

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	X	Case No. 09-2028
Appellee,	:	On Appeal from the Court of
- against -	:	Appeals of Licking County,
ROLAND T. DAVIS	:	Fifth Appellate District,
Appellant.	:	Case No. 09-CA-0019
	:	Death Penalty Case
	X	

**BRIEF OF AMICUS CURIAE THE INNOCENCE NETWORK
IN SUPPORT OF THE DEFENDANT-APPELLANT, ROLAND T. DAVIS**

Counsel for Plaintiff-Appellee

KENNETH W. OSWALT (#0037208)
 Prosecuting Attorney
(Counsel of Record)
 Licking County Prosecutor's Office
 20 S. Second Street
 Newark, Ohio 43055
 Telephone: (740) 670-5255
 Fax: (740) 670-5241

Counsel for Defendant-Appellant

OFFICE OF THE OHIO PUBLIC
 DEFENDER

RUTH L. TKACZ (#0061508)
 Assistant State Public Defender
(Counsel of Record)
 250 E. Broad Street, Suite 1400
 Columbus, Ohio 43215
 Telephone: (614) 466-5394
 Fax: (614) 644-0708
 E-mail: ruth.tkacz@opd.ohio.gov

Counsel for Amicus Curiae

DAVIS POLK & WARDWELL LLP

SHARON KATZ
 (N.Y. Bar #1788090)*
(Counsel of Record)
 EDWARD SHERWIN
 (N.Y. Bar #4400206)
 SARAH E. MALKERSON
 (N.Y. Bar #4804431)
 SAGAR K. RAVI
 (N.Y. Bar #4796942)
 450 Lexington Avenue
 New York, New York 10017
 Telephone: (212) 450-4508
 Fax: (212) 701-5508
 E-mail: sharon.katz@davispolk.com

**Motion to admit pro hac vice pending*

RECEIVED
 MAY 25 2010
 CLERK OF COURT
 SUPREME COURT OF OHIO

FILED
 MAY 25 2010
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	iii
INTRODUCTORY STATEMENT	1
INTEREST OF THE AMICUS CURIAE	2
STATEMENT OF FACTS	3
ARGUMENT	5
<u>Proposition of Law No. 1: When the issue to be decided by the trial court does not fall within the judgment on appeal, the trial court retains jurisdiction to decide the motion before it. Further, to meet due process, a trial court must be able to consider a motion for a new trial based on newly discovered evidence even after an appeal has been taken. U.S. Const. amend. XIV.</u>	5
I. THE DECISION OF THE COURT OF APPEALS WAS INCORRECT BECAUSE IT EFFECTIVELY FORECLOSED ALL FORMS OF RELIEF PERMITTED TO DEFENDANTS AFTER APPELLATE REVIEW OF THEIR CONVICTIONS	5
A. The Court of Appeals Misread <u>Special Prosecutors</u> to Deny Jurisdiction Whenever a Defendant Moves for a New Trial Based on New Evidence Outside of the Trial Record After His Conviction Has Been Affirmed on Appeal.	5
B. The Decision Below Is Inconsistent with the Open-Ended Time Limit on Motions for New Trials Based on Newly Discovered Evidence.	9
1. The Court of Appeals’ Decision Presents Defendants with an Impossible Choice Between Pursuing an Appeal or Making a Motion for a New Trial	9
2. The General Assembly Intended for Defendants to Be Able to Pursue Motions for New Trial on Account of Newly Discovered Evidence at Any Time, Without Regard to the Status of Any Direct Appeal.	11
II. THE DECISION OF THE COURT OF APPEALS WOULD BLOCK CLAIMS FOR RELIEF BASED ON ACTUAL INNOCENCE, LIKELY RESULTING IN THE INCARCERATION OR EXECUTION OF INNOCENT DEFENDANTS	15
A. Defendants May Not Become Aware of Facts Supporting Their Claims for Actual Innocence Until After Their Convictions Have Been Affirmed on Appeal.	16

B.	Many Defendants Who Have Been Exonerated After Their Convictions Have Been Affirmed Would Still Be Incarcerated Under the Rule Adopted by the Court of Appeals.	17
1.	Floyd Fay	18
2.	Robert McClendon.....	20
3.	Clarence Elkins	21
	CONCLUSION.....	23

TABLE OF AUTHORITIES

CASES

	<u>PAGE</u>
<u>03/12/2008 Case Announcements, 2008-Ohio-969</u>	3
<u>09/10/2008 Case Announcements, 2008-Ohio-4487</u>	3
<u>Davis v. Ohio (2008), 129 S.Ct. 137, 172 L. Ed.2d 104</u>	3
<u>Fay v. State (1988), 62 Ohio Misc.2d 640, 610 N.E.2d 622</u>	18, 19
<u>Griffin v. Illinois (1956), 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891</u>	10
<u>Herrera v. Collins (1993), 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203</u>	13
<u>Hopkins v. Dyer, 104 Ohio St.3d 461, 2004-Ohio-6769, 820 N.E.2d 329</u>	6-7
<u>Morgan v. Eads, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157</u>	7
<u>State ex rel. Butler Township Board of Trustees v. Montgomery County Board of Commissioners, 124 Ohio St.3d 390, 2010-Ohio-169, 922 N.E.2d 945</u>	12-13
<u>State ex rel. Columbia Reserve, Ltd. v. Lorain County Board of Elections, 111 Ohio St.3d 167, 2006-Ohio-5019, 855 N.E.2d 815</u>	14
<u>State ex. rel. Neff v. Corrigan, 75 Ohio St.3d 12, 1996-Ohio-231, 661 N.E.2d 170</u>	7
<u>State ex. rel. Rock v. School Employees Retirement Board, 96 Ohio St.3d 206, 2002- Ohio-3957, 772 N.E.2d 1197</u>	9
<u>State ex rel. Special Prosecutors v. Judges, Court of Common Pleas (1978), 55 Ohio St.2d 94, 9 O.O.3d 88, 378 N.E.2d 162</u>	5, 6, 7
<u>State v. Asher (Mar. 3, 1976), Belmont App. No. 1183, 1976 WL 188541</u>	5-6
<u>State v. Beavers, 166 Ohio App.3d 605, 2006-Ohio-1128, 852 N.E.2d 754</u>	8
<u>State v. Burke, Franklin App. No. 06AP-686, 2007-Ohio-1810</u>	8
<u>State v. Daniels (Mar. 23, 1989), Clark App. No. 2490, 1989 WL 27190</u>	8
<u>State v. Davis, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31</u>	3

