

IN THE SUPREME COURT OF OHIO

2008-0363

STATE OF OHIO

Plaintiff-Appellant

-vs-

TIMOTHY EVANS

Defendant-Appellee

On Appeal from the  
Cuyahoga County Court  
of Appeals, Eighth  
Appellate District Court  
of Appeals  
CA: 89057

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**BRIEF IN OPPOSITION TO MOTION TO STAY**

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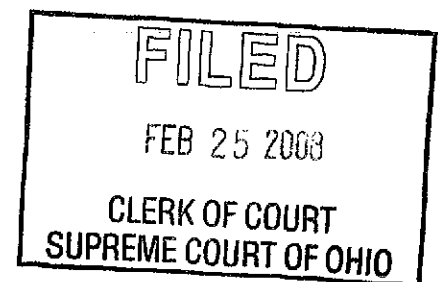
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Comes now Appellee Timothy Evans, through counsel, and, in opposition to the State of Ohio's motion to stay execution of the Eighth District Court of Appeals' mandate in this case, states as follows.

The stay of a lower court's mandate pending review of a discretionary appeal is an extraordinary remedy and should be granted only in those cases where (1) there is a reasonable likelihood that this Court will accept the appeal for plenary review, (2) there is a significant possibility that this Court will reverse the judgment of the lower court, and (3) assuming the appellant prevails on appeal to this Court, there is a likelihood that a stay is necessary to avoid irreparable harm. Cf. *Packwood v. Senate Select Committee on Ethics* (1994), 510 U.S. 1319 (Rehnquist, C.J., in chambers), citing *Barnes v. E-Systems, Inc. Group Medical & Surgical Ins. Plan* (1991), 501 U.S. 1301, slip op. At 2 (Scalia, J., in chambers).

Moreover, when as here, the court of appeals issuing a decision has refused to enter a stay, “applicant has an especially heavy burden.” *Packwood*. With respect to this circumstance, the Eighth District Court of Appeals denied the State’s similar motion for a stay on February 13, 2008, without opinion.<sup>1</sup>

The State cannot satisfy any of the three *Packwood* criteria. Each criteria is addressed below.

**There Is No Reasonable Likelihood That This Court Will Accept This Case.**

It is highly unlikely that this Court will accept this case on the merits for at least two reasons. First, the issue presented, whether robbery under R.C. 2911.02(A)(2) is a lesser included offense of aggravated robbery in violation of R.C. 2911.01(A)(1), is settled by this Court’s decision in *State v. Merriweather* (1980), 64 Ohio St.2d 57. The State’s appeal is asking this Court to effectively reverse *Merriweather*.

Moreover, if this Court were inclined to re-visit *Merriweather*, this is not the case upon which to do so. This Court normally reviews issues that have been squarely presented by the parties below. . See, e.g., *Sherman v. Haines* (1995), 73 Ohio St.3d 125. Here, the State of Ohio never filed a brief in the court of appeals. Thus, the arguments raised by the State in this Court have not had the same opportunity to percolate below as do arguments that are traditionally accepted for plenary review

**There is No Significant Possibility of Reversal**

For much the same reasons, this Court is not likely to reverse, even if it accepts this case. *Merriweather* was decided without a dissenting vote. The principles enunciated therein are

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<sup>1</sup> At the time the State of Ohio submitted its motion for a stay in this Court, the parties had yet to have received notice from the court of appeals about the denial of the motion to stay in that court.

consistent with the traditional elemental-comparison test for determining lesser included offenses, *Blockburger v. United States* (1932), 284 U.S. 299.

Moreover, even if this Court were to adopt the State's proposition of law and hold that robbery is a lesser included offense of aggravated robbery, this Court must still find that it cannot apply this rule to Mr. Evans, who had no way of defending himself against a charge that he could not have contemplated was possibly going to be considered by the trial court in light of prevailing caselaw. *See, Merriweather* at n. 3.

**There Is No Likelihood of Irreparable Harm**

Mr. Evans has already served more than 18 months of his two-year sentence. In the unlikely event the State prevails on this appeal, this Court will order the remainder of his sentence into execution. The State's concern that Mr. Merriweather will not be on post-release control after he is released from prison will be allayed by his return to prison and subsequently being subjected to post-release control.

To the contrary, it is Mr. Evans who will suffer irreparable harm if a stay is *granted*, because he will lose the limited relief still available to him from the Eighth District's decision – the return of his liberty after having been wrongfully convicted in violation of his right to indictment.

Wherefore, the motion should be denied.

Respectfully submitted,

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**SERVICE**

A copy of the foregoing was sent via U.S. Mail to William D. Mason, County Prosecutor,  
Office of the Cuyahoga County Prosecutor, Justice Center, 9<sup>th</sup> Floor, 1200 Ontario Street.  
Cleveland, Ohio 44113, this 25<sup>th</sup> day of February, 2008.

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