

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio, :
 Appellee, : Case No. 09-2028
 -vs- :
 Roland T. Davis, :
 Appellant. : **Death Penalty Case**

On Appeal from the Court of Appeals of Licking County,
Fifth Appellate District, Case No. 2009-CA-00019

**Amici Curiae Ohio Association of Criminal Defense Lawyers and
Cuyahoga County Public Defender's Memorandum in Support of Jurisdiction**

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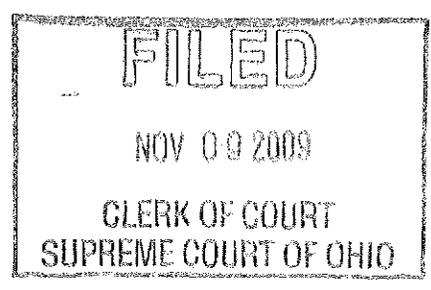
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INTEREST OF AMICI CURIAE

The Ohio Association of Criminal Defense Lawyers (OACDL), founded in 1986, is a professional association with more than 500 members in the State of Ohio. OACDL is among the largest professional organizations of criminal practitioners in the State. OACDL is an advocate of progressive criminal laws and policies that are consistent with constitutional principles, limited government intrusion into the lives of Americans, and a free society.

The Office of the Cuyahoga County Public Defender is legal counsel to more than one-third of all indigent persons indicted for felonies in Cuyahoga County. As such the Office is the largest single source of legal representation of criminal defendants in Ohio's largest county.

The instant case is of great importance to the amici curiae as well as to the people of the State of Ohio. This Court's ruling on the issues presented will affect post-conviction litigation in hundreds of cases throughout the state. The members of the OACDL and the attorneys in the Cuyahoga County Public Defender's Office represent numerous individuals who continue to challenge their convictions after a direct appeal, and both amici curiae have a deep interest in the outcome of the instant case.

**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR
GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

Criminal Rule 33 establishes specific requirements and limitations for motions for new trial in criminal cases. The Fifth District, in the instant case, has imposed a substantial new limitation on motions for a new trial that cannot be found in Rule 33. Specifically, it held that a trial court lacks jurisdiction to consider motions for a trial that are filed after a defendant's conviction is affirmed on direct appeal. This sweeping holding, which is inconsistent with the plain language of Rule 33, will have a profound effect on post-conviction litigation in Ohio and renders Ohio's post-conviction process unconstitutional.

Criminal Rule 33 sets forth clear time frames for the filing of new trial motions based upon newly discovered evidence. Such motions must be filed within 120 days of the jury's verdict unless the defendant can establish, by clear and convincing evidence, that "the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely." Crim. R. 33(B). Crim. R. 33 sets no outer limit on the time for filing motions for a new trial based upon newly discovered evidence and clearly contemplates that such motions could be filed after a defendant's direct appeal.

In this case, the Fifth District, relying on *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St. 2d 94, created a categorical rule that trial courts lack jurisdiction to consider any new trial motions filed after the defendants' convictions are affirmed on appeal. This conclusion is not only inconsistent with the criminal rules but also misapplies this Court's decision in *Special Prosecutors*. In *Special Prosecutors*, this Court held that a trial court lacks jurisdiction to grant a motion to withdraw a guilty plea "subsequent to an appeal and an affirmance by the appellate court" because such action would in effect "vacate a judgment which

has been affirmed by the appellate court.” *Id.* Despite some broad language, *Special Prosecutors*’s concern rests with trial court actions which are directly inconsistent with specific appellate court rulings. *State v. Gaston*, Cuyahoga App. No. 82628, 2003 Ohio 5825, ¶¶ 4-5. When a trial court decides a motion for a new trial based on newly discovered evidence that was not available at trial, its decision obviously does not contradict a prior appellate court ruling based on a different record.

The Fifth District’s categorical jurisdictional bar to new trial motions filed after convictions were affirmed on direct appeal also conflicts with the decisions of numerous other appellate districts. The First, Second, Seventh, Eighth, and Tenth Districts have each entertained new trial motions that were filed *after* a defendant’s conviction was affirmed on direct appeal. See *State v. Beavers* (2006), 166 Ohio App. 3d 605, 610-11 (reversing the trial court’s denial of a motion for new trial); *State v. McConnell* (2007), 170 Ohio App. 3d 800 (same); *State v. Gillispie*, Montgomery App. No. 22877 & 22912, 2009 Ohio 3640, ¶¶ 119-138 and 155 (same); *State v. Love*, Hamilton App. C-050131, C-050132, 2006 Ohio 6158, ¶¶ 2 & 43-67 (same); *State v. Green*, Mahoning App. No. 05 MA 116, 2006 Ohio 3097, ¶ 27 (same); *State v. Burke*, Franklin App. No. 09AP-686, 2007 Ohio 1810, ¶¶ 16-41 (same); *State v. Siler*, Cuyahoga App. No. 90865, 2009 Ohio 2874, ¶¶ 44-61 (same). Unlike the Fifth District, these other appellate districts recognized that the resolution of a direct appeal has no bearing on a defendant’s ability to pursue a new trial based on newly discovered evidence.

