

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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

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**Appellant Roland Davis's Merit Brief**

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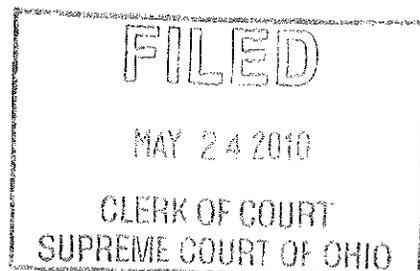
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## STATEMENT OF FACTS

On July 11, 2000, Elizabeth Sheeler was stabbed in her Newark, Ohio, apartment. In 2004, Appellant Roland Davis became the focus of the police investigation as the result of DNA testing conducted on the blood-stained fitted sheet from Sheeler's bedroom. According to the State's expert witness, Megan Clement, blood stains matched Davis's DNA profile. Clement's trial testimony indicated that the statistical frequency of that DNA's presence in the Caucasian population is one in 97.1 quadrillion. (Transcript Vol. VII, p. 1701.) Defense counsel did not challenge the State's DNA evidence with expert testimony.

The jury found Davis guilty of aggravated murder with three capital specifications. Davis was also convicted of aggravated burglary, aggravated robbery, and kidnapping. After the penalty phase, Davis was sentenced to death. This Court affirmed the convictions and death sentence on direct appeal. State v. Davis, 116 Ohio St. 3d 404, 2008-Ohio-2. Davis sought postconviction relief, but the trial court denied his petition. The court of appeals affirmed that decision. State v. Davis, 5th Dist. No. 08-CA-16, 2008-Ohio-6841. This Court did not grant jurisdiction to hear an appeal of Davis's postconviction petition. State v. Davis, 122 Ohio St. 3d 1409, 2009-Ohio-2751.

On October 31, 2008, Davis moved the trial court for leave to file a new-trial motion. He argued under Ohio R. Crim. P. 33(B) that he was unavoidably prevented from discovering his new evidence within 120 days of the jury verdict. (Docket 10/31/2008.) Davis also proffered his substantive new-trial motion with requests for discovery and an evidentiary hearing. He asserted that his defense attorneys were ineffective because they did not adequately contest the State's DNA evidence at trial. Davis supported his motion with an affidavit from Dr. Laurence Mueller. See Crim. R. 33(A)(6). Dr. Mueller is a qualified expert in DNA science. (See New Trial

Motion, Ex. 1 ¶1, 2.) He concluded that the State's DNA evidence is questionable, overstated, and based on a flawed statistical database.

On January 30, 2009, the trial court denied Davis's motion for leave to file a motion for a new trial. The trial court did not reach the merits of Davis's claim. Rather, the court found that Davis was not unavoidably prevented from discovering his new evidence within the 120-day limit of Crim. R. 33(B). (Court of Common Pleas, Judgment Entry, Jan. 30, 2009, p. 4.)

Davis appealed that ruling to the Fifth Appellate District. The sole issue on review was whether Davis satisfied the requirements of Crim. R. 33(B) when he sought leave from the trial court to file his new-trial motion. The Fifth District overruled the assignment of error, finding that the trial court did not have jurisdiction to consider Davis's motion. This Court granted jurisdiction to hear this appeal. State v. Davis, 124 Ohio St. 3d 1442, 2010-Ohio-188. Davis now asks this Court to reverse the decision of the court of appeals.

## ARGUMENT

### PROPOSITION OF LAW

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.

#### **Standard of Review**

The court of appeals denied Appellant Roland Davis's appeal on procedural/jurisdictional grounds. Thus, the only question before this Court is a legal one. This Court's review of questions of law is de novo. Portage County Bd. of Comm'rs v. City of Akron, 109 Ohio St. 3d 106, 124, 2006-Ohio-954, at ¶90.

#### **A. Introduction**

By its existence, Ohio R. Criminal P. 33(B) recognizes that new evidence may be discovered after trial that affects the defendant's conviction and that this evidence should have a chance to be heard by the trial court. The rule gives convicted defendants a remedy in the trial court where no other forum is available. Roland Davis is a death-row inmate who discovered new evidence that affects his capital conviction and who sought to bring his evidence to the trial court.

On appeal of the trial court's denial of Davis's motion for leave to file his new-trial motion, the Fifth Appellate District found that the trial court did not have jurisdiction to rule on the motion because Davis had previously perfected a direct appeal to this Court. State v. Davis, 5th Dist. No. 09-CA-0019, 2009-Ohio-5175, at ¶12. The evidence that compels a new trial was not presented in Davis's direct appeal or R.C. 2953.21 postconviction proceedings.

The court of appeals erred when it relied on a broad construction of this Court’s decision in State ex rel. Special Prosecutors v. Judges, Court of Common Pleas (1978), 55 Ohio St. 2d 94, to affirm the denial of Davis’s new-trial motion. In effect, the appellate court’s decision extends the reach of Special Prosecutors to prohibit all post-trial motions, including cases in which a capital defendant demonstrates actual innocence. This Court could not have intended such consequences to ensue from its opinion. Instead, a trial court may act on a new-trial motion because it “does retain jurisdiction over issues not inconsistent with that of the appellate court to review, affirm, modify or reverse the appealed judgment . . . .” Id. at 97 (citations omitted).

**B. Ohio R. Crim. P. 33(B) gives a trial court jurisdiction to consider a motion for a new trial after the case has been appealed.**

Ohio Rule of Criminal Procedure 33(B) confers jurisdiction on the trial court to decide a motion for a new trial. The rule expects that a new-trial motion may be filed after the case has been appealed. By allowing the defendant to argue that he was unavoidably prevented from discovering the supporting evidence within the rule’s 120-day limit, the rule anticipates that the trial court may hear the motion even after the verdict has been appealed, since a notice of appeal to this Court must be filed within 45 days of the judgment being appealed. S. Ct. Prac. R. 2.2(A)(1)(a) & 19.2(A)(1). Had Davis waited to file his notice of appeal while investigating evidence to warrant a new trial, he would have missed the direct-appeal filing deadline set by this Court’s Rules of Practice and risked defaulting his claims.<sup>1</sup> See S. Ct. Prac. R. 19.2(A).

Caselaw that holds that the trial court loses jurisdiction, not merely after an appellate judgment is rendered, but at “the moment the direct appeal is filed,” leaves defendants with a

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<sup>1</sup> Under S. Ct. Prac. R. 19.2(A)(2), “a motion for a new trial on the ground of newly discovered evidence extends the time for filing the notice of appeal only if the motion is made before the expiration of the time for filing a motion for a new trial on grounds other than newly discovered evidence,” which, under Ohio R. Crim. P. 33(B), is 14 days after the verdict.

stark choice between pursuing a direct appeal or filing a post-trial motion. State v. Parks, 7th Dist. No. 08 CA 857, 2009-Ohio-4817, at ¶7. This decision conflicts with the rules of procedure. There is nothing in Crim. R. 33 that requires a defendant to choose between a direct appeal and a new-trial motion. A decision like the one rendered in Parks—and Davis’s case—essentially repeals Crim. R. 33(B).

There is also statutory support for finding that trial courts have authority to hear post-trial motions. The trial court regains jurisdiction under R.C. 2505.39 after a judgment is appealed:

A court that reverses or affirms a final order, judgment, or decree of a lower court upon appeal on questions of law, shall not issue execution, but shall send a special mandate to the lower court for execution or further proceedings.