State v. Davis, Licking App. No. 09-CA-0019, 2009-Ohio-5175 4

State v. Dean (1958), 107 Ohio App. 219, 158 N.E.2d 217, 80 Ohio Law Abs. 328.....14

State v. DeHaas (1967), 10 Ohio St.2d 230, 39 O.O.2d 366, 227 N.E.2d 212..... 15

State v. Elkins (Sept. 27, 2000), Summit App. No. 19684, 2000 WL 1420285..... 21

State v. Elkins (2001), 91 Ohio St.3d 1429, 741 N.E.2d 893 21

State v. Elkins, Summit App. No. 21380, 2003-Ohio-4522 22

State v. Fay, (June 22, 1979), Wood App. No. WD-78-32, 1979 WL 207155 19

State v. Gaines, Hamilton App. No. C-090097, 2010-Ohio-895 8

State v. Gibbs (Nov. 18, 1983), Miami App. No. 83-CA-7, 1983 WL 2546.....8

State v. Gillispic, Montgomery App. Nos. 22877, 22912, 2009-Ohio-3640 8

State v. Green, Mahoning App. No. 05-MA-116, 2006-Ohio-3097..... 8

State v. Harmon, Summit App. No. 21465, 2003-Ohio-50528

State v. Howard (June 25, 1986), Hamilton App. No. C-850755, 1986 WL 7135..... 9

State v. Ishmail (1978), 54 Ohio St.2d 402, 8 O.O.3d 405, 377 N.E.2d 500 7

State v. Lamar, Lawrence App. No. 01CA17, 2002-Ohio-61308

State v. Lemker (Mar. 23, 2001), Hamilton App. No. C-990331, 2001 Ohio App. LEXIS 1389
.....8

State v. Love, Hamilton App. Nos. C-050131, C-050132, 2006-Ohio-6158 8

State v. McClendon (June 4, 1992), Franklin App. No. 91AP-1380, 1992 WL 125274..... 21

State v. McConnell, 170 Ohio App.3d 800, 2007-Ohio-1181, 869 N.E.2d 77..... 8

State v. Ray, Union App. No. 14-05-39, 2006-Ohio-5640 13

State v. Vaughn (1936), 56 Ohio App. 145, 9 O.O. 282, 10 N.E.2d 170 12-13

State v. Walden (1984), 19 Ohio App.3d 141, 483 N.E.2d 859, 19 OBR 230..... 13

Union Pacific Railroad Company v. Brotherhood of Locomotive Engineers & Trainmen
General Committee of Adjustment (2009), 558 U.S. ____, 130 S.Ct. 584, 175
L.Ed.2d 428..... 12

Weisgram v. Marley Co. (2000), 528 U.S. 440, 120 S.Ct. 1011, 145 L.Ed.2d 958 15

STATUTES & RULES

App.R. 4(A) 10-11

App.R. 4(B)(3) 11

App.R. 5 11

Article IV, Ohio Constitution 13

Crim.R. 33..... 1, 10, 13

Crim.R. 33(A)(1)-(5). 10

Crim.R. 33(A)(6) 3, 4, 8, 10

Crim.R. 33(B) passim

R.C. 2945.80 12, 13, 14

S.Ct. Prac.R. 19.2(A)(1)..... 11

S.Ct. Prac.R. 19.2(A)(2)..... 11

S.Ct. Prac.R. 19.2(A)(3)..... 11

Section 18, Article IV, Ohio Constitution 12

OTHER AUTHORITIES

Innocence Project, Know the Cases: Browse the Profiles, at
<http://www.innocenceproject.org/know/Browse-Profiles.php> (last visited May 22, 2010)
.....18

Michael L. Radelet et al., In Spite Of Innocence: Erroneous Convictions in Capital Cases
(Northeastern Univ. Press 1994).....18

Northwestern Univ. School of Law, Ctr. on Wrongful Convictions, Ohio, at
<http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ohIndex.html> (last
visited May 22, 2010)17

INTRODUCTORY STATEMENT

By rejecting Roland Davis's efforts to secure a new trial on account of newly discovered evidence, not on the merits of his claim but for lack of jurisdiction, the Court of Appeals has converted a case about one man's guilt or innocence into one about the right of innocent criminal defendants to challenge their convictions. Before the decision below, it was well understood that if a defendant convicted of a crime later discovered evidence that could prove his innocence—an exculpatory DNA test, a reliable alibi witness, perhaps the confession of the real perpetrator—he could move for a new trial, subject to the reasonable limitations of Rule 33 of the Ohio Rules of Criminal Procedure. The Court of Appeals upset that understanding by holding that a defendant with evidence of his actual innocence cannot move for a new trial if his conviction has already been affirmed on appeal. This holding is contrary to law, as it misinterprets a precedent of this Court in a manner that would create a new limitation not found in any statute or rule. It is also contrary to logic, as the judgment of an appellate court affirming a conviction upon review of the trial record alone cannot create law of the case with respect to evidence discovered after trial. And it forces a defendant wrongfully convicted of a crime to choose either to appeal his conviction or wait and hope for new evidence that would support a motion for a new trial, when the legislature clearly intended that defendants may pursue both means of redress.

The Innocence Network, as an association of dozens of organizations that together have successfully litigated hundreds of post-conviction challenges on behalf of innocent defendants, is acutely aware of the need for the courthouse doors to remain open to defendants even after their convictions have been affirmed on appeal. Yet the Court of Appeals' decision, if affirmed, would bar those doors to the most deserving of defendants—those unlucky enough to be

convicted of crimes they did not commit, only to discover new evidence of their innocence after trial—and would result in the continued, unwarranted incarceration of many innocent persons.

INTEREST OF THE AMICUS CURIAE

The Innocence Network is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered after conviction can provide conclusive proof of innocence. The 58 current member organizations of the Innocence Network represent hundreds of prisoners with claims of actual innocence in 42 states and the District of Columbia, as well as Canada, the United Kingdom, Australia, and New Zealand. The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system. Drawing on lessons from cases in which innocent persons have been wrongfully convicted, the Innocence Network advocates study and reform to improve the truth-seeking functions of the criminal justice system. The Innocence Network pioneered the post-conviction DNA model that has to date exonerated more than 250 innocent persons and served as counsel in a majority of these cases. As perhaps the nation's leading authority on wrongful convictions, the Innocence Network and its founders, Barry Scheck and Peter Neufeld, are regularly consulted by officials at the local, state, and federal levels.

