

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : CASE NO. 2005-1656  
Appellee-Respondent, : Common Pleas Court Case No. 04-CR-464  
v. :  
ROLAND T. DAVIS, :  
Appellant-Petitioner. : **This is a death penalty case.**

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MOTION FOR STAY OF EXECUTION OF DEATH SENTENCE PENDING  
DISPOSITION OF AVAILABLE STATE REMEDIES

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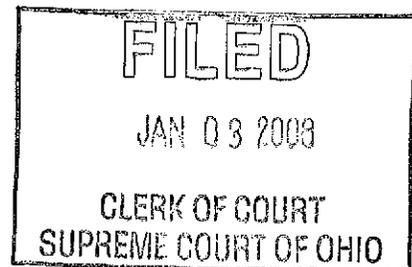
TIMOTHY YOUNG (0059200)  
Ohio Public Defender

JOSEPH E. WILHELM (0055407)  
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IN THE SUPREME COURT OF OHIO

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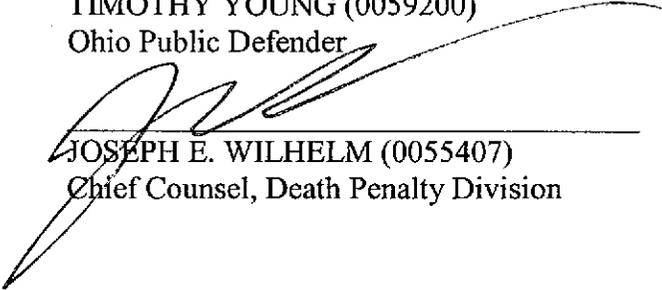
**MOTION FOR STAY OF EXECUTION OF DEATH SENTENCE PENDING  
DISPOSITION OF AVAILABLE STATE REMEDIES**

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Appellant Roland T. Davis respectfully moves this Court for an Order continuing his stay of execution pending exhaustion of his available state remedies. On June 23, 2006, Mr. Davis timely filed a petition for postconviction relief in the Court of Common Pleas, Licking County, Ohio. Mr. Davis amended his postconviction petition on July 20, 2006. The trial court dismissed Mr. Davis' postconviction on November 14, 2007. On November 21, 2007, Mr. Davis, under Ohio Civ.R. 59(A), filed a Motion for New Trial based on the trial court's failure to consider his reply to the State's Supplemental Motion for Summary Judgment. This proceeding is still pending. This Court has jurisdiction to rule on Mr. Davis' motion under State v. Berry, 80 Ohio St.3d 371, 373-74, 686 N.E.2d 1097, 1100 (1997). The reasons for this motion are set forth in the attached Memorandum.

Respectfully submitted,

TIMOTHY YOUNG (0059200)  
Ohio Public Defender

  
JOSEPH E. WILHELM (0055407)  
Chief Counsel, Death Penalty Division

Counsel of Record

  
T. KENNETH LEE (0065158)  
Assistant State Public Defender

**Counsel for Appellant-Petitioner**

**MEMORANDUM**

On January 3, 2008, this Court affirmed Roland Davis' convictions and death sentence (Exhibit A). Previously, this Court granted a stay of execution for Davis pending his direct appeal. Upon the denial of that appeal, this Court has set April 2, 2008, as the new execution date for Roland Davis. (Exhibit A).

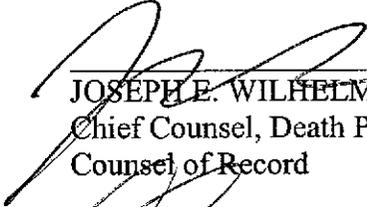
Davis now moves this Court for an order continuing his stay of execution pending the exhaustion of available postconviction remedies, including all appeals. Under State v. Steffen, 70 Ohio St. 3d 399, 639 N.E.2d 67 (1994), Davis is entitled to a stay of execution until he has "exhausted ... one round of postconviction relief, and one motion for delayed reconsideration ... in the court of appeals ...." 70 Ohio St.3d at 412, 639 N.E.2d at 77. See also State v. Glenn, 33 Ohio St. 3d 601, 514 N.E.2d 869 (1987).

