

ORIGINAL

IN THE
SUPREME COURT OF OHIO

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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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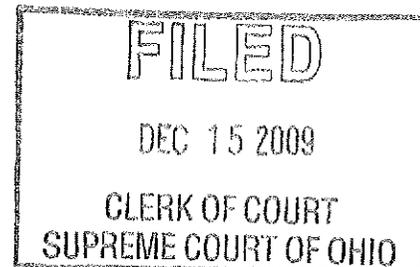
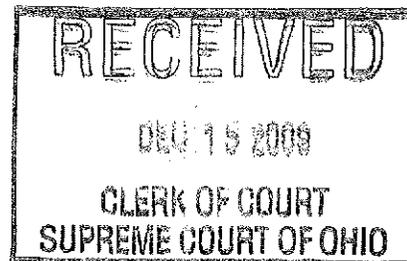


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Defendant-Appellee	:	

I. This case presents this Court with the opportunity to instruct the appellate courts on how they may apply new case law to App. R. 26(A) motions for reconsideration.

Palmer argues that any decision this Court issues in this case will be strictly limited to only Palmer and that it will not affect any other case. That is not true.

This case presents this Court with an opportunity to direct the appellate courts on how they should handle applications to reopen that are filed after the time constraints of App. R. 26(A). It also allows this Court to direct the appellate courts as to whether a new decision from this Court creates extraordinary circumstances that would allow reopening of an otherwise finalized matter under App. R. 14(B).

Considering the opportunity this case provides to offer guidance to the lower courts and considering that at least one case has been stayed pending the decision in this case,¹ this Court has properly exercised jurisdiction over the matter.

¹See *State v. Thomas*, Ohio S.Ct. No. 2009-0630.

II. This case is not about whether the lower court abused its discretion, it is about whether new case law creates an extraordinary circumstance that allows reconsideration under App. R. 14(B).

Palmer argues that any ruling under App. R. 14(B) involves the exercise of an appellate court's discretion. The cases he cites are not authoritative. *Davis v. Immediate Med. Servs., Inc.*² involves Civ. R. 6(B) and that rule specifically states that rulings are left to the trial court's discretion. And both *State ex. rel. Sawyer v. Cuyahoga County Dep't of Children & Family Serv's*³ and *State ex rel. Johnson v. Ohio Adult Parole Auth.*⁴ involve rulings on discovery, which have traditionally been left to the trial court's discretion⁵.

Unlike Civ. R. 6(B) and general discovery rulings, App. R. 14 does not leave enlarging the time for filing application for reconsideration to the discretion of the appellate court. It requires the existence of an extraordinary circumstance before the appellate court is allowed to enlarge the time for reconsideration: "Enlargement to App. R. 26(A) shall not be granted except on a showing of extraordinary circumstances."

The State generally opposed Palmer's motion for reconsideration on both legal and timeliness issues. The First District disagreed with the State and found that the "decision in *Cabrales* and our subsequent decision in *Madaris* made apparent our error in overruling Palmer's third assignment of error, challenging the imposition of consecutive prison terms for aggravated robbery and robbery.

²*Davis v. Immediate Med. Servs., Inc.* 80 Ohio St. 3d 10, 1997-Ohio-363, 684 N.E.2d 292.

³*State ex. rel. Sawyer v. Cuyahoga County Dep't of Children & Family Servs.*, 110 Ohio St. 3d 343, 2006-Ohio-4574, 853 N.E.2d 657.

⁴*State ex rel. Johnson v. Ohio Adult Parole Auth.*, 104 Ohio St. 3d 421, 2004-Ohio-6590, 819 N.E.2d 1106.

⁵See, for example, *State ex rel. Greater Cleveland Regional Transit Authority v. Guzzo* (1983), 6 Ohio St. 3d 270, 452 N.E.2d 1314.

And those decisions provided the extraordinary circumstances that warranted enlarging the time for applying reconsideration."⁶

The question that is properly before this Court is not whether the First District abused its discretion in granting reconsideration. The question is whether court decisions issued years after a case has been finalized created extraordinary circumstances that permitted reconsideration. There is no gray area in this matter. Either the First District was right or it was wrong.

III. Federal law was cited only as an example. Ohio's law, however, shows that new case law should not be given the retroactive effect that the First District gave *Cabrales*.

Palmer correctly notes that some of cases that the State cited as examples of decisions that have not been given retroactive effect include Federal Constitutional issues. But he then incorrectly jumps to the conclusion that since *Cabrales* involved statutory interpretation that is must be given retroactive effect and must therefore create an extraordinary circumstance. In jumping to his conclusions, Palmer has leapt over *Ali v. State*.