Many of the more than 200 post-conviction exonerations by members of the Innocence Network have been the result of investigative work performed after the defendant's wrongful conviction has already been affirmed on direct appeal—often many years later. This work has given the Innocence Network a particularly strong interest in ensuring that wrongfully convicted defendants continue to have access to the courts, even after their convictions have been affirmed on direct appeal, in order to present claims for actual innocence—an interest directly threatened

by the Court of Appeals' mistaken opinion in this case, which would bar the courthouse door to many such defendants.

STATEMENT OF FACTS

On July 8, 2005, a Licking County jury found Mr. Davis guilty of charges of aggravated murder, kidnapping, aggravated robbery, and aggravated burglary stemming from the murder of Elizabeth Sheeler in her Newark, Ohio, apartment on or about July 11, 2000. The court sentenced Mr. Davis to death. Mr. Davis timely appealed to the Ohio Supreme Court, which affirmed his conviction on January 3, 2008. State v. Davis, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31. Mr. Davis moved for reconsideration of the Ohio Supreme Court's decision on January 11, 2008. The Ohio Supreme Court denied Mr. Davis's motion on March 12, 2008. 03/12/2008 Case Announcements, 2008-Ohio-969, at 14. Mr. Davis filed an application for reopening of the appeal in the Ohio Supreme Court on April 2, 2008, and the Ohio Supreme Court denied that motion on September 10, 2008. 09/10/2008 Case Announcements, 2008-Ohio-4487, at 4. Meanwhile, on June 4, 2008, Mr. Davis filed a petition for a writ of certiorari to the United States Supreme Court, which denied the petition on October 6, 2008. Davis v. Ohio (2008), 129 S.Ct. 137, 172 L.Ed.2d 104.

Having exhausted his direct appeals, and the mandate having returned to the Licking County Court of Common Pleas, Mr. Davis moved in that court under Crim.R. 33(B) for a finding that he was unavoidably prevented from discovering new evidence within 120 days of his conviction, so that he might then move for a new trial on account of newly discovered evidence under Crim.R. 33(A)(6). The trial court denied Mr. Davis's motion on January 30, 2009, holding that Mr. Davis had not been unavoidably prevented from discovering his new evidence within 120 days of his conviction. Mr. Davis appealed this decision to the Court of Appeals for Licking

County in the Fifth Appellate District on March 2, 2009. The Court of Appeals affirmed the denial of Mr. Davis's motion, holding that "the trial court was without jurisdiction to entertain [Mr. Davis's] motion for new trial subsequent to the Ohio Supreme Court's decision" affirming his conviction on direct appeal. State v. Davis, Licking App. No. 09-CA-0019, 2009-Ohio-5175, at ¶ 12.

This appeal followed. In his memorandum in support of jurisdiction, Mr. Davis asked this Court to review the Court of Appeals' decision that the trial court lacked jurisdiction to consider his motion for leave to file a delayed motion for a new trial, as well as to review the trial court's denial of that motion on the merits. This Court accepted the appeal only as to the question of the trial court's jurisdiction to hear the motion.¹

¹ Because the Court agreed to review only the first proposition of law set forth in Mr. Davis's memorandum, the only issue before the Court is whether a trial court may decide a motion for a new trial on account of newly discovered evidence after a defendant's conviction has been affirmed on appeal. The underlying merit of Mr. Davis's motion is, therefore, not at issue. Thus, this brief will not address (1) whether Mr. Davis has presented new evidence material to his defense; (2) whether Mr. Davis, with reasonable diligence, could have discovered and produced such evidence at trial; (3) the sufficiency of the affidavit of the witness by whom such evidence would be given; or (4) whether Mr. Davis has shown by clear and convincing proof that he was unavoidably prevented from filing his motion for a new trial within 120 days of his conviction. See Crim.R. 33(A)(6) and 33(B).

ARGUMENT

Proposition of Law No. 1: When the issue to be decided by the trial court does not fall within the judgment on appeal, the trial court retains jurisdiction to decide the motion before it. Further, to meet due process, a trial court must be able to consider a motion for a new trial based on newly discovered evidence even after an appeal has been taken. U.S. Const. amend. XIV.²

I. THE DECISION OF THE COURT OF APPEALS WAS INCORRECT BECAUSE IT EFFECTIVELY FORECLOSED ALL FORMS OF RELIEF PERMITTED TO DEFENDANTS AFTER APPELLATE REVIEW OF THEIR CONVICTIONS

The Court of Appeals' decision was wrong as a matter of law. No statute or rule, nor any precedent of this Court, deprives a trial court of the power to decide a motion for new trial on account of newly discovered evidence because a defendant's conviction has been affirmed on appeal. To the contrary, as such a motion is based on evidence which was not considered on direct appeal, there is no reason why a trial court may not take such action. Moreover, if this Court were to affirm the holding of the Court of Appeals, a defendant would have to choose whether to pursue an appeal or search for evidence in support of a motion for a new trial, because, for all intents and purposes, he would not be allowed to do both.

A. The Court of Appeals Misread Special Prosecutors to Deny Jurisdiction Whenever a Defendant Moves for a New Trial Based on New Evidence Outside of the Trial Record After His Conviction Has Been Affirmed on Appeal.

In its opinion affirming the denial of Mr. Davis's motion under Crim.R. 33(B), the Court of Appeals misapplied this Court's decision in State ex rel. Special Prosecutors v. Judges, Court of Common Pleas (1978), 55 Ohio St.2d 94, 9 O.O.3d 88, 378 N.E.2d 162. In that case, the defendant, after pleading guilty, appealed from the trial court's judgment of conviction, and the Court of Appeals affirmed, specifically finding that the defendant's plea was voluntary. State v.

² While Mr. Davis appeals the decision of the court below on both jurisdictional and constitutional grounds, the arguments in this brief are limited to the question of jurisdiction.

Asher (Mar. 3, 1976), Belmont App. No. 1183, 1976 WL 188541. Subsequently, the defendant moved in the trial court to withdraw his plea and, after a hearing, the trial court granted the motion and scheduled a trial date. The prosecutors filed a complaint in the Court of Appeals for a writ of prohibition to prevent the trial court from proceeding with the trial due to a lack of jurisdiction, but the Court of Appeals denied the writ. Special Prosecutors, 55 Ohio St.2d at 94.