On March 12, 2008, this Court sent the mandate to the Clerk of the Licking County Common Pleas Court. Thus, the case returned to the trial court, which then had jurisdiction. Having regained jurisdiction, the trial court could take action on Davis’s new-trial motion, which was filed on October 31, 2008. By ruling on Davis’s post-trial motion, the trial court was not disregarding the mandate of this Court in a prior appeal because the precise issue was not raised on appeal. See State ex rel. Cordray v. Marshall, 123 Ohio St. 3d 229, 2009-Ohio-4986, at ¶34, 36.

When this Court stated that “the trial court does retain jurisdiction over issues not inconsistent with that of the appellate court to review, affirm, modify or reverse the appealed judgment,” it recognized that a trial court may consider post-trial motions that do not re-litigate settled issues in the case. Special Prosecutors, 55 Ohio St. 2d at 97 (citations omitted). Davis’s post-trial motion does not involve settled issues. But see State ex rel. Neff v. Corrigan (1996), 75 Ohio St. 3d 12, 16, 1996-Ohio-231 (“even if the attorney fees matter had been raised in the

prior appeals, once those appeals were dismissed, Judge Corrigan possessed jurisdiction to consider Porter's motion").

**C. The holding of Special Prosecutors is limited to issues that were raised, or could have been raised, on direct appeal.**

The court of appeals applied the "same rationale" of Special Prosecutors to Davis's case. Davis, 2009-Ohio-5175 at ¶12. That rationale, however, is misplaced here. Unlike the situation in Special Prosecutors, there is nothing in the judgment of this Court that prevents the trial court from considering Davis's post-trial motion.

The issue in Special Prosecutors involved the defendant's motion to withdraw his guilty plea, which had already been raised as an issue on appeal. The court of appeals had addressed the voluntariness of the defendant's guilty plea before the trial court decided his motion to withdraw. In a case where the court of appeals' judgment preceded the trial court's action on the same issue, this Court found that "the trial court's granting of the motion to withdraw the guilty plea and the order to proceed with a new trial were inconsistent with the judgment of the Court of Appeals affirming the trial court's conviction premised upon the guilty plea." Special Prosecutors, 55 Ohio St. 2d at 97. The judgment is the controlling factor.

This Court addressed a similar issue in Marshall, 2009-Ohio-4986. In that case, the defendant, Adrian Rawlins, was convicted of murder. He appealed his conviction and raised a claim that the trial court erred by failing to give a jury instruction on lesser-included offenses. After the court of appeals upheld Rawlins's conviction, he filed a motion for relief from judgment in which he raised the same, settled instructional issue. Id. at ¶4. Citing the law-of-the-case doctrine, this Court held that the trial court did not have jurisdiction to grant a post-trial motion on the same issue that had already been decided in the direct appeal. Id. at ¶27, 28, 42.

The doctrine of res judicata also bars litigating issues that have been or could have been previously litigated. State v. Perry (1967), 10 Ohio St. 2d 175, 180.

This is where the line for filing post-trial motions should be drawn: when a specific issue has already been raised and decided on appeal. To avoid unjust results, this Court should limit the holding of Special Prosecutors to the circumstances in cases like Marshall, where a lower court proceeds contrary to the mandate of the superior court.

Unlike Rawlins, Davis's new-trial motion is not based on a claim that had been previously rejected by the reviewing court. When, on direct appeal, this Court affirmed Davis's conviction and death sentence, it did so on issues other than that raised in his new-trial motion. After appeal, Davis discovered new evidence that challenges his conviction and death sentence. He should be able to avail himself of the established procedural route to raise his claim. But according to the Fifth District's opinion, what Crim. R. 33(B) gives, Special Prosecutors takes away. The Fifth District's opinion forces a defendant like Davis to choose between a direct appeal of right and a new-trial motion under Crim. R. 33(B). See S. Ct. Prac. R. 19.2(A)(2); App. R. 4(B)(3). This unreasonable choice undermines the procedural rule.

**D. When, as in this case, the new-trial issue was not raised on direct appeal, the trial court's consideration of the post-trial motion is not inconsistent with the appellate court's judgment.**

The lower court may act on post-trial motions when the precise issue has not been raised and decided on appeal. There is no conflict between a trial court's actions and an appellate court's judgment when the issue to be decided by the trial court is not within the "compass of the judgment." Special Prosecutors, 55 Ohio St. 2d at 97.

The precise issue in Davis's new-trial motion involves defense counsel's ineffective assistance for failing to present a DNA expert at trial to refute the testimony of the State's expert

witness. This issue could not have been raised on direct appeal and decided by this Court because it required evidence outside the record; that is, the affidavit of a qualified DNA expert. This Court could not have considered the affidavit. State v. Ishmail (1978), 54 Ohio St. 2d 402, 406 (on questions of law, a reviewing court is limited to the trial-court record). This Court's judgment in the direct appeal does not encompass whether defense counsel were ineffective for failing to challenge the State's DNA evidence with the trial testimony of a DNA expert, because that issue was not raised in Davis's merit brief.<sup>2</sup> See State v. Davis, 116 Ohio St. 3d 404, 2008-Ohio-2.

Still, the Fifth District found that the trial court's action on a new-trial motion would be inconsistent with this Court's judgment. Davis, 2009-Ohio-5175 at ¶12. The Fifth District did not identify the reasons why it would be inconsistent. The court of appeals did not—indeed, could not—cite to a holding from this Court in the direct appeal that addressed the issue presented in the new-trial motion. It remains that the judgment of this Court in Davis's direct appeal does not preclude the trial court from considering a new-trial motion based on newly discovered evidence obtained from a qualified DNA expert. This conclusion is supported by decisions of lower courts.

For example, in State v. Griffith, 11th Dist. No. 2005-T-0038, 2006-Ohio-2935, the defendant filed a motion for a new trial two years after his direct appeal had been decided. In his appeal, he had challenged only his conviction. Id. at ¶2. In a motion for a new trial, he challenged his sentence. The trial court considered the motion but denied it. The issue raised in

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<sup>2</sup> The only issues raised on direct appeal concerning defense counsel's ineffectiveness relevant to the State's DNA evidence involved counsel stipulating to the admissibility of DNA evidence at a pretrial hearing (Appellant's Merit Brief, Case No. 2005-1656, filed 7/14/06, Prop. of Law XIII, p. 184), and counsel's failure to zealously object to the exclusion of an exhibit prepared by the State's expert (id. at p. 192).

the new-trial motion did not prevent the trial court from considering the motion. Instead, the court of appeals found that Griffith did not meet his burden of explaining why he was unavoidably prevented from discovering the new evidence within the rule's time limit. *Id.* at ¶18.

Also, in *State v. Lee*, 10th Dist. No. 05AP-229, 2005-Ohio-6374, ¶12–13, the court of appeals perceived no jurisdictional bar to the trial court ruling on a Crim. R. 33(B) motion for a new trial that was filed after the case had been appealed. In that case, the issues raised in the appellant's new-trial motion exceeded those raised on direct appeal. *Id.* at ¶16. Likewise, the issue raised in Davis's new-trial motion was not encompassed in his direct appeal. Therefore any decision on the merits of Davis's new-trial motion will not upend this Court's judgment in the direct appeal.

