

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

Merit Brief of Appellee Toby Palmer

Joseph T. Deters
Hamilton County Prosecutor

Office of the Ohio Public Defender

Scott Heenan, 0075734
Assistant Prosecuting Attorney
(Counsel of Record)

By: Stephen P. Hardwick, 0062932
Assistant Public Defender
(Counsel of Record)

Hamilton County Prosecutors Office
230 E. Ninth Street, Suite 4000
Cincinnati, OH 45202
(513) 946-3200
(513) 946-3017 - Fax

250 East Broad Street - Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 - Fax
stephen.hardwick@opd.ohio.gov

Counsel for Plaintiff-Appellant

Counsel for Defendant-Appellee

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- 1) **The State did not argue in the court of appeals that the State or the victims would be prejudiced by the extension;**
 - 2) **Mr. Palmer continuously litigated a challenge to his sentence from his initial loss;**
 - 3) **This Court specifically named the First District’s initial decision in this case as an example of the “Confusion and Unreasonable Results[,]” Cabrales, at ¶15, 17;**
 - 4) **Under R.C. 2941.25, the illegal sentence was 60% above the statutory range for the offenses; and**
 - 5) **The court of appeals could not have abused its discretion by failing to consider arguments that the State did not make in response to the request for an extension.**
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Introduction

The court of appeals exercised its lawful discretion to correct an unlawful decision. Mr. Palmer's initial sentence was unlawful under R.C. 2941.25 because the trial court failed to merge allied offenses of similar import.

The State misstates the question. The question is not whether new case law grants a defendant the right to demand an App.R. 14(B) extension to file a motion to reconsider under App.R. 26(A). The decision below creates no such right. The question is whether the court below abused its discretion when granting an extension when the following factors converge in this single case:

- 1) The State did not argue in the court of appeals that the State or the victims would be prejudiced by the extension.
- 2) Mr. Palmer continuously litigated a challenge to his sentence from his initial loss;
- 3) This Court specifically named the First District's initial decision in this case as an example of the "Confusion and Unreasonable Results[.]" Cabrales, at ¶15, 17.
- 4) Under R.C. 2941.25, the illegal sentence was 60% above the statutory range for the offenses (he was sentenced to 21 years when 13 was the maximum);
- 5) The court of appeals could not have abused its discretion by failing to consider arguments that the State did not make in response to the request for an extension.

Further, because this case concerns only the court of appeals' discretion, it does not set precedent that would require the First District or any other Appellate District to act similarly in other cases. On discretionary questions, one court may rule one way, and another a different way on the same set of facts, and higher courts will not reverse absent a showing of an abuse of discretion. In future cases, the State may attempt to avoid the results in this

case by more completely setting forth its objections, and by asking the court to exercise its discretion in the State's favor.

Because this case has such a limited, fact-specific holding, and because it will not set binding precedent on other Districts (or even on other panels in the First District), this Court should dismiss this case as improvidently allowed. In the alternative, this Court should affirm the decision of the court of appeals because that court acted within the broad grant of discretion conferred upon it by App.R. 14(B) to grant an extension.

Statement of the Law and the Case

The State correctly states the procedural and factual history of this case, but does not include Mr. Palmer's extensive and continuous efforts to challenge his illegal sentences. The State does not also explain that its response to the motion to dismiss was minimal.

Mr. 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 his sentences, finding that aggravated robbery and robbery were not allied offenses of similar import. State v. Palmer, 148 Ohio App.3d 246, 2002-Ohio-3536, at ¶13. In so holding, the appellate court relied upon its interpretation of State v. Rance, 85 Ohio St.3d 632, 636, 1999-Ohio-291. The Court of Appeals did so grudgingly but obediently, observing that "it is the law we must apply." *Id.*

Mr. Palmer contested his sentence throughout state and federal court. Ultimately, the Sixth Circuit Court of Appeals affirmed that he 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 his 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. Mr. 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.

Fifteen days later, Mr. Palmer 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) or for leave to file the motion instantner. In response, the State argued only that pursuing a case in federal court was not justification for the delay, and that even if it was, he should have filed his motion within ten days of the issuance of the federal court mandate instead of fifteen days. The State did not claim that the State or the victims would be prejudiced by the extension. Response to Motion for Enlargement of Time, July 16, 2008, at 2.

The Court of Appeals granted the enlargement and allowed Mr. Palmer to file his application. While the Court of Appeals reaffirmed two of Palmer's assignments 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 court did not rule on the motion to file the App.R. 26(A) motion instantner.