This Court reversed, and allowed the writ, agreeing with the prosecutors that “the Court of Appeals’ decision on the voluntariness of the plea became the law of the case and the trial court was bound to follow it.” Id. at 96. In reaching that decision, this Court recognized (1) the general rule that “the trial court loses jurisdiction to take action in a cause after an appeal has been taken and decided,” and (2) an exception by which “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.” Id. at 97. From that, this Court found that the trial court’s actions were “inconsistent with the judgment of the Court of Appeals affirming the trial court’s conviction premised upon the guilty plea,” and held that “the trial court lost its jurisdiction when the appeal was taken . . . [and] did not regain jurisdiction subsequent to the Court of Appeals’ decision.” Id.

The Court of Appeals’ decision in this case holding that the trial court lacked jurisdiction to entertain Mr. Davis’s motion for a new trial represents a misreading and an unprecedented extension of Special Prosecutors. In Special Prosecutors, the lower court could not allow the defendant to withdraw a guilty plea whose voluntariness had already been affirmed by the Court of Appeals because of the law of the case doctrine, i.e., the principle that “[t]he judgment of the reviewing court is controlling upon the lower court as to all matters within the compass of the judgment.” Id.; see also Hopkins v. Dyer, 104 Ohio St.3d 461, 2004-Ohio-6769, 820 N.E.2d 329, at ¶ 15 (holding that, as “a longstanding doctrine in Ohio jurisprudence . . . the decision of a

reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels” (citation omitted)). Yet while a trial court cannot revisit issues decided by a court of appeals, it retains jurisdiction over issues “not inconsistent” with appellate review. Special Prosecutors, 55 Ohio St.2d at 97.

In the present case, a decision granting Mr. Davis’s motion for a new trial categorically would not have been inconsistent with the Ohio Supreme Court’s affirmance of Mr. Davis’s conviction because Mr. Davis’s motion was based on newly discovered evidence that the Ohio Supreme Court had not previously considered. See State ex. rel. Neff v. Corrigan, 75 Ohio St.3d 12, 15-16, 1996-Ohio-231, 661 N.E.2d 170 (holding that Special Prosecutors did not apply because the previous appeal did not involve the issue on appeal). Indeed, the Ohio Supreme Court could not have considered the evidence supporting Mr. Davis’s motion because “a bedrock principle of appellate practice in Ohio is that an appeals court is limited to the record of the proceedings at trial.” Morgan v. Eads, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, at ¶ 13; see also State v. Ishmail (1978), 54 Ohio St.2d 402, 405-06, 8 O.O.3d 405, 377 N.E.2d 500 (“Since a reviewing court can only reverse the judgment of a trial court if it finds error in the proceedings of such court, it follows that a reviewing court should be limited to what transpired in the trial court as reflected by the record made of the proceedings.”). Therefore, the Ohio Supreme Court’s decision affirming Mr. Davis’s conviction does not represent the law of the case with respect to whether Mr. Davis may be entitled to a new trial on account of newly discovered evidence. That issue, by definition, was not and could not have been part of the trial record.

Moreover, we are not aware of any previous Ohio court that has read Special Prosecutors to deny a trial court jurisdiction to hear a motion for a new trial based on newly discovered

evidence once direct appeals have been concluded. Indeed, while courts of appeals have split on the question of whether a trial court may hear a motion for a new trial while a defendant's direct appeal is pending,³ over just the last five years, numerous courts of appeals have permitted trial courts to decide motions for new trials based on newly discovered evidence after the defendants' convictions had been affirmed on direct appeal. See, e.g., State v. Gaines, Hamilton App. No. C-090097, 2010-Ohio-895 (reversing the trial court's denial of the defendant's Rule 33(A)(6) motion); State v. Gillispie, Montgomery App. Nos. 22877, 22912, 2009-Ohio-3640 (same); State v. Burke, Franklin App. No. 06AP-686, 2007-Ohio-1810 (same); State v. McConnell, 170 Ohio App.3d 800, 2007-Ohio-1181, 869 N.E.2d 77 (same); State v. Love, Hamilton App. Nos. C-050131, C-050132, 2006-Ohio-6158, cert. denied 552 U.S. 880, 128 S.Ct. 200, 169 L.Ed.2d 135 (2007) (same); State v. Green, Mahoning App. No. 05-MA-116, 2006-Ohio-3097 (same); State v. Beavers, 166 Ohio App.3d 605, 2006-Ohio-1128, 852 N.E.2d 754 (same). By doing so, these courts of appeals acknowledged that trial courts retain jurisdiction to consider motions for new trials after direct appeals have been finalized; otherwise, they would not have reversed the denials of such motions and remanded the cases for further proceedings. And at least one appellate court has held explicitly that a trial court may consider a motion for a new trial on account of newly discovered evidence after the appellate court decided the defendant's appeal.

³ Compare State v. Daniels (Mar. 23, 1989), Clark App. No. 2490, 1989 WL 27190, at *2 ("It seems logical that a trial court should retain jurisdiction to review these matters which are not under review by the appellate court."), and State v. Gibbs (Nov. 18, 1983), Miami App. No. 83-CA-7, 1983 WL 2546, at *3 ("After a notice of appeal has been filed from a final order, a trial court has jurisdiction to hear a motion for a new trial based on newly discovered evidence pursuant to Crim R. 33."), with State v. Harmon, Summit App. No. 21465, 2003-Ohio-5052, at ¶ 9; State v. Lamar, Lawrence App. No. 01CA17, 2002-Ohio-6130, at ¶ 24, and State v. Lemker (Mar. 23, 2001), Hamilton App. No. C-990331, 2001 Ohio App. LEXIS 1389, at *20-21. Nevertheless, this Court need not decide this issue in this case because the Ohio Supreme Court had already affirmed Mr. Davis's conviction when he filed his motion.

See, e.g., State v. Howard (June 25, 1986), Hamilton App. No. C-850755, 1986 WL 7135, at *3 (holding that, when a defendant files a motion for a new trial on account of newly discovered evidence during the pendency of an appeal, the trial court should “defer[] consideration of that motion until the appellate court remanded the case for consideration of the motion, or in the alternative, ruled on the merits of the appeal”); see also State ex. rel. Rock v. Sch. Employees Ret. Bd., 96 Ohio St.3d 206, 2002-Ohio-3957, 772 N.E.2d 1197, at ¶ 9 (holding that neither Supreme Court rules nor precedent “authorizes a court to dismiss a case for lack of jurisdiction once the appeal involving the case has concluded”).

B. The Decision Below Is Inconsistent with the Open-Ended Time Limit on Motions for New Trials Based on Newly Discovered Evidence.