**E. Limiting the holding of Special Prosecutors will still adequately protect the rule of finality.**

The holding of Special Prosecutors is complementary to the law-of-the-case doctrine. The doctrine “provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings . . . .” *Nolan v. Nolan* (1984), 11 Ohio St. 3d 1, 3 (citation omitted). Ohio Rule of Criminal Procedure 33 and other post-trial motions do not thwart what the law-of-the-case doctrine and Special Prosecutors seek to achieve, e.g., consistency in the results of a case and a cap on endless litigation. Post-trial motions permitted by the Ohio Rules of criminal and civil procedure provide a safety net for defendants who have reasonable grounds to challenge their convictions and sentences. The trial judge acts as the gatekeeper for these motions and, using discretion, can limit the litigation to only viable claims.

Although society has an interest in judicial economy, this Court has cautioned that the law-of-the-case doctrine should not be applied in a way that would produce an unjust result. *Id.* The Fifth District's opinion achieves an unjust result, however, by its wholesale exclusion of post-trial motions when an appeal has been perfected.

**F. To comport with due process, a trial court must be able to consider a motion for a new trial, particularly when a claim of actual innocence is raised.**

A defendant's liberty should not be denied on procedural grounds. Ohio's Rules of Criminal Procedure provide a defendant who is convicted of a criminal offense with the means to bring new evidence before the trial court. *See* Crim. R. 33. In a capital case, the ability to present new evidence after conviction may mean the difference between life and death. A conflict between the procedural rule and the caselaw should be resolved in favor of the established rule of procedure. Any other result would deprive a defendant of due process under the Fourteenth Amendment to the United States Constitution.

Davis presented the trial court with new evidence that undermines his conviction. According to the court of appeals, the trial court had no jurisdiction even to hear that evidence. *Davis*, 2009-Ohio-5175 at ¶12. For capital defendants like Davis, this procedural roadblock closes the path to possible exoneration or a life sentence. If this Court affirms the Fifth District's decision, it will deprive all criminal defendants of a remedy for wrongful convictions and unconstitutional sentences.

Ohio has adopted a procedural rule that allows convicted defendants to seek a new trial through the discovery of new evidence. "[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey* (1985), 469 U.S. 387, 401. This is all the more so when a defendant's life interest is at stake.

See Ohio Adult Parole Authority v. Woodard (1998), 523 U.S. 272. Death is different; for that reason more process is due, not less. See Lockett v. Ohio (1978), 438 U.S. 586, 605; Woodson v. North Carolina (1976), 428 U.S. 280, 304–05 (plurality opinion). The court of appeals denied Davis due process when it ruled that he could not pursue a motion for a new trial on matters that were not previously raised in his direct appeal.

### **CONCLUSION**

Ohio Rule of Criminal Procedure 33(B) allows Appellant Davis to seek leave to file a motion for a new trial in the Court of Common Pleas. The trial court had jurisdiction to consider the motion because Davis had not raised the issue in his direct appeal; therefore the court's decision could not be inconsistent with the judgment of this Court.

This Court should reverse the decision of the Fifth Appellant District and remand this case to the court of appeals for its further consideration of the trial court's January 30, 2009 Judgment Entry denying Davis's motion for leave to file his new-trial motion.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Merit Brief was forwarded by regular U.S. mail to Kenneth W. Oswalt, Prosecuting Attorney, Licking County, 20 South Second Street, Newark, Ohio 43055, on the 24<sup>th</sup> day of May, 2010.

  
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Ruth L. Tkacz  
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# APPENDIX

IN THE SUPREME COURT OF OHIO

State Of Ohio, : Case No. 09-2028  
Appellee, :  
-vs- : Appeal taken from the Court of Appeals  
Roland T. Davis, : of Licking County, Fifth Appellate  
Appellant. : District, Case No. 2009-CA-00019  
: **Death Penalty Case**

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Appellant Roland Davis's Notice of Appeal

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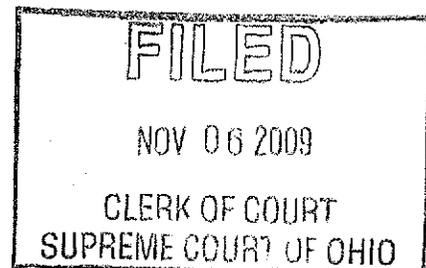
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IN THE SUPREME COURT OF OHIO

State Of Ohio, : Case No.  
Appellee, :  
-vs- : Appeal taken from the Court of Appeals  
Roland T. Davis, : of Licking County, Fifth Appellate  
Appellant. : District, Case No. 2009-CA-0019  
: **Death Penalty Case**

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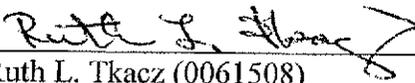
**Appellant Roland Davis's Notice of Appeal**

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Appellant Roland Davis gives notice of appeal to the Supreme Court of Ohio from the judgment entry of the Fifth Appellate District, Licking County, entered on September 24, 2009. Appellant claims an appeal of right as this case raises substantial constitutional questions and is one of public or great general interest. See Sup. Ct. R. Prac. II, Sections 1(A)(2) and (3).

Respectfully submitted,

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**Certificate of Service**

I hereby certify that a true copy of the foregoing Notice of Appeal was forwarded by regular U.S. mail to Kenneth Oswalt, Prosecuting Attorney, Licking County, Admin. Bldg., 20 South Second Street, Newark, Ohio 43055 on the 6<sup>th</sup> day of November, 2009.

  
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Ruth L. Tkacz  
Counsel for Appellant

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

FILED

2009 SEP 24 P 2:08

STATE OF OHIO

Plaintiff-Appellee

-vs-

ROLAND DAVIS

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J. CLERK OF COURTS  
OF APPEALS  
Hon. William B. Hoffman, LICKING COUNTY OH  
Hon. Patricia A. Delaney, JGARY R. WALTERS

Case No. 09-CA-0019

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,  
Licking County, Ohio, Case No. 04-CR-464

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

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For Defendant-Appellant

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*Hoffman, J.*

{¶1} Defendant-appellant Roland Davis appeals the January 30, 2009 Judgment Entry entered by the Licking County Court of Common Pleas, denying his motion for leave to file a motion for a new trial upon finding he was not unavoidably prevented from discovering new evidence. Plaintiff-appellee is the State of Ohio.

#### STATEMENT OF THE CASE<sup>1</sup>

{¶2} On July 8, 2005, a Licking County jury found Appellant guilty of aggravated murder, kidnapping, aggravated robbery, and aggravated burglary. Following the mitigation phase of the trial, the jury recommended Appellant be sentenced to death. The charges arose from the July, 2000 death of 86 year old Elizabeth Sheeler by an intruder into her apartment. The murder went unsolved for almost four years and became a cold case. In 2004, DNA testing identified Appellant as the murderer. Appellant appealed to the Ohio Supreme Court, which upheld his convictions and the imposition of the death sentence. *State v. Davis*, supra. Appellant filed a petition for certiorari with the United States Supreme Court, which was denied on October 6, 2008.

{¶3} Appellant subsequently filed a petition for post-conviction relief. The State filed its answer to the petition as well as a motion for summary judgment. Appellant filed a response to the State's motion to dismiss and filed a motion for leave to respond to the State's motion for summary judgment. Thereafter, Appellant filed a number of other motions, which the State opposed. The State filed a supplemental motion for

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<sup>1</sup> A thorough rendition of the facts underlying Appellant's convictions and sentence can be found in *State v. Davis*, 116 Ohio St.3d. 404, 2008-Ohio-2.

summary judgment on November 8, 2007. Appellant mailed his response to the supplemental summary judgment motion, however, the trial court issued its findings of fact and conclusions of law on that same day. The trial court issued its Final Judgment Entry, granting the State's Motion for Summary Judgment on January 14, 2008. Appellant appealed to this Court, which affirmed. *State v. Davis*, Licking App. No. 2008-CA-16, 2008-Ohio-6841.

