

**ORIGINAL**

**IN THE OHIO SUPREME COURT**

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

Case No. 2009-2028

ROLAND DAVIS,

Defendant-Appellant.

DEATH PENALTY CASE

*[On appeal from the Licking County  
Court of Appeals, 5<sup>th</sup> Appellate District]*

Court of Appeals Case No. 2009-CA-19

Trial Court Case No. 04-CR-464

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**Merit Brief of State of Ohio,  
Plaintiff-Appellee**

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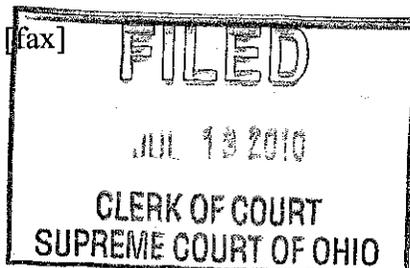
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**TABLE OF CONTENTS**

Table of Authorities. . . . . ii

Combined Statement of Case and Facts. . . . . 1

Argument:

**Proposition of Law:**

**A TRIAL COURT HAS NO JURISDICTION TO ENTERTAIN  
A POST-APPEAL MOTION FOR NEW TRIAL ABSENT A REMAND  
FROM THE SUPERIOR COURT. [*State, ex rel. Special Prosecutors v.  
Judges* (1978), 55 Ohio St. 2d 94, construed and applied . . . . . 5**

I. **The History of *Special Prosecutors*** . . . . . 6

II. **The Reasoning Behind *Special Prosecutors*** . . . . . 9

III. **Even a More Limited Reading of *Special Prosecutors* Provides  
Davis No Help.** . . . . . 13

IV. ***Special Prosecutors*' Rationale Equally Applicable to Motions  
for New Trial** . . . . . 15

V. ***Special Prosecutors* Is Only a Conditional Bar to Jurisdiction.** . . . . . 18

VI. **Post-Conviction Petitions and Motions for New Trial Are Different** . . . . . 20

VII. **Davis Cites Inapplicable Court Precedence** . . . . . 22

VIII. **No Constitutional Right to Litigate a Motion for New Trial.** . . . . . 27

IX. **No Reversal Required When Independent Ground For  
Correct Result** . . . . . 28

Conclusion. . . . . 34

Certificate of Service. . . . . 35

Appendix . . . . . 36

## TABLE OF AUTHORITIES

### Cases:

<i>Brown v. Farwell</i> (9 <sup>th</sup> Cir. 2008), 525 F.3d 787 .....	31
<i>Daloia v. Franciscan Health Systems of Central Ohio, Inc.</i> (1997), 79 Ohio St. 3d 98, 1997-Ohio-402. ....	12
<i>Fenton v. Query</i> (1 <sup>st</sup> Dist., 1992), 78 Ohio App.3d 731. ....	18
<i>Francis v. Henderson</i> (1976), 425 U.S. 536 .....	28
<i>Gitlin v. Plain Dealer Publishing Co.</i> (2005), 161 Ohio App.3d 660 .....	25
<i>Gunsorek v. Pingue</i> (10 <sup>th</sup> Dist. 1999), 135 Ohio App.3d 695. ....	29
<i>Hospitality Motor Inns, Inc. v. Gillespie</i> (1981), 66 Ohio St.2d 206 .....	25
<i>Marshall v. Lonberger</i> (1983), 459 U.S. 422 .....	18
<i>McDaniel v. Brown</i> (2010), ___ U.S. ___; 130 S.Ct. 665. ....	31
<i>Michel v. Louisiana</i> (1995), 350 U.S. 91. ....	28
<i>Murphy v. Elo</i> (E.D. Mich. 2005), Case No. 97-CV-76017-DT, unreported, 2005 WL 2284223, affirmed, 250 Fed.Appx. 703 .....	33
<i>Murray v. Giarratano</i> (1989), 492 U.S. 1 .....	27
<i>Newton v. Ohio University School of Osteopathic Medicine</i> (10 <sup>th</sup> Dist. 1993), 91 Ohio App.3d 703 .....	23
<i>Nolan v. Nolan</i> (1984), 11 Ohio St.3d 1 .....	16
<i>Nottingdale Homeowner's Ass'n. v. Darby</i> (1987) 33 Ohio St.3d 32. ....	24, 25
<i>Pennsylvania v. Finley</i> (1987), 481 U.S. 551 .....	27
<i>People v. Brown</i> (Cal. 1985), 726 P.2d 516 .....	30
<i>People v. Brownlow</i> (Adams Co. Colo. Dist. Ct., May 18, 2006), Slip Opinion, Case No. 05-CR-1125. ....	33

<i>People v. Dalcollo</i> (Ill. App), 669 N.E.2d 378 . . . . .	30
<i>People v. Johnson</i> (Cal.App. 2006), 139 Cal.Rptr 3d 587 . . . . .	33
<i>People v. Nelson</i> (Cal.S.Ct. 2008), 185 P.3d 49 . . . . .	33
<i>Pratts v. Hurley</i> (2004), 102 Ohio St.3d 81. . . . .	5, 26
<i>State ex rel. Cordray v. Marshal</i> , 123 Ohio St.3d 229, 2009-Ohio-4986. . . . .	22, 25, 26
<i>State ex rel. Everhart v. McIntosh</i> , 115 Ohio St.3d 195, 2007-Ohio-4798 . . . . .	23
<i>State ex rel. Neff v. Corrigan</i> , 75 Ohio St.3d 12, 1996-Ohio-231. . . . .	22, 23, 24, 25, 26
<i>State ex rel. Newton v. Court of Claims</i> , 73 Ohio St.3d 553, 1995-Ohio-117. . . . .	23
<i>State ex rel. Rock v. School Employees Retirement Board</i> , 96 Ohio St.3d 206, 2002-Ohio-3957 . . . . .	23
<i>State, ex rel. Special Prosecutors v. Judges</i> (1978), 55 Ohio St.2d 94. . . . .	in passim
<i>State v. Adams</i> (2004), 103 Ohio St.3d 508 . . . . .	30
<i>State v. Asher</i> (March 3, 1976), 7 <sup>th</sup> Dist. App. No. 1183, unreported, 1976 WL 188541 ( <i>Asher I</i> ) . . . . .	7, 8, 11
<i>State v. Asher</i> (June 9, 1977), 7 <sup>th</sup> Dist. App. No. 1231, unreported, 1977 WL 199095 ( <i>Asher II</i> ) . . . . .	9
<i>State v. Baker</i> , 119 Ohio St.3d 197, 2008-Ohio-3330. . . . .	12, 26
<i>State v. Bartylla</i> (Minn.S.Ct. 2008), 755 N.W.2d 8 . . . . .	33
<i>State v. Boston</i> (1989), 46 Ohio St.3d 108 . . . . .	16
<i>State v. Brown</i> , 119 Ohio St. 3d 447, 2008-Ohio-4569. . . . .	29
<i>State v. Butterfield</i> (Utah App.) Case No. 990654, Slip Op. July 10, 2001, fn. 5. . . . .	30
<i>State v. Coombs</i> (1985), 18 Ohio St.3d 123 . . . . .	18
<i>State v. Davis</i> , 116 Ohio St. 3d 404, 2008-Ohio-2 ( <i>Davis I</i> ). . . . .	in passim

<i>State v. Davis</i> , 5 <sup>th</sup> Dist. No. 08-CA-16, 2008-Ohio-6841, juris. denied 122 Ohio St. 3d 1409, 2009-Ohio-2751 ( <i>Davis II.</i> ) . . . . .	in passim
<i>State v. Davis</i> , 5 <sup>th</sup> Dist. No. 09-CA-19, 2009-Ohio-5175 ( <i>Davis III</i> ) . . . . .	18
<i>State v. Elersic</i> , 11 <sup>th</sup> Dist. App. No 2007-L-104, unreported, 2008-Ohio-2121. . . . .	32
<i>State v. Harvey</i> (N.J. 1997), 699 A.2d 596. . . . .	30
<i>State v. Kalish</i> , 120 Ohio St.3d 23, 2008-Ohio-4912 . . . . .	29
<i>State v. Lei</i> (May 25, 2006), 10 <sup>th</sup> Dist. App. No. 05AP-288, 2006-Ohio-2608. . . . .	15
<i>State v. Lopa</i> (1917), 96 Ohio St. 410. . . . .	16
<i>State v. Lozier</i> (2004), 101 Ohio St.3d 161. . . . .	29
<i>State v. Murnahan</i> (1992), 63 Ohio St.3d 60 . . . . .	16, 19
<i>State v. Parker</i> (2002), 95 Ohio St.3d 524, 2002-Ohio-2833 . . . . .	5
<i>State v. Parker</i> (2 <sup>nd</sup> Dist.), 178 Ohio App.3d 574, 2008-Ohio-5178 . . . . .	32
<i>State v. Parks</i> 8 <sup>th</sup> Dist. App. No. 08-CA-857. 2009-Ohio-4817. . . . .	22
<i>State v. Payton</i> (12 <sup>th</sup> Dist. 1997), 124 Ohio App.3d 552 . . . . .	29
<i>State v. Perry</i> (1967), 10 Ohio St.2d 175. . . . .	16, 29
<i>State v. Petro</i> (1947), 148 Ohio St. 505. . . . .	16
<i>State v. Pierce</i> (1992), 64 Ohio St.3d 490. . . . .	30
<i>State v. Reed</i> (1981), 65 Ohio St.2d 117 . . . . .	15
<i>State v. Scheidel</i> (January 20, 2006), 11 <sup>th</sup> Dist. App. No. 2004-A-0055, 2006-Ohio-198 17	
<i>State v. Steffen</i> , 70 Ohio St.3d 399, 1994-Ohio-111. . . . .	27
<i>State v. Swiger</i> (1998), 125 Ohio App.3d 456. . . . .	5
<i>State v. Walden</i> (1984), 19 Ohio App.3d 141 . . . . .	32
<i>Transamerica Ins. Co. v. Nolan</i> (1995), 72 Ohio St. 3d 320 . . . . .	3

*United States v. Jenkins* (D.C.App. 2005), 887 A.2d 1013. . . . . 32, 33

*United States v. Johnson* (Kan.D.C.), 995 F.Supp. 1259. . . . . 27

*United States v. Johnson* (Kan.D.C.), 992 F.Supp. 1257 . . . . . 27

*United States v. MacCollom* (1976), 426 U.S. 317. . . . . 27

*United States v. Porter* (D.C. Cir. 1992), 618 A.2d 629. . . . . 30

*Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306. . . . . 24, 25

*Zimmie v. Zimmie* (1984), 11 Ohio St.3d 94. . . . . 24

**Statutes:**

R.C. §2953.21. . . . . 20, 21

**Appellate Rules:**

App.R. 6. . . . . 21

**Criminal Rules:**

Crim. R. 32.1. . . . . 7, 11, 15, 16, 25

Crim. R. 33. . . . . in passim

Ohio R. Crim. P. 33 (B). . . . . 3, 31

**Other Sources:**

*Interpretation of Statistical Evidence in Criminal Trials: The Prosecutor's Fallacy  
and the Defense Attorney's Fallacy* (1987) . . . . . 31

## COMBINED STATEMENT OF CASE AND FACTS

The Statement of Facts presented by the Defendant-Appellant (hereinafter “Davis” or “Appellant”), though largely correct, nonetheless contains one error, and perhaps more importantly, fails to alert this Court to relevant facts that substantially weigh against any notion that Davis is a falsely-accused offender who is being denied the opportunity to litigate, yet again, issues regarding the DNA evidence in his case by some rogue court or prosecutor. Indeed, here are the facts that Davis fails to include.

### DNA Testing and Related Litigation

The First DNA Testing. Contrary to Davis’ statements, he did not first become a suspect in the murder of Elizabeth Sheeler “as the result of DNA testing conducted on the *blood-stained fitted sheet* from Sheeler’s bedroom.” (Brief of Appellant, p. 1. Emphasis added). In fact, he first became a suspect because of a partial profile match of his DNA to a sample recovered from a *kitchen towel* where the perpetrator was believed to have washed up. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶¶ 17, 25. (*Davis I.*) This DNA testing was done by Ramen Tejwani, a criminalist with the Columbus police crime lab. *Id.* at ¶ 19. Tejwani’s analysis showed that Davis’s DNA matched the DNA from the bloodstain on the kitchen towel. Tejwani testified that even without actually testing the DNA of Randy Davis the statistics of her testing served to exclude him as she testified that her DNA analysis could distinguish between siblings (provided that they are not identical siblings, which Davis is not) and that based upon her examination, only 1 in 547,000,000 Caucasians would have this same *partial* DNA profile.<sup>1</sup> (Tr. p. 1589, 1603.) This figure (i.e. 547,000,000) exceeds the current population of the **entire** United States!

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<sup>1</sup> Davis is Caucasian. The statistics were higher for other racial/ethnic groups.

The Second DNA Testing. After Davis became a suspect, the blood-stained fitted sheet that Davis alluded to in his merit brief was then sent out for Y-chromosome, or Y-STR, DNA testing. *Davis I* at ¶ 34.<sup>2</sup> This testing was conducted by Meghan Clement, the technical director for forensic identity testing at Laboratory Corporation of America Holdings, Inc. (“LabCorp”). Using this Y-STR testing method, three bloodstains matched Davis’ DNA profile. *Id.* at ¶ 34. However, this form of DNA testing would not exclude Randy Davis as they shared the same paternal lineage.<sup>3</sup>

The Third DNA Testing. However, in addition to this Y-STR testing, Ms. Clement also was able to use the more standard “autosomal” STR testing on two of the bloodstains from the fitted sheet. This form of testing, like that done by Tejwani, looks for any human DNA, male or female. Clement testified that when this was done a match was detected with Davis. The statistical frequency of that DNA’s presence was reported as one in 97.1 quadrillion in the Caucasian population. *Id.* at ¶ 35. Clement testified that even without actually testing the DNA of Randy Davis the statistics of autosomal testing (unlike the Y-STR testing) served to exclude him as a donor of the suspect samples from the fitted sheet. (Tr. p. 1702.)

The Fourth DNA Testing. As previously observed, during Davis’ original trial proceedings his attorneys advanced the notion that the Y-STR test results could be used to suggest that Davis’ then-deceased brother Randy Davis could account for the DNA found at the scene as a Y-STR DNA profile would be the same for all males in the same paternal lineage and litigated that issue to this Court on direct appeal. *Id.* at ¶ 169. (Never mind, again, that the

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<sup>2</sup> This form of DNA testing looks specifically for the Y, or male, chromosome and is useful in testing biological samples where the evidence suggests that the bulk of the samples from a crime scene are likely to be from a female victim. Thus, the large amount of the female victim’s DNA, say from bleeding profusely, is “masked” out by this testing while it focuses solely on the presence of male DNA. However, while this was the purpose in sending the samples out, LabCorp. was able to also utilize a more standard DNA testing method as well. See discussion, *infra*.

<sup>3</sup> See f.n. 2.

same could not be true for Tejawani's DNA testing, nor Clement's autosomal DNA testing.) However, despite, losing this argument at trial and upon his direct appeal, not to be dissuaded, Davis filed a petition for post-conviction relief on June 23, 2006. On July 20, 2006 he sought, and later received permission, to amend that motion to specifically raise a claim with respect to the Y-STR testing results, and the possibility that Randy Davis was the true culprit, and that trial counsel was ineffective for not further pursuing that line of defense. See, Amended Post-conviction Petition, filed July 20, 2006, Sixteenth Ground, and related 27-page affidavit. When that was denied, Davis pursued an unsuccessful appeal. *State v. Davis*, 5<sup>th</sup> Dist. No. 08-CA-16, 2008-Ohio-6841, juris. denied 122 Ohio St.3d 1409, 2009-Ohio-2751. (*Davis II*)<sup>4</sup>

Nor did *that* loss dissuade Davis from once again beating on the same drum for, on October 31, 2008, he filed the motion for new trial that is the underlying pleading from whence this appeal arises.<sup>5</sup> However, now that the State could safely conclude that Davis' insistence in raising this same losing issue appeared to have no end, the State – *the prosecution, mind you* – arranged to have a standard of Randy Davis' DNA which been collected at his autopsy<sup>6</sup> sent to the Bureau of Criminal Investigation and Identification's DNA laboratory<sup>7</sup> so that, hopefully, once and for all, the notion that Randy Davis' DNA might explain the samples found at the crime scene could be put to rest.<sup>8</sup>

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<sup>4</sup> Where this Court refuses jurisdiction following the issuance of an opinion by a court of appeals, the court of appeals' opinion becomes the law of the case. See *Transamerica Ins. Co. v. Nolan* (1995), 72 Ohio St.3d 320.

<sup>5</sup> Davis' "motion for new trial" was actually titled: "Motion for Finding Defendant was Unavoidably Prevented From Discovering New Evidence Within 120 Days of Verdict Under Ohio R. Crim. P. 33(B)". However, for ease of reference the State simply uses the phrase "motion for new trial".

<sup>6</sup> He died in a traffic crash after the murder of Mrs. Sheeler, but prior to Davis' trial.

<sup>7</sup> BCI&I's DNA laboratory was not one of the DNA testing labs used in Davis' trial. Thus, they had no stake in the outcome of the testing they were asked to conduct.