The Court of Appeals’ decision finds a conflict between a defendant’s direct appeal and a motion for a new trial where none exists. Indeed, by pitting those two procedures as alternative rather than complementary avenues of relief, the Court of Appeals forces wrongfully convicted defendants to choose whether their best hope lies in demonstrating reversible error or in discovering evidence of their actual innocence, because under the decision below they can no longer do both. This dilemma is clearly contrary to the legislative intent that defendants should have recourse to both direct appeal and, where there is newly discovered evidence pointing to their actual innocence, a motion for a new trial.

1. The Court of Appeals’ Decision Presents Defendants with an Impossible Choice Between Pursuing an Appeal or Making a Motion for a New Trial.

By denying the right to move for a new trial on account of newly discovered evidence to defendants whose convictions have been affirmed on direct appeal, the Court of Appeals has put all defendants who are found guilty—especially those with claims of actual innocence—in an

untenable and unconscionable position. If defendants choose to appeal their convictions and lose, they will have waived their right to move for a new trial in the future, even if clear-cut evidence of their innocence later comes to light. Alternatively, defendants can wait and hope for such evidence—evidence they may even know to exist, but that is unavailable to them—to materialize, but in the meantime must relinquish their right to appeal, even if their convictions are the product of unconstitutional police conduct or serious and prejudicial trial error. This absurd dilemma—a direct and unavoidable consequence of the decision below—is contrary to both the letter of the law and legislative intent.⁴

Under Crim.R. 33(B), a defendant has 14 days after a verdict is rendered (or the decision of the court in the event of a bench trial) to file a motion for a new trial on any of the grounds enumerated in Crim.R. 33(A)(1)-(5), or 120 days to file a motion for a new trial on account of newly discovered evidence pursuant to Crim.R. 33(A)(6). If a defendant seeking to move for a new trial on account of newly discovered evidence can show by clear and convincing proof that he was unavoidably prevented from discovering that evidence, then a court may hear such a motion at any time after the 120-day period has expired. Crim.R. 33(B). Crim.R. 33 does not place any outer time limit as to when such a motion may be heard, nor does it require such motions to be filed before, or in lieu of, direct appeal. Meanwhile, a defendant convicted of a crime has 30 days from the entry of judgment to file an appeal to the Court of Appeals, App.R.

⁴ While there is presently no constitutional right to an appeal, courts have stressed the importance of appellate review to the accuracy of the criminal justice system. See Griffin v. Illinois (1956), 351 U.S. 12, 18-19, 76 S.Ct. 585, 100 L.Ed. 891 (“All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence.”).

4(A), or, where the death penalty has been imposed, 45 days to appeal directly to the Ohio Supreme Court, S.Ct. Prac.R. 19.2(A)(1).⁵

It would be absurd if the rules, which do not conflict on their face, are read to allow a defendant to move for a new trial on account of newly discovered evidence as a matter of right within 120 days of conviction—or at any time later, when unavoidably prevented from discovering such evidence—but preclude a defendant from doing so if he has previously appealed his conviction. This is all the more absurd because, as shown above, a trial court decision concerning newly discovered evidence cannot be inconsistent with the decision of an appeals court limited to review of the trial record.

2. The General Assembly Intended for Defendants to Be Able to Pursue Motions for New Trial on Account of Newly Discovered Evidence at Any Time, Without Regard to the Status of Any Direct Appeal.

The Court of Appeals' decision also contradicts the General Assembly's intent in giving defendants multiple, independent processes by which to contest their convictions in order to

⁵ Both the Rules of Appellate Procedure and the Supreme Court Rules of Practice toll the deadlines for appeals for some defendants who file new-trial motions. In virtually all cases, however, that will be of no benefit to a defendant who files a motion for a new trial on account of newly discovered evidence, even if that motion is timely. For defendants who file a timely motion for a new trial, the time for filing a notice of appeal begins to run only after the motion is denied; however, if the motion for a new trial is made on account of newly discovered evidence, it tolls the deadline for filing a notice of appeal only if it is made before the expiration of the time for filing a motion for a new trial on grounds other than newly discovered evidence. App.R. 4(B)(3); S.Ct. Prac.R. 19.2(A)(2). In other words, a defendant's motion for a new trial on account of newly discovered evidence will toll the deadline for filing a notice of appeal only if it is filed within 14 days of the verdict—an illusory benefit for defendants seeking to prove their innocence through newly discovered evidence, which may require months or years to obtain.

Alternatively, the Rules of Appellate Procedure and the Supreme Court Rules of Practice allow for untimely appeals by leave of the court, so long as the defendant provides adequate reasons for not perfecting his or her appeal as of right. App.R. 5; S.Ct. Prac.R. 19.2(A)(3). The option to pursue an untimely appeal, however, is in these circumstances totally unrealistic and does not eliminate the defendant's dilemma, because there is no guarantee that the reviewing court will agree to hear the appeal, no matter how meritorious.

ensure, to the greatest extent possible, that no innocent person is imprisoned or executed. In addition to providing for direct appeal and post-conviction relief, the General Assembly enacted R.C. 2945.80, from which Crim.R. 33(B) is derived, which allows defendants to move for a new trial on account of newly discovered evidence at any time after their conviction upon a showing that they were “unavoidably prevented” from discovering the evidence. See R.C. 2945.80. This statute reflects the belief that direct appeal by itself is not sufficient to remedy wrongful convictions and strikes a balance between the competing aims of accuracy and finality. Because the Court of Appeals cannot abrogate a statute by denying trial courts jurisdiction over motions for a new trial on account of newly discovered evidence after direct appeal, its decision violates the doctrine of separation of powers and public policy.