{14} On October 31, 2008, Appellant filed a motion requesting the trial court to find he was unavoidably prevented from discovering new evidence within 180 days of verdict under Ohio Crim.R. 33(B) and, if so found, leave to file a motion for a new trial. Therein, Appellant explained his newly discovered evidence was the affidavit of DNA expert, Dr. Laurence Mueller, a professor in the Ecology and Evolutionary Biology Department at the University of California, Irvine. Appellant asserted Dr. Mueller's affidavit undermined the State's DNA evidence which was essential to its case against Appellant. Appellant concluded because his trial counsel was ineffective for failing to properly challenge the State's DNA evidence, a miscarriage of justice resulted and he was entitled to a merit review of his motion for new trial. The State responded, arguing Appellant's motion was defective both procedurally and substantively. Specifically, the State maintained the trial court lacked jurisdiction to entertain the motion due to a pending appeal of the trial court's denial of his petition for post-conviction relief; the motion for new trial was barred by the doctrine of res judicata; and the evidentiary material offered by Appellant in support of his motion was not "newly discovered".

{15} Via Judgment Entry filed January 2, 2009, the trial court denied Appellant's request to find he was unavoidably prevented from discovering new

evidence. The trial court found Appellant failed to demonstrate why he was unable to obtain the "newly discovered" evidence within the timeframe prescribed in Crim.R. 33(B). The trial court also found Appellant failed to demonstrate, but for trial error, to wit: the unavailability of Dr. Mueller's testimony, no reasonable factfinder would have found him guilty.

{¶16} It is from this judgment entry Appellant appeals, raising as his sole assignment of error:

{¶17} "I. THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS WHEN IT DENIED HIS REQUEST FOR LEAVE TO FILE A NEW TRIAL MOTION. U.S. CONST. AMEND. XIV."

{¶18} Herein, Appellant maintains the trial court erred in denying his request for leave to file a motion for new trial as the trial court's finding he was not unavoidably delayed in discovering new evidence was erroneous.

{¶19} We begin by addressing the threshold issue of whether the trial court had jurisdiction to act on Appellant's motion for new trial.

{¶110} In *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 94, the Supreme Court of Ohio granted the relator's request for a writ of prohibition to prevent the trial court from granting a motion to withdraw a guilty plea and conducting a new trial. The Court held the trial court lost jurisdiction to grant a motion to withdraw a guilty plea and grant a new trial when the defendant lost the appeal of his conviction based upon a guilty plea. *Id.* at 97.

{¶11} The Ohio Supreme Court further held the trial court did not regain jurisdiction subsequent to the court of appeals' decision affirming the defendant's conviction. *Id.* The Court reasoned allowing the trial court to consider a Crim.R. 32.1 motion to withdraw a guilty plea subsequent to an appeal and affirmance by the appellate court "would affect the decision of the reviewing court, which is not within the power of the trial court to do." *Id.* at 97-98. Thus, the Supreme Court found "a total and complete want of jurisdiction by the trial court to grant the motion to withdraw [the defendant's] plea of guilty and to proceed with a new trial." *Id.* at 98.

{¶12} For the same rationale set forth in *Special Prosecutors*, we find the trial court's granting of Appellant's motion for new trial would be inconsistent with the judgment of the Ohio Supreme Court, affirming Appellant's convictions and sentence. Accordingly, we find the trial court was without jurisdiction to entertain Appellant's motion for new trial subsequent to the Ohio Supreme Court's decision.

{¶13} Because the trial court was without jurisdiction to hear Appellant's motion for new trial, we find the trial court did not err in denying Appellant's request for leave to file said motion.

{¶14} Appellant's sole assignment of error is overruled.

{¶15} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Hoffman, J.

Farmer, P.J. and

Delaney, J. concur

s/ William B. Hoffman  
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer  
HON. SHEILA G. FARMER

s/ Patricia A. Delaney  
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

ROLAND DAVIS

Defendant-Appellant

JUDGMENT ENTRY

Case No. 09-CA-0019

For the reason stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to Appellant.

s/ William B. Hoffman  
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer  
HON. SHEILA G. FARMER

s/ Patricia A. Delaney  
HON. PATRICIA A. DELANEY

IN THE COURT OF COMMON PLEAS, LICKING COUNTY, OHIO

State of Ohio,

Plaintiff,

v.

Roland T. Davis,

Defendant.

COMMON PLEAS COURT

2009 JAN 30 AM 10:25 CASE NO. 04 CR 00464

FILED  
GARY R. WALTERS  
CLERK JUDGMENT ENTRY

I. NATURE OF THE PROCEEDINGS

This matter is before the Court on defendant's motion for finding defendant was unavoidably prevented from discovering new evidence under Crim.R. 33(B). For the reasons set forth below, this motion is denied.

II. CONCLUSIONS OF LAW

Defendant proffers an affidavit made by Laurence Mueller as expert DNA testimony as grounds for a new trial. Dr. Mueller's testimony alleges that the State overstated the strength of its DNA evidence and that the State's DNA expert incorrectly presented evidence. Defendant asserts that he was unavoidably prevented from obtaining this evidence, Dr. Mueller's testimony, within 120 days of the verdict. Defendant also submits a motion for new trial contingent upon this Court's finding that he was unavoidably prevented from filing the motion within 120 days of the verdict.

Civ.R. 33(B) states:

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court

Judge  
Thomas M. Marcelain  
740-670-5777

Judge  
Jon R. Spahr  
740-670-5770

Courthouse  
Columbus, OH 43055

finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

“[A] party is unavoidably prevented from filing a motion for new trial if the party had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence.” *State v. Walden* (1984), 19 Ohio App.3d 141, 145-146. Defendant must demonstrate by clear and convincing evidence that he was unavoidably prevented from discovering his proffered evidence.

The standard of “clear and convincing evidence” is defined as “that measure or degree of proof which is more than a mere ‘preponderance of the evidence,’ but not to the extent of such certainty as is required ‘beyond a reasonable doubt’ in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.”

*State v. Schiebel* (1990), 55 Ohio St.3d 71, 74.

Defendant first argues that he was unable to discover this evidence during trial due to ineffective assistance of counsel. While this may or may not be grounds for a new trial, it does not demonstrate that defendant was unavoidably prevented from procuring the testimony in the 120 days after the trial. The Court further notes that the issue of ineffective assistance of counsel as to DNA testimony has already been litigated on appeal and in defendant’s first petition for post-conviction relief. See *State v. Davis* (2008), 116 Ohio St.3d 404 and *State v. Davis*, 5th Dist. No. 2008-CA-16, 2008-Ohio-6841.

Defendant also contends that he could not have raised the instant claim on appeal. Again, this does not demonstrate that he was unavoidably prevented from discovering any evidence and raising the issue in a timely motion for new trial.

Defendant next cites the post-conviction petition statute. He argues that the post-conviction statute allows for petitions to be filed outside the 120-day period of Crim.R. 33.