<sup>8</sup> The State's supplemental response explained its motivation in having this testing done in the following way: "It has become quite obvious that counsel representing this defendant is intent upon raising – apparently an infinite number to time [sic], in an infinite number of legal

Upon the conclusion of that testing, the State filed a supplemental response to Davis' motion for new trial on January 20, 2009, notifying all parties that the BCI&I testing had served – as expected – to *exclude* Randy Davis as being the contributor of the DNA from either the kitchen towel, or the two samples from the fitted sheet. See, State's Supplement Response to [Motion for New Trial], filed January 20, 2009 with attached BCI&I report prepared by Mark Losko.

Accordingly, the evidence in this case shows that THREE independent DNA experts (Tejwani, Clement, Losko), from THREE separate DNA laboratory facilities (Columbus PD, LabCorp., and BCI&I) tell us that Randy Davis cannot account for the DNA at issue in this case.

It is upon this evidence that Davis' renewed attempt to litigate issues related to the DNA evidence and his brother being a possible suspect comes to this Court. Davis is not someone being deprived of an ability to litigate a *legitimate* DNA claim.<sup>9</sup>

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ways – the specter of whether the DNA found on the evidence in this case might not be that of the defendant, but instead that of his deceased brother. In light of this obvious defense tactic to unduly delay the defendant's legal efforts to avoid the death penalty by submitting arguments that simply fly in face of scientific fact, undersigned counsel decided that perhaps, just perhaps, the only way to get the defendant to stop manufacturing these different nuances of the same argument (i.e. the DNA belongs to my dead brother defense), was to test the available DNA standard of Randy Davis, the defendant's brother. Indeed, counsel sent this standard to BCI&I, a DNA lab not involved in the original trial proceedings."

<sup>9</sup> Davis also fails to include within his "Statement of Facts" that his trial counsel were given funds to employ a DNA expert to examine the testing done in this case as of that time. See, motion requesting appointment of experts, and related entry granting same, both filed May 20, 2005, appointing Dr. Theodore Kessis, of Applied DNA Resources, as a DNA expert.

## ARGUMENT

### Proposition of Law

**A TRIAL COURT HAS NO JURISDICTION TO ENTERTAIN A POST-APPEAL MOTION FOR NEW TRIAL ABSENT A REMAND FROM THE SUPERIOR COURT.** [*State, ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 94, construed and applied.]

It should go without need for citation that a trial court's authority to act in a case is always affected in some degree by whether or not appellate proceedings are pending, or have already occurred. Indeed, this Court has previously observed that when an appeal is taken from the decision of a trial court the trial court is divested of jurisdiction<sup>10</sup> except to take action in aid of that appeal. See, generally, *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94. Davis' appeal calls upon this Court to determine whether the pronouncement in *Special Prosecutors* is broad enough to bar a trial court from hearing – absent a remand – a defendant's motion for new trial under Crim.R. 33 which he filed *after* an

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<sup>10</sup> Although perhaps not entirely necessary to the correct outcome of this appeal, the reference to "jurisdiction" as used in *Special Prosecutor* may require some clarification regarding its meaning. As this Court has previously observed: "[j]urisdiction has been described as 'a word of many, too many, meanings.' (Citation omitted). The term is used in various contexts and often is not properly clarified. This has resulted in misinterpretation and confusion." *Pratts v. Hurley* (2004), 102 Ohio St.3d 81, ¶ 33. "Jurisdiction" means a court's statutory or constitutional power to adjudicate a case, and encompasses jurisdiction over the subject matter of the action as well as jurisdiction over the person. *Id.* at ¶ 11. However, the term "jurisdiction" is also frequently used when referring to a court's exercise of its jurisdiction over a particular case. *Id.* at ¶ 12, citing, *State v. Parker* (2002), 95 Ohio St.3d 524, ¶ 20 (Cook, J., dissenting); and, *State v. Swiger* (1998), 125 Ohio App.3d 456, 462. This "third category" of jurisdiction (i.e., jurisdiction over the particular case) encompasses the trial court's authority to determine a specific case within that class of cases that is within its subject matter jurisdiction. In undersigned counsel's judgment, *Special Prosecutors* appears to be one example of this "third category" of jurisdiction.

unsuccessful direct appeal (not to mention *after* an additional appeal of his unsuccessful post-conviction petition in *Davis II*.)

Davis brings this appeal attacking the Fifth District's conclusion that the trial court properly declined to grant him leave to file a motion for new trial, *albeit* for the different reason that without a remand, the trial court lost jurisdiction to entertain such a motion as, at the time Davis filed his motion for leave, this Court had affirmed his conviction upon direct appeal, in *Davis I*. (And, as if that were not enough, as previously noted, at the time he filed his motion for new trial the denial of a previously filed petition for post-conviction relief was the subject of a then-pending appeal before the Fifth District in *Davis II*.) This result is dictated as a logical extension of the holding in *Special Prosecutors*. In order to fully appreciate the correctness of the Fifth District's conclusion, a full understanding of the *Special Prosecutor's* decision is necessary.

### **I. The History of *Special Prosecutors***

The *Special Prosecutor's* decision had its genesis in the criminal prosecution of Ronald Asher for an aggravated murder that occurred in Belmont County, Ohio in the mid-1970's.<sup>11</sup> This Court described the procedural history of Asher's case as follows:

Ronald E. Asher (hereinafter appellee), on June 11, 1975, pleaded guilty to the charge of murder. Appellee's plea of guilty was accepted by Judge William

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<sup>11</sup> Some of the facts discussed below come from the *Special Prosecutors'* opinion itself. However, some of the facts mentioned below do not appear in that opinion, but would have been a part of the record on appeal in that case as they are garnered from pleadings, transcripts, and documents of the various proceedings that led up to the *Special Prosecutors* decision. Indeed, in order to fully understand the factual and legal background giving rise to *Special Prosecutors* undersigned counsel (with the gracious help of both the staff of the Supreme Court, Clerk of Court, as well as the staff of the Belmont County Clerk of Courts) reviewed the archived files in the custody of those offices related to various trial-level and appellate proceedings in Mr. Asher's case. For the Court's convenience a copy of some of those documents are attached to the appendix herein.

Iddings of the Court of Common Pleas of Belmont County, resulting in appellee's conviction. Thereafter, on June 23, 1975, appellee filed notice of appeal. The Court of Appeals, in its journal entry of March 3, 1976, affirmed the judgment of the trial court.

Subsequently, counsel for appellee, on November 4, 1976, filed a motion to withdraw the plea of guilty, pursuant to Crim.R. 32.1, with the Court of Common Pleas of Belmont County (hereinafter the trial court). An evidentiary hearing was held concerning this motion on February 15, 1977. The trial court then granted the motion to withdraw the plea of guilty. The state of Ohio failed to perfect an appeal to the Court of Appeals from this judgment of the trial court.

*Id.* at 94.

In actuality, the history leading up to *Special Prosecutor's* is far more involved than this passage itself suggests.

After Asher pled guilty, he filed an appeal from that conviction. In that appeal he raised what appears to be three assignments of error: (1) that the trial court failed to make an initial determination that the plea was entered voluntarily; (2) that after Asher made an "exhortation of innocence" the trial court was required to "once again ... test the voluntariness of the plea"; and (3) that the trial court failed to have the record properly demonstrate the nature of any plea discussions. See, *State v. Asher*, (March 3, 1976), 7<sup>th</sup> Dist. App. No. 1183, unreported, 1976 WL 188541. (*Asher D.*) [This also appears in the Record for Appellant, at R-V "Appendix C", on file with the Clerk of this Court, in *State ex rel. Special Prosecutors*, Case no. 77-1447.]

In addition to this appeal, and indeed apparently before the appeal was even heard, Asher filed a motion for a "new trial" with the trial court which included affidavits from Asher's alleged co-defendants supporting his claims of innocence. (See, Statement of Facts, p. 1, of Answer Brief of Intervenor – Appellee Ronald E. Asher, on file with the Clerk of this Court, in *State ex rel. Special Prosecutors*, Case no. 77-1447.)<sup>12</sup> The trial court did not immediately act upon this motion it seems. *Id.* Ultimately, however, that motion culminated in an evidentiary

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<sup>12</sup> Included in the Appendix hereto as State's Exhibit A.

hearing on September 20, 1976 at which Asher's counsel at the time of his plea testified regarding certain supposed threats conveyed to Asher that allegedly originated with the original sentencing judge and original prosecutor that induced his plea of guilty. *Id.* at pp. 1-2. When that hearing did not immediately produce the desired result (i.e. the setting aside of the conviction), in November 1976 Asher filed a motion to withdraw his plea. *Id.* See also, "Motion to Set Aside Judgment of Conviction and Permit Defendant to Withdraw His Plea" filed in Belmont County Common Pleas Court Case no. 75-CR-054.<sup>13</sup>

In that motion, Asher based his arguments upon the testimony of his former counsel, Edward G. Sustersic, which had been given at the September 20, 1976 evidentiary hearing – testimony that was given some six months after his direct appeal had been disposed of on March 3, 1976. See, Transcript attached to that motion referred to therein as "Exhibit A", and *Asher I.* [See, also partial transcript of hearing of February 15-16, 1977 included in Record for Appellant, at R-VI, "Appendix E", on file with the Clerk of this Court, in *State ex rel. Special Prosecutors*, Case no. 77-1447.]<sup>14</sup> Thus, by definition then, this motion included information that was not possible to be included in the record on direct appeal in *Asher I.*

Asher's motion to withdraw his plea was ultimately sustained by a newly assigned judge in February 1977. See, Statement of Facts, p. 2, of Answer Brief of Intervenor – Appellee Ronald E. Asher, and, partial transcript of hearing of February 15-16, 1977 included in Record for Appellant, at R-VI, "Appendix E", both of which are on file with the Clerk of this Court, in

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<sup>13</sup> As noted, this document is alluded to in the Statement of Facts in the intervenor's brief in *Special Prosecutors*, but it also should have been part of the record on appeal in that case. However, the actual documents filed in the trial court do not appear to be a part of this Court's **current** file when undersigned counsel recently reviewed the 1977 Special Prosecutors file in preparation for this appeal. For the Court's convenience a copy of that document was obtained from the Belmont County Clerk of Courts and is attached to the Appendix herein as State's Exhibit B.

<sup>14</sup> Also attached to the Appendix herein as State's Exhibit C – a portion of a large series of documents collectively referred to "Record of Appellant".

*State ex rel Special Prosecutors*, Case no. 77-1447. [See also, Judgment Entry, February 16, 1977, Belmont County Common Pleas Court Case No. 75-CR-054.]<sup>15</sup> Thereafter, the special prosecutors assigned to Asher's case sought to appeal that ruling, however, they failed to timely perfect that appeal. See, *State v. Asher*, (June 9, 1977), 7<sup>th</sup> Dist. App. No. 1231, unreported, 1977 WL 199095. (*Asher II*).

Then and only then did the special prosecutors, instead of proceeding forward with trying Asher, seek a writ of prohibition in the Court of Appeals. This writ was denied. See, *State ex rel. Special Prosecutors v. Judges*, (November 29, 1977) 7<sup>th</sup> Dist. App. No. 1263. [Also included in a Supplemental Record, as "Exhibit A" on file with the Clerk of this Court, in *State ex rel Special Prosecutors*, Case no. 77-1447.] This denial, needless to say, resulted in the appeal to this Court that ultimately rendered its 1978 decision in *Special Prosecutors*.

## II. The Reasoning Behind *Special Prosecutors*

In *Special Prosecutors* this Court decided that once the court of appeals had exercised jurisdiction to hear Asher's appeal, the trial court did not have jurisdiction to entertain a motion by Asher that sought to allow him to withdraw his guilty plea. This Court reasoned, properly, as follows:

[I]n the instant cause, 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. The judgment of the reviewing court is controlling upon the lower court as to all matters within the compass of the judgment. Accordingly, we

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<sup>15</sup> This actual February 16, 1977 judgment entry, again, should have been included in the record on appeal in *Special Prosecutors*, however does not appear to be a part of this Court's file in that case as it exists today. This entry is however specifically mentioned in other documents, which still remain in this Court's *Special Prosecutors*' file. See, as two examples, "Memorandum of Decision" noted as being "Appendix (D)(1) and (2)"; and Complaint in Prohibition, noted as being "R-I" at ¶ 6. For the Court's convenience a copy of that entry was obtained from the Belmont County Clerk of Courts and is attached to the Appendix herein as State's Exhibit D.

find that the trial court lost its jurisdiction when the appeal was taken, and, absent a remand, it did not regain jurisdiction subsequent to the Court of Appeals' decision.

*Special Prosecutors*, 55 Ohio St.3d at 97.

Notably, this Court observed that the trial court's action was "inconsistent with the judgment of the Court of Appeals affirming the trial court's conviction premised upon the guilty plea". This Court did not use the far more limiting language such as to say that the trial court's action was "inconsistent with the judgment of the Court of Appeals affirming the trial court's conviction premised upon the [voluntariness of the] guilty plea". At no point does the *Special Prosecutors*' decision reach a conclusion that its breadth is limited by the precise issue or issues that had been before the appellate court in the earlier appeal(s) as Davis would have this Court think.

Contrary to the suggestions of either Davis or the various *Amici Curiae* herein, *Special Prosecutors* cannot be legitimately read to mean that a trial court somehow retains jurisdiction over all other issues not *specifically* addressed in the prior appellate proceedings. The reasons that this limited reading of the opinion makes no sense are simple. First, the opinion clearly mentions the existence of an evidentiary hearing that was had on Asher's motion to withdraw his pleas. See, 55 Ohio St.2d at 94. As discussed in detail above, the record before the Court in *Special Prosecutors* included claims that Asher was the recipient of off-the-record threats that by definition could have played no part whatsoever in his earlier direct appeal.

In fact, when Asher intervened in the *Special Prosecutors*' case the entire thrust of his argument as to why the trial court did have jurisdiction to grant his motion to withdraw was predicated upon the very fact that the trial court had before it evidence that could not have been a part of his direct appeal – a claim very reminiscent of what this Court is now hearing from Davis and the *Amici Curiae* herein.

For example in *Special Prosecutors* Asher argued that “[I]f it were the legislative intent to restrict or give a defendant a choice of either an appeal or Crim.R. 32.1, it would have endeavored to make that distinction.” See, Answer Brief of Intervenor – Appellee Ronald E. Asher, pp. 4-5, on file with the Clerk of this Court, in *State ex rel. Special Prosecutors*, Case no. 77-1447. Asher further extolled this Court to observe that “the Court of Appeals recognized that the trial judge made his determination beyond what had been appealed. The trial court, after an evidentiary hearing, found that the defendant was ineffectively represented by counsel in tendering his plea”, *Id.* at p. 5, and that “the Court of Appeals recognized that the trial court based its decision beyond that which the Court of Appeals ruled upon on direct appeal” *Id.* at p. 6, and that “[i]n this case, the trial court went further in its decision when it determined after an evidentiary hearing that defendant was represented by ineffective counsel.” *Id.*

In light of the expanded record which took place between the decision in *Asher I*, and the decision in *Special Prosecutors*, **and especially** when one factors in the equation that the trial court in Asher’s case determined that Asher’s plea was invalid, not so much because it was not “voluntary”, but rather because he had inadequate counsel (i.e. a new issue); one cannot reasonably argue that *Special Prosecutors* can be fairly read to be limited as Davis would like it to be (i.e. to only the exact issues raised in the earlier appeals), for if it were, one must ignore the wealth of evidence that shows categorically that this Court in *Special Prosecutors* was confronted with evidence that was not present for use in Asher’s direct appeal, as well as being confronted with legal arguments (i.e. ineffective assistance of counsel) that were not raised in Asher’s direct appeal.

Accepting, as a fair reading of that opinion requires we must, that *Special Prosecutors* is not an “issue-specific” limitation on a trial court’s jurisdiction, Davis’s arguments must fail.<sup>16</sup>

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<sup>16</sup> See discussion at Section VII at p 21, *infra*, for reasons as to why Davis’ citation to

The fact is that if *any* decision of a superior court on appeal is contingent upon the validity of the underlying conviction,<sup>17</sup> a trial court's grant of a new trial would "undo" the very basis for that superior court's actions and thus would be inconsistent with that court's judgment "for this action would affect the decision of the reviewing court, which is not within the power of the trial court to do." *Special Prosecutors*, 55 Ohio St.2d at 97.

Secondly, Davis' claim that the *Special Prosecutors* bar is limited to the "same issues" as addressed previously on appeal ignores one other subtle, but nonetheless significant, defect in the logic behind it. It would appear that all parties accept the concept that when there is a *pending* appeal, a trial court is divested of jurisdiction to entertain motions for new trial, and the like.<sup>18</sup> If Davis is correct that the raising of a different issue which had not been raised on appeal is not "inconsistent" with the appellate court's exercise of jurisdiction, then why couldn't a trial court address a motion to withdraw a plea **WHILE** an appeal is pending as long as it dealt with a different issue? Said differently, if a new or different issue were not inconsistent with the appellate court's jurisdiction, why would the trial court "regain" jurisdiction over such issues after an appeal, instead of having never lost jurisdiction in the first place? Davis' argument fails to note this logical incongruity. The *Special Prosecutors* rule cannot rest solely upon the same-

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various cases that involve trial or appellate courts addressing the merits of a post-appellate motion for new trial provide him no support.

<sup>17</sup> Indeed, as this Court has recently held, a final appealable order must include certain things before an appellate court even acquires jurisdiction to hear the case. See, for example, *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, syllabus of court, ("A judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court.") Indeed, in a criminal case then, the very fact that a conviction is in place must, by definition, always be, in the language of *Special Prosecutors*, "within the compass of the judgment" of an appellate court. 55 Ohio St.2d at 97.

