

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,

Plaintiff-Appellee,

vs.

Roland T. Davis,

Defendant-Appellant.

Case No. 09-2028

[Death Penalty Case.

On Appeal from the Licking

County Court of Common Pleas]

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PLAINTIFF-APPELLEE'S RESPONSE TO MEMORANDUM  
IN SUPPORT OF JURISDICTION

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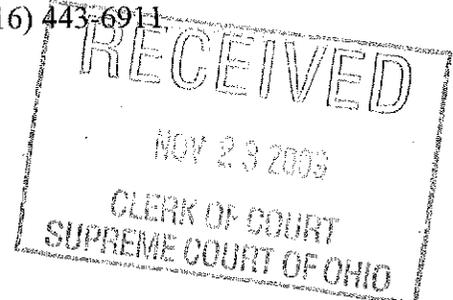
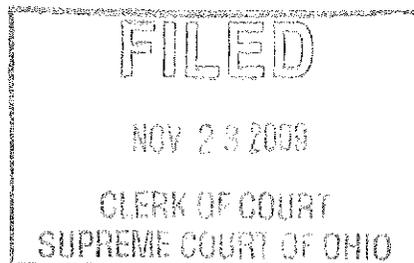
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## WHY THIS CASE DOES NOT MERIT REVIEW

The assertions that the appellant offers as to why this Court should accept review of this case – if read in isolation and accepted as a complete recitation of the facts – sound, at first blush, *interesting*. They are, however, at best an incomplete recitation of the case and, at worst, a horribly distorted version of the truth as Davis is anything but innocent.<sup>1</sup>

Davis seeks review of the court of appeals affirmance of the trial court's denial of his motion for new trial. Never mind that Davis has had a direct appeal raising issues relating to the DNA component of the case in terms of an ineffective assistance of counsel claim. See, State v. Davis (2008), 116 Ohio St.3d 404, ¶¶ 345-46, (Davis I). Likewise, never mind that he also pursued a petition for post-conviction relief wherein he again alleged ineffective assistance of

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<sup>1</sup>Although not technically relevant to the sole issue present here (i.e. the trial court's jurisdiction to entertain a motion for new trial), a brief comment should be made in response to Davis' extended recitation of the contents of the affidavit of his purported "expert", Dr. Laurence Mueller. (See, Memorandum in Support of Jurisdiction, pp. 6-8.) What Davis fails to tell this Court is that other courts around the country, when confronted with *all* sides of the scientific debate, have rejected the argument advanced by Dr. Mueller as a basis for error. See, People v. Nelson (Cal.S.Ct. 2008), 185 P.3d 49, 62 (describing Mueller as "an ecologist and population geneticist who frequently appears as a defense witness ..."); State v. Bartylla (Minn.S.Ct. 2008), 755 N.W.2d 8, (rejecting Mueller's testimony as a basis for error); People v. Deo (Cal. App.), 2008 WL 2404210, p. 11, ("Several courts, however, have rejected [Mueller's] view on the use of the product rule and error rates."); People v. Brownlow (Adams Co. Colo. Dist. Ct., May 18, 2006), Slip Opinion, Case No. 05-CR-1125, (rejecting testimony of Mueller as "incongruous"); and Overstreet v. State (Ind. 2008), 877 N.E.2d 144, 163-64.

Moreover, the supposed "science" behind Mueller's "expert opinion" regarding a "cold-case" hit, has been rejected by other courts. See, for example, United States v. Jenkins (D.C.App. 2005), 887 A.2d 1013; and, People v. Johnson (Cal.App. 2006), 139 Cal.Rptr. 3d 587.

Finally, it should be noted that the sole case where Mueller's testimony was the basis for relief was when the government – inexplicably – did not respond to his affidavit and thus its validity went unchallenged. See, Brown v. Farwell (Nev. D.C. 2006), 2006 WL 6181129, f.n. 3, and related appeal, 525 F.3d 787, 795. The State herein has made it clear that but-for the procedural bars to Davis' motion, had an evidentiary hearing been granted, it was intent upon challenging the scientific underpinnings of Mueller's affidavit. See, State's Response to Defendant's "Motion for Finding Defendant was Unavoidably Prevented from Discovering New Evidence Within 120 Days of Verdict Under Ohio R. Crim. P. 33(B), filed November 26, 2008, f.n. 1.

counsel based upon alleged deficiencies in the way trial counsel addressed the DNA evidence in the case. *State v. Davis* (5<sup>th</sup> Dist), 2008 WL 5381695, 2008-Ohio-6841, ¶¶ 153-67, *juris. denied*, 122 Ohio St.3d 1409, (*Davis II*). Accordingly, Davis wants to use his Motion for Leave to File a Motion for New Trial as his THIRD effort to attack his trial counsel's performance related to the DNA evidence in this case.

