

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

v.

ROLAND DAVIS,

Appellant.

On Appeal from the
Licking County Court of Common Pleas

Case No. 2005-1656

THIS IS A DEATH PENALTY CASE

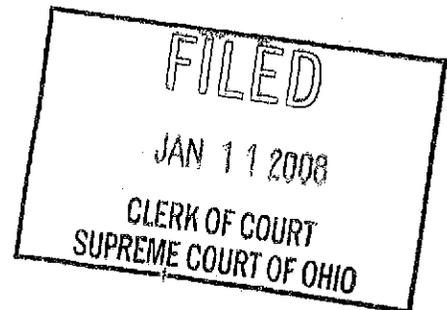
APPELLANT ROLAND DAVIS' MOTION FOR RECONSIDERATION

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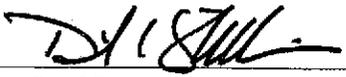


MOTION FOR RECONSIDERATION

Pursuant to Supreme Court Rule of Practice, Rule 11,§2, Appellant Roland Davis moves this Court for Reconsideration of its Opinion and Order issued on January 3, 2008 for the reasons set forth herein. Roland Davis was denied a fair trial, due process, a fair and reliable sentencing determination, the right to confront witnesses, and the effective assistance of counsel, as well as a full and fair appellate review of his conviction and sentence of death, in violation of Art. I, §§ 2, 9, 10 and 16 of the Ohio Constitution and the 5th, 6th, 8th, and 14th Amendments. This court should reconsider its earlier decision, and permit new briefing and argument on these and/or any other issues.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF MOTION FOR
RECONSIDERATION**

PROPOSITION OF LAW III

THE ADMISSION OF TAPE RECORDINGS AS EVIDENCE WITHOUT FIRST PRESENTING AND AUTHENTICATING THE TAPE RECORDING IN OPEN COURT IN THE PRESENCE OF THE DEFENDANT DENIED DAVIS HIS CONSTITUTIONAL RIGHT TO BE PRESENT AT A CRITICAL STAGE OF THE TRIAL AND TO A TRIAL IN OPEN COURT IN VIOLATION TO THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND ARTICLE I, § 2, 9, 10 AND 16 OF THE OHIO CONSTITUTION. ADDITIONALLY THE ADMISSION OF A TRANSCRIPT OF THESE UNIDENTIFIED TAPES THAT WERE NEVER PLAYED IN THE COURTROOM VIOLATED DAVIS RIGHTS TO DUE PROCESS, A FAIR TRIAL, THE EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE SENTENCING DETERMINATION.

A. The Admission of The Taped Interview

The State elicited testimony from Sgt. Vanoy about his tape recorded interview of Roland Davis in Florida. (Tr. 1320-1361) (State's exhibit 12A.1 and 12A.2) These tapes were never played for the jury in the courtroom, although they were admitted as evidence and sent back to the jury along with State's Exhibit 12.B, the transcript of the tape recordings during deliberations at the trial phase (Tr. at 1782) and the penalty phase. (Tr. 2292-93) Both parties argued the contents of the tapes and urged the jury to rely on the contents of the tapes as substantive evidence in determining guilt or innocence throughout the trial and arguments. (Tr. at 915, 1376, 1860, 1866, 1875, 1912)

The procedure used here, the admission of the tapes as substantive evidence without being played in front of the jury, denied Davis due process and a fair trial: because:

- Davis was denied the right to be present during a the actual presentation of evidence;
- Davis was denied the right to the effective assistance of counsel as counsel were not present when the evidence was heard by the jury;
- Davis was denied the right to a public trial;
- It prevented this court from having any record of what evidence was presented at trial.

Sending these tapes to the jury-room without playing them in court is not the same as playing the tapes for the jury in open court with Davis and counsel present. There is no way for this Court to know whether the jury listened to the tapes, listened to parts of the tapes or failed to play any part of the tapes.

The 5th, 6th, 8th and 14th Amendments as well as Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution guarantee to an accused in a criminal proceeding the right to be personally present at all stages of the trial, where the accused's absence would frustrate the fairness of the proceedings. *Kentucky v. Stincer* 482 U.S. 730 (1987); *Faretta v. California*, 422 U.S. 806, 819 (1975). The right to be present is a fundamental component of due process and has been viewed as "scarcely less important to the accused than the right of trial itself." *Diaz v. United States*, 223 U.S. 442, 455 (1912). It is difficult to perceive a more critical stage of a criminal trial than the state's presentation of evidence.