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. For the first time, the State raised arguments concerning

finality and retroactive effect in its own reconsideration motion of the decision granting reconsideration. Application for Reconsideration, July 12, 2008. The appellate court issued a second entry denying both requests. *Id.*, October 8, 2008 Judgment Entry.

Argument

Proposition of Law No. I:

The court of appeals did not abuse its discretion when it granted Appellee an extension of time under App.R. 14(B) to file a motion to reconsider under App.R. 26(A) given that:

- 1) The State did not argue in the court of appeals that the State or the victims would be prejudiced by the extension;**
- 2) Mr. Palmer continuously litigated a challenge to his sentence from his initial loss;**
- 3) This Court specifically named the First District's initial decision in this case as an example of the "Confusion and Unreasonable Results[,]" Cabrales, at ¶ 15, 17;**
- 4) Under R.C. 2941.25, the illegal sentence was 60% above the statutory range for the offenses; and**
- 5) The court of appeals could not have abused its discretion by failing to consider arguments that the State did not make in response to the request for an extension.**

A. The standard of review is abuse of discretion.

Decisions on whether to grant extensions are committed to the sound discretion of lower court. Davis v. Immediate Med. Servs., Inc., 80 Ohio St.3d 10, 14, 1997-Ohio-363 (extensions under Civ.R. 6); State ex rel. Sawyer v. Cuyahoga County Dep't of Children & Family Servs., 110 Ohio St. 3d 343, 345, 2006-Ohio-4574, at ¶10 (applying to abuse of extension standard to a court of appeals' decision on an extension motion in an original action); State ex rel. Johnson v. Ohio Adult Parole Auth., 104 Ohio St.3d 421, 424 (Ohio 2004).

"An abuse of discretion connotes an unreasonable, arbitrary, or unconscionable attitude." *Id.*, at ¶9, quoting State ex rel. Grady v. State Emp. Relations Bd. (1997), 78 Ohio St.3d 181, 183, 1997-Ohio-221. Further, this

Court has directed that courts of appeals exercise their discretion in a way to achieve “a just result in the light of the particular circumstances of the case”:

Judicial discretion is the option which a judge may exercise between the doing and not doing of a thing which cannot be demanded as an absolute legal right, guided by the spirit, principles and analogies of the law, and founded upon the reason and conscience of the judge, to a just result in the light of the particular circumstances of the case.

Hawkins v. Marion Correctional Institute, 28 Ohio St. 3d 4, 7 (Ohio 1986), quoting Krupp v. Poor (1970), 24 Ohio St. 2d 123, paragraph two of the syllabus, and citing DeHart v. Aetna Life Ins. Co. (1982), 69 Ohio St. 2d 189, 192.

B. Federal case law concerning the “retroactive” application of federal constitutional decisions is irrelevant to the review of an Ohio court of appeals’ exercise of its discretion under an Ohio Rule of Court, as well as that court’s application of Ohio statute.

Mr. Palmer need not show a federal constitutional right to reconsideration to prevail, and he need not show a right to have a decision of this Court applied “retroactively.” Federal case law concerning the retroactive application of the decisions of federal courts on federal constitutional questions have little or no applicability to questions of whether a state court abused its discretion under a state court rule and then misapplied a state statute.

This Court rejected a nearly identical argument in Agee v. Russell, 92 Ohio St.3d 540, 2001-Ohio-1279. Citing some of the same authority that the State relies on, this Court held that federal constitutional decisions generally do not apply retroactively. *Id.* at 543. But this Court then expressly rejected

applying federal constitutional retroactivity to this Court's interpretation of an Ohio statute:

In fact, there is no retroactivity issue here because we did not announce a new rule of law in [State v. Hanning (2000), 89 Ohio St.3d 86, 2000-Ohio-436]. Instead, we merely determined what R.C. 2151.26 has meant since its enactment. [Bousley v. United States (1998), 523 U.S. 614, 620; Fiore v. White (2001), 531 U.S. 225, 227-229] (state supreme court's interpretation of state statute clarified the meaning of the statute and was thus not new law so that case presented no issue of retroactivity); cf., also, State v. Webb (1994), 70 Ohio St.3d 325, 331, quoting Peerless Elec. Co. v. Bowers (1955), 164 Ohio St. 209, 210 ("A decision of this court overruling a former decision 'is retrospective in its operation, and the effect is not that the former [decision] was bad law, but that it never was the law.'").