R.C. 2953.21 allows petitions to be filed within 180 days of the date the trial transcript is filed in the appeals court. Defendant's motion was filed beyond both of these time limitations, and it is not styled as a post-conviction petition. Nevertheless, considering the instant motion under the post-conviction petition statute, R.C. 2953.23 sets out exceptions to the 180-day limitation. The first exception includes the requirement that defendant be unavoidably prevented from discovering the facts on which his claim is based or that the United States Supreme Court has recognized a new right that applies retroactively and requires the petitioner to show "by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense" or eligible for the death penalty. R.C. 2953.23(A)(1)(a) and (b). The second exception is where DNA testing of the petitioner establishes by clear and convincing evidence actual innocence of the offense or aggravating circumstance. R.C. 2953.23(A)(2). Defendant has not alleged that any DNA testing establishes he is innocent or that any new, retroactive right applies. Defendant under R.C. 2953.23 must establish, as with a motion for new trial, that he was unavoidably prevented from discovering evidence.

Defendant contends that since actual innocence is not grounds for post-conviction relief, he was prevented from obtaining this evidence within the 120 or 180-day time limitations. Defendant is correct that actual innocence is not grounds for post-conviction relief. *State v. Nash*, Cuyahoga App. No. 87635, 2006-Ohio-5925, ¶ 14; *State v. Watson* (1998), 126 Ohio App.3d 316, 323. However, this in no way demonstrates why defendant was unable to obtain any such evidence, specifically Dr. Mueller's testimony or the substance thereof. Nor has defendant demonstrated that but for trial error—the unavailability of Dr. Mueller's testimony—no reasonable factfinder would have found him guilty. Nothing in Dr.

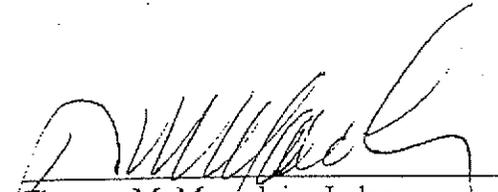
Mueller's testimony suggests that Roland Davis can be conclusively excluded as the source of the DNA evidence. Neither does Dr. Mueller's affidavit suggest that the DNA conclusively matches that of defendant's brother. The Fifth District Court of Appeals made the same observation concerning testimony similar to Dr. Mueller's that defendant offered in his petition for post-conviction relief. *State v. Davis*, 5th Dist. No. 2008-CA-16, 2008-Ohio-6841, ¶165. Defendant has already offered testimony similar in substance to Dr. Mueller's by affidavit of attorney Gregory Meyers. This is evidence that the substance of Dr. Mueller's testimony was in fact available and discoverable previous to the instant motion.

Defendant has provided no evidence that Dr. Mueller's testimony was previously unavailable or undiscoverable through reasonable diligence. He has not demonstrated that Dr. Mueller's testimony is based on any evidence that was not available in the 120 days after his conviction. As Dr. Mueller's affidavit shows, most if not all of the sources and studies Dr. Mueller cites to support his statistical contentions were available at the time defendant was convicted. As mentioned above, the defendant previously raised similar criticisms of the state's DNA evidence in his petition for post-conviction relief, evidence that he was previously aware of similar evidence to that which he now proffers. Defendant has not demonstrated by clear and convincing proof that he was unavoidably prevented from discovering the evidence in Dr. Mueller's testimony. Thus, defendant's accompanying motion for new trial is untimely.

### III. CONCLUSION

For the reasons set forth above, defendant's motion for finding he was unavoidably prevented from discovering new evidence is DENIED.

It is so ORDERED.



Thomas M. Marcelain, Judge

Copies of the Judgment Entry were mailed by ordinary U.S. Mail to all persons listed below on the date of filing.

Kenneth W. Oswalt, Esq., Assistant Prosecuting Attorney  
20 S. Second Street, Newark, OH 43055

Paul Burke, Adult Court Services  
Courthouse, Newark, OH 43055

Joseph Wilhelm, Esq., Attorney for Defendant-Petitioner  
Ohio Public Defenders Office, 8 E. Long St., Columbus, OH 43215

THE CONSTITUTION OF THE UNITED STATES  
AMENDMENTS TO THE CONSTITUTION

US CONST AMENDMENT XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ORC 2505.39

OHIO REVISED CODE

TITLE 25. COURTS -- APPELLATE  
CHAPTER 2505. PROCEDURE ON APPEAL

ORC Ann. 2505.39 (2010)

§ 2505.39. Cases remanded

A court that reverses or affirms a final order, judgment, or decree of a lower court upon appeal on questions of law, shall not issue execution, but shall send a special mandate to the lower court for execution or further proceedings.

The court to which such mandate is sent shall proceed as if the final order, judgment, or decree had been rendered in it. On motion and for good cause shown, it may suspend an execution made returnable before it, as if the execution had been issued from its own court. Such suspension shall extend only to stay proceedings until the matter can be further heard by the court of appeals or the supreme court.

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2953. APPEALS; OTHER POSTCONVICTION REMEDIES  
POSTCONVICTION REMEDIES

ORC Ann. 2953.21 (2010)

§ 2953.21. Petition for postconviction relief

(A) (1) (a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, and for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code

no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United

States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of the court. The clerk of the court in which the petition is filed immediately shall forward a copy of the petition to the prosecuting attorney of that county.

(C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an

appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

(F) At any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings. The petitioner may amend the petition with leave of court at any time thereafter.

(G) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (E) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. The court also may make supplementary orders to the relief granted, concerning such matters as arraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (E) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(H) Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(I) (1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a

finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (I)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (I)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (I) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06, 120.16, 120.26, or 120.33 of the Revised Code and those appointed counsel meet the requirements of division (I)(2) of this section.

(J) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 33 (2010)

Rule 33. New Trial

(A) Grounds.

A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

- (1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;
- (2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;
- (3) Accident or surprise which ordinary prudence could not have guarded against;
- (4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified;
- (5) Error of law occurring at the trial;
- (6) When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

(B) Motion for new trial; form, time.

Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

(C) Affidavits required.

The causes enumerated in subsection (A)(2) and (3) must be sustained by affidavit showing their truth, and may be controverted by affidavit.

(D) Procedure when new trial granted.

When a new trial is granted by the trial court, or when a new trial is awarded on appeal, the accused shall stand trial upon the charge or charges of which he was convicted.

(E) Invalid grounds for new trial.

No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:

(1) An inaccuracy or imperfection in the indictment, information, or complaint, provided that the charge is sufficient to fairly and reasonably inform the defendant of all the essential elements of the charge against him.

(2) A variance between the allegations and the proof thereof, unless the defendant is misled or prejudiced thereby;

(3) The admission or rejection of any evidence offered against or for the defendant, unless the defendant was or may have been prejudiced thereby;

(4) A misdirection of the jury, unless the defendant was or may have been prejudiced thereby;

(5) Any other cause, unless it affirmatively appears from the record that the defendant was prejudiced thereby or was prevented from having a fair trial.

(F) Motion for new trial not a condition for appellate review.

A motion for a new trial is not a prerequisite to obtain appellate review.

Ohio App. Rule 4

Ohio Rules Of Appellate Procedure

Ohio App. Rule 4 (2010)

Rule 4. Appeal as of right--when taken

(A) Time for appeal.

A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.

(B) Exceptions.

The following are exceptions to the appeal time period in division (A) of this rule:

(1) Multiple or cross appeals. If a notice of appeal is timely filed by a party, another party may file a notice of appeal within the appeal time period otherwise prescribed by this rule or within ten days of the filing of the first notice of appeal.