On November 21, 2007, Davis filed a Motion for New Trial because the trial court failed to consider his reply to the State's supplemental motion for summary judgment, before it dismissed his postconviction petition. (Exhibit B). Davis' motion is still pending in the trial court. Thus, a stay is needed to ensure that the issues raised Davis' new trial motion and in his postconviction petition are fully resolved. This Court has granted similar motions. See, e.g., State v. Raglin, 85 Ohio St. 3d 1429, 707 N.E.2d 945 (1999).

Roland T. Davis respectfully requests that this Honorable Court grant a stay of execution pending the exhaustion of available state remedies, and more specifically, his postconviction proceedings, in accordance with State v. Steffen, 70 Ohio St. 3d 399, 639 N.E.2d 67.

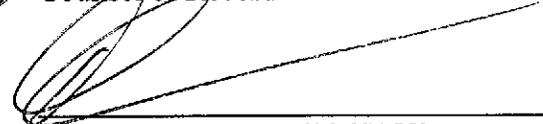
Respectfully submitted,

TIMOTHY YOUNG  
Ohio Public Defender



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JOSEPH E. WILHELM (0055407)  
Chief Counsel, Death Penalty Division  
Counsel of Record



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T. KENNETH LEE (0065158)  
Assistant State Public Defender

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing motion for stay of execution was forwarded by regular U.S. mail to Kenneth Oswalt, Assistant Prosecuting Attorney, Administration Building, 20 South Second Street, Newark, Ohio 43055, on this 3rd day of January, 2008.



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T. KENNETH LEE (0065158)  
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Counsel for Appellant-Petitioner

FILED

# The Supreme Court of Ohio

JAN 03 2008

CLERK OF COURT  
SUPREME COURT OF OHIO

State of Ohio

Case No. 2005-1656

v.

JUDGMENT ENTRY

Roland T. Davis

APPEAL FROM THE  
COURT OF COMMON PLEAS

This cause, here on appeal from the Court of Common Pleas for Licking County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the Court of Common Pleas is affirmed consistent with the opinion rendered herein.

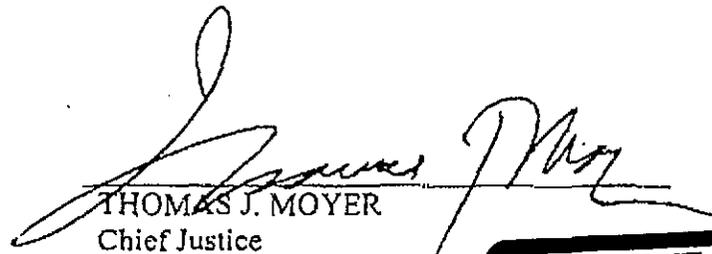
Furthermore, it appearing to the Court that the date fixed for the execution of judgment and sentence of the Court of Common Pleas has passed,

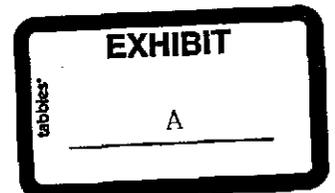
It is ordered by the Court that the sentence be carried into execution by the Warden of the Southern Ohio Correctional Facility or, in his absence, by the Deputy Warden on Wednesday, the 2<sup>nd</sup> day of April, 2008, in accordance with the statutes so provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this Court be certified to the Warden of the Southern Ohio Correctional Facility, and that the Warden shall make due return to the Clerk of the Court of Common Pleas for Licking County.

It is further ordered that a mandate be sent to the Court of Common Pleas for Licking County by certifying a copy of this judgment and filing it with the Clerk of the Court of Common Pleas for Licking County.

(Licking County Court of Common Pleas; No. 04CR464)

  
THOMAS J. MOYER  
Chief Justice



In The Court Of Common Pleas  
Licking County, Ohio

LICKING COUNTY  
COMMON PLEAS COURT

State Of Ohio, :  
 :  
Plaintiff-Respondent, :  
 :  
-vs- : Case No. 04 CR 464  
 :  
Roland T. Davis, : Judge Marcelain  
 :  
Defendant-Petitioner. :

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FILED  
GARY R. WALTERS  
CLERK

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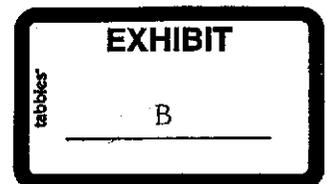
**Petitioner's Motion for New Trial Under Civil Rule 59(A)**

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Roland Davis moves this Court for a new trial under Civil Rule 59(A). This rule provides "a new trial may be granted in the sound discretion of the court for good cause shown." Davis shows good cause for relief under Civil Rule 59(A) because this Court failed to give him an opportunity to be heard after the State filed its supplemental motion for summary judgment.