Where the legislature has conferred jurisdiction upon the courts by statute, courts must exercise that jurisdiction when proper under the statute and “may not decline to exercise it.” Union Pac. R.R. Co. v. Bhd. of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment (2009), 558 U.S. ___, 130 S.Ct. 584, 590, 175 L.Ed.2d 428; see also Section 18, Article IV, Ohio Constitution (“The several judges of the Supreme Court, of the common pleas, and of such other courts as may be created, shall . . . have and exercise such power and jurisdiction . . . as may be directed by law.”). Because the Ohio Constitution vests the legislative authority of the State in the General Assembly, the Court of Appeals may not decline jurisdiction when it is conferred by statute, thereby restricting a substantive right granted by the legislature. See State v. Vaughn (1936), 56 Ohio App. 145, 149, 9 O.O. 282, 10 N.E.2d 170 (“Courts cannot, by reason of any

real or imagined equities limit, qualify or annul rights granted by legislative enactment.” (citation omitted)).⁶

When construing a statute, “reviewing courts must ascertain the intent of the legislature in enacting the statute. To determine intent, a court looks to the language of the statute.” State ex rel. Butler Twp. Bd. of Trs. v. Montgomery County Bd. of Comm’rs, 124 Ohio St.3d 390, 2010-Ohio-169, 922 N.E.2d 945, at ¶ 20 (citation omitted). R.C. 2945.80 provides for motions for new trial based on newly discovered evidence that the defendant was unavoidably prevented from discovering within 120 days of his conviction and contains no outer time limit on this right, except that the motion shall be filed within three days from a court order finding that the defendant was unavoidably prevented. R.C. 2945.80.⁷ Indeed, there is no exception to this broad right for cases that have gone through appellate review. The United States Supreme Court has even recognized this result from its interpretation of R.C. 2945.80, observing that Ohio is among those States that “allow a new trial motion based on newly discovered evidence to be filed more than three years after conviction,” as the normal 120-day limit can be “waived.” Herrera v. Collins (1993), 506 U.S. 390, 411 & n.11, 113 S.Ct. 853, 122 L.Ed.2d 203.

⁶ Crim.R. 33 is “purely procedural in character” and does not create any rights but only controls the timing of a motion to enforce the rights granted to defendants in R.C. 2945.80. State v. Ray, Union App. No. 14-05-39, 2006-Ohio-5640, at ¶ 58; see also State v. Walden (1984), 19 Ohio App.3d 141, 145, 483 N.E.2d 859, 19 OBR 230 (“Crim.R. 33(B) is apparently derived from the statutory provision for new trials in a criminal case, R.C. 2945.80 . . .”).

⁷ Crim.R. 33 only deviates from R.C. 2945.80 by extending the time limit of three days to seven days for the filing of the motion for a new trial once the court has found that the defendant was unavoidably prevented from filing his motion within 120 days of his conviction. See Crim.R. 33(B). The Third Appellate District recently addressed the power of the Supreme Court to extend the time limit under Article IV of the Ohio Constitution. The court stated that Crim.R. 33 “does not create, affect or alter the right to a new trial, but merely controls the timing of the motion for such. Therefore, Crim.R. 33(B) supersedes the conflicting provision” contained in R.C. 2945.80. Ray, 2006-Ohio-5640, at ¶ 58.

By enacting R.C. 2945.80 without providing any outer time limit on motions for a new trial made after a finding of unavoidable prevention—while time limits are found elsewhere in the statute—the General Assembly expressly indicated a preference for accuracy over finality when new evidence of a defendant’s innocence is discovered long after a conviction. Indeed, before R.C. 2945.80 was amended in 1965 to give defendants the right to make a motion for a new trial upon a showing of unavoidable prevention, there was no procedure by which courts could grant such a motion after the 120-day period had expired. See State v. Dean (1958), 107 Ohio App. 219, 228-29, 158 N.E.2d 217, 80 Ohio Law Abs. 328. The Court of Appeals’ decision, however, without giving any effect to this legislative intent, eviscerated the right of a defendant to move for a new trial by effectively adding a new requirement onto the statute that any such motion must be made prior to or in lieu of direct appeal. In doing this, the Court of Appeals committed a clear error since courts cannot “add a requirement that does not exist in the statute.” State ex rel. Columbia Reserve, Ltd. v. Lorain County Bd. of Elections, 111 Ohio St.3d 167, 2006-Ohio-5019, 855 N.E.2d 815, at ¶ 32.

In addition to ignoring the General Assembly’s concern for the accuracy of criminal convictions, the Court of Appeals also failed to recognize that, practically speaking, trial courts are better equipped than appellate courts to consider claims of newly discovered evidence in the first instance. Many (if not most) innocence claims are contested, and therefore require evidentiary hearings to determine the merits of such claims. Not only are there more trial courts than appellate courts, but those trial courts typically sit more frequently than the courts of appeals. More importantly, it is quite common for a defendant’s motion for a new trial to be brought before the judge who presided over his trial, who is steeped in the trial record, has heard all of the evidence that gave rise to the defendant’s conviction, and made personal observations

of the credibility of the witnesses. Because of that experience, the trial judge can place any new evidence in context and more accurately determine whether the defendant has carried his burden. It is for this reason that, in ordinary appeals, appellate courts are required to defer to the findings of fact made by the trial courts. See, e.g., State v. DeHaas (1967), 10 Ohio St.2d 230, 231, 39 O.O.2d 366, 227 N.E.2d 212 (“In either a criminal or civil case the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.”); see also Weisgram v. Marley Co. (2000), 528 U.S. 440, 451 n.7, 120 S.Ct. 1011, 145 L.Ed.2d 958 (“[T]he trial judge was in the best position to pass upon the question of a new trial in light of the evidence, his charge to the jury, and the jury’s verdict and interrogatory answers.” (citation and internal quotation marks omitted)). For this reason, trial courts should, as the General Assembly intended, retain jurisdiction to review their own judgments in the first instance in light of newly discovered evidence.

II. THE DECISION OF THE COURT OF APPEALS WOULD BLOCK CLAIMS FOR RELIEF BASED ON ACTUAL INNOCENCE, LIKELY RESULTING IN THE INCARCERATION OR EXECUTION OF INNOCENT DEFENDANTS

If the decision below were to stand, the defendants most likely to be harmed would be those with colorable claims of actual innocence, who, after their convictions, discover the evidence necessary to show that they did not commit the crimes for which they were convicted. In fact, had the rule established by the Court of Appeals been in place earlier, many innocent defendants who have earned their freedom—often with the help of the Innocence Network—would have been unable to do so, and may have remained in prison for crimes they did not commit.

A. Defendants May Not Become Aware of Facts Supporting Their Claims for Actual Innocence Until After Their Convictions Have Been Affirmed on Appeal.

The rule established by the Court of Appeals will, for all practical purposes, only harm those defendants who seek a new trial on account of newly discovered evidence. As discussed above, while a motion for a new trial on any ground other than newly discovered evidence must be filed within 14 days of the defendant's conviction—well before the deadline has run for direct appeal—motions on account of newly discovered evidence can be filed as of right within 120 days of the defendant's conviction, or at any time later upon a finding of unavoidable prevention. For all intents and purposes, the Court of Appeals' decision would prevent any such motions from being heard.