<sup>18</sup> But, if the State is wrong in thinking Davis and *Amici Curiae* agree with this general proposition, see, for example *Daloia v. Franciscan Health Systems of Central Ohio, Inc.* (1997), 79 Ohio St.3d 98, 101, 1997-Ohio-402, at f.n. 5. [There is, however, one exception to this rule as a result of specific statutory authorization, namely a first petition for post-conviction relief. See discussion at Section VI, at p. 20, *infra*.

versus-different issue distinction, for if it did a trial court would always have jurisdiction over all issues not specifically addressed by a superior court, regardless of where that case might be in the appellate process (i.e. pending or closed).

### **III. Even a More Limited Reading of *Special Prosecutors* Provides Davis No Help**

Davis' argument appears to implicitly concede, by its efforts to distinguish *Special Prosecutors* on a "specific-issue" basis,<sup>19</sup> that the reasoning behind the *Special Prosecutors* decision would and should apply to a Motion for New Trial in the same way it was applied in that case to a Motion to Withdraw a Plea, *provided, of course*, that the same issues are raised in the motion for new trial as were addressed in the prior appeal.<sup>20</sup>

In Davis' case, try as he might to deny it, his motion for new trial addressed the very same issues raised in his prior appeals ... that's correct ... appealS! For example in his direct appeal to this Court he raised the issue that his trial counsel had been ineffective for stipulating to evidence establishing the admissibility of DNA evidence. See, *Davis I*, 116 Ohio St. 3d 404, at ¶¶ 344-45.

When that failed, he used the process of a petition for post-conviction relief<sup>21</sup> to supplement the trial record and again, based upon that new material, attacked the DNA evidence in his case. This led to a second appeal, this time to the court of appeals in *Davis II*. In that case Davis claimed that the DNA evidence in his case was questionable "because his trial counsel failed to adequately address the state's DNA evidence." *Id.* 2008-Ohio-6841 at ¶ 153.

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<sup>19</sup> See, as some examples, Davis' use of such phrase as "the precise issue", and "settled issues". See, Brief of Appellant, p. 5.

<sup>20</sup> Since it is likely that Davis will attempt to avoid being bound by this implicit concession, see discussion at Section IV, at p. 15, *infra*, for analysis as to why it should apply in the same way to both forms of proceedings.

<sup>21</sup> As for why the trial court had jurisdiction to entertain that type of pleading/proceeding, but did not similarly have jurisdiction to enter a post-appeal motion for new trial under Crim.R. 33, see discussion at Section VI, at p. 20, *infra*.

The court of appeals rejected Davis' claim. *Id.* at ¶¶ 153-60. In fact, the claims made in the amended post-conviction petition in *Davis II*, are for all intents and purposes the same claims made in Davis's motion for new trial that is the basis for this appeal. The only real difference is that in *Davis II* the challenge to the DNA evidence was supported by an affidavit of an attorney claiming to have experience with DNA cases, while the challenge to the DNA in the motion for new trial which led to the instant appeal contained an affidavit from Dr. Lawrence Mueller, a supposed DNA scientist.<sup>22</sup>

Accordingly, even *if*, for purposes of argument only, one were to confine the *Special Prosecutors* holding to bar the trial court from having jurisdiction to entertain only those pleadings that address the same issues addressed by the superior court (or in this case superior court~~S~~), Davis loses as he attacked the DNA evidence in two appellate courts prior to filing his motion for new trial. Thus, even under the narrowest interpretation of *Special Prosecutor* then, the Fifth District reached the correct result.

Further still, Davis filed his motion for a new trial on October 31, 2008. At that time the Court of Appeals had not completed its review of his post-conviction petition appeal in *Davis II*. Accordingly, at the time he filed his motion, there was not just a prior direct appeal, but there was actually a *then-pending* appeal as well. Thus, the trial court could have denied the motion at the very time of its filing predicated upon this lack of jurisdiction.

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<sup>22</sup> Though perhaps not entirely relevant to the jurisdictional issue raised by this appeal (but see discussion at Section IX, at p.28, *infra*, as to there being an independent basis to affirm the court of appeals), since Davis and the *Amici Curiae* seem to want to paint a picture of Davis being wrongly deprived of an opportunity to raise a legitimate DNA issue, it should be noted that Dr. Mueller's opinions have been rejected by various courts. Again, see discussion at Section IX, *infra*.

#### **IV. *Special Prosecutors' Rationale Equally Applicable to Motions for New Trial***<sup>23</sup>

As previously noted, *Special Prosecutors* addressed a defendant's efforts to withdraw his plea pursuant to Crim.R. 32.1, while the instant case involves an effort to get a new trial pursuant to Crim.R. 33. Nonetheless, despite this difference the rationale of that case is equally applicable here for the simple reason that, like the grant of a motion to withdraw a plea, the ultimate granting of a motion for new trial by the trial court would have the effect of making the judgment of conviction that is the underlying basis for this Court's affirmance in *Davis I* and, the Fifth District's affirmance in *Davis II* essentially "void". A trial court's grant of a new trial now (or ever) would be entirely inconsistent with the decisions of two superior courts – this Court in *Davis I*, and the Fifth District in *Davis II*. Both of those decisions are legally contingent upon the validity of the underlying conviction (i.e. a finding of guilt, and the subsequent imposition of sentence) flowing from Davis' one and only trial.

Davis' and the *Amici Curiae's* reliance on the fact that Crim.R. 33 does not specifically contain limitations within its terms that bar a post-appeal motion for new trial is specious for the simple reason that neither did Crim.R. 32.1 that was at issue in *Special Prosecutors*! If the jurisdictional bar did not need to be within the precise language of Crim.R. 32.1<sup>24</sup> for that bar to be applied in *Special Prosecutors*, why would it need to appear within the precise terms of Crim.R. 33? In fact this Court in *Special Prosecutors* observed that "Neither the Ohio Rules of Appellate Procedure nor the Ohio Rules of Criminal Procedure are explicit as to what effect the taking of an appeal has on the jurisdiction of the lower court." 55 Ohio St.2d at 97-98. Thus the

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<sup>23</sup> *Amici Curiae's* reliance on references to *statutory* provisions addressing motions for new trial are irrelevant. Those provisions have been superceded by Crim.R. 33. Cf. *State v. Reed* (1981), 65 Ohio St.2d 117, f.n. 1; and, *State v. Lei*, (May 25, 2006), 10<sup>th</sup> Dist. App. No. 05AP-288, 2006-Ohio-2608, f.n. 4.

<sup>24</sup> A point argued in the *Special Prosecutors* case incidentally, see discussion at Section II, p. 11, *supra*.

absence of a *written* limitation actually within Rule 32.1 itself was not lost on this Court in that case.

Indeed, even the newest of attorneys should be aware that many “rules” are nowhere found in a formalized RULE. Cf. *State v. Murnahan*, (1992), 63 Ohio St.3d 60, at f.n. 6, (observing that Ohio, at that time, had no rule in place for a litigant to request a delayed consideration when a claim is raised with respect to effectiveness of appellate counsel, but nonetheless creating such a procedure.); and, *State v. Boston* (1989), 46 Ohio St.3d 108, 115, (applying evidence rulings despite no existing evidence rules in place, while referring matter to Rules Advisory Committee.) See also, *State v. Petro* (1947), 148 Ohio St. 505, (although not appearing in any statute or rule, court, citing *State v. Lopa* (1917), 96 Ohio St. 410, engrafted a “not merely impeaching or cumulative evidence” prong onto standard by which a motion for new trial is to be granted.)

Simply put, the failure of Crim.R. 33 to contain “jurisdictional” limitations resulting from prior appellate proceedings as some basis for concluding that no jurisdictional bars exist, is ridiculous. Crim.R. 33 does not contain language addressing a *res judicata* bar, but such a bar does exist. See, generally, *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus. Nor does Crim.R 33 contain language about a law-of-the-case doctrine – which, incidentally Davis alludes to in his brief, see brief of appellant, p.9 – but that doctrine exists and can bar such pleadings. See, generally, *Nolan v. Nolan* (1984), 11 Ohio St.3d 1. Thus, it is totally irrelevant that Crim.R 33 does not specifically include the jurisdictional bar resulting from *Special Prosecutors*. The rule addressed in that case, Crim.R 32.1, had no such limiting language. There is no reason to require Crim.R. 33 to have it.

Indeed, Davis's brief has failed to answer a fundamental question, namely: If a criminal defendant, as all parties would apparently agree,<sup>25</sup> could not pursue a motion for new trial while an appeal is pending due to a lack of jurisdiction,<sup>26</sup> why would that same defendant be able to automatically pursue one after he has lost that appeal? Said differently, if a motion for new trial cannot be pursued while an appeal is pending – regardless of merit, regardless of whether new evidence exists, and regardless of the legal issues involved – why could that very same motion be automatically pursued after the appellate court has rendered an adverse judgment? In either case the underlying judgment of conviction being attacked is the precisely the same.

Moreover Davis and *Amici Curiae* are simply wrong when they suggest that a jurisdictional bar to motions for new trial resulting from prior appellate proceeding don't serve to put a cap on endless litigation. (See, brief of appellant, p. 9.). This case is a perfect example of endless litigation over the DNA evidence. There was litigation prior to trial by way of a motion *in limine* to exclude the DNA evidence. There was litigation at trial about DNA. There was litigation during the direct appeal in *Davis I*. There was litigation at the trial level in a post-conviction petition. There was litigation on appeal to the court of appeals after that in *Davis II*. Then there was litigation again at the trial court by way of the instant motion for new trial.<sup>27</sup> That was followed by an appeal to the court of appeals and now to this Court.

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<sup>25</sup> And if we can't agree, see, as one example only, *State v. Scheidel*, (January 20, 2006), 11<sup>th</sup> Dist. App. no. 2004-A-0055, 2006-Ohio-198, ¶ 12.

<sup>26</sup> A limitation on the litigation of a Crim.R. 33 motion that, incidentally, appears nowhere within the rule itself, but merely appears in case law. See, as one example only, *State v. Scheidel*, (January 20, 2006), 11<sup>th</sup> Dist. App. no. 2004-A-0055, 2006-Ohio-198, ¶ 12.

<sup>27</sup> Which motion, obviously, did not get withdrawn even though the State took the initiative to actually perform testing of Randy Davis' DNA standard that had been at the very heart of Davis' claims. DNA evidence has excluded Davis' brother, but nonetheless we have further litigation over him being some "phantom" perpetrator.

## V. Special Prosecutors Is Only a Conditional Bar to Jurisdiction

Davis' and *Amici Curiae*'s claim that the application of the *Special Prosecutors* would somehow lead to some horrible injustices are absurd – if for no other reason than that they fail to note that the *Special Prosecutors* rule is simply a conditional bar to a trial court's jurisdiction, namely conditioned upon the fact that the superior court remands the matter to the trial court to consider the motion at issue.<sup>28</sup> Davis' concerns about unjust convictions, and the proverbial “parade of horrors” that he and *Amici Curiae* use to deflect this Court from the reality of this case entirely ignore the fact that *Special Prosecutors* does not set forth a categorical, unlimited, “never-can-it-be-permissible” rule. Indeed, in *Special Prosecutors* this Court was specific: “Accordingly, we find that the trial court lost its jurisdiction when the appeal was taken, *and, absent a remand*, it did not regain jurisdiction subsequent to the Court of Appeals' decision.” 55 Ohio St.2d at 97. (Emphasis added.)

Thus, the easy answer to Davis' concerns is simply to require that when a defendant who has a legitimate claim of being wrongfully convicted comes along (and Davis is hardly one of them), but that defendant has previously pursued an appeal from his conviction, that he file a motion in the highest level appellate court to have assumed jurisdiction in his case, make a

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<sup>28</sup> The court of appeal's decision in this matter, *State v. Davis*, 5<sup>th</sup> Dist. No. 09-CA-19, 2009-Ohio-5175, (*Davis III*), relying as it expressly did upon *Special Prosecutors*, clearly shows that that court understood that its holding was a conditional one predicated upon the “absent a remand” language of *Special Prosecutors*. In fact the court of appeals entered its decision “[f]or the same rationale set forth in *Special Prosecutors*.” *Id.* at ¶ 12. Even if this passage were to be viewed as ambiguous as to whether the court of appeals was following the “absent a remand” exception, because its opinion did not *specifically* mention it, a reviewing court must give deference to matters that are implicit in lower court's action. *Cf.* for example, *Marshall v. Lonberger* (1983), 459 U.S. 422, 432; *State v. Coombs* (1985), 18 Ohio St.3d 123, 125, (A judge is presumed to have applied the correct law unless it is clearly shown to the contrary); and, *Fenton v. Query* (1<sup>st</sup> Dist., 1992), 78 Ohio App.3d 731, 744, (although not specifically mentioned in judgment entry, court's citation to specific case authority makes it implicit that the court relied upon its full holding.)

showing that his motion for new trial has arguable merit<sup>29</sup> and seek a remand of the case to the trial court to consider the motion for new trial. In this fashion, the superior court's jurisdiction is respected at all times, while at the same time truly meritorious claims that cannot be otherwise addressed through other procedural avenues (and that are not simply attempts to bypass an adverse appellate decision) have a remedial avenue.<sup>30</sup>

Davis' suggestion that the trial court is to serve some "gate-keeper" function between legitimate and illegitimate claims, see brief of appellant p. 9, ignores a very significant point. It is the *appellate* court, not the *trial* court, that will always be in the best position to determine what issues were, and what issues were not, within the "compass of its [previous] judgment." Cf. *Murnahan*, supra, 63 Ohio St. 3d at 65 (observing that trial courts are not the best courts to assess appellate proceedings for "[t]o allow such ... could in effect permit trial courts to second-guess superior appellate courts. Also, appellate judges are in the best position to recognize, based upon the record and conduct of appellate counsel, whether such counsel was adequate in his or her representation before that body.") Thus, the appellate court,<sup>31</sup> not the trial court, should be

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<sup>29</sup> And, obviously, not barred by some recognized procedural default.

<sup>30</sup> As Davis and *Amici Curiae* seem to want to paint themselves as the only champions of the wrongfully charged, the Court's attention is directed to not only, again, the fact that undersigned counsel initiated the independent DNA testing of Randy Davis' DNA in *this* case, but undersigned counsel's office recently initiated new DNA testing in another matter that resulted in the dismissal of charges. See, *Columbus Dispatch*, Retest of DNA Clears Defendant of Charges, June 3, 2010 [website date]; *Newark Advocate*, Additional DNA Testing Leads to Man's Release, June 2, 2010 [website date].

*Amicus Curiae*, The Innocence Network's, efforts to inundate this Court with supposed anecdotal examples of prior cases involving persons wrongly convicted, see Brief of *Amicus Curiae*, The Innocence Network, pp. 17-23, misses the point of this appeal. In the first place the vast majority of the information that they rely upon is NOWHERE in this record. Second, the Fifth District's decision simply did not say that under NO circumstances would a motion for new trial be an appropriate avenue (nor is the State suggesting so). The limited impact of the Fifth District's decision is that "absent a remand", a trial court does not regain jurisdiction to consider a post-appeal motion for new trial.

<sup>31</sup> Because some cases involve multiple appeals, by this reference to "the appellate court" the State is suggesting that this be a reference to the highest state appellate court that has actually exercised jurisdiction to the point of issuing an opinion.

the one to serve this gate-keeping function.<sup>32</sup> Indeed, if consistency in post-trial judicial rulings between appellate districts is of any importance at all, then there is all the more reason for the gate-keeping function Davis relies upon to be served by the appellate courts.

## **VI. Post-Conviction Petitions and Motions for New Trial Are Different**

In the event Davis were to point out (or that members of this Court notice on their own) an *apparent* anomaly, certain observations should be made as to why a trial court DOES maintain jurisdiction to entertain a petition for post-conviction relief under R.C. § 2953.21, *et seq.* The answer to that is found in both statutory authorization granted by the General Assembly, as well as an appellate rule adopted by this Court. R.C. 2953.21 provides in relevant part:

(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.*

\* \* \*

(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.

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(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

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<sup>32</sup> This does not mean, however, that appellate courts would be required to conduct evidentiary hearings. On the contrary, in the event that the appellate court found a colorable basis for allowing consideration of the motion on the merits, it could easily remand the matter to the trial court for the purpose of holding an evidentiary hearing, and/or other appropriate proceedings.

and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question ...

(Emphasis added.)

Likewise, this Court promulgated, and the General Assembly thereafter approved,

App.R. 6:

(A) Whenever a trial court and an appellate court are exercising concurrent jurisdiction to review a judgment of conviction, *and the trial court files a written determination that grounds exist for granting a petition for post-conviction relief*, the trial court shall notify the parties and the appellate court of that determination. on [sic] such notification, or pursuant to a party's motion in the court of appeals, the appellate court may remand the case to the trial court.

(Emphasis added.)

The Staff Note to the 1997 amendment to this rule states that “[t]he purpose of this rule is to implement the provisions in section 2953.21 of the Revised Code, ... that establish concurrent jurisdiction in criminal cases when a direct appeal and a petition for post-conviction relief are proceeding concurrently.”