The State filed its supplemental motion for summary judgment on November 8, 2007, which undersigned counsel received on November 13, 2007. Davis mailed his reply to the clerk on November 14, 2007. (Motion Ex. A.) The clerk filed Davis's reply on November 16, 2007. (Motion Ex. B.) This Court, however, dismissed Davis's post-conviction petition on November 14, 2007.

Under Local Rule 2, Davis had fourteen days to file his reply. Davis also has a due process right to respond to a dispositive motion filed by the State. See State v. Pless, 91 Ohio App. 3d 197, 199, 632 N.E.2d 524, 525 (1993). And because this is a capital case more process is due to Davis. See Burger v. Kemp, 483 U.S. 776, 785 (1987) (heightened scrutiny by reviewing court needed on collateral review of capital conviction). Due process includes the opportunity to be heard on dispositive motion filed by the State.

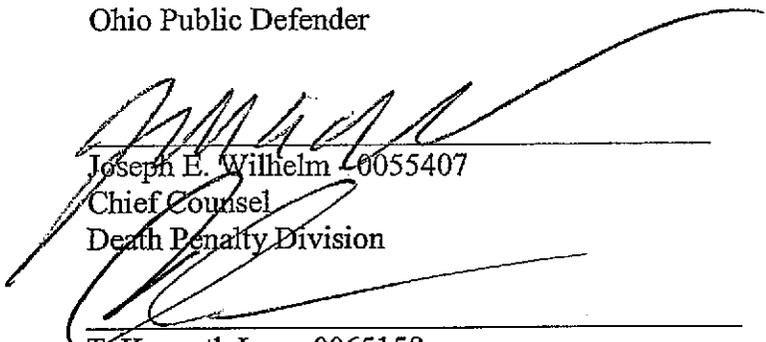


But this Court proceeded to judgment on Davis's petition without considering his reply to the State's supplemental summary judgment motion. Indeed, this Court's final entry of November 8, 2007, states that the Court reviewed the "State's Supplemental Motion for Summary Judgment addressing the amended post-conviction petition." The Court's entry makes clear that it did not consider Davis's supplemental reply — which sets out why his claims are not barred by res judicata — and why he is entitled to substantive relief or a hearing. Of course, this would have been impossible considering this Court's entry denying Davis relief was journalized only three business days after the State's supplemental summary judgment pleading was filed, and before Davis' filed his supplemental reply. (Motion Ex. A.)

Accordingly, Davis moves for relief under Civil Rule 59(A). Although Davis challenges his criminal conviction in his amended petition, Civil Rule 59(A) applies to his case because his post-conviction challenge is a civil collateral proceeding. See State v. Milanovich, 42 Ohio St. 2d 46, 49, 325 N.E.2d 540, 542 (1975). A proposed entry is attached to this motion.

Respectfully submitted,

David H. Bodiker - 0016590  
Ohio Public Defender



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Joseph E. Wilhelm - 0055407  
Chief Counsel  
Death Penalty Division

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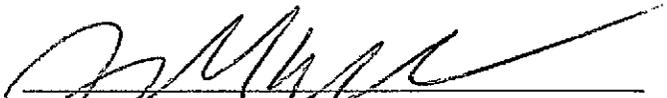
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Assistant State Public Defender

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(614) 644-0708 - Fax

Counsel for Petitioner-Defendant

Certificate of Service

I certify a copy of the foregoing Petitioner's Motion for New Trial Under Civil Rule 59(A) has been sent by regular U.S. mail to Kenneth Oswalt, Assistant Prosecutor, Licking County, Administration Building, 20 South Second Street, Newark, Ohio 43055 on this 21<sup>ST</sup> day of November, 2007.