If the Fifth District’s decision stands and spreads throughout Ohio, it will effectively bar the litigation of post-conviction actual innocence claims in Ohio. No longer could a criminal defendant file a new trial motion based on newly discovered evidence that the victim had recanted, *McConnell*, 170 Ohio App. 3d at 801-802; that someone else committed the crime,

Gillispie, 2009 Ohio 3640, ¶¶ 119-138, that several new witnesses supported the defendant's alibi defense, *Love*, 2006 Ohio 6158, ¶¶ 45-51; that new or recanted eyewitness testimony demonstrates the defendant's innocence, *Green*, 2006 Ohio 3097, at ¶¶ 14-23 and *Burke*, 2007 Ohio 1810, at ¶¶ 16-41, and that exculpatory evidence had not been disclosed, *Siler*, 2009 Ohio 2874, at ¶¶ 44-61. The Fifth District's approach of categorically barring post-appeal new trial motions is unnecessary, unreasonable, and unconstitutional. At least two other districts (

This Court must therefore accept the instant case to clarify the scope of its prior decision in *Special Prosecutors*, to resolve an inter-district conflict, and to ensure that Criminal Rule 33 continues to be a meaningful remedy for those individuals who have been wrongly convicted.

STATEMENT OF THE CASE AND FACTS

Amici defer to the Statement of the Case and Facts set forth in the appellant's memorandum in support of jurisdiction and incorporate that statement herein as if set forth in full.

ARGUMENT

Proposition of Law No. 1

When the issue to be decided by the trial court does not fall within the judgment on appeal, the trial court retains jurisdiction to decide the motion before it. Further, to meet due process, a trial court must be able to consider a motion for a new trial based on newly discovered evidence even after an appeal has been taken. U.S. Const. amend. XIV.

Proposition of Law No. 2

A trial court errs and violates the defendant's right to due process when it denies a motion for a new trial filed beyond the time limit in Ohio R. Crim. P. 33(B) when the defendant has shown that he was unavoidably prevented from discovering the relevant new evidence. U.S. Const. amend. XIV.

After his conviction, Appellant Roland Davis filed a motion for leave to file a new trial motion under Ohio R. Crim. P. 33(B). The basis for a new trial in this case arises from a claim of ineffective assistance of trial counsel. The evidence that compels a new trial was not presented on direct appeal or in Davis's postconviction proceedings. The trial court did not consider the merits of the claim. Instead, the court ruled that Davis did not meet the standard under Crim. R. 33(B) to show that he was unavoidably prevented from discovering the new evidence within the rule's timeframe. On appeal, the Fifth Appellate District, relying on this Court's decision in *Special Prosecutors*, held that the trial court did not even have jurisdiction to rule on Davis's motion. The Fifth District was wrong to expansively interpret *Special Prosecutors* as establishing a jurisdictional bar to post-appeal new trial claims.

In *Special Prosecutors*, this Court addressed the concern that a post-appeal Crim. R. 32.1 motion to withdraw a guilty plea might be used improperly to "affect the decision of [a] reviewing court." 55 Ohio St. 2d at 98. This Court explained that a trial court lacks jurisdiction to grant a motion to withdraw a guilty plea when such action is "inconsistent with the judgment of the Court of Appeals affirming the trial court's conviction premised upon the guilty plea." *Id.* at 97. In *Special Prosecutors*, the court of appeals had specifically rejected a challenge to the voluntariness of the defendant's plea and then the trial court granted the defendant's motion to withdraw the plea. *Id.* at 96. Because the court of appeals' judgment on the issue preceded the trial court's ruling, this Court found that the trial court lacked the authority to withdraw plea as that action was inconsistent with the decision of the court of appeals. *Id.*