Thus, if Davis wants to rely upon the absence of a *Special Prosecutors*-type jurisdictional bar appearing within the precise language of Crim.R. 33, he still loses, as there is no similar statutory provision or appellate rule that serve to authorize a Crim.R. 33 motion to be heard during an appeal, nor after an appeal has occurred. Said differently, as Ohio law has no express provisions that *affirmatively authorize* a trial court to take any action on a motion for new trial once a defendant has chosen to pursue an appeal (unlike those that allow for post-conviction petitions), this difference is strongly indicative of the fact that concurrent jurisdiction between the two courts is only permitted in the one case (i.e. a post-conviction petition proceedings). Crim.R. 33 is notably different than the post-conviction relief statute, which specifically authorizes a trial court to consider a petition “even if a direct appeal of the

judgment is pending”. *R.C. § 2953.21(C)*. The absence of similar statutory language and appellate rule must mean something!

## VII. Davis Cites Inapplicable Court Precedence

Davis and *Amici Curiae*'s citation to various cases where either trial or intermediate appellate courts have chosen to address the merits of a motion for new trial provide him no safe harbor, for the simple reason that in none of those cases does it appear that the prosecution actually raised the jurisdictional bar occasioned by the *Special Prosecutors* case in the context of a motion for new trial, let alone while providing those courts with a detailed history of the proceedings and arguments presented by Asher in the lengthy litigation which culminated in the Special Prosecutors opinion. Accordingly those courts had no reason to truly consider the issue.

Conversely, one case cited by Davis that does cite *Special Prosecutors*, is actually in accord with the Court of Appeals' decision below. For example in *State v. Parks*, 8<sup>th</sup> Dist. App. No. 08-CA-857, 2009-Ohio-4817 the court affirmed the trial court's denial of a motion to withdraw a plea after an earlier appeal by observing: "We issued our final ruling on the direct appeal on December 23, 2005, affirming the conviction and sentence in full. The trial court could not have issued *any valid ruling* after that date to vacate *any part* of the conviction or sentence." *Id.* at ¶ 7. (Emphasis added.)

Nor is Davis' or *Amici Curiae*'s reliance on this Court's opinions in *State ex rel. Neff v. Corrigan*, 75 Ohio St.3d 12, 1996-Ohio-231, nor *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, persuasive.<sup>33</sup> In fact, in many respects these two cases actually

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<sup>33</sup> Both of these cases, like *Special Prosecutors*, involved requests for extraordinary writs. Thus in those cases the question of whether a judgment was void, or voidable, was of some potential importance as that issue occasionally factors into the "adequate remedy at law" by way of a direct appeal analysis of one of the prongs considered when deciding the appropriateness of granting an extraordinary writ. This case is not an extraordinary writ case so this distinction is of

support the position taken by the State of Ohio.

In *Neff*, this Court addressed the propriety of a writ of mandamus/prohibition to prevent a probate court from taking action on a probate estate.<sup>34</sup> One of the arguments raised by the *Neff* was that the jurisdiction of a trial court ceased when a prior appeal to the court of appeals was taken in the matter. This Court characterized the argument in that case: “Appellant claims that Judge Corrigan lacked jurisdiction after a prior executor’s appeals were dismissed following settlement.” *Id.* at p. 15.

The Court rejected the argument making the observation (the only want that Davis wants this Court to consider) that “[a]s the court of appeals determined, the settled appeals did not involve the attorney fees issue.” *Id.* at pp. 15-16. However, this Court continued and noted later: “Further, 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.” *Id.* at p. 16.<sup>35</sup> (Emphasis added.) These passages actually support the State for two reasons.

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no relevance here.

<sup>34</sup> The overall underlying case addressed two estates, Gerber and Borgh, but it appears that jurisdictional issues arose only in relationship to a prior appeal in the Borgh matter that had been dismissed. *Id.* (It does appear that there were prior appeals related to the Gerber estate that were also dismissed for want of a final appealable order. *Id.* at 13.)

<sup>35</sup> Indeed, after making this observation in *Neff* about the prior appeal being dismissed, this Court cited to *State ex rel. Newton v. Court of Claims*, 73 Ohio St.3d 553, 558; 1995-Ohio-117. That case also is supportive of the State’s position in this appeal. In *Newton*, there were two prior appeals – one that was voluntarily dismissed, *Id.* at 554, and an earlier one that resulted in a reversal together with a “remand with instructions”. *Id.* In fact, the remand with instructions specifically provided: “The cause is remanded with instructions to enter a new order [related to an immunity issue], **and for other appropriate proceedings.**” *Newton v. Ohio University School of Osteopathic Medicine* (10<sup>th</sup> Dist. 1993), 91 Ohio App.3d 703, 713. (Emphasis added.) Thus, these cases are entirely consistent with the State’s position herein that absent a remand (or a prior complete dismissal of the appellate proceedings), a trial court does not simply regain the opportunity to “undo” a criminal conviction that was a required legal predicate for the prior appellate jurisdiction.

Indeed, this Court has relied upon *Neff* in cases where the prior appeal was voluntarily dismissed, see *Neff* itself; dismissed for want of a final appealable order, see *State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798; or dismissed for want of prosecution, see *State ex rel. Rock v. School Employees Retirement Board*, 96 Ohio St.3d 206,

First, a *dismissal* of an action is altogether different in legal significance than when a court acts to exercise jurisdiction over a matter and enters judgment of some nature. Cf., for example, *Zimmie v. Zimmie* (1984), 11 Ohio St.3d 94, (“It is axiomatic that [a] dismissal deprives [a] court of jurisdiction over the matter dismissed. After its voluntary dismissal, an action is treated as if it had never been commenced.”) (Citation omitted.)

In Davis’ case his prior appeals, not *Davis I*, nor *Davis II*, resulted in neither a dismissal, nor any form of a remand. In both cases the superior courts “affirmed” the judgment of conviction. See, *Davis I*, 116 Ohio St.3d 404, ¶405, (“Judgment affirmed.”); and, *Davis, II*, 2008-Ohio-6841, ¶ 169, (“For all the foregoing reasons, the judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.”

Moreover, *Neff* dealt with an issue of attorneys fees. Issues regarding attorney’s fees are addressed by Ohio law in ways wholly different from other issues. As this Court observed in *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, ¶¶ 8-9, “agreements to pay another’s attorney fees are generally ‘enforceable and not void as against public policy so long as the fees awarded are fair, just and reasonable as determined by the trial court upon full consideration of all of the circumstances of the case.’ ... [A]greements to pay attorney fees in a ‘contract of adhesion, where the party with little or no bargaining power has no realistic choice as to terms,’ are not enforceable.’ ...” *Id.* at ¶¶ 8-9. However, in all instances any attorney fees award must be “fair, just and reasonable as determined by the trial court upon full consideration of all of the circumstances of the case.” *Id.* at f.n. 3, citing, *Nottingdale Homeowner’s Ass’n. v Darby* (1987), 33 Ohio St.3d 32, at syllabus.

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2002-Ohio-3957. Any broader reading of any language in any of the opinions of this Court to suggest that a trial court regains nearly unlimited jurisdiction over any issues not actually raised on appeal both takes the actual holding of those cases outside of the true facts of the case, and/or rely upon *dicta*.

How could a trial court hope to ever determine that attorneys fees are “fair, just and reasonable” unless the litigation were at an end (i.e. after all appellate proceedings have concluded)? Thus, post-appellate jurisdiction to address attorney’s fees is an absolute necessity as would not be inconsistent with the appellate court’s ruling, but collateral to it, or in aid of it. Ohio law has such a myriad of specialized rules dealing with attorney’s fees<sup>36</sup> such an issue is hardly one upon which this Court, or any court for that matter, should base some generalized ruling on “jurisdiction” related to a motion which constitutes a direct frontal attack on the very foundation of a criminal conviction – the validity of the very finding of guilt itself.<sup>37</sup>

Similarly, Davis and *Amici Curiae*’s reliance upon *Marshall* is unfounded. In that case this Court found that a trial court did not have jurisdiction to entertain a post-appeal motion for relief from judgment under Crim.R. 57(B) and Civ.R. 60(B). Indeed the opposing parties’ citation to this case is especially puzzling in that *Marshall* clearly supports the proposition that the *Special Prosecutors* bar is not merely limited to the confines of a motion to withdraw a plea under Crim.R. 32.1 as that case was specially addressing, but it applies to other pleadings as well – a holding that is obviously contrary to Davis’ claims that *Special Prosecutors* does not apply to a Crim.R 33 motion. (Brief of appellant, p. 4.) In *Marshall*, this Court applied *Special Prosecutors* outside the confines to a Crim.R. 32.1 motion. *Id.* at ¶ 33.

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<sup>36</sup> See, as a few examples, *Wilborn*, and *Nottingdale*, *supra*. See also, *Hospitality Motor Inns, Inc. v. Gillespie* (1981), 66 Ohio St.2d 206, 208, (despite non-appealable nature of claim presented to Industrial Commission and therefore dismissal for lack of jurisdiction, attorneys’ fees could be awarded under R.C. 4123.519); and, *Gitlin v. Plain Dealer Publishing Co.* (2005), 161 Ohio App.3d 660, ¶ 14, (voluntary dismissal of action, while divesting court of jurisdiction for most things, does not divest jurisdiction to award attorneys fees under Civ.R. 11.)

<sup>37</sup> Moreover, to the extent that the attorneys’ fees issue in *Neff* concerned what appears to be payment of any attorney who appears to have been employed by an initial executor of an estate, and the issue arose in the context of the appointment of a successor executor of that estate, this issue appears to squarely fall within the realm of matters that are “in aid of an appeal” such as “collateral issues like contempt, appointment of a receiver and injunction”, a recognized exception to the *Special Prosecutors*’ rule – indeed one which was specifically mentioned in that decision. 55 Ohio St.2d at 97.

Nor does *Marshall* stand for the proposition that, if perhaps, a different issue than those which were presented in the prior appeal were to be included in the trial level post-appeal motion the trial court would have jurisdiction to consider it.<sup>38</sup> First, the Court in *Marshall* had no occasion to actually reach that issue as it specifically found that the issue in that case WAS the same. *Id.* at ¶ 30. Thus any commentary suggesting that this Court thought otherwise is merely *dicta* at best.<sup>39</sup>

Second, *Marshall* did not have occasion to discuss the necessary impact of this Court's decision in *Baker*, [cited supra at f.n. 17]. As *Baker* observed, a final criminal conviction doesn't even become ripe for any appeal absent a determination of guilt and an ensuing sentence both being in place. 119 Ohio St.3d 197, syllabus of court. That being the case, a trial court's "removal" of that foundational legal predicate, by granting a new trial for example, undoes the very basis for the prior appeal. Thus the only way to square the legal principles of *Special Prosecutors*, *Neff*, and *Marshall*, with *Baker*, is to simply require that the trial court "regain" jurisdiction to consider motions that by their very nature "undo" the former final and appealable

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<sup>38</sup> See discussion at Section III, at p. 13, supra supporting that fact that Davis' motion for new trial, try as he might to say otherwise, did in fact raise the same issue (reliability of DNA evidence) as was raised in prior appeals.

<sup>39</sup> Indeed, this Court's observation later in the *Marshall* opinion to the effect that "[w]hile new arguments are barred by the res judicata portion of the law-of-the-case doctrine, ..., res judicata – unlike the portion of the law-of-the-case doctrine at issue here – is not a basis for extraordinary relief in prohibition", *Id.* at ¶11, though on an initial read may support Davis' "different issue" exception to *Special Prosecutors*, it really does not. As previously noted, THIS appeal is not an extraordinary writ case. Thus, this language in *Marshall* (aside from being *dicta* in the first place given this Court's conclusion that the same issue was actually involved) is inapplicable because many forms of "jurisdictional" claims can be raised in a normal appeal that can find no legal foothold in extraordinary writ proceedings. Hence, Ohio law recognizes a dichotomy between situations when a trial court lacks *subject matter* jurisdiction over a case and thus its judgment is "void" and subject to remedy by extraordinary writ, versus situations involving a *lack of jurisdiction over the particular case* which merely renders the judgment "voidable" and subject to remedy by normal appellate proceedings. See discussion of *Pratts v. Hurley*, [cited previously supra at f.n. 10,] 102 Ohio St.3d 81, at ¶¶ 11-12, quoting *State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833, 769 N.E.2d 846, ¶ 22.

nature of the original entry of conviction by way of a remand only (or by way of the appellate proceedings being dismissed.)

### **VIII. No Constitutional Right to Litigate a Motion for New Trial**

An implicit thread that clearly underlies the arguments made by Davis and *Amici Curiae*, is the notion that any criminal defendant has some *constitutional* due process *right* to litigate a motion for new trial. Said differently Davis, essentially, claims an absolute right to litigate a motion for new trial four years after his conviction *and* after his case has been reviewed by state superior courts on DNA-related issues on two prior occasions. See, *Davis I*, and *Davis II*. This Court should not be misled by appellant's implication, as it is simply not the law.

The United State's Supreme Court has never held that the Due Process clause requires a state to permit a criminal defendant to file a motion for new trial (let alone after an appeal, as well as after a post-conviction petition). Cf. *United States v. MacCollom* (1976), 426 U.S. 317, 323, (Plurality opinion.) (Due process clause "certainly does not establish any right to collaterally attack a final judgment of conviction."); *Pennsylvania v. Finley* (1987), 481 U.S. 551, 557, (States have no obligation to provide post-conviction relief.); *Murray v. Giarratano* (1989), 492 U.S. 1, (applying same rule to death penalty cases); and, *State v. Steffen*, 70 Ohio St.3d 399, 410; 1994-Ohio-111, (post-conviction proceeding not a constitutional right).

Indeed, Davis has cited to no case that stands for the legal proposition that a criminal defendant has the *right* to file a motion for new trial. Indeed, case authority holds otherwise. See, *United States v. Johnson* (Kan.D.C.), 995 F.Supp. 1259, 1263, ("[T]here is no constitutional right to assert a motion for new trial."); and *United States v. Johnson* (Kan.D.C.), 992 F.Supp. 1257, 1262, (same).

Moreover if there were some constitutional right to file a motion for new trial *at any time a defendant wished to do so*, then Crim.R. 33 could not validly have a time limit for filing such a motion including within it at all. But clearly it can. See, for example, *Francis v. Henderson* (1976), 425 U.S. 536, 541, (“It is beyond question that under the Due Process Clause of the Fourteenth Amendment [a state] may attach reasonable time limitations to the assertion of federal constitutional rights.”), quoting, *Michel v. Louisiana* (1955), 350 U.S. 91, 97. If a *formal rule of procedure* (like Crim.R. 33) could validly place time limits upon the filing of motions for new trial, why wouldn’t a *rule of practice* (like that of *Special Prosecutors* which is built upon the fundamental acknowledgment that lower courts must respect the decisions, and jurisdiction, of superior courts) be equally valid? Clearly they are and should be. This, in essence, is all that the Fifth District decided.

Davis should not get a third (lest that be lost, THIRD) round of trial court proceedings on DNA issues just because he wants to. Given the fact that Davis has been permitted to pursue a direct appeal, as well as a petition for post-conviction relief and related appeal, it is hard to imagine how the “fundamental fairness” requirement of the Due Process clause is undermined by not letting Davis have a third bite at the proverbial apple.

#### **IX. No Reversal Required When Independent Ground For Correct Result**

Regardless of this Court’s decisions on the merits of *Special Prosecutors’* application to Davis’ case, Davis is nonetheless not entitled to a reversal in that separate, and independent grounds exists to support the Fifth District’s ultimate conclusion that the trial court was not empowered to entertain his motion for new trial, namely that it was barred by the doctrine of *res judicata*, and/or the evidence presented did not constitute newly discovered evidence as required by Crim.R. 33.

A fundamental tenet of appellate review is that when a lower court has stated an erroneous basis for its judgment, a reviewing court must still affirm the judgment if it is legally correct on other grounds, that is, it achieves the “right result for the wrong reason” because such an error is not demonstrated to be prejudicial.<sup>40</sup> *Gunsorek v. Pingue* (10<sup>th</sup> Dist. 1999), 135 Ohio App.3d 695, 701, citing *State v. Payton* (12<sup>th</sup> Dist. 1997), 124 Ohio App.3d 552, 556-57. See also, *State v. Lozier* (2004), 101 Ohio St.3d 161, 166.

In this case the *trial* court did not address the jurisdictional bar occasioned by *Special Prosecutors*. (Judgment Entry, January 30, 2009.) Moreover the State of Ohio did not limit its response to Davis’ motion to that jurisdictional bar. (State Response ... filed November 26, 2008, and State’s Supplemental Response ..., filed January 20, 2009.) Accordingly, it is entirely proper to consider other reasons for affirming the trial court’s denial of Davis’ motion, and the court of appeals’ affirmance of that denial.

A. Res Judicata. Contrary to Davis’ claims otherwise (see Motion for Leave, p. 4), his current *proposed* grounds for a motion for new trial merely raised issues that could have been included either in his direct appeal, or in this previously filed petition for post-conviction relief. See, generally, *Perry*, 10 Ohio St.2d 175, syllabus at ¶ 9.<sup>41</sup> Indeed both in the direct appeal to this Court, and in his appeal related to his petition for post-conviction relief – and while being represented by counsel other than trial counsel in both – Davis raised issues associated with DNA testing, see, *Davis I*, 116 Ohio St.3d 404, at ¶¶ 344-45; and *Davis II*, 2008-Ohio-6841, at

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<sup>40</sup> Indeed, because of this tenet of Ohio law, Davis wrongly avoids discussion of the trial court’s decision. See also, *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 18 (affirming court of appeal, “albeit on different grounds”, even though court of appeals had not reviewed trial court’s decision on appropriate legal basis); and, *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 44, (same).