This Court summarily concluded that sending the tapes to the jury-room (where the jury may or may not have listened to them) did not deprive Davis of due process and a fair trial {¶¶ 90 - 93}. This Court first concluded that Davis had waived his right to object to the admission of the tapes without playing them in open court and that he could have reviewed the verbatim transcript of the tapes when they were offered and admitted. He was also present when they were admitted. {¶91}

These conclusions miss the point of the constitutional violation at issue here. The state presented *substantive* evidence of Davis' guilt through these tapes. The state argued this evidence supported Davis' guilt. This evidence was not presented and played in open court where Davis and counsel could point out and correct discrepancies between the tapes and the "verbatim" transcripts. Although Davis and counsel were "present" when the tapes were admitted, neither Davis nor counsel were "present" if and when the jury listened to the tapes. Thus neither Davis nor counsel were able to object to any inaccuracies in the tapes or the transcripts. In addition, if the tapes were played at all by the jury they were played outside of the presence of the public - who have a right to hear the evidence presented by the state in support of a criminal conviction - especially a capital case.

This Court further concluded that the trial court was not required to hold a colloquy with Davis to determine if he knowingly waived his right to be present

during the presentation of this substantive evidence relying on *United States v. Riddle*, 249 F. 3d 529, 534 (6th Cir. 2001) This Court's reliance on *Riddle* is inapposite. In *Riddle*, the Sixth Circuit Court of Appeals concluded that the waiver of the right to be present must be knowing and voluntary, as with all other constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) In finding that *Riddle* and his co-defendants had waived their right to be present, the Court reasoned:

In this case, *defense counsel suggested defendants' absence, and the court allowed the waiver only after it instructed defense counsel to consult with their clients and then received assurance from defense counsel that the defendants waived their right to be present.* To hold that such a waiver of a defendant's voir dire presence would be effective only after an on-the-record colloquy with the defendant would create a burdensome and impractical rule. Indeed, such a rule would effectively stop the proceedings whenever a defendant refused to return to court. We hold that defendants' waiver through their counsel of their right to be present during voir dire was effective. (emphasis supplied)

United States v. Riddle, 249 F. 3d at 534-35. In *Riddle*, the defendants were absent during the voir dire of the jury which the Sixth Circuit concluded was "not one of those structural rights whose violation constitutes per se error." *Id.* at 535.

Riddle is thus distinguishable from this case on two grounds. First, the error here occurred during the presentation of the state's case - not merely during voir dire. Second, there is nothing on the record to indicate that Davis waived any right to be present during the presentation of substantive evidence or that his counsel

discussed the waiver with him. There was simply no discussion on the record from which the trial court -- or this Court -- could conclude that Davis knowingly and voluntarily waived his right to be present while the jury heard the state's substantive evidence of his taped interview with the police. This is a fundamental constitutional right where waiver cannot be assumed from a silent record. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084.

The presentation of substantive evidence of guilt to the jury out of the presence of the public, out of the presence of Roland Davis, and out of the presence of his counsel is simply an intolerable trial practice that deprived Davis of his right to a public trial, his right to be present at all critical stages of the trial, the right to confront the evidence against him, the right to the effective assistance of counsel, and the right to a fair trial and due process.

The right of the accused to be present is guaranteed by Art. I, § 10 of the Ohio Constitution. See *State v. Walker*, 108 Ohio App. 333 (1959) and Ohio R. Crim. P. 43(A). In addition, the Sixth Amendment right to counsel includes: “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy *and public trial*, . . .” Art. I, § 10 of the Ohio Constitution likewise guarantees the right to every person accused of a crime: “[i]n any trial, in any court, the party accused

shall . . . have . . . a speedy *public trial*. . . .” *State v. Bethel, supra. State v. Drummond, supra.*