Agee at 544. Accordingly, once the court of appeals granted the extension, the substantive law was clear: the court of appeals was bound to follow this Court's interpretation of R.C. 2941.25. Under State v. Harris, 122 Ohio St.3d 373, 2009-Ohio-3323, and State v. Cabrales, 118 Ohio St.3d 54, 2008-Ohio-1625, Mr. Palmer's sentence was illegal and the original court of appeals judgment contained an obvious error. The court of appeals was well within its discretion to grant the extension, and was substantively correct when it granted reconsideration.

C. A court of appeals decision affirming an illegal sentence can provide extraordinary circumstances justifying an extension to file an App.R. 26(A) motion, especially when this Court has specifically denounced the decision.

This Court has ruled that an intervening decision from this Court may constitute an "extraordinary circumstance[]" permitting a trial court to refuse to follow the mandate of a court of appeals. State ex rel. Cordray v. Marshall, - -- Ohio St.3d ---, 2009-Ohio-4986, ¶28, citing State ex rel. Dannaher v.

Crawford (1997), 78 Ohio St.3d 391, 394, 1997-Ohio-72, quoting Nolan v. Nolan (1984), 11 Ohio St.3d 1, syllabus. Here, this Court's decision in Cabrales and now in Harris, constitute extraordinary circumstances that permit, but do not require, a court of appeals to exercise its discretion to grant an extension under App.R. 14(B). In fact, this Court has noted that extraordinary circumstances constitute an exception to the general rule of finality that litigants are precluded "from attempting to rely on arguments at retrial which were fully litigated, or could have been fully litigated, in a first appeal." State ex rel. Danziger v. Yarbrough, 114 Ohio St. 3d 261, 2007-Ohio-4009, at ¶16, citing Hubbard ex rel. Creed v. Sauline (1996), 74 Ohio St.3d 402, 404-405, 1996-Ohio-174.

Further, this Court has held that when the First District initially decided Mr. Palmer's case, the First District was confused and unreasonable. Cabrales, at ¶15, 17 (First District's decision was an example of the "Confusion and Unreasonable Results" of a misunderstanding of this Court's precedent). Because this Court specifically denounced the decision, Mr. Palmer "called to [the First District's] attention an obvious error" and raised "an issue for consideration that was . . . not fully considered when it should have been" Matthews v. Matthews (1981), 5 Ohio App.3d 140, quoted in Oberlin Manor v. Lorain County Bd. of Revision, 69 Ohio St.3d 1, 2, 1994-Ohio-500.

Appellant is correct that courts of appeals are not bound to grant a motion to reconsider when this Court rules that a previous court of appeals decision was wrong. But when this Court rules that a court of appeals decision

in a case was incorrect, App.R. 14(B) expressly gives any litigant prejudiced by that error the right to ask that court to exercise its sound discretion to grant an extension to file a motion to reconsider.

D. Unlike this Court's rules, the Ohio Rules of Appellate Procedure expressly create an exception to finality.

The State's policy arguments concerning finality are factors that courts of appeals may consider when exercising their discretion under App.R. 14(B). But if the State wishes a total ban on filing late App.R. 26(A) motions, its remedy is with the Rules Committee of this Court, not in this discretionary appeal. The State could ask this Court amend App.R. 14(B) to include a provision similar to S.Ct.Prac.R. XI, Section 2(D) ("The Clerk shall refuse to file a motion for reconsideration that is not expressly permitted by this rule or that is not timely"). So unlike this Court's rules, the rules that the courts of appeals must follow contain an express and open-ended exception finality.

E. The Sky is Not Falling: Sound judicial discretion and more vigorous advocacy by the State in the courts of appeals will prevent a flood of litigation.

Discretion goes both ways. Here, the State must show an abuse of discretion. But if the State successfully persuades the court of appeals to deny an extension, the defendant would face the difficult task of convincing this Court that the court of appeals abused its discretion.

Further, to the extent that the State or victims might be prejudiced by an extension, the State may oppose the extension on that ground. Prejudice to the non-prevailing litigant is one of the factors courts can consider when exercising their discretion to grant or deny an extension. See, e.g., State v. Unger (1981),

67 Ohio St.2d 65, 68, Feldman v. Feldman, 8th Dist. No. 92015, 2009-Ohio-4202, ¶20; In re Estate of Howard, 9th Dist No. 2008-Ohio-2104, ¶18. But here, the State did make a claim of prejudice until it filed a reconsideration motion challenging the court of appeals decision granting Mr. Palmer's motion for an extension and for reconsideration. Arguments made for the first time on reconsideration are not properly before a court of appeals. See, e.g., State v. Crawford, 1st Dist. No. C-030540, 2004-Ohio-4505, at ¶6; State v. Berry, 5th Dist. No. 01-CA-26, 2003-Ohio-167, ¶13.