<sup>41</sup> “Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.”

¶¶ 153-60. [See also, Petition, Sixteenth Ground for Relief (and affidavit of Gregory Meyers, Exh. X thereto)]. In fact Meyers' affidavit attached to the Petition makes many of the same points that Dr. Mueller attempts to make in his affidavit which Davis relies upon in his motion for new trial.

In order to avoid a *res judicata* bar Davis advanced the claim that he could not have pursued this DNA argument sooner as Dr. Mueller's information was not available to him earlier. He is plainly wrong. First, the entirety of Dr. Mueller's affidavit is based upon published journal articles that pre-date this Court's ruling on his direct appeal (January 3, 2008) in *Davis I*. Thus absolutely nothing prevented Davis from making these exact same arguments, citing to these exact same articles, as part of his direct appeal.<sup>42</sup> Indeed, Davis would be disingenuous to suggest that this Court could not have considered scientific literature in his direct appeal as his merit brief to this Court in that appeal included a string citation to supposed scientific sources, *albeit* related to fingerprinting, that were clearly not a part of the record before the trial court. (See Appellant's Merit Brief in his direct appeal, p. 86-87, f.n. 29.). Moreover, this Court has considered scientific literature in reviewing DNA claims long before now. See, *State v. Pierce* (1992), 64 Ohio St.3d 490, 496; and, *State v. Adams* (2004), 103 Ohio St.3d 508, ¶ 81<sup>43</sup>.

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<sup>42</sup> Although these studies/articles may not have been part of the trial record, this is of no relevance as appellate courts may consider and rely upon legal and scientific commentaries when reviewing a trial court's determinations regarding scientific evidence even if the commentaries were not originally before the trial court. See, *State v. Butterfield* (Utah App.) Case No. 990654, Slip Op. July 10, 2001, fn. 5; citing, *People v. Brown* (Cal. 1985), 726 P.2d 516, *rev'd. on other grounds*, 479 U.S. 538; *People v. Dalcollo* (Ill.App), 669 N.E.2d 378, 385; *United States v. Porter* (D.C. Cir. 1992), 618 A.2d 629, 635; and, *State v. Harvey* (N.J. 1997), 699 A.2d 596, 620.

<sup>43</sup> "To support his claims, Adams cites a variety of studies suggesting limitations on DNA evidence. For example, Adams argues that the court should have excluded DNA evidence because of controversy over (1) 'the statistical estimates being offered for Polymerase Chain Reaction (PCR) tests'; (2) 'the reliability of the methods used ... for collecting, handling,

In addition, Davis' merit brief filed in *Davis II* (his appeal of the denial of his petition for post-conviction relief) specifically attached the very case that he later relies upon in his motion for new trial, *Brown v. Farwell* (9<sup>th</sup> Cir. 2008), 525 F.3d 787, which makes mention of the phrase "prosecutor's fallacy".<sup>44</sup> Indeed, the phrase "prosecutor's fallacy" was originated by William C. Thompson and Edward Schumann in 1987 in their article *Interpretation of Statistical Evidence in Criminal Trials: The Prosecutor's Fallacy and the Defense Attorney's Fallacy* (1987). It is thus absurd for anyone to argue that this "evidence" could not have been "discovered" earlier. In fact, an affidavit that Davis attached to his petition for post-conviction relief in support of his Sixteenth Ground for Relief made the same arguments, albeit relying upon the opinion of an attorney, Greg Myers, who claimed to have expertise in DNA cases.

B. *Failure to Show Due Diligence in Locating "Newly" "Discovered" Evidence.* For many of the same reasons that any motion for new trial would be barred by the doctrine of *res judicata*, the "evidence" that the defendant now presents (i.e. the substance of Dr. Mueller's opinion) is not "newly discovered". Crim.R. 33(B) requires that the defendant show by clear and convincing proof that he was "unavoidably preventing from the discovery of the evidence upon which he must rely." "[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

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processing, and testing crime scene samples'; and (3) 'coincidental match probabilities and false error rates.'"

<sup>44</sup> Inexplicably, the prosecution in *Brown* did not dispute Mueller's report in that case, which is rather surprising since it is laden with the same rejected analysis present in this case. In the event an evidentiary hearing on the motion for new trial is authorized herein, undersigned counsel will not make the same mistake by simply assuming a court will understand Mueller to be nothing more than a hired "expert" that, it appears, does not even have the certification to actually do a forensic DNA test pursuant to the certification standards he cites. In fact, in an ensuing appeal the United States Supreme Court found that the Ninth Circuit committed error in even considering Mueller's opinion and reversed *Brown*. See, *McDaniel v. Brown* (2010), \_\_\_ U.S. \_\_\_; 130 S.Ct. 665.

the motion for new trial in the exercise of reasonable diligence.” *State v. Walden* (1984), 19 Ohio App.3d 141, 145-146. (Italics added.)

Noticeably absent from Dr. Mueller’s affidavit is exactly *when* he was first contacted by Davis’ defense team. Moreover, as Dr. Mueller’s affidavit conceded, the argument he now makes was introduced years ago in the widely read National Research Council I (NRC-I) report published in 1992. (Mueller affidavit, ¶ 13.) In light of this, it is fully understandable that the affidavit doesn’t even so much as make the slightest attempt to explain “how” this supposed new evidence was finally supposedly discovered, nor “why” it could not have been discovered earlier. Cf. *State v. Parker* (2<sup>nd</sup> Dist.), 178 Ohio App.3d 574, 2008-Ohio-5178, ¶ 21, (failure of affidavit in support of motion for leave to file a motion for new trial to explain “how” new evidence was discovered and to explain “why” it could not have been discovered earlier warrants denial of motion for leave.) Knowing these types of timing-related facts is crucial for even after the lapse of the 120-day time limit under Crim.R. 33 courts apply a “reasonableness” standard to any post-discovery delay. *State v. Elersic*, 11<sup>th</sup> Dist. App. No. 2007-L-104, unreported, 2008-Ohio-2121, ¶ 20.

Likewise, attacks upon the statistics associated with DNA analysis have been raging for some time – both in the scientific community, as well as in the courts. They are hardly “new”. Indeed, in addition to the cases and scientific authority cited above, the Court’s attention is called to the case of *United States v. Jenkins* (D.C.App. 2005), 887 A.2d 1013. In that case the arguments being presented by Davis here through Mueller’s affidavit, were made at a motion hearing on a “cold- hit” case in the spring of 2001. *Id.* at 1017. The defense expert in that case was Dr. Daniel Krane of Wright State University in Dayton, Ohio. *Id.* at 1018. If Jenkins can make these statistical-based arguments in Washington D.C. in 2001 using an expert from Dayton, Ohio, there is no reason that the same arguments could not have been made in the

instant case long before the current, and substantially belated, motion for new trial was filed in November 2008!

Similarly, in *People v. Johnson* (Cal.App. 2006), 139 Cal.Rptr 3d 587, the court was addressing a claim based upon a “cold-hit” CODIS match based upon an evidentiary hearing that took place years prior and held that “[t]he fact appellant was first identified as a possible suspect based upon a database search simply does not matter.” Id. at 598. Instead, the relevant population statistics “is the population of possible perpetrators, not the population of convicted offenders whose DNA has been entered into CODIS.” Id. Citing *Jenkins*, the *Johnson* court concluded that no new methodology is necessary for “cold-hit” cases. Id. at 601.

Further still, in *Murphy v. Elo* (E.D. Mich. 2005), Case No. 97-CV-76017-DT, unreported, 2005 WL 2284223, affirmed, 250 Fed.Appx. 703, the court, citing a 1991 scientific journal article, noted the existence of a debate over the proper statistical calculations associated with DNA testing relating to a phenomenon know as “substructuring” or “subgrouping” in populations. Id. at p. 10.

Perhaps even more importantly, recently courts confronted with *all* sides of the debate (unlike the *Brown* court relied upon by Davis) have rejected the argument advanced by Dr. Mueller. See, *People v. Nelson* (Cal.S.Ct. 2008), 185 P.3d 49, 62 (describing Mueller as “an ecologist and population geneticist who frequently appears as a defense witness ...”); *State v. Bartylla* (Minn.S.Ct. 2008), 755 N.W.2d 8, (rejecting Mueller’s testimony as a basis for error); and, *People v. Brownlow* (Adams Co. Colo. Dist. Ct., May 18, 2006), Slip Opinion, Case no. 05-CR-1125, (rejecting testimony of Mueller as “incongruous”).

Finally, even Dr. Mueller’s affidavit’s reliance upon an Arizona database 9-STR locus match is of no help. That was first reported in 2001 – some fours years prior to trial herein. Thus, this is clearly not “newly discovered” evidence.

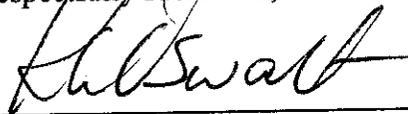
## CONCLUSION

The Fifth District Court of Appeals properly concluded that, once an appellate court affirms a conviction, a trial court is divested of jurisdiction to grant any motion that would be inconsistent with the appellate court's affirmance of that conviction. There can be but no question that, once an appellate court has affirmed a conviction, a trial court's grant of a new trial is absolutely "inconsistent with the judgment" of that superior court as it would entirely "undo" the superior court's affirmance of the conviction. As a result, the Fifth District was correct in applying the *Special Prosecutors* rule to this case. And Davis, assuming he could even show a truly legitimate issue of newly found evidence, had a simple remedy available to him, which he ignored: to ask the superior court in his case for a remand.

Moreover, the denial of his motion for new trial was appropriate for many other reasons beyond that relied upon by the Court of Appeals. Accordingly, regardless of this Court's view of the "jurisdictional" argument, no reversal should be ordered.

Based upon the foregoing the State of Ohio has shown that Davis was not entitled to having a motion for new trial considered by the trial court. Accordingly, the court of appeals' decision should be affirmed.

Respectfully submitted,



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Kenneth W. Oswalt, Reg. #0037208  
Prosecuting Attorney

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing has been sent by regular U.S. Mail this 12<sup>th</sup> day of July 2010 to each of the attorneys noted on the coverage hereto.



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Kenneth W. Oswalt, Reg. #0037208  
Prosecuting Attorney

**IN THE OHIO SUPREME COURT**

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

Case No. 2009-2028

ROLAND DAVIS,

Defendant-Appellant.

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**APPENDIX TO  
Merit Brief of State of Ohio,  
Plaintiff-Appellee**

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## ***ITEMS INCLUDED IN APPENDIX***

### **Rules and Statutory Provisions**

App. R. 6

Crim.R. 32.1

Crim.R. 33

R.C. 2953.21

### **Court Documents Associated with *Special Prosecutors Decision***

- |                   |   |
|-------------------|---|
| State's Exhibit A | Answer Brief of Intervenor – Appellee Ronald E. Asher, on file with the Clerk of this Court, in <i>State ex rel. Special Prosecutors</i> , Case no. 77-1447   |
| State's Exhibit B | Motion to Set Aside Judgment of Conviction and Permit Defendant to Withdraw His Plea” filed in Belmont County Common Pleas Court Case no. 75-CR-054   |
| State's Exhibit C | Partial transcript of hearing of February 15-16, 1977 included in Record for Appellant, at R-VI, “Appendix E”, on file with the Clerk of this Court, in <i>State ex rel. Special Prosecutors</i> , Case no. 77-1447 |
| State's Exhibit D | Judgment Entry, February 16, 1977, Belmont County Common Pleas Court Case No. 75-CR-054   |

## **App R 6 - Concurrent jurisdiction in criminal actions**

(A) Whenever a trial court and an appellate court are exercising concurrent jurisdiction to review a judgment of conviction, and the trial court files a written determination that grounds exist for granting a petition for post-conviction relief, the trial court shall notify the parties and the appellate court of that determination. on [sic] such notification, or pursuant to a party's motion in the court of appeals, the appellate court may remand the case to the trial court.

(B) When an appellate court reverses, vacates, or modifies a judgment of conviction on direct appeal, the trial court may dismiss a petition for post-conviction relief to the extent that it is moot. The petition shall be reinstated pursuant to motion if the appellate court's judgment on direct appeal is reversed, vacated, or modified in such a manner that the petition is no longer moot.

(C) Whenever a trial court's grant of post-conviction relief is reversed, vacated, or modified in such a manner that the direct appeal is no longer moot, the direct appeal shall be reinstated pursuant to statute. Upon knowledge that a statutory reinstatement of the appeal has occurred, the court of appeals shall enter an order journalizing the reinstatement and providing for resumption of the appellate process.

(D) Whenever a direct appeal is pending concurrently with a petition for post-conviction relief or a review of the petition in any court, each party shall include, in any brief, memorandum, or motion filed, a list of case numbers of all actions and appeals, and the court in which they are pending, regarding the same judgment of conviction.

### **STAFF NOTES - 1997:**

*The purpose of this rule is to implement the provisions in section 2953.21 of the Revised Code, as amended effective September 21, 1995, that establish concurrent jurisdiction in criminal cases when a direct appeal and a petition for post-conviction relief are proceeding concurrently. Orderly exercise of that jurisdiction is facilitated by providing for remand to the trial court when the trial court has determined that post-conviction relief should be granted. Further, appellate review in the direct appeal and appellate review of the post-conviction ruling are coordinated to preserve efficient use of judicial resources. Under R.C. 2953.21 an appeal remanded for a trial court's consideration of post-conviction relief is automatically reinstated if the trial court's favorable consideration is reversed, vacated, or modified. This rule provides a mechanism for entering this automatic reinstatement in the record.*

### Crim R 32.1 – Withdrawal of guilty plea

A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.

### Crim R 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.

**R.C. 2953.21 – Petition for postconviction relief**

(A)(1) 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 his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States 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.

(2) 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 the date on which the trial transcript is filed in the supreme court if the direct appeal involves a sentence of death. If no appeal is taken, 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 upon whom a sentence of death has been imposed 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.

(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.

(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 petitioner need not serve a copy of the petition on the prosecuting attorney. 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, 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 and supporting affidavits, 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 made up, 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 prisoner in custody, shall discharge or resentence the prisoner or grant a new trial as may appear 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 this section by a prisoner in a state correctional institution who has received the death penalty, the court may stay execution of the judgment challenged by the petition.

(I) 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 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 a related order of disposition.

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. :  
Special Prosecutors in :  
Case No. 75-CK-054 in :  
Belmont County Common :  
Pleas Court :

Relators, :

-vs- :

CASE NO. 77-1447

JUDGES OF BELMONT COUNTY :  
COURT OF COMMON PLEAS, :

Respondents. :

APPEAL FROM COURT OF APPEALS FOR BELMONT COUNTY  
SEVENTH JUDICIAL DISTRICT

---

ANSWER BRIEF OF INTERVENOR - APPELLEE RONALD E. ASHER

---

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Attorneys for Relators-Appellants

FILED  
DEC 30 1977  
SUPREME COURT OF OHIO  
THOMAS L. STARTZMAN, Clerk

STATE'S  
EXHIBIT  
**A**

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE FACTS	1
LAW AND ARGUMENT	
<u>Proposition of Law No. 1:</u>	4
The Trial Court Does Have Jurisdiction Of The Subject Matter Pursuant To Criminal Rule 32.1.	
Authorities Cited in Support:	
<u>Majnaric v. Majnaric</u> , 46 Ohio App. 2d 157.....	5
Ohio Rules of Criminal Procedure, Rule 32.1.....	4
<u>State v. Smith</u> , 49 Ohio St. 2d, 261.....	4
<u>Proposition of Law No. 2:</u>	6
Criminal Rule 32.1 Vests Jurisdiction In The Trial Court To Maintain And Determine Motions Pursuant Thereto And Does Not Affect Substantive Law	
Authorities Cited in Support:	
Ohio Rules of Criminal Procedure, Rule 32.1.....	6
<u>Proposition of Law No. 3:</u>	7
A Writ of Prohibition Is Not The Proper Remedy. The Trial Court Has Continuing Jurisdiction Pursuant To Criminal Rule 32.1. Appeal Is The Proper Remedy To Determine Abuse Of Discretion By The Trial Court.	
Authorities Cited In Support:	
<u>Marsh v. Goldthorpe</u> , (1930) 123 Ohio State 103.....	7
Ohio Rules of Criminal Procedure, Rule 32.1.....	7
<u>State v. Gusweiler</u> , 30 Ohio 2d 326.....	7
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF CONTENTS (Continued...)

	<u>Page</u>
APPENDICES:	
A. Notice of Appeal	11
B. Decision of Court of Appeals	13
C. Decision of Court of Appeals	14
D. Memorandum of Decision	17

## STATEMENT OF THE FACTS

On June 11, 1975, Ronald Asher entered a plea of guilty to the lesser included offense of murder. Immediately thereafter he filed a motion for a new trial based upon newly discovered evidence.

The trial court took no action on the aforementioned motion until counsel for the intervenor filed a motion for immediate hearing. A hearing was conducted on the 20th day of September, 1976.

During the hearing, Asher's attorney, at the time the plea was entered, testified that he was told by the trial court if they were successful in winning the original charge but was convicted of any of the other charges, they would be run consecutive and he would spend more time incarcerated than if he pled guilty to murder. There were other threats toward Asher if he did not plead guilty.