Here, evidence was presented to the jury -- for the first time -- behind the closed doors of the jury deliberation room -- without the presence of the public, the accused Roland Davis, or his counsel. The right of the accused to a public trial includes the right of the public to be made aware of the evidence the state presents against the accused, and for the accused to have the public observe the trial. These fundamental constitutional rights of the accused and the public in general to open and public trials are denied by the presentation of the state’s evidence -- in the first instance -- behind the closed doors of the jury deliberation room. This is especially egregious where there is no indication in the record that the jury ever listened to the tape recording upon which both parties relied. This procedure denied Roland Davis the fundamental constitutional right to a fair, open, and public trial as well as his right to due process of law, the right to confront witnesses against him, and the right to the effective assistance of counsel, as well as a fair and reliable sentencing determination under the 5th, 6th, 8th and 14th Amendments as well as Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution. This Court must determine whether the error here was harmless beyond a reasonable doubt before simply dismissing any error as harmless. *Chapman v. California*, 386 U.S. 18 (1967).

Counsel' failure to object to the submission of the tapes to the jury during its deliberations at either the trial or penalty phases and counsel's failure to require that the tapes be played in open court, fell far below the prevailing professional norms, and was therefore unreasonable denying Davis the effective assistance of counsel under the 5th, 6th, 8th and 14th Amendments as well as Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution.

This Court summarily rejected Davis' claim of ineffective assistance of counsel: "We also reject Davis ineffectiveness claim because of counsel's tactical decision to permit the introduction of the tapes and the transcript." {¶99} There is nothing in the record from which this Court could conclude that counsel made any decision -- tactical or otherwise -- to permit the introduction of the tapes and the transcript without first having the tapes played in open court. Counsel simply failed to object and failed to protect their client's fundamental constitutional rights to a public presentation of all of the evidence in an open trial and his right to be present and confront all of the evidence against him. Counsel's performance was unreasonable and deprived Davis of the effective assistance of counsel.

This Court should reconsider its decision and order a new trial.

PROPOSITION OF LAW V

UNQUALIFIED OPINION TESTIMONY CONCERNING THE TRUTHFULNESS OF A WITNESS OR A DECLARANT USURPS THE FUNCTION OF THE JURY AND DENIED DAVIS DUE PROCESS, A FAIR TRIAL THE RIGHT OF CONFRONTATION, AND THE EFFECTIVE ASSISTANCE OF COUNSEL.

Det. Steve Vanoy, the lead investigator in this case, assisted the prosecutor as the state's representative at counsel table during the trial. (Tr. 854) Det. Vanoy also testified extensively at the trial, primarily about his investigation of the case, his thought processes in focusing on Roland Davis, and his interviews of Roland Davis in Florida and later in Newark, Ohio.

Det. Vanoy testified as to his training and experience (Tr. 1304), but Det. Vanoy was neither offered nor qualified as an expert on any subject. Despite that, Det. Vanoy offered his unsupported opinion testimony about the meaning of evidence, about why Davis said and did specific things during the interviews, and offered his opinions about Davis' thought processes. Det. Vanoy offered his opinions that Davis was lying and admitting to lying. Vanoy testified in detail about the contents of the taped interview he conducted with Davis in Florida. (Tr. 1329-1350) The taped interview was never played for the jury in open court although it was submitted to the jury as an exhibit. (See discussion at Proposition of Law III).

Police witnesses may testify about facts that they have discovered or observed. They may testify about statements the defendant made to them (if properly admitted). They may even testify about proper police techniques. They may not, however, give their unsupported opinions about the meaning of specific pieces of evidence, nor may they give their opinions about the defendant's thought processes while being interviewed, nor may they give their opinion about the truthfulness of statements made by the defendant.

Det. Vanoy was not qualified to testify about the thought process of the Newark Police Department for investigating and eventually charging Roland Davis with these crimes. His opinions about the truthfulness of Davis' statements were improper. His opinions about Davis' thought processes during the interrogations were likewise improper. All of this testimony was beyond the scope of any purported expertise and usurped the function of the jury. Permitting Vanoy to give these opinions denied Davis due process, the right to confront witnesses, a fair trial, the effective assistance of counsel, and a fair and reliable sentencing determination in violation of the 5th, 6th, 8th and 14th Amendments, as well as Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution.