In the experience of the Innocence Network, this will work a great injustice on the defendants most deserving of a hearing—those wrongfully convicted of crimes they did not commit who, by luck or by effort, or a combination of both, later discover evidence that merits their freedom. The Innocence Network's member organizations work mainly with defendants to investigate and litigate their claims of actual innocence after they have been convicted. The defendants who the Innocence Network has helped exonerate were incarcerated for an average of 13 years, in many cases long after their direct appeals were finalized, thereby highlighting the need for continued access to the courts.

The evidence relied upon to prove these defendants' claims can take many forms. DNA evidence has become the most frequent basis for exonerating wrongfully convicted defendants because of its definitiveness. But while Ohio, since 2003, has allowed post-conviction DNA testing for some (though not all) defendants, claims of actual innocence are also based on other types of evidence, all of which are fact intensive and may take time to develop, but which may

yield equally powerful results. For example, exonerations have been based on newly discovered alibi witnesses or eyewitnesses, statements by victims and other witnesses recanting their prior testimony, newly discovered physical evidence (besides the defendant's DNA), proof of prosecutorial misconduct, and even confessions by the actual perpetrators of these crimes. In these and other common scenarios, a defendant will often be unable to marshal the evidence of his innocence within 120 days, much less 30 or 45 days, thereby requiring trial courts to hear the very motions that the Court of Appeals' decision would now preclude.

B. Many Defendants Who Have Been Exonerated After Their Convictions Have Been Affirmed Would Still Be Incarcerated Under the Rule Adopted by the Court of Appeals.

If the rule established by the Court of Appeals were correct, many innocent defendants who enjoy their freedom today would likely still be incarcerated in Ohio prisons. In fact, the jurisdiction of trial courts to hear motions for new trials on account of newly discovered evidence, or to take other actions upsetting convictions that have been affirmed on appeal, has been indispensable to the work of the Innocence Network in successfully challenging the wrongful convictions of actually innocent defendants.

The Center on Wrongful Convictions at Northwestern University School of Law lists 36 defendants, in Ohio alone, who were wrongfully convicted of crimes they did not commit, and for whom evidence of actual innocence exists—including many whose convictions were affirmed on direct appeal and who won their freedom only years later, after new evidence had come to light. See Northwestern Univ. School of Law, Ctr. on Wrongful Convictions, Ohio, at <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ohIndex.html> (last visited May 22, 2010). This list, however, is incomplete, as it fails to account for a number of other defendants known to amicus to have won their freedom, including several represented by

member organizations of the Innocence Network. (The example of Clarence Elkins, discussed below, is but one missing from the Northwestern list.)⁸ Their stories illustrate the importance of adequate post-conviction procedures to the pursuit of claims of innocence, as well as the fact that trial courts in this state have routinely—and until now, without any controversy whatsoever—exercised jurisdiction over criminal cases that had completed the full appellate process, in order to redress the wrongful convictions of defendants in possession of newly discovered proof of their innocence.

1. Floyd Fay

In the summer of 1978, Floyd Fay was tried in Wood County for the aggravated murder of Fred Ery. See Fay v. State (1988), 62 Ohio Misc.2d 640, 640, 610 N.E.2d 622. About four months earlier, on March 28, 1978, a man wearing a ski mask and carrying a sawed-off shotgun entered Andy's Carry-Out, a convenience store in Perrysburg, Ohio, and shot Ery, a store employee, in the shoulder. Michael L. Radelet, et al., *In Spite Of Innocence: Erroneous Convictions in Capital Cases* 219 (Northeastern Univ. Press 1994). When the police asked Ery whether he knew who had shot him, he responded that “[i]t looked like Buzz . . . but it couldn't have been.” Id. Upon inquiry, the police determined that Fay, an occasional customer at Andy's Carry-Out, was known as “Buzz” and subsequently arrested him for the shooting. Id. The shooter's gun and ski mask were never recovered. Id. at 220.

⁸ The Web site of the Innocence Project, the oldest member organization of the Innocence Network, lists 253 innocent defendants, including eight from Ohio, who have been exonerated in post-conviction proceedings nationwide through the efforts of the Network's member organizations. See Innocence Project, Know the Cases: Browse the Profiles, at <http://www.innocenceproject.org/know/Browse-Profiles.php> (last visited May 22, 2010).

At Fay's jury trial, the State introduced evidence of at least one polygraph examination that Fay had voluntarily taken and which did not exonerate him. State v. Fay (June 22, 1979), Wood App. No. WD-78-32, 1979 WL 207155, at *3. The State also introduced evidence at trial that Fay had ingested phencyclidine, a psychedelic drug, on the evening prior to the shooting, and asserted that Fay had experienced a delayed negative response to the drug which caused him to shoot Ery. Id. at *4. On August 1, 1978, Fay was found guilty and sentenced to a term of life imprisonment. On June 22, 1979, the Court of Appeals affirmed Fay's conviction, id. at *4, and the Ohio Supreme Court declined to hear a further appeal. Radelet, supra, at 224.

In a fortuitous turn of events, approximately eight months later in July 1980, Fay's lawyer learned that a man named James Sharpe had approached an attorney in Cleveland and claimed that a former friend of his had acted as a lookout during the robbery of Andy's Carry-Out and that he also knew the identity of the two other men involved in the crimes. Id. Fay's lawyer met with Sharpe and, subsequently, spent several months collecting evidence against the three men he believed were responsible for Ery's murder. In particular, he discovered that one of these men bore a striking resemblance to Fay, which provided an explanation for Ery's statement that his shooter "looked like Buzz, but it couldn't have been." Fay's lawyer presented his findings to the Wood County prosecutor, who agreed to reinvestigate the case. Id. at 226. A short time later, the driver of the getaway car used in the robbery confessed to Fay's counsel and the Wood County prosecutor about his and the other two men's involvement in the crimes. Id. at 227.

On October 30, 1980, Judge Gale E. Williamson, who had presided over Fay's trial, granted Fay's motion for a new trial and ordered him released. See Fay, 62 Ohio Misc.2d at 641. Commenting on Fay's case, Judge Williamson later stated: "The whole thing is totally

unfortunate. . . . I couldn't be any sadder.” Radelet, *supra*, at 227. In early 1981, the two men implicated by the getaway driver pled guilty to murdering Ery. *Id.* at 228.