---

Joseph E. Wilhelm - 0055407  
Chief Counsel  
Death Penalty Division

#267609



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DAVID H. BODIKER  
State Public Defender

(614) 466-5394  
Fax (614) 644-0708

November 14, 2007

Clerk, Court of Common Pleas  
Licking County Courthouse  
Courthouse Square – 2nd Floor  
Newark, Ohio 43055

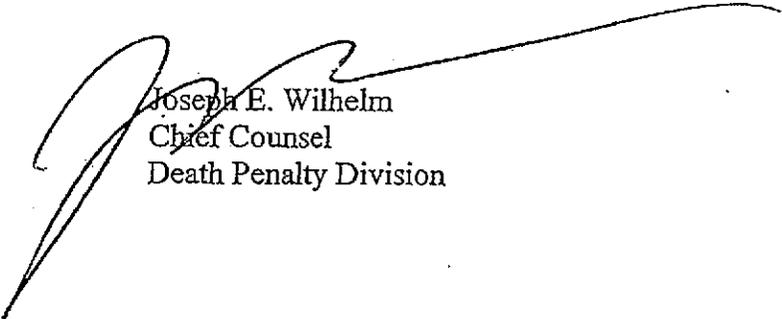
Re: *State v. Roland T. Davis*  
Case No. 04 CR 00464

Dear Clerk:

Enclosed please find the original and five copies of the Reply to State's Supplemental Motion for Summary Judgment to be filed in the above-captioned case.

Please return a time stamped copy in the envelope provided. Thank you.

Sincerely,



Joseph E. Wilhelm  
Chief Counsel  
Death Penalty Division

JEW/ts

Encls.

267399

EXHIBIT

A

In The Court Of Common Pleas

Licking County, Ohio  
LICKING COUNTY  
COMMON PLEAS COURT.

State Of Ohio,

Plaintiff-Respondent, 2007 NOV 16 A 9: 5:0 Case No. 04-CR-464

-vs-

Roland T. Davis

FILED : Judge Marcelain  
GARY R. WALTERS :  
CLERK :

Defendant-Petitioner : Capital Case

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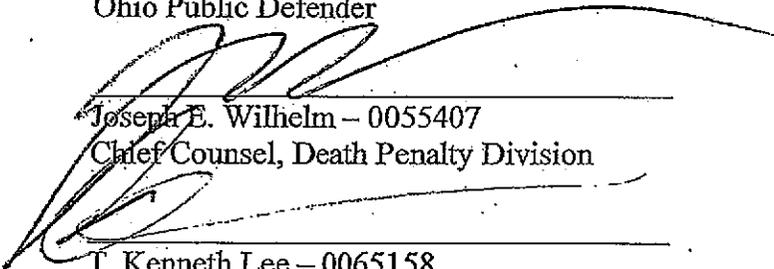
Reply to State's Supplemental  
Motion For Summary Judgment

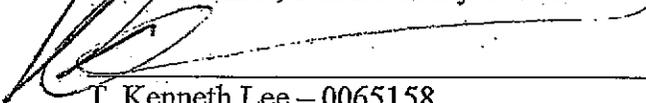
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Petitioner Roland Davis opposes the State's supplemental motion for summary judgment, filed on November 8. For the reasons set forth in the attached memorandum in support, this Court should deny the State's motion and grant Roland Davis discovery and an evidentiary hearing on his Fifteenth and Sixteenth grounds for relief.

Respectfully submitted,

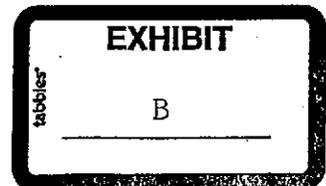
David H. Bodiker  
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T. Kenneth Lee - 0065158  
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Counsel for Defendant-Petitioner



## Memorandum In Support

### A. Summary dismissal is not warranted.

The right to post-conviction relief is set forth in O.R.C. §2953.21(A)(1). Under this statute, any person convicted of a criminal offense, whose rights have been infringed under the Ohio or federal constitutions, may seek relief in post-conviction. The duty “to search for constitutional error with painstaking care is never more exacting than it is in a capital case.” Kyles v. Whitley, 514 U.S. 419, 422 (1995) (quoting Burger v. Kemp, 483 U.S. 776, 785 (1987)).