The aforementioned, as testified by his former attorney, were all related to Mr. Asher prior to entering into the plea. He also testified that the threats came from the trial court and the prosecutor.

Based upon the accusations of the witness, the Honorable Judge Iddings withdrew from further consideration of the motion. Following, the Honorable Judge Hoddinott was appointed to hear the motion. The motion for a new trial based upon newly discovered evidence was subsequently dismissed.

On November 4, 1976, counsel filed a Motion to Vacate the Plea, pursuant to Cr. Rule 32.1.

The basis of that motion was the testimony of Asher's trial counsel's

testimony as to the pre-trial negotiations and the alleged threats of the trial court and the prosecutor which were related to Mr. Asher.

None of the foregoing was part of the record at the time the appeal was perfected, nor could the Court of Appeals decide that particular aspect with no record before them.

An evidentiary hearing was held on the 15th day of February, 1977 pursuant to the Motion to Vacate. Again Mr. Asher's attorney testified to the threats of the court and prosecutor made as to what the trial court would do to Mr. Asher if he were convicted of any charges contained in the indictment.

The area that was presented before the Honorable Judge Hoddinott had not been decided by the Court of Appeals the first time the threats and accusations toward Mr. Asher were first heard on September 20, 1976 and on February 15, 1977.

Based upon the totality of the evidence presented to Judge Hoddinott on February 15, 1977, the Motion to Vacate was sustained and Mr. Asher remanded to the Belmont County Jail to stand arraignment and trial.

The prosecutors filed a Notice of Appeal and on March 29, 1977, the Court of Appeals dismissed the motion because the prosecutor failed to properly follow the rules of appellate procedure. On April 7, 1977, the prosecutor again attempted to file a Notice of Appeal. This time the Court of Appeals dismissed said Notice of Appeal because it was not timely filed.

Mr. Asher has been confined in the Belmont County Jail since February 15, 1977 and is still confined. Finally, through the efforts of

Mr. Asher's counsel, a trial date was set for December 7, 1977. On November 17, 1977, the prosecution filed in the Court of Appeals a Complaint in Prohibition.

The Court of Appeals, on November 29, 1977, dismissed the Complaint of Prohibition and stated the trial court did have jurisdiction pursuant to Cr. Rule 32.1, and the conclusions of the trial court went beyond its original determination in that the trial court found the defendant was ineffectively represented by counsel in tendering his plea. This was never considered by the Court of Appeals as previously stated in the testimony which led the trial court to that opinion and was never introduced until September, 1976 and February, 1977.

The Court of Appeals, in their November 29, 1977 opinion, never stated that the trial court did not have jurisdiction. To the contrary, the court stated that the trial court did have jurisdiction even though it did not agree with the decision and the trial was mandated.

## LAW AND ARGUMENT

### Proposition of Law No. 1:

#### The Trial Court Does Have Jurisdiction Of The Subject Matter Pursuant To Criminal Rule 32.1.

Rule 32.1, Ohio Rules of Criminal Procedure, reads in part:

"...but to correct manifest injustice the Court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

It is obvious the rule grants the trial court the right to hear and determine if the judgment of conviction should be set aside to correct a manifest injustice.

State v. Smith, 49 Ohio St. 2d, 261 states as follows:

"A motion made pursuant to Crim. R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court."

Crim. R. 32.1 is almost identical to Federal Crim. R. 32 (d).

9 A.L.R. Fed. 309 at page 322; Section 4, Rule that motion is addressed to discretion of trial court:

"It is firmly established either expressly or impliedly by virtually all the cases in this annotation that a motion after sentence to withdraw a plea of guilty nolo contendere is addressed to the discretion of the trial court, whose ruling will be reversed on appeal for an abuse of such discretion." (Emphasis added)

If it were the legislative intent to restrict or give a defendant a choice of either appeal or Crim. R. 32.1, it would have endeavored to make that

distinction.

If the court were to say that the same matter which was the subject of appeal cannot be subject to Rule 32.1, the proper remedy of the trial court's decision was subject to appeal and could have been reversed for abuse of discretion.

Regardless, the Court of Appeals recognized that the trial judge made his determination beyond what had been appealed. The trial court, after an evidentiary hearing, found that the defendant was ineffectively represented by counsel in tendering his plea.

There can be no question that the trial court was vested with jurisdiction pursuant to Crim. R. 32.1. Further, the prosecution had the right of appeal for a higher court to determine whether the trial court abused its discretion.

The relators rely primarily on the question of jurisdiction on Majnaric v. Majnaric, 46 Ohio App. 2d 157. Majnaric, supra stated: "when an appeal is pending, the trial court is divested of jurisdiction".

In this case there was no appeal pending and pursuant to Crim. R. 32.1, the trial court was vested with jurisdiction and could and did act on said motion.

Proposition of Law No. 2:

Criminal Rule 32.1 Vests Jurisdiction In The Trial Court  
To Maintain And Determine Motions Pursuant Thereto And Does  
Not Affect Substantive Law.

Ohio Rules of Criminal Procedure were adopted by the Supreme Court. Provisions have been provided that if there is an abuse of discretion, appeal is the proper forum.

The answer to Proposition of Law No. 1 basically answers this proposition of law.

Trying to avoid repetition, the Court of Appeals recognized that the trial court based its decision beyond that which the Court of Appeals ruled upon on direct appeal. The trial court ruled and declared that the defendant had been denied ineffective counsel at the time of his appeal.

Relators had their opportunity to appeal the trial court's decision and seek a determination as to abuse of discretion.

There are no restrictions on filing Motions to Vacate pursuant to Rule 32.1. If the issue had been decided previously, the relators could have appealed that issue. In this case, the trial court went further in its decision when it determined after an evidentiary hearing the defendant was represented by ineffective counsel.

Proposition of Law No. 3:

A Writ Of Prohibition Is Not The Proper Remedy. The Trial Court Has Continuing Jurisdiction Pursuant To Criminal Rule 32.1. Appeal Is The Proper Remedy To Determine Abuse Of Discretion By The Trial Court.

Relators cite State v. Gusweiler, 30 Ohio 2d 326, which reads as follows:

"Where there is a total want of jurisdiction on the part of a court, a writ of prohibition will be allowed to arrest the continuing effect of an order issued by such court, even though the order was entered on the journal of the court prior to the application for the writ of prohibition. (The record sentence of the third paragraph of the syllabus of State ex rel. Frasch v. Miller (1933), 126 Ohio State, 287; the second paragraph of the syllabus of Marsh v. Goldthorpe (1930) 123 Ohio State 103; and the fifth paragraph of the syllabus of State ex rel. Brickel v. Roach (1930) 122 Ohio St. 117, distinguished)

The law, as quoted by the Court of Appeals in relation to Marsh v. Goldthorpe, supra, is still the law controlling a writ of prohibition. There is no doubt that the trial court had jurisdiction and the Court of Appeals correctly denied the writ of prohibition.

The law is clear on the issue of Crim. Rule 32.1. It is addressed to the trial court and is subject to review on appeal to the appellate court to determine whether the trial court abused its discretion.

The relators are attempting to circumvent their own errors in not

perfecting an appeal of the decision of the trial court.

The Court of Appeals in its opinion stated that the trial of Ronald Asher is not unauthorized but rather mandated.

## CONCLUSION

The trial court had jurisdiction pursuant to Crim. R. 32.1 to hear and determine the Motion to Vacate. Further, the Relators had the right to appeal the trial court's decision to determine whether the trial court abused its discretion.

The Court of Appeals properly denied the Writ of Prohibition when it determined that the trial court's decision went to ineffective counsel at the time of the plea.

The Relators have been the cause of most of the delay; first, not providing an immediate hearing on the defendant's motion for new trial based upon newly discovered evidence; secondly, the delay in trial between February 15, 1977 until the present has been because of no action on the part of the Relators. The only movant for trial has been counsel for Ronald Asher.

This action is an attempt to circumvent the proper procedure which was appeal to the Court of Appeals and which Relators did not perfect.

It is, therefore, respectfully submitted that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

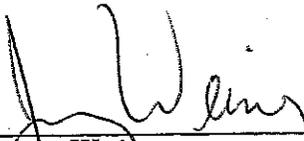


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Jerry Weiner  
Attorney for Intervenor, Ronald Asher  
WEINER, LIPPE & CROMLEY  
505 South High Street  
Columbus, Ohio 43215  
Phone: 614/224-1238

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum Contra of Claimed Jurisdiction by Intervenor Ronald E. Asher was mailed, by ordinary mail, to the attorneys for Relators-Appellants, Charles F. Knapp and Keith Sommer, at their respective offices located at 3381 Belmont Street, Bellaire, Ohio 43906 and 4th and Walnut Streets, Martins Ferry, Ohio 43935, this 30<sup>th</sup> day of December, 1977.

  
\_\_\_\_\_  
Jerry Weiner  
Attorney for Intervenor

*Recd*  
MAR 11 1977

IN THE COURT OF COMMON PLEAS, BELMONT COUNTY, OHIO

STATE OF OHIO	)	
Plaintiff-Appellant	)	NOTICE OF APPEAL
vs	)	
RONALD E. ASHER	)	Case No. <u>1231</u>
Defendant-Appellee	)	

\*\*\*\*\*

Now comes the State of Ohio and gives notice of appeal to the Court of Appeals of the Seventh Appellate District from the judgment of the Common Pleas Court of Belmont County, Ohio, entered on the 16th day of February, 1977, wherein Defendant-Appellee's motion to withdraw his former plea of guilty was sustained. Said appeal is on questions of law.

*Charles F. Knapp*  
\_\_\_\_\_  
Charles F. Knapp

*Keith Sommer*  
\_\_\_\_\_  
Keith Sommer

Special Prosecutors Representing the State of Ohio

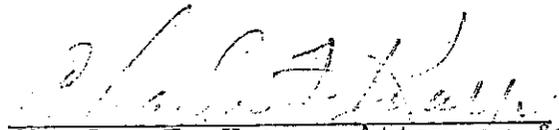
CERTIFICATE

I certify that a copy of the Notice of Appeal was served upon Jerry Weiner, Weiner, Lippe and Cromley Co., L.P.A., Court House Square, 505 South High Street, Columbus, Ohio 43215, attorney for the Defendant-Appellee, by mailing to him by regular U. S. Mail on March 7, 1977.

RECORDED & INDEXED  
CLERK OF COURTS  
BELMONT CO. OHIO

77 MAR 9 PM 1 46

ANTHONY M. VAVRA  
CLERK OF COURTS



Charles F. Knapp, Attorney for  
Plaintiff-Appellant  
3381 Belmont Street  
Bellaire, Ohio 43906  
Telephone: (614) 676-2743

**FILED**

**COURT OF APPEALS**

NO. 1231 APP 3 P. 124

ANTHONY M. VAVRA  
CLERK OF COURTS BELMONT CO.

MAR 9 1977

IN THE COURT OF COMMON PLEAS OF BELMONT COUNTY, OHIO  
CRIMINAL DIVISION

STATE OF OHIO, :  
 :  
 Plaintiff, :  
 :  
 -vs- : CASE NO. 75-CR-054  
 :  
 RONALD E. ASHER, :  
 :  
 Defendant. :

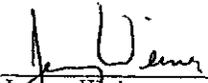
MOTION TO SET ASIDE JUDGMENT OF CONVICTION  
AND PERMIT DEFENDANT TO WITHDRAW HIS PLEA

Now comes the defendant and moves this Honorable Court for an ORDER setting aside the Judgment of Conviction and permit the defendant to withdraw his prior plea.

The defendant further says such action is permissible under rule 32.1, Ohio Rules of Criminal Procedure. Further defendant requests an evidentiary hearing.

Respectfully submitted,

APPROVED  
JERRY M. WEINER  
ATTORNEY AT LAW  
CLERK OF COURTS

  
\_\_\_\_\_  
Jerry Weiner  
Attorney for Defendant  
Weiner, Lippe, & Cromley, Co., L.P.A.  
505 South High Street  
Columbus, Ohio 43215  
Phone: 224 1238 (614)

MEMORANDUM IN SUPPORT

Rule 32.1. Ohio Rules of Criminal Procedure reads as follows:

"A Motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

(Emphasis Added)

To fully enlighten the Court certain portions of various hearings will be attached to this memorandum, so the Court will appreciate the manifest injustice that has been inflicted upon the defendant.



11

Further, Mr. Sustersic testified that as to aggravated murder, the trial court would only charge on "felony murder" which means that any lesser included offenses such as "murder" or "voluntary manslaughter" would not be given to the jury for their consideration.

Mr. Sustersic, on page 6, Exhibit "A", testified the Court told Mr. Sustersic that the aforementioned would be charged to the jury and this was related to the defendant.

I am sure the Court is aware under aggravated murder based on the facts the defendant could be convicted only of voluntary manslaughter if the evidence showed an accidental homicide during the commission of a felony.

It should be further noted and the facts would prove that the co-defendants refuted their statements, that the defendant was involved, prior to the entering of his plea. However, this information was never made available to Mr. Sustersic until after the defendant had entered his plea. This is substantiated by the affidavits of Stewart and Pridgon contained in the Court's official file of this case.

Page 8, of Exhibit "A", it is indicative the defendant, while in the Belmont County Jail, was not "coherent" and counsel was called to the county jail to appease or pacify the situation so things would stay orderly.

Page 9, of Exhibit "A", Mr. Sustersic testified that the defendant was attended by a psychiatrist until at least the week before the plea was entered.

It was further stated at page 9, the defendant was treated by numerous other doctors but the psychiatric treatment took place at the Bellaire Clinic and he was taken there by the Belmont County Sheriff's Department.

Page 10, of Exhibit "A", Mr. Sustersic testified that the trial Court was aware or should have been aware that the defendant was under psychiatric care. I can only agree with that statement because ordinarily for a prisoner to be taken out of the jail, there must be a subpoena or a court order.

Page 14, of Exhibit "A", reinforces Mr. Sustersic's earlier testimony of consecutive sentences and on page 18, Mr. Sustersic informed the defendant of what he was facing and that he disagreed with the trial court and the prosecutor on the charge of felony murder, he would have to fight it on appeal if he lost.

page 4.

To bolster the fact that "Felony Murder" was the view of the prosecutor and stated in open court before the trial court. Attached hereto and marked Exhibit "C" is an excerpt from a motion to set bond on behalf of the defendant and also testimony that the statements of Pridgon and Stewart indicated an accidental shooting in this case.

Both under the Federal and Ohio Rules of Criminal procedure a motion to vacate sentence and withdrawal of plea must be read in para-materia with Rule 11, of the Rules of Criminal Procedure.

Taking into consideration the testimony of Mr. Sustersic, that the trial court advised him that if the defendant was convicted of all or any of the charges contained in the indictment the defendant would be sentence consecutively; that the trial court would only charge the jury on "Felony Murder"; that the trial court was aware or should have been aware that the defendant was under psychiatric care; and the fact that the defendant had lost all motions including but not limited to; refusal of bond; and a change of venue and counsel's statement in open court that public sentiment in Belmont County was very high and incited against the defendant; and coupled with that fact that counsel was not notified that the co-defendants had refuted their statements involving the defendant in the crime, there could not have been a "voluntary" plea.

The trial court, after the defendant plead, should have further interrogated the defendant after he claimed innocence and before acceptance of the plea.

Due process in the guilty plea context means that the plea reflects the considered choice of the accused, free of any factor or inducement which has unfairly, influenced or overcome his will.

In United States v. Tateo, 214, F. Supp. 560 (1963) the court stated at page 565:

"... an accused' splea may be accepted only if it is made voluntarily and knowingly. And if it appears that a guilty plea is a product of coercion, either mental or physical, or was unfairly obtained or given through ignorance, fear or inadvertance, it must be vacated or void since it is violative of constitutional safeguards."

(Emphasis Added)

The Supreme Court case of Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969) reiterates the position of Tate, supra, and imposes strict requirements for the determination of voluntariness. The Court stated at p. 1712;

" . . . .What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. . . ."

The "Boykin Doctrine" has been advocated in several Ohio cases including State v. Buchanan, 43 Ohio App. 2d, 93 (1974), the court held as follows:

"For a waiver of constitutional rights to be valid under the due process clause there must be an intentional relinquishment or abandonment of a known right or privilege. The waiver must be voluntarily, intelligently and knowingly made. . . . \* \* \*"

Therefore, by reason of the aforementioned authority, due process requires that the plea be entered voluntarily and without coercion.

(Emphasis Added)

In the instant case the defendant professed his innocence at all times including the time of the guilty plea.

We now come to the testimony of Mr. Sustersic, attorney for the defendant, which is attached hereto and marked Exhibit "A".

Mr. Sustersic, states that the trial court told him, the defendant would receive consecutive sentences, that the trial court would only charge the jury on "Felony Murder". Mr. Sustersic also testified the defendant was being treated by a psychiatrist during his incarceration and the the court was aware or should have known. Coupling the testimony of Mr. Sustersic with other hearings at which time the defendant was present, you can reach only one conclusion and is the defendant could not receive a fair trial in Belmont County.

The question of whether Mr. Sustersic ever had his alleged discussion with the Court or not is immaterial, because they were related to the defendant. Once having been related to the defendant his ability to enter a plea has been clouded and the plea could not be voluntary based on the fact that everything related to the defendant would properly lead the defendant to believe he could not receive a fair trial and that he was being coerced into pleading guilty to a lesser offense.