The example of Floyd Fay demonstrates that the discovery of exculpatory evidence may be triggered by pure luck and chance, that the follow-up requires time-consuming diligent investigation, and that evidence of actual innocence simply is not often susceptible of discovery before an appeal is concluded. Thus, if Sharpe had not contacted the lawyer in Cleveland with information about the true perpetrators of the crime, Fay might never have been exonerated. Moreover, under the Court of Appeals' holding in *State v. Davis*, Judge Williamson would have lacked jurisdiction to hear the very evidence that convinced him to release Fay and that led to the conviction of those responsible for Ery's death. The other cases discussed below similarly demonstrate the importance of a motion for a new trial as a critical avenue of relief for individuals wrongly convicted and imprisoned.

2. Robert McClendon

In 1991, Robert McClendon was tried in Franklin County for the rape of his own daughter. A year earlier, the victim, then 10 years old, had been abducted from her backyard, blindfolded, driven to an abandoned house, and raped. The perpetrator then drove with the victim to a convenience store; after he went inside, she jumped from the car and ran home. The next day, the victim told her mother that her father had abducted and assaulted her the day before. While being taken to the hospital, she told police that she thought it was her dad but that she was not sure because her eyes were covered. Before the day of the assault, the victim had seen her father only once before in her life. There was no physical evidence connecting McClendon to the crime, and he had an alibi. After a bench trial, McClendon was convicted of rape and kidnapping and sentenced to life in prison on the rape count and 10 to 25 years on the

kidnapping count. His conviction was affirmed on appeal. State v. McClendon (June 4, 1992), Franklin App. No. 91AP-1380, 1992 WL 125274.

In 2008, in response to requests from the Ohio Innocence Project, which had taken on McClendon's case, prosecutors found that the victim's underwear had been preserved. When tested, the DNA evidence showed that another man had committed the assault. The trial court granted McClendon's motion for a new trial in August 2008, freeing him after he had served nearly 17 years for a crime he did not commit.⁹

3. Clarence Elkins

In 1999, Clarence Elkins was tried in Summit County for the rape and murder of his 68-year-old mother-in-law and the rape of his 6-year-old niece a year earlier. There was no physical evidence linking Elkins to the crime, but Elkins's young niece identified him as her attacker, despite having seen the attacker for a short time and under poor lighting. After a jury trial, Elkins was convicted of murder, attempted aggravated murder, rape, and felonious assault and sentenced to life in prison. Elkins's conviction was affirmed on appeal. State v. Elkins (Sept. 27, 2000), Summit App. No. 19684, 2000 WL 1420285; State v. Elkins (2001), 91 Ohio St.3d 1429, 741 N.E.2d 893.

⁹ McClendon had previously petitioned the trial court for DNA testing of evidence collected from the crime scene. However, the judge had never acted on McClendon's request and the petition simply slipped through the cracks. The case therefore demonstrates how a motion for a new trial remained and should remain the available procedure for defendants to contest their convictions on the basis of new evidence after direct appeal when other avenues for relief, for whatever reason, become unavailable.

Three years after his conviction, and two years after his conviction was affirmed on appeal, Elkins's niece recanted her testimony identifying her uncle as her attacker.¹⁰ Elkins subsequently paid for a forensic lab to conduct testing, which established a DNA profile for a different male perpetrator. Elkins's wife also hired a private investigator and learned that a convicted rapist, who had been living near her mother's house in 1998, may have committed the crimes. In a serendipitous sequence of events too implausible for a Hollywood thriller, that person—Earl Mann, then serving a seven-year sentence for the unrelated rapes of three young girls—was transferred to Elkins's cell block in 2005. Carrying a tissue and a clean plastic bag, Elkins followed Mann around the prison yard for several days, and when Mann tossed a cigarette butt, Elkins carefully picked it up. He then mailed the cigarette butt to his lawyer, who had it tested. The DNA from the cigarette butt matched that taken from a vaginal swab from Elkins's mother-in-law and his niece's underwear.

Attorneys from the Ohio Innocence Project brought the new evidence to then-Ohio Attorney General Jim Petro, who publicly proclaimed Elkins's innocence and pressured reluctant county prosecutors to revisit the case. Ultimately, only after obtaining further DNA evidence and watching Mann fail a series of lie-detector tests did prosecutors agree that Elkins had been wrongfully convicted. After vacating Elkins's conviction, even though it had already been affirmed on appeal—the very thing the decision of the court below would now preclude—the trial court released Elkins after he had served more than seven and a half years in prison. Mann

¹⁰ Elkins subsequently filed a petition for post-conviction relief and a motion for leave to file a motion for a new trial, both of which were denied. *State v. Elkins*, Summit App. No. 21380, 2003-Ohio-4522. Elkins also requested DNA testing utilizing recent improvements in testing technology, but that request was denied on the grounds that the results would not prove his innocence.

later pled guilty to aggravated murder, attempted murder, aggravated burglary, and rape, and was sentenced to 55 years to life in prison.

CONCLUSION

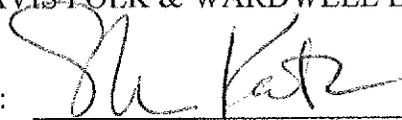
For all of the foregoing reasons, as well as the reasons contained in the brief of Appellant Roland T. Davis, amicus curiae the Innocence Network urges the Court to reverse the decision of the court below finding that the trial court lacked jurisdiction to hear Mr. Davis's motion under Crim.R. 33(B) for a finding that he was unavoidably prevented from discovering new evidence within 120 days of his conviction.

Dated: May 24, 2010

Respectfully submitted,

DAVIS POLK & WARDWELL LLP

By:



Sharon Katz*

Edward Sherwin

Sarah E. Malkerson

Sagar K. Ravi

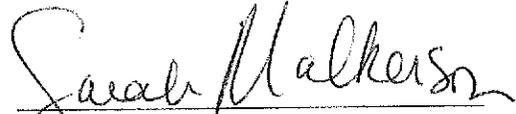
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4508
Fax: (212) 701-5508
E-mail: sharon.katz@davispolk.com

Counsel for Amicus Curiae The Innocence Network

** Motion to admit pro hac vice pending*

CERTIFICATE OF SERVICE

A copy of the foregoing document was served on this 24th day of May, 2010, by Federal Express overnight delivery services, on (1) Kenneth W. Oswalt, Prosecuting Attorney, Licking County Prosecutor's Office, 20 S. Second Street, Newark, Ohio, 43055; and (2) Ruth L. Tkacz, Assistant State Public Defender, Office of the Ohio Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215.


Sarah Malkerson