(2) Civil or juvenile post-judgment motion

In a civil case or juvenile proceeding, if a party files a timely motion for judgment under Civ. R. 50(B), a new trial under Civ. R. 59(B), vacating or modifying a judgment by an objection to a magistrate's decision under Civ. R. 53(D)(4)(e)(i) or (ii) or Rule 40(D)(4)(e)(i) or (ii) of the Ohio Rules of Juvenile Procedure, or findings of fact and conclusions of law under Civ. R. 52, the time for filing a notice of appeal begins to run as to all parties when the order disposing of the motion is entered.

(3) Criminal post-judgment motion. In a criminal case, if a party timely files a motion for arrest of judgment or a new trial for a reason other than newly discovered evidence, the time for filing a notice of appeal begins to run when the order denying the motion is entered. A motion for a new trial on the ground of newly discovered evidence made within the time for filing a motion for a new trial on other grounds extends the time for filing a notice of appeal from a judgment of conviction in the same manner as a motion on other grounds. If made after the

expiration of the time for filing a motion on other grounds, the motion on the ground of newly discovered evidence does not extend the time for filing a notice of appeal.

(4) Appeal by prosecution. In an appeal by the prosecution under Crim.R. 12(K) or Juv.R. 22(F), the prosecution shall file a notice of appeal within seven days of entry of the judgment or order appealed.

(5) Partial final judgment or order. If an appeal is permitted from a judgment or order entered in a case in which the trial court has not disposed of all claims as to all parties, other than a judgment or order entered under Civ.R. 54(B), a party may file a notice of appeal within thirty days of entry of the judgment or order appealed or the judgment or order that disposes of the remaining claims. Division (A) of this rule applies to a judgment or order entered under Civ.R. 54(B).

(C) Premature notice of appeal.

A notice of appeal filed after the announcement of a decision, order, or sentence but before entry of the judgment or order that begins the running of the appeal time period is treated as filed immediately after the entry.

(D) Definition of "entry" or "entered".

As used in this rule, "entry" or "entered" means when a judgment or order is entered under Civ.R. 58(A) or Crim.R. 32(C).

Ohio S. Ct. Prac. SECTION 2

Rules Of Practice Of The Supreme Court Of Ohio

Ohio S. Ct. Prac. SECTION 2 (2010)

SECTION 2. INSTITUTION OF APPEALS;  
NOTICE OF APPEAL

S.Ct. Prac. R. 2.1. Types of Appeals.

(A) Appeals from courts of appeals.

(1) Appeals of right.

An appeal of a case in which the death penalty has been affirmed for an offense committed prior to January 1, 1995, an appeal from the decision of a court of appeals under App. R. 26(B) in a capital case, or a case that originated in the court of appeals invokes the appellate jurisdiction of the Supreme Court and shall be designated an appeal of right. The Supreme Court will render judgment after the parties are given an opportunity to brief the case on the merits in accordance with S.Ct. Prac. R. 6.1 through 6.8.

(2) Claimed appeals of right.

An appeal that claims a substantial constitutional question, including an appeal from the decision of a court of appeals under App. R. 26(B) in a noncapital case, may invoke the appellate jurisdiction of the Supreme Court and shall be designated a claimed appeal of right. In accordance with S.Ct. Prac. R. 3.6, the Supreme Court will determine whether to accept the appeal.

(3) Discretionary appeals.

An appeal that involves a felony or a question of public or great general interest invokes the discretionary jurisdiction of the Supreme Court and shall be designated a discretionary appeal. In accordance with S.Ct. Prac. R. 3.6, the Supreme Court will determine whether to accept the appeal.

(4) Certified conflict cases.

A case in which the court of appeals has issued an order certifying a conflict under Article IV, Section

3(B)(4) of the Ohio Constitution invokes the appellate jurisdiction of the Supreme Court. In accordance with S.Ct. Prac. R. 4.2, the Supreme Court will act upon the court of appeals order.

(B) Appeals from administrative agencies: Board of Tax Appeals; Public Utilities Commission; Power Siting Board.

An appeal that involves review of the action of the Board of Tax Appeals, the Public Utilities Commission, or the Power Siting Board invokes the appellate jurisdiction of the Supreme Court. The Supreme Court will render judgment after the parties are given an opportunity to brief the case on the merits in accordance with S.Ct. Prac. R. 6.1 through 6.8.

(C) Appeals from courts of common pleas.

(1) An appeal of a case in which the death penalty has been imposed for an offense committed on or after January 1, 1995, invokes the appellate jurisdiction of the Supreme Court and shall be designated an appeal of right. The Supreme Court will render judgment after the parties are given an opportunity to brief the case on the merits in accordance with S.Ct. Prac. R. 6.1 through 6.8 and 19.6.

(2) An appeal of a case contesting an election under section 3515.15 of the Revised Code shall be designated an appeal of right. The Supreme Court will render judgment after the parties are given an opportunity to brief the case on the merits in accordance with S.Ct. Prac. R. 6.1 through 6.8.

S.Ct. Prac. R. 2.2. Institution of Appeal from Court of Appeals.

(A) Perfection of appeal.

(1) (a) To perfect an appeal from a court of appeals to the Supreme Court, other than in a certified conflict case, which is addressed in S.Ct. Prac. R. 4.1,

the appellant shall file a notice of appeal in the Supreme Court within forty-five days from the entry of the judgment being appealed. The date the court of appeals filed its judgment entry for journalization with its clerk, in accordance with App. R. 22, shall be considered the date of entry of the judgment being appealed. If the appeal is a claimed appeal of right or a discretionary appeal, the appellant shall also file a memorandum in support of jurisdiction, in accordance with S.Ct. Prac. R. 3.1, at the time the notice of appeal is filed.

(b) Except as provided in divisions (A)(2), (3), and (4) of this rule, the time period designated in this rule for filing a notice of appeal and memorandum in support of jurisdiction is mandatory, and the appellant's failure to file within this time period shall divest the Supreme Court of jurisdiction to hear the appeal. The Clerk of the Supreme Court shall refuse to file a notice of appeal or a memorandum in support of jurisdiction that is received for filing after this time period has passed.

(2) (a) If a party timely files a notice of appeal in the Supreme Court, any other party may file a notice of appeal or cross-appeal in the Supreme Court within the later of the time prescribed by division (A)(1) of this rule or ten days after the first notice of appeal was filed.

(b) A notice of appeal shall be designated and treated as a notice of cross-appeal if it is filed both:

(i) After the original notice of appeal was filed in the case;

(ii) By a party against whom the original notice of appeal was filed.

(c) If a notice of cross-appeal is filed, a combined memorandum both in response to appellant/cross-appellee's memorandum and in support of jurisdiction for the cross-appeal shall be filed by the deadline imposed in S.Ct. Prac. R. 3.4.

(3) (a) In a claimed appeal of right or a discretionary appeal, if the appellant intends to seek from the Supreme Court an immediate stay of the court of appeals judgment that is being appealed, the appellant may file a notice of appeal in the Supreme Court without an accompanying memorandum in support of jurisdiction, provided both of the following conditions are satisfied:

(i) A motion for stay of the court of appeals judgment shall accompany the notice of appeal.

(ii) A copy of the court of appeals opinion and judgment entry being appealed shall be attached to the motion for stay.

(b) A memorandum in support of jurisdiction shall be filed no later than forty-five days from the entry of the court of appeals judgment being appealed. The Supreme Court will dismiss the appeal if the memorandum in support of jurisdiction is not timely filed pursuant to this provision.