The State has moved this Court to dismiss Davis’s Fifteenth and Sixteenth Grounds for Relief without an evidentiary hearing. But the plain language of the post-conviction statute *creates a presumption in favor of a hearing*. See O.R.C. §2953.21(E) (emphasis added). O.R.C. §2953.21(E) direct this Court to hold an evidentiary hearing “[u]nless the petition and the files and the records of the case show the petitioner is not entitled to relief.” O.R.C. §2953.21(E). Thus, the presumption is against dismissal or summary judgment for the State.

Although, the State has captioned its motion as a summary judgment motion, it is apparent from its argument that it really seeks dismissal under Ohio R. Civ.P. 12(B)(6). See State’s Supplemental Motion for Summary Judgment, pp. 2, 4 (Lack of substantive merit). See also Ohio R. Civ. P. 12(B)(6) (Failure to state a claim upon which relief can be granted); compare Ohio R. Civ. P. 56(C) (No genuine issue of material fact). However, the State has failed to meet its burden. As the moving party, the State is required to demonstrate that Davis could prove no set of facts that entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); York v. Ohio State Highway Patrol, 60 Ohio St.3d 143, 144, 573 N.E.2d 1063, 1064 (1991); O’Brien v. University Community Tenants Union, 42 Ohio St.2d 242, 245, 327 N.E.2d 753, 755 (1975). Not

only is the State required to prove that Davis could prove no set of facts that entitle him to relief, but it is also required to prove it beyond a reasonable doubt. O'Brien, 42 Ohio St.2d at 245, 327 N.E.2d at 755; Zuber v. Ohio Dept. of Insurance, 34 Ohio App.3d 42, 44, 516 N.E.2d 244, 245 (1986).

In performing an Ohio R. Civ. P 12(B)(6) review, this Court is required to “examine only the allegations of the complaint.” Rogers v. Targot Telemarketing Services, 70 Ohio App.3d 689, 692, 591 N.E.2d 1332, 1333 (1990); Stephens v. Boothby, 40 Ohio App.2d 197, 199, 318 N.E.2d 535, 537 (1974). And as a matter of law, this Court is required to accept the allegations in the complaint as true for purposes of deciding the Ohio R. Civ. P. 12(B)(6) motion.<sup>1</sup> O'Brien, 42 Ohio St.2d at 245, 327 N.E.2d at 755. Further, all reasonable inferences from the allegations are to be made in favor of the petitioner. Mitchell v. Lawson Milk Co., 40 Ohio St.3d 190, 192, 532 N.E.2d 753, 756 (1988). The petitioner is not required to prove in his claims in his petition; he is merely required to plead sufficient facts to give the State notice of the basis for his claims that, if proven, warrant relief. York, 60 Ohio St.3d at 145, 573 N.E.2d at 1065; State v. Kapper, 5 Ohio St.3d 36, 38, 448 N.E.2d 823, 826 (1983); State v. Jackson, 64 Ohio St.2d 107, 111, 413 N.E.2d 819, 822 (1980).

There are genuine issues of material fact on these claims and Davis has set forth claims upon which relief can be granted that preclude this Court from granting the State’s motion. The face of Davis’ petition alleges an infringement or denial of constitutional rights that make his convictions and death sentence void or voidable. Davis pled with sufficient specificity the acts complained of, as well as the specific constitutional provisions violated. Davis has met the

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<sup>1</sup> Even if the State’s motion is in essence a summary judgment motion, Davis is “entitled to have [this Court] ... construe[] [the evidence] most strongly in [his] favor.” Ohio R. Civ. P. 56(C).

pleading standard necessary to overcome either a motion for dismissal or a motion for summary judgment.

**B. Davis's Claims are not barred by res judicata.**

In moving for the petition's summary dismissal, the State argues that Davis' Fifteenth and Sixteenth Grounds for relief are barred by the doctrine of *res judicata* or lack of evidentiary support. But the State's assertions have no merit and, therefore, this Court must deny the State's request.