In addressing these issues, this Court first concluded that Vanoy's testimony that Davis became a suspect only after the Newark Police received a tip was not offered for the truth of the matter asserted but only to explain why Vanoy opened

the investigation in to Roland Davis - and therefore admissible (Tr. 1320-21). This Court further concluded that his reasons for opening the investigation were “relevant and helped provide the foundation for his subsequent testimony.” {¶117} The fact that the Police received a “tip” is a piece of incriminating information that did “not hav[e] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.” Ohio R. Evid. 401. Because it was not relevant under Ohio R. Evid. 401, it was not admissible under Ohio R. Evid 402. It is unclear why it would be necessary or relevant for Vanoy to explain to the jury why he took each and every step in the investigation including initiating the investigation of Roland Davis in the first place. That fact only demonstrates that the police believed that Davis was guilty. It is not a fact that tends to prove any of the elements of the charged crimes.

Second, the Court justifies the admission of Vanoy’s testimony about Davis’ responses to questions asked during the taped interview, by concluding that his testimony satisfied the requirements of Ohio R. Evid 701. {¶¶ 119, 120} Vanoy was permitted to testify about the details of the interrogation, and how and why he asked specific questions and -- critically -- his opinion of Davis’ truthfulness in his responses. (Tr. 1331) Most, if not all, of Vanoy’s “observations” were unnecessary if the tape had simply been played in the courtroom for the jury to

hear. The jury would have been able to hear the questions and responses -- without Vanoy's interpretations.

The tape was not played, however. Instead, the taped interview was edited, interpreted, and sensationalized by the police detective who had conducted and taped the interview. There was simply no reason for Vanoy to testify about Davis' statements and reactions when a far more accurate presentation could have been provided through the simple expedient of playing the tape in the courtroom. Permitting the police to express their opinions about the meaning of a defendant's statements when the actual tape recording was available to be played for the jury denied Davis due process and a fair trial.

Third, this Court concluded that Vanoy's testimony that Davis "was being very deceptive" was erroneously admitted because it was an improper opinion on Davis' veracity. This Court, however, concluded that it was not plain error as there was sufficient evidence to convict Davis despite this improper opinion. {¶123} The court did not address Davis' claim that counsel's failure to object was unreasonable or whether it prejudiced Davis. There is no conceivable tactical reason for failing to object to improper opinion testimony that the defendant was lying. Clearly, permitting a police witness to repeatedly give his opinions that the defendant was lying usurped the role of the jury for determining the veracity of the

witnesses -- including the defendant -- and prejudiced Davis.¹ *State v. Boston*, 46 Ohio St.3d 108 (1989), *State v. Eastham*, 39 Ohio St.3d 307, 312 (1988) This Court failed to address the issue of whether the conduct of the prosecuting attorney in repeatedly eliciting these statements over sixteen pages of transcript (Tr. 1334-1350) constituted prosecutorial misconduct that denied Davis a fair trial

Fourth, this Court concluded that *Crawford v. Washington*, 541 U.S. 356 (2004) does not apply to Vanoy's testimony because Davis was available to testify. The point is that Davis was unable to cross-examine Vanoy about his observations without being forced to testify to refute those "observations." There was no need for the observations or the commentary about Davis' truthfulness since the tape recording was available. The state may not force the defendant to take the stand by presenting "observations" and commentary about an interview - when the tape recording of that interview is readily available to be played for the jury. This type of subterfuge denied Davis a fair trial and due process.²

¹ This Court likewise concluded that Vanoy's statements that Davis admitted he was lying was not error because he was merely stating what Davis had said. Again, the tape of the interview was available and provided a much better and more accurate account of the how the police set him up to admit he had earlier lied. The tape however was not played for the jury. Instead Vanoy was permitted again to provide his interpretation of the events. The jury has the right to hear the accurate taped account of the interview - not the enhanced version through the police interviewer.

² Not only did counsel's failure to object to Vanoy's ongoing "observations" and commentary fall far below the prevailing professional norms, but counsel's failure to play the tape in the courtroom to refute Vanoy's commentary was likewise

These errors in permitting Vanoy to offer his opinions and observations and commentaries on Roland Davis' truthfulness were tantamount to Vanoy giving his opinion of Davis' guilt of the crimes charged. There was no reason for Det. Vanoy to give his opinion about the veracity of Davis' statements or about Davis' reactions to questions. (See also, Discussion of Evid. R. 702 and the gate-keeping role of the trial court in admitting only reliable testimony that will assist the trier of fact in *Valentine v. Conrad*, 110 Ohio St. 3d 42, 2006-Ohio-3561). This ongoing commentary (and counsel's failure to object to it) denied Davis a fair trial and due process in violation of Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution as well as the 5th, 6th, 8th, and 14th Amendments. This Court must determine whether any error here was harmless beyond a reasonable doubt before simply dismissing the error as harmless. *Chapman v. California*, 386 U.S. 18 (1967).