(4) (a) In a felony case, when the time has expired for filing a notice of appeal in the Supreme Court, the appellant may seek to file a delayed appeal by filing a motion for delayed appeal and a notice of appeal. The motion shall state the date of entry of the judgment being appealed and the reasons for the delay. Facts supporting the motion shall be set forth in an affidavit. A copy of the court of appeals opinion and the judgment entry being appealed shall be attached to the motion.

(b) A memorandum in support of jurisdiction shall not be filed at the time a motion for delayed appeal is filed. If the Supreme Court grants a motion for delayed appeal, the appellant shall file a memorandum in support of jurisdiction within thirty days after the motion for delayed appeal is granted. If a memorandum in support of jurisdiction is not timely filed after a motion for delayed appeal has been granted, the Supreme Court will dismiss the appeal.

(c) The provision for delayed appeal does not apply to appeals involving postconviction-relief or appeals brought pursuant to App. R. 26(B). The Clerk shall refuse to file motions for delayed appeal involving postconviction-relief or App. R. 26(B).

(B) Contents of notice of appeal.

[See Appendix A for a sample notice of appeal from a court of appeals.]

(1) The notice of appeal shall state all of the following:

(a) The name of the court of appeals whose judgment is being appealed;

(b) The case name and number assigned to the case by the court of appeals;

(c) The date of the entry of the judgment being appealed;

(d) That one or more of the following are applicable:

- (i) The case involves affirmance of the death penalty;
- (ii) The case originated in the court of appeals;
- (iii) The case raises a substantial constitutional question;
- (iv) The case involves a felony;
- (v) The case is one of public or great general interest;
- (vi) The case involves termination of parental rights or adoption of a minor child, or both;
- (vii) The case is an appeal of a court of appeals determination under App.R. 26(B).

(2) In an appeal of right under S.Ct. Prac. R. 2.1(A)(1), a date-stamped copy of the court of appeals judgment entry that is being appealed shall be attached to the notice of appeal. For purposes of this rule, a date-stamped copy of the court of appeals judgment entry shall mean a copy bearing the file stamp of the clerk of the court of appeals and reflecting the date the court of appeals filed its judgment entry for journalization with its clerk under App. R. 22. If the opinion of the court of appeals serves as its judgment entry, a date-stamped copy of the opinion shall be attached.

(3) In a discretionary appeal or claimed appeal of right, if a party has timely moved the court of appeals to certify a conflict under App. R. 25, the notice of appeal shall be accompanied by a notice of pending motion to certify a conflict, in accordance with S.Ct. Prac. R. 4.4(A), that a motion to certify a conflict is pending with the court of appeals.

(C) Notice to the court of appeals.

The Clerk of the Supreme Court shall send a copy of any notice of appeal or cross-appeal to the clerk of the court of appeals whose judgment is being appealed.

(D) Jurisdiction of court of appeals after appeal to Supreme Court is perfected.

(1) After an appeal is perfected from a court of appeals to the Supreme Court, the court of appeals is

divested of jurisdiction, except to take action in aid of the appeal, to rule on an application timely filed with the court of appeals pursuant to App. R. 26, or to rule on a motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution.

(2) In all appeals from a court of appeals, the court of appeals retains jurisdiction to appoint counsel to represent indigent parties before the Supreme Court where a judgment of the court of appeals is being defended by a defendant or upon order of the Supreme Court that counsel be appointed in a particular case.

S.Ct. Prac. R. 2.3. Institution of Appeal from Administrative Agency.

(A) Appeal from the Board of Tax Appeals.

(1) A notice of appeal from the Board of Tax Appeals shall be filed with the Supreme Court and the Board within thirty days from the date of the entry of the decision of the Board, include a copy of the decision being appealed, set forth the claimed errors, comply with the service requirements of S.Ct. Prac. R. 14.2(B)(2), and otherwise be in conformance with section 5717.04 of the Revised Code.

(2) If a party timely files a notice of appeal in the Supreme Court, any other party may file a notice of appeal pursuant to section 5717.04 of the Revised Code.

(B) Appeal from the Public Utilities Commission.

(1) A notice of appeal from the Public Utilities Commission shall be filed with the Supreme Court and with the Commission within the time specified in and in conformance with sections 4903.11 and 4903.13 of the Revised Code and sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.

(2) If a party files a notice of appeal in the Supreme Court, any other party may file a notice of cross-appeal pursuant to section 4903.13 of the Revised Code. The notice of cross-appeal shall be filed within the later of the time prescribed by section 4903.11 of the Revised Code or ten days after the first notice of appeal was filed.

(C) Appeal from the Power Siting Board.

A notice of appeal or cross-appeal from the Power Siting Board shall be filed with the Supreme Court and the Board in accordance with division (B) of this

rule and pursuant to section 4906.12 of the Revised Code.

S.Ct. Prac. R. 2.4. Filing of Joint Notice of Appeal.

Where there are multiple parties appealing from the same decision of a court of appeals or an administrative agency, appellants may join in the filing of a single notice of appeal.

S.Ct. Prac. R. 2.5. Name of Case on Appeal.

Unless rule, statute, or the Clerk's discretion require otherwise, an appeal shall be docketed under the case name assigned to the action in the court or agency whose decision is being appealed.

S.Ct. Prac. R. 2.6. Request for Mediation.

In any discretionary appeal or claimed appeal of right of a civil case, a party may file a motion to refer the case to mediation pursuant to S.Ct. Prac. R. 17.1. The motion should be filed no later than thirty days after the filing of the memorandum in support of jurisdiction. The Clerk shall refuse to file a motion to refer a criminal case to mediation.

Ohio S. Ct. Prac. SECTION 19

Rules Of Practice Of The Supreme Court Of Ohio

Ohio S. Ct. Prac. SECTION 19 (2010)

SECTION 19. DEATH PENALTY APPEALS

S.Ct. Prac. R. 19.1. Scope of Rules.

S.Ct. Prac. R. 19.1 through 19.6 apply only to death penalty appeals from the courts of common pleas for offenses committed on or after January 1, 1995.

S.Ct. Prac. R. 19.2. Institution of Appeal.

(A) Perfection of appeal

(1) To perfect an appeal of a case in which the death penalty has been imposed for an offense committed on or after January 1, 1995, the appellant shall file a notice of appeal in the Supreme Court within forty-five days from the journalization of the entry of the judgment being appealed or the filing of the trial court opinion pursuant to section 2929.03(F) of the Revised Code, whichever is later.

(2) If the appellant timely files in the trial court a motion for a new trial, or for arrest of judgment, the time for filing a notice of appeal begins to run after the order denying the motion is entered. However, a motion for a new trial on the ground of newly discovered evidence extends the time for filing the notice of appeal only if the motion is made before the expiration of the time for filing a motion for a new trial on grounds other than newly discovered evidence.

(3) When the time has expired for filing a notice of appeal in the Supreme Court, the appellant may seek to file a delayed appeal by filing a motion for delayed appeal and a notice of appeal. The motion shall state the date of the journalization of the entry of the judgment being appealed, the date of the filing of the trial court opinion pursuant to section 2929.03(F) of the Revised Code, and adequate reasons for the delay. Facts supporting the motion shall be set forth in an affidavit.