Properly understood, the legal doctrine underlying *Special Prosecutors* is a "part of the law of the case doctrine, which bars the relitigation of issues resolved in appellate decisions." *State v. Gaston*, Cuyahoga App. No. 86268, 2003 Ohio 5825, ¶ 5; *see also Hawley v. Ritley*

(1988), 35 Ohio St. 3d 157, 160 (citing *Special Prosecutors* as an example of the law of the case doctrine). In other words, *Special Prosecutors* makes clear that a trial court cannot revisit issues in a post-appeal Rule 32.1 motion to withdraw a plea that were previously addressed on appeal. On the other hand, a trial court retains jurisdiction to rule on post-appeal motions to withdraw a guilty plea if the motion is based on different grounds. See e.g. *State v. Duvall*, Cuyahoga App. No. 80316, 2002 Ohio 4574, ¶¶ 24-29 (affirming denial of motion to withdraw guilty plea) and *State v. Duvall*, Cuyahoga App. No. 83107, 2004 Ohio 640, ¶¶ 4-5 (reversing denial of subsequent motion to withdraw a guilty plea).

The Fifth District disconnected *Special Prosecutors* from its analytical moorings within the law of the case doctrine and improperly applied it to categorically bar post-appeal Crim. R. 33 motions for a new trial. Criminal Rule 33 clearly contemplates post-appeal new trial motions as it permits new trial motions to be filed more than 120 days after the jury's verdict if "the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely." Crim. R. 33(B). Moreover, by its very nature, newly discovered evidence in a new trial motion will never have been addressed in a defendant's direct appeal. The decision of a trial court on a motion for a new trial based on newly discovered evidence will never be inconsistent with the court of appeals' decision which did not address that evidence or the issues implicated by the evidence. The law of the case doctrine underlying this Court's decision in *Special Prosecutors* is therefore inapplicable to new trial motions based on newly discovered evidence.

The Fifth District's decision, categorically barring post-appeal new trial motions, is not only incorrect but also leads to absurd results and imposes an arbitrary penalty for the exercise of one's appellate rights. Under the categorical bar applied by the Fifth District, a criminal defendant who appealed his or her criminal conviction could not later file a motion for a new

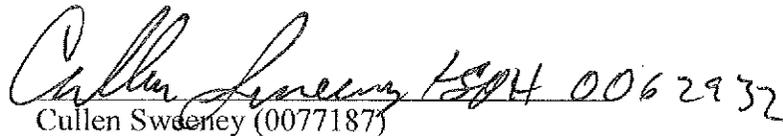
trial if the conviction was affirmed on appeal. However, that very same defendant could file a motion for a new trial as long as he or she did not exercise his or her right to appeal the conviction. In essence, a criminal defendant who exercises his or her right to appeal any issue from his or her trial is, under the Fifth District's decision in the instant, forever barred from filing a new trial motion based on newly discovered evidence. This Court obviously did not intend its decision in *Special Prosecutors* to lead to such absurd results that are inconsistent with due process.

In sum, this Court should reverse the Fifth District's decision categorically barring the defendant's motion for a new trial on jurisdictional grounds based on his prior appeal.

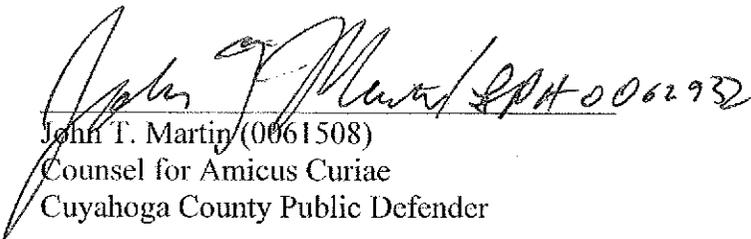
CONCLUSION

Wherefore, amici curiae respectfully ask this Court to accept jurisdiction over this matter as it presents substantial constitutional questions for review and reverse the decision of the court of appeals.

Respectfully submitted,

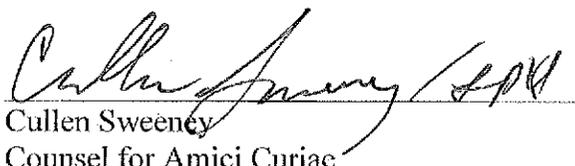
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Certificate of Service

I hereby certify that a true copy of the foregoing Memorandum was forwarded by regular U.S. mail to Kenneth Oswalt, Prosecuting Attorney, Licking County, Admin. Bldg., 20 South Second Street, Newark, Ohio 43055 and to Ruth L. Tkacz, Assistant State Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215, on the 9th day of November, 2009.


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