This Court should reconsider its decision on Proposition of Law V.

unreasonable. Counsel left Davis no alternative to refute these "observations" other than to take the stand.

PROPOSITION OF LAW VII

REPORTS PREPARED BY AN EXPERT WITNESS AND RELIED ON BY THAT WITNESS DURING HER TESTIMONY AND SUBJECT TO CROSS-EXAMINATION ARE ADMISSIBLE AS EXHIBITS WHEN REQUESTED BY THE PARTY OPPONENT. THE TRIAL COURT'S EXCLUSION OF SUCH REPORTS OF THE STATE'S DNA EXPERT DENIED ROLAND DAVIS HIS RIGHT TO A FAIR TRIAL, DUE PROCESS AND A RELIABLE SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I §§ 2, 9, 10 AND 16 OF THE OHIO CONSTITUTION.

The State called as a witness Meaghan Clement, the technical director of the forensic identity testing department at LabCorp. (Tr. at 1655) Ms. Clement testified that she was responsible for interpreting all the raw data of all the cases analyzed. (Tr. at 1656) She had been working in the area of DNA forensics for 17-18 years. (*Id.*)

During an extensive cross-examination, Clement identified the Lab Corp, Inc. Amended Certificate of Analysis. (Defendant's Exhibit L, Tr. at p. 1730) She testified that she prepared that document based on the testing she performed. (Tr. at 1731) She then testified regarding the specifics of the autosomal testing and the data obtained from that testing and identified alleles at thirteen separate loci in the sample. (Tr. at 1733) The alleles identified in sample 4.6 and 4.7 did not match at every loci with Davis. There were additional alleles that appeared in these samples.

She acknowledged that there was additional activity in several of the loci that could be a different allele – not attributable to Davis. (Tr. at 1744-45, 1746, 1749)

Defense counsel moved for admission into evidence of Defense Exhibit L, the Amended Certificate of Analysis that Clement prepared and testified from. (Tr. at 1795) The State objected claiming the report was hearsay. (Tr. at 1796) The court sustained the objection, and excluded the report finding that “the jury heard everything that she testified to and I’ll argue it that way, which isn’t hearsay as the report could be. I’ll sustain the objection on that basis.” (Tr. at 1798)

Defense counsel discussed Clement’s cross examination during closing argument, (Tr. at 1867, 1892-1895), relying on page three of Defense Exhibit L as a demonstrative exhibit. (Tr. at 1893, 1970) The jury requested this exhibit during deliberations. (Tr. at 1970) The court refused to reconsider and instructed the jury that they had all the exhibits admitted in trial. (Tr. at 1973)

The trial court’s exclusion of this report was prejudicial error and a denial of due process and a fair trial. The report contained relevant probative evidence particularly given the complexity of the thirteen loci, the identifiers for those thirteen loci, the alleles of Davis, the alleles of Sheeler, the alleles in sample 4.6 and the alleles in 4.7. The fact that Clement testified regarding those facts -- and was cross-examined on this document -- does not substitute for the probative value

of the actual exhibit which contained the table demonstrating each of those alleles in each of the persons and samples tested and demonstrated the differences and discrepancies raised on cross-examination. This exhibit clearly demonstrated the problems with Clement's testimony that counsel raised on cross-examination. There was nothing prejudicial about the report.