Moreover, when the State realized that Davis' counsel were intent on endlessly litigating the issue of the possibility of Davis' deceased brother, Randy Davis, possibly accounting for the DNA at the crime scene,<sup>2</sup> the Licking County Prosecutor's Office, in hopes that there would be some finality to this issue,<sup>3</sup> secured a DNA standard for Randy Davis<sup>4</sup> and had it analyzed by the Bureau of Criminal Investigation and Identification (BCI&I)<sup>5</sup> who positively *excluded* Randy Davis as the contributor of the crime scene samples. See, "State's *Supplemental* Response to Defendant's 'Motion for Finding Defendant was Unavoidably Prevented from Discovering New Evidence Within 120 Days of Verdict Under Ohio R. Crim. P. 33(B)'" , filed January 20, 2009.

Accordingly, THREE separate DNA laboratories *excluded* Randy Davis as a suspect – the Columbus Police Department Lab (CPD), Laboratory Corporation of America (LabCorp), and BCI&I.<sup>6</sup> Nonetheless, Davis' counsel are apparently intent upon endless litigation over what

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<sup>2</sup> This "suggestion" came up for the first time very late in trial.

<sup>3</sup> Which, obviously, did not turn out to be the case, and hence this appeal.

<sup>4</sup> Randy Davis was killed prior to trial in an automobile accident. As part of standard protocol for the Licking County Coroner's Office, they preserve a DNA standard for all people upon whom an autopsy is performed. It was this standard that was used.

<sup>5</sup> A laboratory, incidentally, that was never involved in the DNA testing in the original case.

<sup>6</sup> CPD and LabCorp excluded Randy Davis based upon the fact that he and Davis were not identical siblings and the astronomical statistic findings had to exclude him. BCI&I, again at the request of the Licking County Prosecutor, went the proverbial "extra mile" and excluded Randy Davis by actually testing his DNA.

is undisputed scientific evidence excluding Randy Davis.<sup>7</sup>

Thus, Davis' effort to advertise his case as one dealing with "actual innocence" is, graciously speaking, ludicrous. Similarly, Davis' effort to advertise this case as one having some untold consequences for some unspecified host of other defendants who seek to pursue a motion for new trial is equally meritless. As discussed *infra*, and contrary to Davis' claims, there is no conflict of cases decided by the various courts of appeals that need resolution by this Court's intervention. Simply put, this appeal is nothing short of a delay for delay's sake.

### **STATEMENT OF CASE AND FACTS**

In the interests of brevity, and other than those facts noted above, the State of Ohio will reserve for the "Argument" section of this pleading those additional or different facts that are relevant to the propositions of law advanced by the appellant.

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<sup>7</sup> The so-called "expert" Davis now hangs his hopes on that supposedly Davis points to as disputing the State's DNA evidence has never tested ANY evidence in this case, and indeed, as noted *supra* at f.n. 1, has questionable "scientific" theories in any event.

## ARGUMENT

### Proposition of Law No. 1

[In response to Davis' First Proposition of Law]

**A TRIAL COURT HAS NO JURISDICTION TO HEAR A MOTION FOR NEW TRIAL AFTER THE CONVICTION HAS BEEN AFFIRMED ON APPEAL.** [*State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 94, followed.]

Once an appellate court affirms a conviction, a trial court is divested of jurisdiction to grant any motion that would be inconsistent with the appellate court's affirmance of that conviction. See, generally, *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 94. Indeed, once an appellate court has affirmed a conviction, a trial court's grant of a new trial is absolutely "inconsistent with the judgment" of that superior court as it would entirely "undo" the superior court's affirmance of the conviction. Indeed it would make the appellate court's affirmance of the conviction a totally vain act.

The Court of Appeals in this case, as have other courts of appeals around the state, simply followed the rule of *Special Prosecutors* which holds, essentially, that various rules of criminal procedure that allow for a trial-level attack on a criminal conviction are nonetheless subservient to the general rule that no procedural rule can "confer upon the trial court the power to vacate a judgment which has been affirmed by the appellate court". *Special Prosecutors*, 55 Ohio St.2d at 98.<sup>8</sup>

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<sup>8</sup>As this Court observed in *Special Prosecutors*: "Neither the Ohio Rules of Appellate Procedure nor the Ohio Rules of Criminal Procedure are explicit as to what effect the taking of an appeal has on the jurisdiction of the lower court. The general rule of law is that the trial court loses jurisdiction to take action in a cause after an appeal has been taken and decided. *Id.* at 96-97.

