

IN THE SUPREME COURT OF OHIO

CASE NO. 2008-0363

ORIGINAL

STATE OF OHIO	:	
Appellant	:	
-vs-	:	On Appeal from the
	:	Cuyahoga County Court
	:	of Appeals, Eighth
TIMOTHY EVANS	:	Appellate District Court
Appellee	:	of Appeals
	:	CA: 89057
	:	

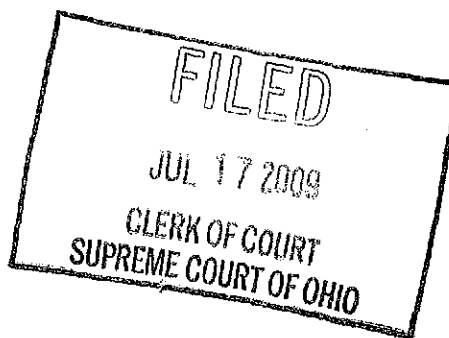
APPELLEE'S MOTION FOR RECONSIDERATION

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APPELLEE’S MOTION FOR RECONSIDERATION

Pursuant to S.Ct. R. XI, Section 2(B)(4), Appellee Timothy Evans moves this Court to reconsider paragraphs 32 and 33 of its opinion in the instant case, Slip Opinion 2009-Ohio-2974, announced July 7, 2009 (hereinafter “Slip Opinion”). Paragraphs 32 and 33 hold that the remainder of the decision in this case applies to Mr. Evans.

The two paragraphs for which reconsideration is sought do not address the principal holding in this case and thus do not address either of the syllabus paragraphs. Thus, even if this Court were to reconsider paragraphs 32 and 33, the precedential value of this case remains the same: “Robbery as defined in R.C. 2911.02(A)(2) is a lesser included offense of aggravated robbery as defined in R.C. 2911.01(A)(1).” *Id.*, at syllabus paragraph 1.

Review of the Parties’ Positions and the Court’s Principal Holding

In this appeal, the State argued that the Court should modify the test for lesser-included offenses set forth in *State v. Deem* (1988), 40 Ohio St.3d 205. The State urged the Court to

modify *Deem* “to permit courts to consider particular facts and circumstances of each case in determining whether one offense is a lesser included offense of another.” Slip Opinion at par. 11 (reviewing State’s argument).

Mr. Evans urged the Court to strictly apply *Deem* as written. Specifically, Mr. Evans urged this Court not to disturb the second part of the three-part *Deem* test:

- (ii) the greater offense cannot, as statutorily defined, *ever* be committed without the lesser offense, as statutorily defined, also being committed.

Deem at syllabus paragraph 3 (emphasis added). In support of his argument, Evans posited a hypothetical scenario whereby the offense of aggravated robbery in violation of R.C. 2911.01(A)(1) could be committed without the committing the offense of robbery in violation of R.C. 2911.02(A)(2). The Court correctly characterized that scenario posited by Mr. Evans as “implausible.”¹

The Court took a middle ground in reaching its unanimous decision. The Court “decline[d] the state’s invitation to abandon” *Deem* and its progeny by applying a fact-based test. *Id.* at par. 13. Nonetheless, the Court found it necessary to “clarify,” or “modify” *Deem* by eliminating the word “ever” from the second plank of the *Deem* test. Slip Opinion at par. 25 (“we further clarify the second part of the *Deem* test to delete the word “ever.”); *id.* at par. 6 (“we modify the second part of the lesser included offense analysis to delete the word ‘ever’ to clarify its application in future cases.”).

This Court correctly recognized that due process under the Fourteenth Amendment to the United States Constitution precluded the Court from applying the holding in this case to Mr.

¹ Had counsel been more insightful, they would have posited a much more plausible scenario. See *State v. Smith*, Trumbull App. No. 2005-T-0080, 2006-Ohio-4669, at par. 34 (describing several ordinary scenarios whereby an offender can commit aggravated robbery in violation of R.C. 2911.01(A)(1) but not robbery in violation of R.C. 2911.02(A)(2).)

Evans if the Court's holding were an unexpected departure from "law which had been expressed prior to the conduct in issue." Slip Opinion at par. 32. However, the Court noted that *Deem* was well-established. The Court also noted that *State v. Merriweather* (1980), 64 Ohio St.2d 57, which recognized that a differently-worded robbery provision was not a lesser included offense of aggravated robbery, would not constitute a decision upon which a defendant would have relied regarding the robbery-aggravated robbery relationship in the instant case. Slip Opinion at par. 33.

Why the Principal Holding Cannot Be Applied to Mr. Evans.

This latter portion of the Court's decision should be reconsidered. The deletion of the word "ever" from the second part of the *Deem* test is a modification or clarification that changes its application to Mr. Evans. Simply put, when "ever" is part of the *Deem* test, Mr. Evans wins. When "ever" is removed, Mr. Evans loses. And there is no question that *Deem* – with the word "ever" as part of the test – was established law when Mr. Evans went to trial. Slip Opinion at par. 34.