In addressing this Proposition of Law, this Court first concluded at {¶172} that "trial counsel did not offer defense Exhibit L into evidence as a business record and did not lay the necessary foundation for doing so. . . . However, Clement offered no testimony showing that defense Exhibit L was 'generated by a systematic entry kept in the ordinary course of business. (citation omitted)." This Court next concluded that whatever error occurred was harmless: "Clement's testimony was compelling and credible evidence from which the jury could conclude that Davis' DNA was found on the bloodstained sheet. Clement's testimony, though based in part on the report, was admissible expert opinion. The information and charts on defense exhibit L were merely cumulative of her testimony. Moreover, the jury saw the chart showing the autosomal DNA results during trial counsel's final argument." {¶174}

On direct examination, Meaghan Clement testified at great length about the standardized procedures and protocols that were always followed at LabCorp in every case. These standardized procedures and protocols are strictly followed in

order to insure that the test results are accurate and that the samples are not contaminated. Ms. Clement likewise stressed these standards include accurate record keeping and reporting of results. The protocols for testing and reporting the results are followed in each and every test. These standards and protocols are critical because LabCorp is in the business of doing DNA testing and presenting the results in court. Ms. Clement likewise testified about the standard preparation of her reports and the necessary cross-checking of those reports. (Tr. 1655-1705) These regularly followed practices formed the basis for the opinions contained in her reports.

Likewise on cross-examination, defense counsel extensively reviewed the procedures and protocols, including the writing of these reports -- all of which were regularly followed by Ms. Clement and everyone else employed at LabCorp. (Tr. 1705-1732) Defense counsel also introduced defense Exhibits K and L and had Ms. Clement identify them as records regularly kept in the day to day operations of LabCorp:

MR. SANDERSON: Okay. May I approach,
Your Honor?

THE COURT: Please do.

BY MR. SANDERSON:

Q I'm going to hand you what's been marked
as Defendant's Exhibit K and Defendant's Exhibit L
just for identification purposes. I'm assuming
you've got copies of those as well.

A Yes.

Q Okay. Can you identify what Defendant's

Exhibit L is for me?

A Defendant's Exhibit L is an amended certificate of analysis outlining the results.

Q And that's a 4-page document.

A That's correct.

Q Did you prepare that document, ma'am?

A Yes.

Q I believe it bears your signature.

A Yes, it does.

Q And that is related to the DNA testing done in connection with this case.

A Yes.

Q And looking at Defendant's Exhibit K.

A Defendant's Exhibit K is a photograph of the original report that was issued.

Q And that is also prepared by you.

A That's correct.

Q Also bears your signature.

A Yes, it does.

Q And also was prepared in connection with this matter.

A Yes.

Q Okay. Now, I'm not trying to play games or anything here.

A Okay.

Q There was an amended report done here, correct?

A That is correct.

Q And a separation of a few days between the two.

A That is correct.

Q And the reason for the amended report is basically we got a typo.

A That's correct.

Q And that was in the name of the Defendant, correct?

A That's correct. We were using his initial -- middle initial T, I believe, instead of the R for his first name.

Q Okay. Didn't change the report in any way, just the -- other than getting the name right, so to speak.

A Correct.

MR. SANDERSON: Okay. May I approach again, Your Honor?

THE COURT: Please do.

BY MR. SANDERSON:

Q I'm going to let you refer to your reports in dealing with these, because I'm sure you've probably got them tabbed and indexed better than I do. But do those appear to be fair and accurate copies of the reports that you prepared in connection with these cases

A Yes, they do.

Q -- other than my exhibit stickers and the holes in the one?

(Tr. 1732-35) Defense counsel than extensively cross-examined Ms. Clement on defense Exhibit L the report she prepared for this case. (Tr. 1735-39, 1742-1750).

To now conclude that defense counsel failed to lay the necessary foundation for having defense Exhibit L admitted as a business record is contrary to the record established at trial. All of Ms. Clement's testimony pointed to defense Exhibit L being a record "regularly recorded in a regularly conducted activity." Ohio R. Evid. 803(6). Ms. Clement worked at LabCorp whose business it is to conduct DNA testing and prepare reports for court. The testing of DNA and the preparation of these reports is "a regularly conducted activity." This Court's conclusion is contrary to the record and elevates form over substance in a critical capital case. Nothing in this Court's past cases required a rote recitation of all of the elements of Ohio R. Evid. 803(6) before a document may be admitted as a business record. This is especially true when the person who prepared the document is present in court and has been subject to direct and cross examination.

The document presented though such testimony no longer contains hearsay because the person who prepared the document has been subject to cross-examination as to the accuracy of the report. The 803(6) exception to the hearsay rule should not come into play where the document is not hearsay. Nevertheless, if it should come in to play, Exhibit L was clearly a regularly kept business record that should have been admitted under Rule 803(6).