(B) Copy of the praecipe to court reporter

The notice of appeal shall be accompanied by a copy

of the praecipe that was served by the appellant on the court reporter pursuant to S.Ct. Prac. R. 19.4(B)(2). The appellant shall certify on this copy the date the praecipe was served on the reporter.

(C) Notice to the common pleas court

The Clerk of the Supreme Court shall send a date-stamped copy of the notice of appeal to the clerk of the court of common pleas whose judgment is being appealed.

(D) Jurisdiction of common pleas court after appeal to Supreme Court is perfected

After an appeal is perfected from a court of common pleas to the Supreme Court, the court of common pleas is divested of jurisdiction, except to take action in aid of the appeal, to grant a stay of execution if the Supreme Court has not set an execution date, or to appoint counsel.

S.Ct. Prac. R. 19.3. Appointment of Counsel.

If a capital appellant is unrepresented and is indigent, the Supreme Court will appoint the Ohio Public Defender or other counsel qualified pursuant to the Rules of Superintendence to represent the appellant, or order the trial court to appoint qualified counsel.

S.Ct. Prac. R. 19.4. Record on Appeal.

(A) Composition of the record to be transmitted

(1) Unless otherwise ordered by the Court, the record to be transmitted on appeal shall consist of the original papers filed in the trial court; the transcript of proceedings, an electronic version of the transcript, if available; and a certified copy of the docket and journal entries prepared by the clerk of the trial court.

(2) The custodian of the record shall not transmit any physical exhibits unless directed to do so by the Clerk of the Supreme Court or as provided by S.Ct. Prac. R. 19.4(A)(3).

(3) The custodian shall transmit any audio exhibits, video exhibits, and documents such as papers, maps, or photographs.

(4) If exhibits are not transmitted pursuant to subdivision (2), the custodian who certifies the record shall designate in the index the exhibits not being transmitted and identify the custodian of those exhibits.

(B) The transcript of proceedings; duty of appellant to order

(1) The transcript of proceedings shall be prepared by the court reporter appointed by the trial court to transcribe the proceedings for the trial court. The reporter shall transcribe into written form all of the trial court proceedings, including pre-trial, trial, hearing, and other proceedings.

(2) Before filing a notice of appeal in the Supreme Court, the appellant shall, by written praecipe, order from the reporter a complete transcript of the proceedings.

(3) A transcript prepared by a reporter under this rule shall be in the following form:

(a) The transcript shall include a front and back cover; the front cover shall bear the case name and number and the name of the court in which the proceedings occurred;

(b) The transcript shall be firmly bound on the left side;

(c) The first page inside the front cover shall set forth the nature of the proceedings, the date or dates of the proceedings, and the judge or judges who presided;

(d) The transcript shall be prepared on white paper, 8 1/2 by 11 inches in size, with the lines of each page numbered and the pages sequentially numbered;

(e) An index of witnesses shall be included in the front of each volume of the transcript and shall contain page and line references to direct, cross, re-direct, and re-cross examination;

(f) An index to exhibits, whether admitted or rejected, briefly identifying each exhibit, shall be included in each volume following the index of witnesses and shall reflect page and line references

where each exhibit was identified and offered into evidence, was admitted or rejected, and if any objection was interposed;

(g) No volume of a transcript shall exceed two hundred fifty pages in length, except it may be enlarged to three hundred pages, if necessary, to complete a part of the voir dire, opening statements, closing arguments, or jury instructions. When it is necessary to prepare more than one volume, each volume shall contain the number and name of the case and be numbered sequentially and consecutively from the previous volume, and the separate volumes shall be approximately equal in length.

(4) The reporter shall certify that the transcript is correct and complete.

(C) Statement of the evidence or proceedings when no report was made or when the transcript is unavailable

If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to S.Ct. Prac. R. 19.5. The appellee may serve objections or proposed amendments to the statement within ten days after service. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to S.Ct. Prac. R. 19.5, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal.

(D) Correction or modification of the record.

If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated in the record, the parties by stipulation, or the trial court, either before or after the record is transmitted to the Supreme Court, or the Supreme Court, sua sponte or upon motion, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the Supreme Court.

S.Ct. Prac. R. 19.5. Transmission of the Record.

(A) Time for transmission; duty of appellant.

(1) The clerk of the trial court shall prepare a certified copy of the docket and journal entries, assemble the original papers, and transmit the record on appeal to the Clerk of the Supreme Court within ninety days after the date the notice of appeal is filed in the Supreme Court, unless an extension of time is granted under division (I).

(2) The appellant shall take any action necessary to enable the clerk to assemble and transmit the record, including, if required, filing a motion for an extension of time for transmission of the record under division (C).

(B) Duty of trial court and Supreme Court clerks

(1) Before transmitting the record to the Supreme Court, the clerk of the trial court shall number the documents, transcripts, and exhibits comprising the record. The clerk of the trial court shall prepare an index of the documents, transcripts, and exhibits, correspondingly numbered and identified. All exhibits listed in the index shall be briefly described. If applicable, a separate index shall be prepared identifying any exhibits that are part of the record, but which have not been transmitted under division (B)(3). The clerk of the trial court shall send a copy of each index to all counsel of record in the case and transmit each index with the record to the Clerk of the Supreme Court.

(2) Documentary exhibits offered at trial whose admission was denied shall be included with the record and transmitted in a separate envelope with a notation that they were not admitted.

(3) Transmission of the record is effected when the Clerk of the Supreme Court files the record. The Clerk of the Supreme Court shall notify counsel of record and the clerk of the trial court when the record is filed in the Supreme Court.

(C) Extension of time for transmission of the record

(1) The Supreme Court may extend the time for transmitting the record or, notwithstanding the provisions of S.Ct. Prac. R. 14.1, may permit the record to be transmitted after the expiration of the time prescribed by this rule or set by order of the Supreme Court.

(2) A request for extension of time to transmit the record shall be made by motion, stating good cause for the extension and accompanied by one or more affidavits setting forth facts to demonstrate good cause. The motion shall be filed within the time originally prescribed for transmission of the record or within the time permitted by a previously granted extension.

(3) A request for extension of time to transmit the record shall be accompanied by an affidavit of the court reporter if the extension is necessitated by the court reporter's inability to transcribe the proceedings in a timely manner.

(D) Retention of copy of the record in the trial court

(1) Before transmitting the record to the Clerk of the Supreme Court, the clerk of the trial court shall make a copy of the record. A copy of the original papers, transcript of proceedings, and any documentary exhibits shall be made by photocopying the original papers, transcript of proceedings, and documentary exhibits. A copy of any physical exhibits may be made by either photographing or videotaping the physical exhibits. A copy of a video, audio, or other electronic recording that is part of the record shall be made by making a duplicate recording.

(2) The clerk of the trial court shall retain the copy of the record for use in any postconviction proceeding authorized by section 2953.21 of the Revised Code or for any other proceeding authorized by these rules.

S.Ct. Prac. R. 19.6. Briefs on the Merits.

(A) The appellant shall file a merit brief with the Supreme Court within one hundred eighty days from the date the Clerk of the Supreme Court files the record from the trial court.

(B) Within one hundred twenty days after the filing of appellant's brief, the appellee shall file a merit brief.

(C) The appellant may file a reply brief within forty-five days after the filing of appellee's brief.

(D) The form of the briefs shall comply with the provisions of S.Ct. Prac. R. 6.1 through 6.8.

(E) A party may obtain one extension of time to file a merit brief in accordance with the provisions of S.Ct. Prac. R. 14.3(B)(2).