The Court correctly distinguishing *Merriweather* from the instant case in that the two cases deal with different statutory provisions. But *Merriweather* is somewhat significant nonetheless because *Merriweather* was another case in which this Court strictly applied *Deem*, albeit to a different version of robbery. To the extent that Mr. Evans' citation to *Merriweather* in this regard may have caused the Court to understand Mr. Evans to believe *Merriweather* was on point, and thus a basis for not applying a new test retroactively to Mr. Evans, counsel apologizes. In citing *Merriweather* regarding the issue of retroactive application, Mr. Evans was relying upon *Merriweather's* third footnote, which discussed the problem of retroactively applying a change in the law of lesser-included offenses:

Assuming, *arguendo*, that we did interpret R.C. 2911.01(A)(1) to include this additional element, and thus to sustain the robbery conviction, we would be required to confront the possible defect of convicting *this* defendant for an offense not fairly discoverable as a separate and distinct offense or as a lesser included offense from the indictment (see fn. 1), from R.C. 2911.01(A)(1) and 2911.02, and from the then existing case law.

Merriweather, at n.3 (emphasis added).

Mr. Evans personally enjoyed an expectation that *Deem* as written was controlling law when he went to trial. Obviously, the Eighth District Court of Appeals, in reversing his conviction, believed that *Deem* precluded a robbery conviction. The Eighth District's view was shared by the Eleventh District in *State v. Smith*, Trumbull App. No. 2005-T-0080, 2006-Ohio-4669. Mr. Evans is aware of no post-*Deem* cases to the contrary.

Indeed, the Sixth District, while not addressing these two provisions as greater and lesser included offenses, had gone even further and held that aggravated robbery under R.C. 2911.01(A)(1) was not even allied with R.C. 2911.02(A)(2). *State v. Jones*, Lucas App. No. L-07-1292, 2009-Ohio-1742. Only the First District had held that these two provisions were allied prior to this Court's decision of July 7, 2009 in *State v. Harris*, Slip Opinion 2009-Ohio-3323, and, to do so the First District was required to overrule the controlling authority in that district that existed at the time of Mr. Evans' trial. *State v. Madaris*, Hamilton App. No. C-070287, 2008-Ohio-2470 (overruling *State v. Palmer*, 148 Ohio App.3d 246, 2002-Ohio-3536 on the basis of *State v. Cabrales*, *infra*).

To the extent that this Court's decisions in *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260, and *State v. Cabrales* 121 Ohio St.3d 409, 2009-Ohio-787,² were precursors to the instant case, thus previously placing *Deem* in flux, Mr. Evans' Fourteenth Amendment due

² The Slip Opinion cites both cases with approval, *passim*.

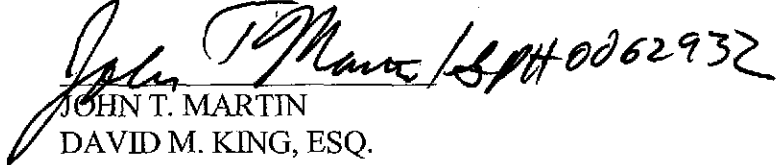
process rights have been no less violated by retroactively applying the holding in this case to him. *Smith* and *Cabrales* were decided *after* Mr. Evans July 26, 2006 trial. Indeed, neither case had even been filed in this Court at the time of Mr. Evans' trial.

Accordingly, this Court should hold that Mr. Evans was convicted of theft in violation of R.C. 2913.02, which is a lesser included offense of aggravated robbery. See, *Smith*. He has already served almost 20 months of imprisonment in this case and thus the case need not be remanded for resentencing.³

CONCLUSION

Wherefore, Mr. Evans prays that this Court reconsider and hold that its decision cannot be applied to him, and thus remands the case to the trial court for entry of a conviction for theft in violation of R.C. 2913.02.

Respectfully submitted,


JOHN T. MARTIN
DAVID M. KING, ESQ.
Assistant Public Defender

³ The trial docket indicates Mr. Evans was not released from prison as a result of the Eighth District's decision until February 29, 2008, after serving more than 19 months of a two-year sentence; this Court did not stay the Eighth District's decision until March 3, 2008, after Mr. Evans was released. No arrest warrant was issued and he is now scheduled for voluntary surrender at the end of July, 2009.

SERVICE

A copy of the foregoing Application for Reconsideration was sent via U.S. Mail to Matthew Meyer in the office of William D. Mason, County Prosecutor, Justice Center, 9^h Floor, 1200 Ontario Street. Cleveland, Ohio 44113, this 17TH day of July, 2009.


JOHN T. MARTIN, ESQ.