The State chose to defend the request for extension on limited grounds. In the future the State and other litigants might choose to litigate against an extension request differently. But here, the State forfeited and waived most of its defenses by filing only a limited opposition to the motion.

Proposition of Law No. II:

A court of appeals correctly grants a timely motion to reconsider under App.R. 26(A) when its initial decision is obviously in conflict with a decision of this Court.

Once the court of appeals granted the motion for extension, the motion to reconsider was timely. Calling a motion to reconsider a “delayed motion to reconsider” because it was timely filed with an extension is like calling this merit brief a “delayed merit brief” because it was timely filed with an extension.

Further, courts of appeals show respect to this Court when change their decision based on the decisions of this Court, especially where this Court has cited a specific decision as an example of confusion and unreasonableness. Cabrales, at ¶15, 17. Because this Court specifically denounced the decision, Mr. Palmer’s timely motion to reconsider “called to [the First District’s] attention an obvious error” and raised “an issue for consideration that was . . . not fully considered when it should have been” Matthews v. Matthews (1981), 5 Ohio App.3d 140, quoted in Oberlin Manor v. Lorain County Bd. of Revision, 69 Ohio St.3d 1, 2, 1994-Ohio-500.

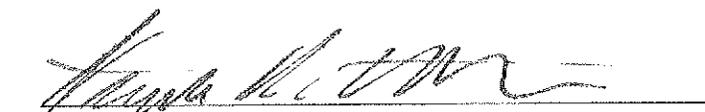
Conclusion

Appellate Rule 14(B) commits the decision to grant or deny an extension to file a motion to reconsider to the sound discretion of the court of appeals. Given that the State did not claim that it or the victims would be prejudiced by the extension, given that this Court had expressly denounced the previous decision in this case, and given that the sentence imposed was outside the limits set by the General Assembly, the court of appeals did not abuse its discretion when it granted the extension.

This Court should dismiss this case as improvidently allowed because it is a fact-specific challenge to the court of appeals' discretion to grant an extension of time to file a motion to reconsider. In the alternative, this Court should affirm the decision of the court of appeals.

Respectfully submitted,

Office of the Ohio Public Defender

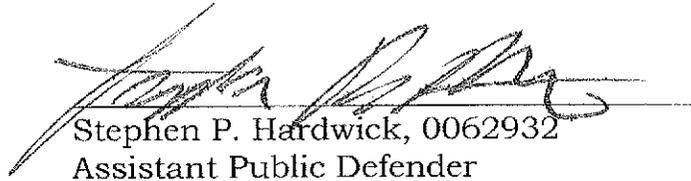

By: Stephen P. Hardwick, 0062932
Assistant Public Defender

250 East Broad Street - Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (Fax)

Counsel for Toby Palmer

Certification of Service

This is to certify that a copy of the foregoing 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 9th day of November, 2009.



Stephen P. Hardwick, 0062932
Assistant Public Defender

Counsel for Toby Palmer

#307029

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	:	Case No. C010583

Appendix To

Merit Brief of Appellee Toby Palmer

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY
AND FILED WITH THE SECRETARY OF STATE THROUGH OCTOBER 27, 2009 ***

*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2009 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH OCTOBER 14, 2009 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2941. INDICTMENT
FORM AND SUFFICIENCY

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ORC Ann. 2941.25 (2009)

§ 2941.25. Multiple counts

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

HISTORY:

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*** RULES CURRENT THROUGH OCTOBER 1, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***

Rules Of Practice Of The Supreme Court Of Ohio

Ohio S. Ct. Prac. RULE XI (2009)

Review Court Orders which may amend this Rule.

RULE XI. ENTRY OF SUPREME COURT JUDGMENT; MOTIONS FOR RECONSIDERATION AND FOR REOPENING; ISSUANCE OF MANDATE

Section 1. Entry of Judgment.

The filing of a judgment entry or other order by the Supreme Court with the Clerk for journalization constitutes entry of the judgment or order. A Supreme Court judgment entry or other order is effective when it is filed with the Clerk. In every case involving termination of parental rights or adoption of a minor child, or both, the Supreme Court will expedite the filing of the judgment entry or other orders for journalization.

Section 2. Motion for Reconsideration.

(A) Except in expedited election cases under *S.Ct.Prac.R. X*, Section 9, a motion for reconsideration may be filed within 10 days after the Supreme Court's judgment entry or order is filed with the Clerk. In expedited election cases, a motion for reconsideration may be filed within three days after the Supreme Court's judgment entry or order is filed with the Clerk and shall be served on the date of filing by personal service, facsimile transmission, or e-mail.

