ORIGINAL

IN THE SUPREME COURT OF OHIO

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

Motion of Appellee Toby Palmer for Leave to File a Motion to Dismiss as Improvidently Allowed (Expedited Review Requested)

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SUPREME COURT OF OHIO

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Appellee Toby Palmer asks for leave to file a motion to dismiss as improvidently allowed. S.Ct. Prac. R. 9.9. Approximately five minutes before oral argument, undersigned counsel learned that the State, the appellant in this case, intended to raise a jurisdictional argument that had not previously been raised. The issue the State raised, and on which undersigned counsel initially thought might provide grounds for relief, could have profound and unintended consequences for this and other cases. While post-argument filings should generally not be a substitute for pre-argument briefing and argument, it is appropriate in this case because potentially dispositive issues were raised for the first time at oral argument. .

For the first time in this case, at oral argument, the State suggested that this Court vacate the decision of the court of appeals. The State did not give any authority for the holding that a court of appeals decision is void simply because it the lower court's ruling was arguably void because postrelease control was imposed improperly. At first glance, the result appeared reasonable. But after further review, the proposed resolution raises a number of complex issues and potentially unintended consequences, such as:

1) Does this Court intend to hold that this Court was wrong to reverse the Eighth District's decision in State v. Finger, 104 Ohio St.3d 21, 2004-Ohio-6085, at ¶63, or to affirm the court of appeals ruling on a non-postrelease control issue in Jordan? [1] Instead, should this Court have vacated the court of appeals decisions in both cases?

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[1] Jordan and Finger were decided in one opinion.

2) Does this Court intend to rule that a motion to reconsider filed pursuant to an extension is on direct review? Jordan and Finger apply if this case is on direct appeal, but the State asserts that a decision to grant an extension to file a reconsideration motion is the procedural equivalent to a no-name motion collaterally challenging a judgment in the trial court based on a procedural issue. Appellant's Merit Brief at 9 and Reply Brief at 3, citing to Ali v. State, 104 Ohio St.3d 328, 2004-Ohio-6592. Mr. Palmer vigorously disagrees. Appellee's Brief at 7-8.

3) Did Watkins v. Collins, 111 Ohio St.3d 425, 2006-Ohio-5082, overrule State v. Bloomer, 122 Ohio St.3d 200, 2009-Ohio-2462? If this case is not on direct review, the difference between Watkins and Bloomer becomes critical because the entry in this case is compliant with Watkins, which required only general notice of postrelease control, id., at ¶51, but not with Bloomer because that case held that an entry void if it does not "notify the offender of the mandatory nature of the term of postrelease control and the length of that mandatory term and incorporate that notification into its entry." Id., at ¶69.

4) At oral argument, the State asserted that there were "subtle differences" between this case and State v. Finger/Jordan, 104 Ohio St.3d 21, 2004-Ohio-6085. What are those subtle differences, and how might they affect other cases?

5) Would vacating the court of appeals decision summarily resolve the issue presented in State v. Fischer, Case No. 2009-897? In Fischer, this Court is receiving briefs on the issue of whether an appeal from a void judgment creates a procedural bar to raising non-sentencing issues on appeal from a Bezak resentencing,[3] which turns significantly on the issue of whether a court of appeals decision is void when it is reviewing an entry that does not properly impose postrelease control.

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[3] The appellant's proposition of law in Fischer is: "A direct appeal from a void sentence is a legal nullity; therefore, a criminal defendant's appeal following a Bezak resentencing is the first direct appeal as of right from a valid sentence. State v. Bezak, 114 Ohio St.3d 94, 2007-Ohio-3250."

Expedited review is requested.

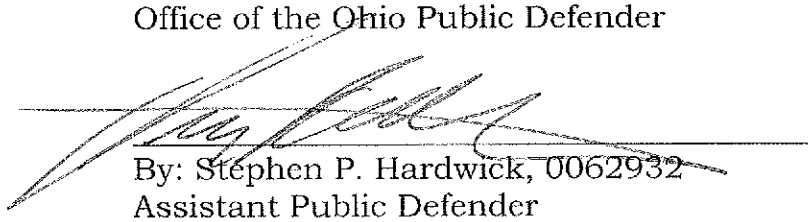
Because this Court sometimes issues summary decisions shortly after oral argument, Appellee requests that this Court grant expedited review.

Conclusion

This is not the case that the Appellant presented to this Court. If this Court summarily makes any decision other than dismissing as improvidently allowed, it will likely set precedent on postrelease control issues that have not been briefed and that were only discussed in a cursory fashion at oral argument. Accordingly, this Court should grant Appellee leave to file a motion to dismiss as improvidently allowed. In the alternative, this Court should order further briefing.

Respectfully submitted,

Office of the Ohio Public Defender



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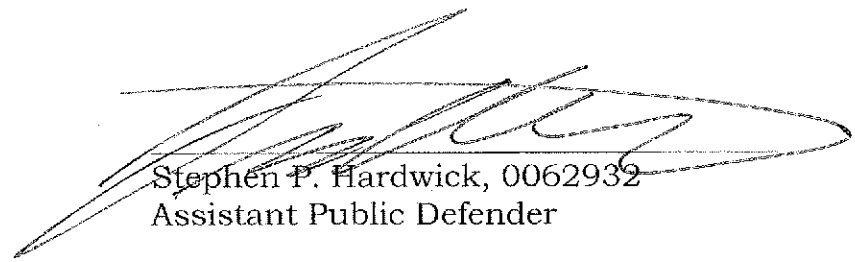
Certification of Service

This is to certify that a copy of the foregoing was forwarded by electronic mail Scott Heenan, Assistant Hamilton County Prosecutor, Suite 4000, 230 E. 9th Street, Cincinnati, Ohio 45202, Scott.Heenan@hcpros.org, this 13th day of January, 2010.



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