The doctrine of *res judicata* does not apply if the post-conviction issues are supported by evidence outside the record, as well as evidence appearing in the record. State v. Smith, 17 Ohio St.3d 98, 101, n.1, 477 N.E.2d 1128, 1131 (1985); State v. Cooperrider, 4 Ohio St.3d 226, 228-229, 448 N.E.2d 452, 454 (1984). Davis's Fifteenth Ground for Relief is based solely on evidence *de hors* the record and thus cannot be barred by *res judicata*. Davis's Sixteenth Ground for Relief, on the other hand, arose, in part from the face of the trial record, but he has supported this claim with credible evidence *de hors* the trial record. (Ex. X -- attached to Davis's Amended Post-Conviction Petition). When evidence is outside the record, it cannot be raised by counsel on direct appeal. State v. Ishmail, 54 Ohio St.2d 402, 406, 377 N.E.2d 500, 502 (1978); State v. Milanovich, 42 Ohio St.2d 46, 50, 325 N.E.2d 540, 543 (1975).

Davis attached to his amended petition two exhibits as evidence *de hors* the record.<sup>2</sup> The petition and attached documentation contain specific "factual allegations that cannot be determined by an examination of the files and records of the case." State v. McNeill, 137 Ohio App.3d 34, 41, 738 N.E.2d 23, 28 (2000) (citing Milanovich, 42 Ohio St.2d at 52, 325 N.E.2d at

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<sup>2</sup> The State, while disparaging Davis for using his own affidavit, uses its own self-serving affidavit to support its argument that trial counsel was not ineffective for failing to call Damien Turner. See State's Supplement Motion for Summary Judgment, pp. 2-3.

544). Because Davis' claims are based on evidence *de hors* the record, *res judicata* cannot apply. This is especially so for Davis's Sixteenth claim which alleges that trial counsel failed to mount a cogent challenge to the State's DNA evidence. Without the supporting affidavit of attorney expert such as Gregory Meyers, Davis would not be able to establish prejudice on this claim from only a cold record. Cf. State v. Keith, 79 Ohio St.3d 514, 537, 684 N.E.2d 47, 67 (1997) (claim alleging ineffective counsel based on failure to present mitigation evidence could not be reviewed on direct appeal because it required proof "outside the record...").

### C. Merits of Sixteenth Claim.

The State claims that Davis is not entitled to relief on the merits of his Sixteenth claim—which alleges that trial counsel failed to properly contest the State's DNA evidence—by arguing 1) the affidavit of attorney expert Gregory Meyers merely creates a "battle of experts;" 2) Meyers's affidavit only states his "own opinion" and not the opinion of a DNA expert, and; 3) Meyers's affidavit suffers from bias and interest because Meyers is a Senior Assistant Public Defender. None of these so-called merits arguments entitle the State to summary judgment or other relief.

The State offers no affidavit or other documentary evidence to rebut Meyer's assertions of trial counsel's ineffective performance. (See Petitioner's Exhibit X.) Nor does the State even point to any part of the trial record might render Meyers's assertions of counsel's ineffective performance false or incredible. Thus, a genuine issue of material fact remains regarding whether trial counsel were incompetent in failing to challenge the State's DNA evidence.

The State, moreover, fails to identify any assertions by Meyers as false, scientifically unsound, or strategically unwise regarding how trial counsel should have challenged the State's DNA case. This is important because the State's silence eviscerates its claims that Meyers could

give only his “own opinion” and that he is incredible due to bias. In other words, if Meyers is too unqualified or too biased to discuss DNA basics, or trial counsel’s prejudicial omissions, then the State should have no problem explaining why the record makes it so. Likewise, the State should have no problem getting a scientist to say so in an affidavit if that were true. The State’s failure to point out a single fallacy in Meyers’s affidavit is proof positive that summary dismissal is inappropriate.

Meyers’s sets out in his affidavit his extensive experience and qualifications as a capital litigator. He also sets out in detail the education, training, and experience that makes him qualified to discuss how a trial attorney should have challenged the flaws in the State’s DNA evidence. Meyers also states in his affidavit that he vetted his understanding of the mathematics and science behind DNA evidence by consulting three qualified DNA experts. According to Meyers’s sworn affidavit, none of those experts expressed any concerns that Meyers’s fundamental understanding of DNA science and math, as set out in his affidavit, was incorrect. And any issue of Meyers’s purported interest or bias should be resolved at an evidentiary hearing where this Court can assess his credibility by observing his demeanor and weighing his testimony.