(B) A motion for reconsideration shall be confined strictly to the grounds urged for reconsideration, shall not constitute a reargument of the case, and may be filed only with respect to the following:

- (1) The Supreme Court's refusal to grant jurisdiction to hear a discretionary appeal;
- (2) The *sua sponte* dismissal of a case;
- (3) The granting of a motion to dismiss;
- (4) A decision on the merits of a case.

(C) An *amicus curiae* may not file a motion for reconsideration. An *amicus curiae* may file a memorandum in support of a motion for reconsideration within the time permitted for filing a motion for reconsideration.

(D) The Clerk shall refuse to file a motion for reconsideration that is not expressly permitted by this rule or that is not timely.

Section 3. Memorandum Opposing Motion for Reconsideration.

(A) Except in expedited election cases under *S.Ct.Prac.R. X*, Section 9, a party opposing reconsideration may file a memorandum opposing a motion for reconsideration within 10 days of the filing of the motion. In expedited election cases, a party opposing reconsideration may file a memorandum opposing a motion for reconsideration within three days of the filing of the motion for reconsideration.

(B) An *amicus curiae* may file a memorandum opposing a motion for reconsideration within 10 days of the filing of the motion.

Section 4. Issuance of Mandate.

(A) After the Supreme Court has decided an appeal on the merits, the Clerk shall issue a mandate. The mandate shall be issued 10 days after entry of the judgment, unless a motion for reconsideration is filed within that time in accordance with Section 2 of this rule.

(1) If a motion for reconsideration is filed but denied, the mandate shall be issued when the order denying the motion for reconsideration is filed with the Clerk.

(2) If a motion for reconsideration is filed and granted, the mandate shall be issued after the Supreme Court reconsiders the case and when the entry on reconsideration is filed with the Clerk.

(B) No mandate shall be issued on the Supreme Court's refusal to grant jurisdiction to hear a discretionary appeal or the dismissal of a claimed appeal of right as not involving a substantial constitutional question.

(C) A certified copy of the judgment entry shall constitute the mandate.

Section 5. Assessment of Costs.

(A) Unless otherwise ordered by the Supreme Court, costs in an appeal shall be assessed as follows at the conclusion of the case:

(1) If an appeal is dismissed, to the appellant;

(2) If the judgment or order being appealed is affirmed, to the appellant;

(3) If the judgment or order being appealed is reversed, to the appellee.

(4) If the judgment or order being appealed is affirmed or reversed in part or is vacated, the parties shall bear their respective costs.

(B) As used in this section, "costs" includes only the filing fee paid to initiate the appeal with the Supreme Court, unless the Court, sua sponte or upon motion, assesses additional costs.

Section 6. Application for Reopening.

(A) An appellant in a death penalty case involving an offense committed on or after January 1, 1995, may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel in the Supreme Court. An application for reopening shall be filed within 90 days from entry of the judgment of the Supreme Court, unless the appellant shows good cause for filing at a later time.

(B) An application for reopening shall contain all of the following:

(1) The Supreme Court case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(2) A showing of good cause for untimely filing if the application is filed more than 90 days after entry of the judgment of the Supreme Court;

(3) One or more propositions of law or arguments in support of propositions of law that previously were not considered on the merits in the case or that were considered on an incomplete record because of the claimed ineffective representation of appellate counsel;

(4) An affidavit stating the basis for the claim that appellate counsel's representation was ineffective with respect to the propositions of law or arguments raised pursuant to division (B)(3) of this section and the manner in which the claimed deficiency prejudicially affected the outcome of the appeal, which affidavit may include citations to applicable authorities and references to the record;

(5) Any relevant parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(C) Within 30 days from the filing of the application, the attorney for the prosecution may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(D) An application for reopening and an opposing memorandum shall not exceed 10 pages, exclusive of affidavits and parts of the record.

(E) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(F) If the Supreme Court grants the application, the Clerk shall serve notice on the clerk of the trial court, and the Supreme Court will do both of the following:

(1) Appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(2) Impose conditions, if any, necessary to preserve the status quo during the pendency of the reopened appeal.

(G) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the Supreme Court may limit its review to those propositions of law and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to *S.Ct.Prac.R. XLX* shall run from entry of the order granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(H) If the Supreme Court determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the Supreme Court or referred to a master commissioner.

(I) If the Supreme Court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the Supreme Court shall vacate its prior judgment and enter the appropriate judgment. If the Supreme Court does not so find, it shall issue an order confirming its prior judgment.

HISTORY: Amended, eff 4-1-96; 4-1-00; 7-1-04; 1-1-08.