This Court's conclusion here is also contrary to the Court's conclusions and reasoning in a similar issue in *State v. Crager, Slip Opinion*, No. 2007-Ohio-6840, ¶38:

The starting point for our analysis is that the DNA reports admitted into evidence in this case were "business records," under the hearsay exception of Evid. R. 803(6). The reports were made "from information transmitted by, a person with knowledge, [and are] kept in the course of a regularly conducted business activity," and it "was the regular practice of that business" (BCI) to make the reports. Moreover the reports were introduced through the testimony of a "qualified witness" [] and nothing suggests that the "method or circumstances of preparation indicate lack of trustworthiness," *State v. Craig*, 110 Ohio St. 3d 306, 2006-Ohio-4571, 853 NE2d 621, ¶ 81-82 (autopsy reports are business records)

*Id.*³ As in *Crager* and *Craig*, if the report was determined to be hearsay (incorrectly) the records at issue here were "business records," and were thus

³ In *Crager*, the person who prepared the DNA report was unavailable to testify or to be cross-examined. Thus it was necessary to have the report introduced by another person who could not be cross-examined about the accuracy of the report. In that situation, the report was hearsay and could only be admitted under the

admissible under the Ohio R. Evid. 803(6) exception to the hearsay rule. The trial court erred in refusing to admit defense Exhibit L - especially after the jury asked to see the Exhibit.

This Court then concluded that whatever error occurred was harmless, because Clement's testimony was "compelling and credible;" because the report was based on admissible expert opinion; because the report was merely cumulative of her testimony, and because the jury saw the chart during argument. {¶173} This analysis fails for at least two reasons.

First, the analysis begs the question raised by the failure to admit DEFENSE Exhibit L. Defense Exhibit L was used to cross-examine state's witness Clement. The purpose of the cross examination was to make her testimony less "compelling and credible." The purpose of admitting Exhibit L likewise was to make her testimony less "compelling and credible." Absent cross-examination from proper documents, all testimony will appear "compelling and credible."

It is also precisely because the report was based on admissible opinion testimony that it was not hearsay. Meaghan Clement prepared the report and testified about it. It was not hearsay. Even so it was a "business record" and should have been admitted. Finally, the fact that the jury specifically requested to

803(6) business records exception to the hearsay rule. Here, the report at issue was prepared by Meaghan Clement who was available to defend its accuracy on cross-examination. This simply was not a question of hearsay or an exception to the hearsay rule contained in Ohio R. Evid. 803(6).

see Exhibit L during deliberations indicates that merely seeing the chart during closing argument was not sufficient to answer all of the questions that the jury had concerning the reliability of Ms. Clement's testimony.

This Court must determine whether the error here was harmless beyond a reasonable doubt before simply dismissing the error as harmless. *Chapman v. California*, 386 U.S. 18 (1967). This Court may not find the error to be harmless merely because it found the witness to be "compelling and credible." The jury may well have found otherwise. The credibility of the witness is likewise irrelevant to whether this error denied Davis a fair trial and due process. The trial court's refusal to admit defense Exhibit L and this Court's ruling denied Roland Davis due process and a fair trial under Art. I, § 2, 9, 10, and 16 of the Ohio Constitution and the 5th, 6th, 8th, and 14th Amendments.

This court should re-consider its earlier ruling.

CONCLUSION

Roland Davis was denied a fair trial, due process, a fair and reliable sentencing determination, the right to confront witnesses, and the effective assistance of counsel, as well as a full and fair appellate review of his conviction and sentence of death, in violation of Art. I, §§ 2, 9, 10 and 16 of the Ohio Constitution and the 5th, 6th, 8th, and 14th Amendments. This court should

reconsider its earlier decision, and permit new briefing and argument on these and/or any other issues.

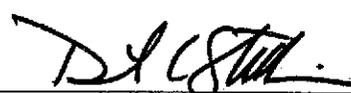
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Counsel of Record for Roland Davis

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing BRIEF ON THE MERITS was delivered by regular U.S. Mail to Kenneth Oswalt, Prosecuting Attorney, County Administration Building, 20 S. Second St., 4th Floor, Newark, OH 43055 this 11th day of January, 2008.


DAVID C. STEBBINS (0005839)
Counsel of Record for Roland Davis