Quoting from the text of the defendant's statement of innocence at the time of plea is of great importance as to what was in the mind of the defendant and substantiates Mr. Sustersic's testimony:

"My attorney has advised me well and to the fullest of his capabilities, but he did not write the laws nor can he singly change them. So, even though justice has to be done, I don't feel justice has been done in my case."  
(Emphasis Added)

Based upon the aforementioned, it is obvious that questions of law had been expressed to the defendant by Mr. Sustersic. Further, that Mr. Sustersic disagreed with the law and of necessity, we must look to the statement of "Felony Murder" doctrine told to the defendant. Further, that justice was not done in my case can only lead to the clear version the plea was not voluntary but in fact coerced.

The trial court should have made further inquiry of the defendant based on two aspects of the case.

- 1) Based on Mr. Sustersic's testimony, the court was involved in coercing a plea from the defendant, the court should have inquired as follows:
  - a) Were any statements by the court to your counsel prior to entering the plea, a part of your change of plea;
  - b) Did the defendant feel he could receive a fair and impartial trial in Belmont County;
  - c) Was the defendant under undue influence from his family, his counsel, his minister, the prosecution or even the court;
  - d) The court should have inquired into the defendant's mental capacity to determine his ability to voluntarily, intelligently and knowingly enter a plea.

On the other hand, if the court does not believe the testimony of Mr. Susteric as to what the trial court said or did not, this does not alter the situation. The defendant must rely on counsel. In this case, counsel testified everything he stated in "Exhibit A" was related to the defendant and the defendant had every right to rely on the comments by his attorney. Therefore, either

page 7.

way the guilty plea could not be voluntary but in fact was coerced.

State v. Milanovich, 42 Ohio State 2d. 46 (1975), as pointed out on page 50:

"... The procedural mechanism of obtaining a signed statement that a guilty plea was voluntary cannot preclude all further challenge; like any procedural mechanism, its exercise is neither always perfect nor uniformly invulnerable to subsequent challenges calling for an opportunity to prove the allegations."

Also see Fontaine v. United States, 411 U.S. 213, 215 (1973).

Most of what has been brought forth in this memorandum is not part of the original record but are testimony under oath of the attorney for the defendant at a hearing conducted on September 20, 1976 and are now part of the record in this motion.

As stated in U. S. v. Mancusi, 275 F. Supp. 508 (1967) at p. 519:

"A mere routine inquiry - the asking of several standard questions - will not suffice to discharge the trial court. ... The fact the defendant was represented by counsel did not relieve the court of the responsibility of further inquiry."

State v. Younger (1975) 46, Ohio App. 2d, 269, held as follows:

"Criminal Procedure - Crim. R. 11 (C) (2) - Guilty plea in felony case - explanation of rights mandatory - statement of court must be full and clear."

1. Rule 11 (C) (2) of the Rules of Criminal Procedure require the performance of a specific act by a trial judge before acceptance of a plea in a felony case. The performance of those acts is mandatory and not discretionary.

2. Criminal Rule 11 (C) (2) clearly and distinctly mandates that the trial judge, before accepting a guilty plea in a felony case, inform the defendant of his rights as expressed in the rule and that he understand those rights and that he is making his guilty plea voluntarily.

3. To insure justice, Criminal Rule 11 (C) (2) requires a full and clear statement of those rights to a defendant. That which is not explained is often not understood. That which is not understood cannot be knowingly and intelligently waived. (Emphasis Added)

Citing further from State v. Younger, supra

\*\*\*\* "It is clear ... Rule 11 of the Ohio Rules of Criminal Procedure ... must be scrupulously adhered to ... State v. Griffey (1973) 35 Ohio State 2d, 101, 111.

\*\*\*\* This principal was recently addressed by the Ohio Supreme

Court, State v. Stone, 43 Ohio State 2d, 163, wherein the court stated:

"It should be noted that Crim. Rule 11 remedies the problem inherent in subjective judgment by the trial court as to whether a defendant has intelligently and voluntarily waived his constitutional rights \*\*\*\* by requiring the court to personally inform the defendant of his rights and the consequence of his plea and determine if the plea is understandingly and voluntarily made" \*\*\*\*

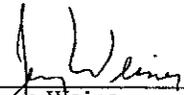
Based upon all of the exhibits, the defendant's contention of innocence at the time of trial, it is obvious the defendant's plea was not voluntary and that a manifest injustice has been dealt this defendant. The court has the power under Criminal Rule 32.1 to vacate the judgment of conviction and set aside the defendant's plea.

Respectfully submitted,

  
\_\_\_\_\_  
Jerry Weiner  
Attorney for Defendant  
WEINER, LIPPE & CROMLEY  
505 South High Street  
Columbus, Ohio 43215  
Phone: 614/224-1238

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Set Aside Judgment of Conviction and Permit Defendant to Withdraw His Plea has been mailed to Mr. John Malik, Belmont County Prosecutor, Belmont County Court House, St. Clairsville, Ohio 43950, this 4 day of November, 1976.

  
\_\_\_\_\_  
Jerry Weiner  
Attorney for Defendant

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STATE OF OHIO, COUNTY OF BELMONT, SS:

IN THE COURT OF COMMON PLEAS

State of Ohio,	(	
	(	
vs.	(	CASE NO. 75-CR-054
	(	
Ronald E. Asher,	(	
	(	
Defendant.	(	

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PARTIAL  
TRANSCRIPT OF TESTIMONY

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APPEARANCES:

For the State of Ohio: Messrs. John J. Malik, Jr. and Charles F. Knapp of the Office of the Prosecuting Attorney, Belmont County, Ohio.

For the Defendant: Mr. Jerry Weiner of the firm Weiner, Lippe and Cromley Co., L. P. A., Attorneys at Law, Court House Square, 505 South High Street Columbus, Ohio, 43215.

BEFORE:

The Honorable William Iddings, Judge of the Court of Common Pleas, Belmont County, Ohio, on Monday, September 20, 1976, at one o'clock P. M.

REPORTED BY: Alice W. Reilly, Asst. Official Shorthand Reporter, Belmont County, Ohio.

SEP 20 1976

ANTHONY M. VAVRA  
CLERK OF COURTS

EDWARD G. SUSTERSIC, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Jerry Weiner

MR. WEINER: May it please the Court, in Mr. Sustersic's position as having been Counsel for Mr. Asher, up through the time of Mr. Asher's entering a plea before this Court, I believe on June 11, 1975, that I am going to be limiting my examination of Mr. Sustersic and asking him questions which have nothing to do with the waiving of the Client-Attorney privilege.

Q. Would you state your name in full, sir?

A. Edward G. Sustersic.

Q. And your address, Mr. Sustersic?

A. R. D. 5, Willow Grove Road, St. Clairsville, Ohio.

Q. What is your business or occupation?

A. Attorney at Law.

Q. And how long have you been an Attorney at Law?

A. November, 1969.

Q. Are you licensed to practice law in the State of Ohio?

A. To the best of my knowledge, yes.

Q. Do you practice primarily in Belmont County?

A. Primarily. My office is in Belmont County.

Q. Do you practice law with anyone?

A. With my wife Jean.

Q. With your wife, Jean?

A. Yes.

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ANDRETT H. VAYRA  
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Q. Now, calling your attention to the year 1975, approximately March or April, were you retained to represent one Ronald Asher?

A. Yes, sir. I was.

Q. And over what period of time did you represent Mr. Asher, if you recall?

A. From the moment he retained me until immediately after the entering of the plea.

Q. That would have been June 11, 1975, is that correct?

A. I believe that is correct.

Q. Now, during the course of your representation of Mr. Asher, did you have any contact with the Belmont County Prosecutor's Office in relation to any type of plea bargaining, whether as initiated by yourself or by the Prosecutor's Office?

A. I would say that. I think we must keep in mind there was at least three additional cases, involvement in this case, involved in this particular Indictment.

Q. What were the total cases involved?

A. There was four against Ronald Asher, and four against an individual whose last name is Childers, and four against Marshall Pridgon, and four against Ronald Stewart. I had been made aware that some bargaining was going on.

Q. When you say you were made aware some bargaining was going on, who made you aware?

A. Well, obviously the Prosecutor's Office, and perhaps some comments made by other Counsel in a particular case.

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Q. Were you made aware I was doing plea bargaining with the Prosecutor's Office in representing Cisco Childers?

A. I was not told that, no, but the facts would probably lead me to believe that.

Q. Now, at anytime, did you enter into any plea bargaining with the Prosecutor, Mr. Malik, or his Assistant?

A. As you are using that term, if it would be considered bargaining, I had been made aware what he could plead to, what the alternatives would be, if he did not plead to that.

Q. Could I stop you? How were you made aware of what he could plead to and what the alternatives were?

A. By the Prosecutor's comments. Comments I had with the Prosecutor, or one of his Assistants.

Q. When you mention the Prosecutor, who are you referring to?

A. Attorney John J. Malik, Jr.

Q. Talking about his Assistant, who are you referring to?

A. Charles F. Knapp, and possibly a Joe Livorno, but I would say most of the conversation I had with respect to this case would be with Mr. Knapp and Mr. Malik.

Q. Now, what were you made aware that you could plead to?

A. I was told that, and I had asked on numerous occasions, that the only thing he could plead to was the same thing all the other Defendant could plead to, and that is Murder.

Q. All the other Defendants? Whom are you referring to?

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A. Other Defendants in the Indictment, Childers, Pridgon, Stewart.

Q. Were you led to believe all three Defendants, Childers, Pridgon and Stewart, were going to plead guilty to Murder?

A. When you use the term led to believe, it was represented to me they would. So far as what I was led to believe, some of the facts of the case, as in any case, would leave doubt, but I had accepted the fact, as that representation was made to me, that is the way it would be.

Q. Who made that representation to you?

A. The Prosecutor, and I so informed my client.

Q. Now, you mentioned alternatives. What do you mean by alternatives?

A. Alternatives to entering that plea? The alternative to entering that plea was that he would face trial and, say, successfully, defend him on the issue of aggravated murder or murder, and if the possibility the Jury returned a verdict of involuntary manslaughter, aggravated robbery or burglary, as well as the kidnapping, the sentence would be consecutive. I so informed Mr. Asher, which would mean he would be denied his freedom three times as long, by even successfully, being successful in Court on the issue of aggravated murder or murder.

Q. Now, who made this type of a representation to you?

A. Seems to me that I was made aware of this...bearing in mind this is about a year and a half ago...

Q. Yes.

A. ...probably by my observing the two cases that went

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believe it was made to the two previous Defendants. I wanted to verify that position. My wife and I approached the Court, Judge Iddings, in his chambers, to determine whether or not that is the best position Ronald Asher could have found himself in. After being affirmed that would be the best position, I so advised Ronald Asher, so he could make an intelligent decision.

Q. You say you had the conversation...

THE COURT: I want to know the date and the time and the place where I ever mentioned to you that there would be a consecutive sentence if this man stood trial and was found guilty. You are under oath.

A. I appreciate that one hundred per cent. It would have been approximately one week prior to Mr. Asher's entering the plea, and I believe in addition to that, I have had discussion with Mr. Malik, and it was perhaps confirmed by Mr. Malik as well, that would be the alternative. I so informed Mr. Asher.

Q. Now, was there ever any discussion of the murder felony?

A. Felony murder?

Q. Felony murder.

A. Yes, there had been. The talk had continued throughout the time from the Indictment until sentencing. Yes, there had been.

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Q. With whom did you have any discussion as to felony murder?

A. I discussed that both with Mr. Malik and with the Court.

Q. And do you recall when that was discussed?

A. With Mr. Malik on numerous occasions throughout the... I won't say every time we worked on the case together...but on numerous occasions when I would want to see what position he could put Ronald Asher in. I believe it was also discussed at the time just before Indictment. I came up...first, I went to Martins Ferry, found he was no longer there, and he was being indicted here, and I spoke with Charley Knapp, expressed my views, and it did not apply in this particular case, or in any of the four cases, again shortly before...perhaps a week, week and a half before...I approached the Court and asked the Court what the Court was going to charge.

Q. Did the Court indicate to you what it was going to charge?

A. The Court indicated it would be charged under felony murder.

MR. MALIK: Which Court?

A. Judge Iddings.

Q. Did you relate that to the Defendant?

A. Yes, with my dissatisfaction with the acceptance of that doctrine. I think we must bear in mind the new law of aggravated murder and murder was perhaps almost a year old, and there was no case law on that. I believe, to the best of my knowledge, the Belmont County Prosecutor's Office may have gotten their interpretation on felony murder doctrine as applied under the new laws from you.

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CLERK OF COURTS

Q. There was a conversation then that involved myself also as to the defense of felony murder?

A. I asked for their authority, as I couldn't find it.

Q. They used Jerry Weiner as authority?

A. You as authority working on many numerous capital cases in and around Columbus and the State of Ohio, the only authority that Belmont County had available. I didn't agree with you though, I am sorry to say.

Q. Was that related to Mr. Asher, was the conversation that you had with Judge Iddings related to Mr. Asher?

A. Yes.

Q. As to that?

A. Yes.

Q. Was that your interpretation that there would be no charge on any lesser degree as to murder, but strictly felony murder?

A. That was my interpretation. I advised Ronald Asher that was his alternative. If he disagreed it would be incumbent on the Appellate Court to overrule the lower Court, if he should be found guilty on murder or felony murder.

Q. Now, were you ever told by the prosecution that either Marshall Pridgon or Ronald Stewart had ever changed their stories involving Ronald Asher?

A. First of all, I don't believe there was one story. The only story or stories I was aware of were those stories that were reduced to writing and submitted to me at the time of my discovery procedures under Rule 16, including the Bill of Particulars, and I know of no other position

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those particular individuals may have taken or may have had with the Assistant Prosecutor or the Prosecutor.

Q. Had you ever made any attempt to talk to either Pridgon or Stewart, to interview them what they would testify to in Court?

and

A. I realize I am under oath/with respect to Ronald Stewart, I may have, but I can't honestly say one way or the other. It is highly conceivable before Counsel was appointed I may have had the opportunity, and certainly no insult to Mr. Asher, but I couldn't tell one black man from another under that stressful situation. I don't know. With respect to Marshall Pridgon, Marshall Pridgon was housed with Ronald Asher. I had made request upon the Sheriff's Department to separate them, so I could talk in confidentiality with Mr. Asher. That was never met. They were housed together continuously. When I say continuously, I mean on the same floor, and there were times when Ronald Asher, because of his mental or medical condition was not coherent. I was called to the jail to try to appease or pacify the situation, so things would stay orderly. Pridgon and I may have had some words, but so far as any statement with respect to what he did...

MR. MALIK: He is not responsive.

THE COURT: He hasn't been responsive to hardly any question. He could answer yes or no/some of the questions.

Q. Let me ask you this: When did you learn that Cisco Childers was not going to plead guilty to murder?

A. When I read it in the newspaper.

Q. That would have been after June 16, 1975, after Mr. Asher pled guilty?

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ANTHONY M. VAVRA  
CLERK OF COURTS

A. Yes.

Q. When did you learn that Marshall Pridgon and Ronald Stewart stated that their original statements were not true?

A. I suppose I read that in the newspaper as well.

Q. That would again be after Mr. Asher pled guilty?

A. Yes.

Q. I believe you stated that Mr. Asher was going to a physician, is that correct, during the time he was incarcerated?

A. He was being treated, attended by numerous physicians, ye

Q. Was he also being attended by a psychiatrist?

A. Yes.

Q. Was he being attended by a psychiatrist until the time he entered the plea?

A. Yes. I believe his last visit may have been... probably the week before he entered the plea.

MR. WEINER: Thank you. I have no further questions.

CROSS - EXAMINATION

By Mr. John J. Malik, Jr.

Q. Mr. Sustersic, you stated that Mr. Asher was receiving psychiatric treatment, and I assume that psychiatric treatment was rendered at the Belmont County Jail?

A. No, sir.

Q. Where was he receiving psychiatric treatment?

A. At the Bellaire Clinic, being taken there by Belmont County Sheriff's Department.

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ANTHONY M. VAVRA  
CLERK OF COURTS

Q. At the time he was incarcerated at the Belmont County Jail and being taken to the Bellaire Clinic for psychiatric treatment?

A. That would be correct.

Q. This went on for a period of how long?

A. Well, perhaps half of his stay at the jail.

Q. Was he also being treated by medical physicians for medical reasons?

A. Within the jail, but not outside the jail.

Q. Do you know what was wrong with him medically, or what he complained to you at least?

A. The jail took care of his medical care. I am not sure of his medical complaints.

Q. You said the last bit of psychiatric treatment was received by him at least one week prior to entering his plea on June 11, 1975?

A. I said he last saw the psychiatrist the... I don't know when the termination of his care, Ronald Asher's care...

Q. Do you know what the diagnosis was?

MR. WEINER: Objection.

THE COURT: Sustained.

Q. Thank you, Your Honor. Mr. Sustersic, Mr. Asher was receiving psychiatric treatment, and this was known to you, and yet you permitted him, or perhaps advised him, to enter a plea to murder, while he was under those circumstances, is that correct?

MR. WEINER: Objection.

THE COURT: Overruled.

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A. The Court was aware, or should have been aware of it, as well.

Q. The Court was not representing Mr. Asher. You were, Mr. Sustersic.

A. I had checked with the psychiatrist after Ronald Asher wanted to enter his plea to determine whether or not he was capable of entering that plea. I had been so advised.