Nonetheless Davis, essentially, claims an absolute right to litigate a motion for new trial four years after his conviction *and* after his case has been reviewed by state superior courts on DNA-related issues on two prior occasions. See, Davis I, and Davis II. He has cited to NO case that supports his position, and instead cites to two cases – one whose holding was abrogated by a subsequent holding by this Court, and one that never once considered the jurisdictional bar occasioned by Special Prosecutors.

Davis recognizes that several courts of appeals have decided cases that are in accord with what the Fifth District did in his case. See, Memorandum in Support of Jurisdiction, p. 10, citing, State v. Nicholson (8<sup>th</sup> Dist.), 2009 WL 3043759, 2009-Ohio-5004; State v. Hill (6<sup>th</sup> Dist.), 2009 WL 3133180, 2009-Ohio-5187; State v. Parks (7<sup>th</sup> Dist.), 2009 WL 2929242, 2009-Ohio-4817, and, State v. Fields (1<sup>st</sup> Dist.), 2009 WL 2632175, 2009-Ohio-4187. Instead, Davis hangs his proverbial hat on citation to two cases, Day v. McDonald (1990), 67 Ohio App.3d 240, and State v. Lee (10<sup>th</sup> Dist.), 2005 WL 3220245, 2005-Ohio-6374, that he alleges have conflicting holdings. He is wrong.

Day provides Davis with no support whatsoever. Day's relevant holding was abrogated by this Court in Howard v. Catholic Social Services of Cuyahoga Co., Inc. (1994), 70 Ohio St.3d 141, 147. In Howard this Court expressly held that post-appeal motions that attack a judgment that has been affirmed on appeal may not be entertained by the trial court due to a lack of jurisdiction.

Similarly, in Lee, the court had no occasion to discuss the holding of Special Prosecutors as, apparently, neither party nor the court itself, raised the issue. The court in Lee was concerned solely with the language of R.C. § 2953.21(J) that provided that the post-conviction relief statutes provided the “exclusive remedy by which a person may bring a collateral challenge to

the validity of a conviction or sentence in a criminal case”. *Id. at ¶ 11*. Thus, the court in Lee was never confronted with the issue present in this case, namely: Does a trial court maintain jurisdiction to entertain a motion for new trial under Crim.R. 33 after an affirmance of the conviction in light of the holding of Special Prosecutors?

Try as he might, Davis is unable to show any conflict among the lower courts that is in need of any clarification by this Court.<sup>9</sup> Accordingly, jurisdiction should be denied. Indeed, Davis has failed to answer a fundamental question, namely: If he could not pursue a motion for new trial while an appeal is pending due to a lack of jurisdiction, why would he be able to automatically pursue one after he has lost that appeal? Said differently, if a motion for new trial – regardless of merit, and regardless of the issues involved – could not be pursued *while* an appeal is pending; why could that same motion be automatically pursued *after* the appellate court has rendered an adverse judgment?

The recent filing by Amici Curiae Ohio Association of Criminal Association of Criminal Defense Lawyers and the Cuyahoga County Public Defender, changes nothing. First it would appear that Amici Curiae are either unaware – or don’t care – that this is a case where the State went out of it’s way to do post-trial DNA testing to totally dispel the notion that Davis’ brother was a possible suspect. For if they knew – or cared – they might have mentioned something about it their memorandum.

Second, Amici Curiae citation to several cases that address new trial motions (see Amici Curiae Memorandum in Support of Jurisdiction, pp. 3-4) is flawed, for like Davis’ own cited cases, NOT ONE of those cases even discuss the holding of Special Prosecutors.

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<sup>9</sup> Which explains why there has been no motion to certify a conflict.

Davis (and Amici Curiae) operate upon an invalid premise in alleging that somehow a criminal defendant's Due Process rights would be violated by not allowing them to file motions for new trial. The invalid premise that Davis and Amici Curiae rely upon is some notion that there is some *constitutional* due process *right* to file a motion for new trial. Such is not the case.

