's untimely application to reopen, and dismiss Appellant's appeal.

Respectfully submitted,

**WILLIAM D. MASON**  
**Cuyahoga County Prosecutor**

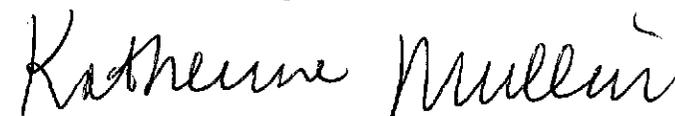
  
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**CERTIFICATE OF SERVICE**

A copy of the foregoing Memorandum in Response was sent by regular U.S. mail  
this 28th day of May 2009, to:

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