Nor is the State’s characterization of Davis’s evidence as creating a “battle of experts” accurate. Again, the State offers no expert on attorney performance or DNA science to rebut Meyers’s assertions. So where is the battle?

But more to the point, Davis does not claim that his trial suffered from ineffective DNA experts — which the State’s language of battling experts suggests. Rather, Davis claims **ineffective counsel**. Davis’s counsel failed him by not exploiting available opportunities to

create reasonable doubt based on exaggerated claims and fallacies in the State's most important evidence against him. (See Petitioner's Ex. X.)

The Kenneth Richey case illustrates this important distinction between Davis's ineffective counsel claim and the State's assertion of a mere battle between experts. In Richey v. Bradshaw, 498 F.3d. 344, 361-64 (6th Cir. 2007), the United States Court of Appeals for the Sixth Circuit found that defense counsel were ineffective because they failed to mount a cogent challenge to the State's crucial arson evidence. Richey makes clear that defense counsel in a capital case has a duty to make himself/herself familiar enough with scientific forensic evidence to present a defense that can exploit apparent weaknesses found in the expert testimony presented by the State. See id.

Here, similar to Richey, trial counsel could have made the State's DNA evidence seem far less compelling. This is especially true because trial counsel sought to make Davis's brother Randy an alternative suspect. (See Petitioner's Ex. X.) And, similar to Richey, trial counsel should have been familiar enough with the basics of DNA science, and the statistical probabilities underlying DNA science, to debunk the State's claim of a "match" with Davis resulting from DNA testing. (See, Petitioner's Ex. X.) Simply put, Meyers's affidavit shows how trial counsel dropped the ball where a strong attack on the State's DNA evidence was there to be made. And trial counsels' substandard performance in this respect certainly prejudiced Roland Davis because the DNA evidence was absolutely essential to the State's ability to convict him of this capital offense.

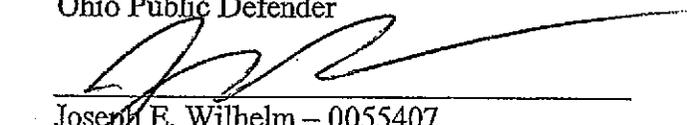
**D. Conclusion.**

Davis has produced sufficient evidence *de hors* the record in the form of affidavits to support his Fifteenth and Sixteenth grounds for relief contained in his Amended Petition for

Post-Conviction Relief. Therefore, Roland Davis respectfully requests this Court deny the State's Supplement Motion for Summary Judgment.

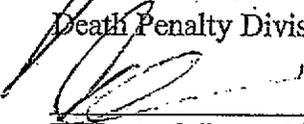
Respectfully submitted,

David Bodiker  
Ohio Public Defender



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Joseph E. Wilhelm – 0055407  
Chief Counsel  
Death Penalty Division



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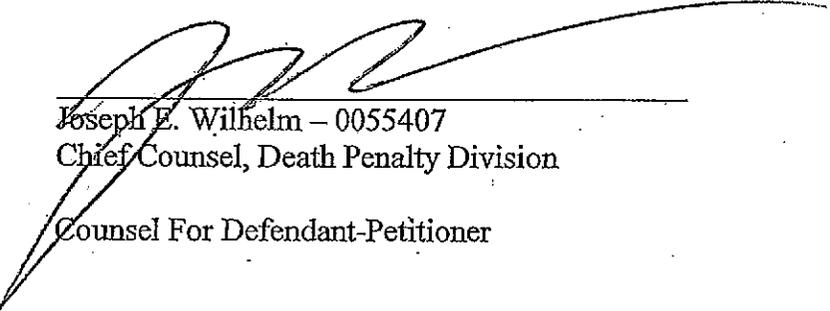
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Fax: (614) 644-0708

Counsel For Defendant-Petitioner

### CERTIFICATE OF SERVICE

I certify a copy of the foregoing Reply to State's Supplemental Motion For Summary Judgment has been sent by regular U.S. mail to Kenneth Oswalt, Assistant Prosecutor, Licking County, Administration Building, 20 South Second Street, Newark, Ohio 43055 on this 14<sup>th</sup> day of November, 2007.



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Joseph E. Wilhelm – 0055407  
Chief Counsel, Death Penalty Division  
Counsel For Defendant-Petitioner

#267348