The United State's Supreme Court has never held that the Due Process clause requires that a state permit a criminal defendant to file a motion for new trial (let alone after an appeal, as well as after a post-conviction petition). Cf. *United States v. MacCollom* (1976), 426 U.S. 317, 323, (Plurality opinion.) (Due process clause "certainly does not establish any right to collaterally attack a final judgment of conviction."). *Pennsylvania v. Finley* (1987), 481 U.S. 551, 557, (States have no obligation to provide post-conviction relief.) Thus, it is, at best, questionable whether the Due Process Clause grants any criminal defendant the *right* to file a motion for new trial. Given the fact that Davis has been permitted to pursue a direct appeal, as well as a petition for post-conviction relief and related appeal, it is hard to imagine how the "fundamental fairness" requirement of the Due Process clause is undermined by not letting Davis have a third bite at the proverbial apple. See also, *United States v. Johnson* (Kan.D.C.), 995 F.Supp. 1259, 1263, ("[T]here is no constitutional right to assert a motion for new trial."); and *United States v. Johnson* (Kan.D.C.), 992 F.Supp. 1257, 1262, (same).

Moreover if there were some *constitutional right* to file a motion for new trial at any time a defendant wished to do so, then Crim.R. 33 could not validly have a time limit for filing such a motion including within it at all. But clearly it can. See, for example, *Francis v. Henderson* (1976), 425 U.S. 536, 541, ("It is beyond question that under the Due Process Clause of the Fourteenth Amendment [a state] may attach reasonable time limitations to the assertion of federal constitutional rights."), quoting, *Michel v. Louisiana* (1955), 350 U.S. 91, 97.

If a **formal rule of procedure** (like Crim.R. 33) could validly place time limits upon the filing of motions for new trial, why wouldn't a **rule of practice** (like that of *Special Prosecutors*) which is built upon the fundamental acknowledgment that lower courts must respect the decisions, and jurisdiction, of superior courts, be equally valid? Clearly they are and should be. This, in essence is all that the Fifth District decided.

Davis' first proposition of law should be rejected for review. Davis should not get a third (lest that be lost, THIRD) round of trial court proceedings just because he wants to.

**Proposition of Law No. II**

[In response to Davis' Second Proposition of Law]

**THE SUPREME COURT WILL NOT ENTERTAIN AN ISSUE DECIDED BY A TRIAL COURT, BUT NEVER PASSED UPON BY THE COURT OF APPEALS BECAUSE THAT COURT DECIDED THE MATTER ON JURISDICTIONAL GROUND, RENDERING THE NEED TO REVIEW THE TRIAL COURT'S REASONING MOOT. [*Thirty-Four Corp. v. Sixty-Seven Corp.* (1984), 15 Ohio St.3d 350, 352, followed.]**

In his second proposition of law Davis attacks the trial court's decision to decline to grant him leave to file a motion for new trial. However, the trial courts' reasoning was never put to the crucible of appellate review by the court of appeals because that court decided that the trial court had no jurisdiction. See, *State v. Davis* (5<sup>th</sup> Dist.), 2009 WL 3119881, 2009-Ohio-5175, (*Davis III*), ¶¶ 8-9.

Generally, the Supreme Court will not pass upon any question unless the record demonstrates that the question was presented to *and ruled upon* by the lower court. *Winslow v. Ohio Bus Lines Co.* (1947), 148 Ohio St. 101, 117, ("[I]t is the practice of this court, before reversing or modifying the judgment of the Court of Appeals, to examine appellee's assignments

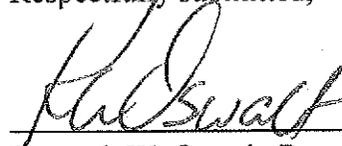
of error which were pressed in the Court of Appeals *and passed upon by that court ...*”]. (Emphasis added.). See also, *Thirty-Four Corp. v. Sixty-Seven Corp.* (1984), 15 Ohio St.3d 350, 352, (“[I]ssue should not be reviewed by this court since the same was not considered or decided by the court of appeals.”)

For this reason alone, Davis’ second proposition of law should be rejected for review.

**CONCLUSION**

For all of the above reasons, the appellate court’s well-reasoned decision to deny the Davis’ efforts to litigate a post-direct appeal motion for new trial was proper. Accordingly all of the current propositions of law should be rejected as a basis for jurisdiction.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing has been sent by regular U.S. Mail this 20<sup>th</sup> day of November, to counsel for appellant and counsel for Amici Curiae, as noted on the cover page hereto.



\_\_\_\_\_  
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