Ali involved the question of whether *State v. Comer* – a case that involved statutory interpretation of 2929.14 and 2929.19 – should be applied retroactively to a case that had been finalized.⁷ *Ali* reaffirmed that a "new judicial ruling may be applied only to cases that are pending on the announcement date" and that a "new judicial ruling may not be applied retroactively to a conviction that has become final, i.e., where the accused has exhausted all of his appellate remedies."⁸ In reaching that conclusion this Court relied on, amongst other cases, *State v. Evans*,

⁶*State v. Palmer*, 1st Dist. No. C-010583 at ¶ 7.

⁷*Ali v. State*, 104 Ohio St. 3d 328, 2004-Ohio-6592, 819 N.E.2d 687; *State v. Comer*, 99 Ohio St. 3d 463, 2003-Ohio-4165, 793 N.E.2d 473, ¶ 10.

⁸*Ali*, supra, 2004-Ohio-6592 at ¶ 6.

which involved the retroactive application of a rule involving the types of photos used to identify defendants; and *State v. Gonzalez*, which involved hearsay evidence.

This Court also relied on *State ex rel. Adams v. Krichbaum*, where it ruled that mandamus could not be used to compel vacating a sentence based on *Comer* because the only way *Comer* would apply was if the relator had a pending appeal from his conviction and sentence when *Comer* was decided; *State v. Greene* and *Olds v. State*, which both held that "once a conviction has become 'final' because the defendant can no longer pursue any appellate remedy, any new case law cannot be applied retroactively even if it would be relevant to the facts of his case;" and *State v. Harrold*, which held that a trial court could not resentence a defendant under *Comer* if the defendant had no pending appeal when *Comer* was decided.

All of those cases involved statutory interpretation. None involved new constitutional rules.

Just like *Ali*, this case involves the retroactive application of a ruling from this Court that construed Ohio's sentencing laws. For this Court to agree with Palmer would require reversal of *Ali* and each case cited above that this Court relied upon in *Ali*.

And even if this Court were to find that its *Ali* decision and all the legal precedent it relied upon in *Ali* are wrong, it would not automatically mean that *Cabrales* created extraordinary circumstances that allowed the First District to grant reconsideration.

In numerous writ cases, this Court has ruled that intervening decisions from this Court can create extraordinary circumstances.⁹ *Cabrales*, however, was not an intervening case. It was a subsequent case.

⁹See, for example, *State ex rel. Cordray v. Marshall*, 123 Ohio St. 3d 229, 2009-Ohio-4986, 915 N.E.2d 633, ¶ 27 and cases cited therein.

The only way that *Cabrales* can become an intervening case for Palmer's is if reconsideration is allowed to artificially render his case pending at the time *Cabrales* was released. But this Court ruled in *State v. Silsby* that procedural rules that allow filing delayed or late matters will not cause subsequent case law to suddenly become pending case law.¹⁰ To allow the First District's decision to stand would require reversal of the legal principles set forth in *Silsby*.

IV. State's Response to Palmer's Proposition of Law No. II.

The State is not certain where Palmer's Proposition of Law No. II has come from. This Court only accepted jurisdiction over the State's first proposition of law and the State's second proposition of law questioned whether robbery and aggravated robbery were allied offenses of similar import, a question that has been answered by this Court in *State v. Harris*.

Regardless, Palmer's argument, does strike at an argument made in support of the State's first proposition of law. As noted above, this Court held in *State v. Silsby*¹¹ that procedural rules cannot be used to make an appeal artificially pending at the time new case law is released. Yet that is what the First District has done by granting reconsideration and applying *Cabrales* to this matter. The First District's actions were wrong and should be reversed.

¹⁰*State v. Silsby*, 119 Ohio St. 3d 370, 2008-Ohio-3834, 894 N.E.2d 667.

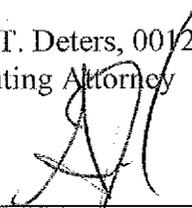
¹¹*Id.*

Conclusion

Absent extraordinary circumstances, the lower court could not consider Palmer's late motion for reconsideration. Subsequent case law does not create extraordinary circumstances that justify granting late reconsideration of an appeal that has been long finalized. The First District was wrong when it found otherwise. Its granting of reconsideration, therefore, should be reversed.

Respectfully,

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Certificate of Service

I hereby certify that I have sent a copy of the foregoing Reply Brief of Plaintiff-Appellant, by United States mail, addressed to Stephen P. Hardwick, Ohio Public Defender's Office, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, counsel of record, this 17th day of December, 2009.



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Appendix

Civ. R. 6(B)

(B) Time: Extension

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rule 50(B), Rule 59(B), Rule 59(D) and Rule 60(B), except to the extent and under the conditions stated in them.