MR. WEINER: Object. Move that this be stricken as hearsay.

A. It is hearsay. That is the only way I can answer.

THE COURT: That part will be stricken.

Q. Now, you are an Attorney at Law, and as such, you are authorized to practice criminal law, as well as Civil Law in this State?

A. That would be true.

Q. And you can interpret Statutes, as a matter of fact, are trained to do so?

A. Yes.

Q. And you knew the felony murder rule was a recent statute passed by the Legislature?

A. No. That is not correct. That is not correct.

MR. WEINER: Object.

A. I object to anyone's interpreting, interpretation of felony murder law.

Q. I asked you if there was a recent law passed by the Legislature.

MR. WEINER: Objection.

ANTHONY W. VAVRA  
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THE COURT: Overruled.

A. When you say recent...

THE COURT: Under the new criminal law.

A. Dating January, 1974?

Q. 1974.

A. I was not aware under the rules of January, 1974. The felony murder doctrine...

Q. Or purported in 2903.02, as I recall, is then what purported to be the new felony murder?

A. Not to me.

Q. What does it say?

A. If you show me the book, I will read.

Q. I can read. He was indicted for aggravated murder, murder in the perpetration of kidnapping and robbery, is that correct?

MR. WEINER: Object. It is not his interpretation.

MR. MALIK: It is the interpretation he is giving of others.

THE COURT: You opened the door.

MR. WEINER: Not to this.

THE COURT: He volunteered it, if you didn't, in response to one of the questions.

MR. WEINER: I think he volunteered what was told him by the Court and Prosecutor.

MR. MALIK: He is representing Mr. Asher at the time he is blaming everything on us.

A. I said I disagreed with that position, and I still do.

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Q. You were advising Mr. Asher what he should or should not do.

A. I did think that was my duty.

Q. Tell the Court who approached who on the method of a plea in this particular case. I would like to hear that again. You indicated that we sought you out.

A. No, I didn't say that.

Q. Did we seek you out?

A. I don't know if I understand seeking out. We had communications.

Q. And ask you to please come in my office for the purpose of entering a plea on Mr. Asher's behalf?

A. Of course not.

Q. So then, apparently you then approached the Prosecutor's Office?

A. Of course not.

Q. You didn't?

A. No.

Q. We never got together?

A. We talked on numerous occasions. I think the first time of conversation is shortly after Ronald Asher turned himself in. He wanted to talk. I advised him not to talk to you.

Q. When did the conversation regarding plea bargaining take place?

A. We never used that term. I asked you, after I was aware

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CLERK OF COURTS

of the fact that Stewart and Pridgon was entering a plea to murder, I felt there was certainly a difference in Ronald Asher's case from their cases, I asked you if a plea would be offered him, what that would be. The information, all four had the same, and the other three were made.

Q. When or who told you all four people were going to enter the same plea?

A. Numerous occasions.

Q. On numerous occasions?

A. Yes.

Q. You were psychic because I didn't know this myself until...

MR. WEINER: Object and ask Counsel's remarks be stricken.

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THE COURT: Sustained.

Q. With regard to this consecutive sentence, when did this conversation with Judge Iddings occur?

A. It would have followed a conversation I had with you. Perhaps his memory is better than mine. I have been away from this over a year. It would have been a time you indicated to me if he stood trial, that the Court would impose consecutive sentence on him, and that consecutive sentence would have been more than if he just would enter a plea to murder. I then approached the Court to confirm that. I am not sure of how much discussion, but it was confirmed to me that was the situation it would be, consecutive sentence.

Q. That was a situation or a possibility?

A. No. The situation.

Q. The situation?

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A. That 's right.

Q. The Court informed you that the Court would impose consecutive sentence on Mr. Asher?

A. The Court, and so did you.

Q. And I did too?

A. Yes.

Q. And do I impose sentence? Does the Prosecutor impose sentence?

A. You know that as well as I do.

Q. I do not.

A. But in plea bargaining, you find out what the other position is going to be.

Q. You were given an alternative to enter a plea of guilty to murder under the new law or go to trial, were you not?

A. I don't know if that is an alternative, but it is two choices.

Q. Which were what? Either plead or go to trial?

A. My intention was to go to trial all along.

Q. I am approaching from the standpoint of privilege. You were given two choices, either plead guilty to murder or go to trial as the Indictment...

A. My intention was to go to trial for him.

Q. Why didn't you go to trial?

A. Mr. Asher chose to enter a plea.

Q. Would you please answer the question. The question can be answered yes or no. Were you given two choices by the prosecutor, either

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plead to murder or go to trial? Answer yes or no.

A. I will answer yes if I can qualify.

MR. WEINER: He can qualify an answer.

Q. Those were the alternatives given to you?

A. Those were given to me, quite obviously, of course.

Q. They were given...

A. No, they were not given.

Q. Were they related?

A. Those were alternatives.

Q. They were told to you?

A. I don't know if they were told.

Q. How did you find out?

A. How did I find out? If you don't plead, you go to trial.

Nobody has to tell me that. I am smarter than that.

Q. You chose to plead guilty to murder?

A. If you will listen, I never chose to plead. That was Mr. Asher's choice. I wanted to go to trial.

Q. He chose?

A. After he chose...

Q. I thought Mr. Asher said he wasn't guilty.

A. Whether he chose to enter a plea and whether he was guilty are...

Q. Remember having prepared the amount of possible time M Asher could have gotten, had he gone to trial and been convicted of all these charges?

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A. No, I didn't prepare that.

Q. You didn't sit down...

A. No. I was told he would get consecutive sentences.

Q. By the Court?

A. By you.

Q. Was this told in Mr. Asher's presence?

A. I don't know. I can't remember. It would not have been told by the Court in Mr. Asher's presence but it may have been told by you. He would have to testify to that. I don't know. I relayed to Mr. Asher...

Q. You in no way attempted to get Mr. Asher to plead guilty to this charge?

A. No way. I informed him what he was facing. I disagreed wholeheartedly with Court and with Counsel, but that if the Court would so charge on felony murder, he would have to fight it on appeal if we were to lose the case. No way did I tell him we would lose it. With four indictments, look at the odds. If it wasn't a clean sweep, he could have been caught on...

Q. Which were those?

A. The four, the aggravated...

Q. How about kidnapping?

A. I think this might be getting into confidentiality. I was saying with the odds, with the felony murder doctrine...

Q. You have an Attorney representing you?

A. Yes.

Q. I assume he will enter an objection on your behalf.

MR. McGEARY: I don't think...I assume Counsel for Mr. Susteric

17

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CLERK OF COURTS

can claim privilege. My interpretation Mr. Sustersic has said what his opinion was with regard to the charges against his client. We haven't talked too much from client to Counsel.

THE COURT: I understand.

MR. MALIK: At this time, without excusing Mr. Sustersic, I would like to have a short recess with Mr. Weiner and Court and perhaps any Attorney who might be representing Mr. Sustersic.

- R E C E S S -

THE COURT: Gentlemen, from the evidence that has been adduced in this case which has cast a reflection upon the Court, this Court does not feel that it should sit in judgment in this case. The case will be continued to a future date and perhaps a foreign judge will be assigned to hear this man's Motion. The Court will use every effort to have it assigned at an early date.

MR. WEINER: May I make a Motion to the Court? Based on the testimony of Mr. Sustersic, we would move that the Court issue an order sui sponte granting a new trial for Mr. Asher. Testimony would certainly by all means indicate there was not a voluntary and intelligently made plea of guilty at the time back in June, 1975 when Mr. Asher did in fact make and enter a plea.

THE COURT: That Motion will be overruled.

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IN THE DISTRICT COURT OF APPEALS  
FOR THE STATE OF NEW YORK  
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I, Alice W. Reilly, Asst. Official Shorthand  
Reporter in and for Belmont County, Ohio, hereby  
partial  
certify that the foregoing testimony is a transcript of  
testimony taken during the partial hearing of Defendant's  
Motion on September 20, 1976, before the Honorable  
William Iddings, Judge of the Court of Common Pleas,  
Belmont County, Ohio.

  
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Alice W. Reilly, Asst. Official Shorthand Re-  
porter, Belmont County, Ohio.

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CLERK OF COURTS

(DEFENDANT'S PLEA AND SENTENCING BY THE COURT)

MR. SUSTERSIC: Your Honor, the Defendant withdraws his former Plea of Not Guilty to the indictable offenses, all of them set forth in the indictment, as well as the specifications, and if the Court would accept a Plea Guilty to Murder, which is a Lesser Included Offense under the Indictment

THE COURT: Do you wish...do you have any statement to make

MR. MALIK: No, Your Honor. Since the Defendant has entered a Plea to R. C. 2903.02 which is the crime of Murder, a Lesser Included Offense, State will move that the R. C. 2903.01, Sub-Sections A and B, together with the charges contained in the Indictment, of Aggravated Robbery and Kidnapping, be dismissed.

THE COURT: May be done.

Mr. Asher, you may stand. Your Counsel has withdrawn former Plea of Not Guilty to the charge in the Indictment, and has entered Plea of Guilty to a Lesser Included charge of Murder. Did you enter that plea voluntarily?

A. Yes, sir.

Q. Do you understand fully the nature of this charge?

A. I understand it.

Q. Do you understand the maximum penalty involved?

A. It's been explained to me.

Q. Do you understand the Court may sentence you today?

A. Yes, sir.

Q. Do you further understand that if you stood trial by Jury

that the State of Ohio must find you Guilty and prove you Guilty beyond a

ANTHONY ALVARA  
CLERK OF COURTS  
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reasonable doubt? Understand that?

A. Yes, sir.

Q. You further understand if you stood trial that you have a right to confront the State's witnesses? Understand that?

A. Yes. It's all been explained to me.

Q. I am explaining it to you again. You further understand if you stood trial, you could subpoena witnesses on your behalf? Understand, that would testify for you?

A. Yes.

Q. And that if you stood trial, that you would not have to testify? Understand that?

A. Yes.

Q. Now, a Petition has been presented to you which explains your constitutional rights and the nature and extent of the charge. Has that been fully read to you by your Counsel?

A. I read it myself.

Q. You fully understand the contents of that Petition?

A. I think so.

Q. And did you sign that Petition?

A. No, not yet.

Q. Are you willing to sign that Petition?

A. Yes.

MR. MALIK: Ed, will you have the Petition signed?

MR. SUSTERSIC: I will present the Petition now if it is agreeable with the Court.

TO THE COURT  
CAMPBELL COUNTY  
DEPT. OF CORRECTIONS  
COLUMBUS, OHIO  
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ANTHONY M. VAVRA  
CLERK OF COURTS

THE COURT: Yes. Have it executed. ... By virtue of the law of Ohio, Mr. Asher, no person shall purposely cause the death of another. Whoever violates this Section is Guilty of Murder and shall be incarcerated for not less than fifteen years to life in prison.

Do you have anything to say before the sentence of the Court is pronounced against you? You may be seated, if you do not wish to speak, and your Counsel may speak for you.

(WHEREUPON, Counsel for Defendant and Defendant confer.)

MR. SUSTERSIC: Your Honor, the Defendant did wish to address the Court, had written it out, and he was going to read it to the Court, but states he is unable to at this time, because of the feelings he has, and has asked me to read it on his behalf. I am not sure if I can read it any more than what he could.

It is dated today and states: "I would only like to say this to the Court and Prosecutor: Being of sound mind, I'm aware of the reality of this situation. A man's life has been taken and justice must be done. I've entered a plea of Guilty to Murder, 2nd Degree. Because of this, the reality of the whole case as it now stands, even tho I played no part in the taking of Mr. Thomas Carney's life. But of course that isn't the issue any longer. So I want everyone who worked on this case to know that I feel no malis toward anyone, I'm sorry a man lost his life in such a needless way. If I could have prevented it in any way, God knows as my witness I would have. But I haven't the power to read other men's minds. My attorney has advised me well and to the fullest of his capabilities, but he didn't write the laws, nor can he

ANTHONY M. VAVRA  
CLERK OF COURTS

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COLUMBUS OHIO

singlly change them. So! Even though justice has to be done I don't feel that justice has been done in my case. But I've learnt to accept the reality of things and survive on hope and faith that a better world is coming. Also at this point, I'd like to say that Cisco Childers is innocent of any part in the death of Mr. Carney. I don't know what his fate will be, but he and the other two men charged in this case are younger men and still have chance to do good with their lives. I hope they do! As for me? Right now I feel like I'm the loneliest man on earth, so I'll accept my fate like a man. I'll strive the rest of my life to maintain the good that is in me, not so much for myself as for wife, Wenda and our kids. I forgive those who slandered me and liked to protect themselves. I'm going to enter prison with an open mind and will make the most of my time with the facilities there. I'd like to thank my new found friends Ed and Jean for your loyal support.

Oh, one final thing I'd like to say, in the last 5 months I've been locked up but I have also managed to finally find myself. I've found new values, new hope. Even though I know by making this plea I am branding myself a murderer, I also know within me, in my heart as well as my mind I've never killed anyone or been a part of anyone's death, so even though this been a nightmare for me and my loved one's I've gained some wisdom from it. I gave myself up because I felt justice would prevail and the truth would set me free, but only God has the truth, so may God be my true Judge."

MR. MALIK: State has nothing to say.

THE COURT: Mr. Asher, you may stand.

It will be the sentence of the Court that you be taken from the Bar of this Courtroom to the Belmont County Jail and within five days be

CLEAN  
MAYOR'S M. VAVRA  
12:08 PM 8 NOV 91  
CLERK OF COURT

taken to the Correctional Institute at Chillicothe, Ohio, there to remain for not less than fifteen years to life imprisonment, and that you pay the costs of prosecution. You may be remanded to the custody of the Sheriff.

CERTIFICATE

The foregoing Transcript of Proceedings is a transcript of verbatim shorthand and stenotype notes taken in open Court during the hearing of Defendant's Motions and Defendant's Plea and Sentencing by the Court, together with the exhibits attached, and constitutes all the evidence taken during these proceedings.

*Helmut V. Schepfer*  
Official Shorthand Reporter, Belmont Co., O.  
*Alvin W. Reilly*  
Asst. Official Shorthand Reporter, Belmont  
County, Ohio.

CERTIFICATE

WHEREUPON, the Court, after due consideration, found as appears of record herein, concerning said matters;

AND THEREUPON, and within \_\_\_\_\_ days thereafter, the Defendant filed his Notice of Appeal in writing.

AND NOW, Defendant presents this, his true Transcript of Proceedings herein, and prays the Court that the same may be corrected, signed, sealed and allowed, which is accordingly done this \_\_\_\_\_ day of \_\_\_\_\_, A. D., 19\_\_\_\_.

Judge of the Common Pleas Court, Belmont  
County, Ohio

ANTHONY M. VAVRA  
CLERK OF COURTS

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DEFENDANT  
EXHIBIT C  
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Michael Janizewski - Cr. Ex.

case?

A. I did not.

Q. Have you in any way aided in the investigation of this case?

A. I have not.

Q. Do you have any facts, or do you know of any knowledge of this case whatsoever?

A. I do not.

Q. Were you here on the day of the Grand Jury?

A. I was.

Q. Did you accompany Lt. Shrodes, Charles Bell, and Paul Canter... I am sorry, Chief Shrodes?

A. There was quite a few of us out here. Could you... those four were here I think. No, Patrolman Bell wasn't.

Q. He wasn't here?

A. No, sir.

MR. SUSTERSIC: I have no further questions. No further evidence.

DEF.  
RSTS

THE COURT: Court will consider this case and take it under advisement.

MR. SUSTERSIC: I would like to make closing remarks. At the beginning of this hearing I had indicated to the Court the test that is to be applied.

The only way that Mr. Asher could be denied bail in this particular case and his freedom in any litigation is if the Court is of such a firm conviction that the presumption is great that he purposely caused the death of Thomas Carney.

The evidence the Defendant attempted or did elicit from the witness on the stand, first of all, points out he did not order it. He was not there in the car. The car was closed. He did not have the gun, and that the theory has been that the death was accidental, and that witnesses, people, supposedly were there, excluding Mr. Asher, had so indicated it, and that no testimony has been put on by the State; that there was if any purpose to kill Mr. Carney but more particularly that this Defendant has purposely taken his life, there is no evidence whatever to that contention.

In light of that, aside from the community sentiments, he has the right by the Constitution and by the Laws of this State to be free on bail, so he can adequately prepare the defense and assure the Court there is no reason to believe he won't appear. He has appeared, much to his public disgrace, to clear himself of the charge, and citing State vs. Woolard, the test is after hearing the evidence before the Court on this day, if the Court would grant his new trial, grant a new trial for Ronald Asher after a verdict on the evidence presented to this Court today, if the Court would order a new trial, the Court must put this man on bail now, so he can be free to prepare his defense.

MR. MALIK: I think that by the Indictment itself that this Court can take notice of the death of Thomas Carney on February 28, 1975. That was testified to on the stand. In addition to Mr. Asher, we have also charged three other people in this crime. They were all similarly charged in a joint Indictment charging each of them with Robbery, Kidnapping, Aggravated Murder, and Murder in the Commission of a Felony. There has been no evidence to go into any of the aspects of the Robbery, Kidnapping,

the Felony Murder rule as such, and it has all been directed, of course, to Aggravated Murder in and of itself. I think the presumption that the Indictment carries is still... it still remains. That's all.

**THE COURT:** Court will take this matter under advisement.

In the meantime the Defendant will be remanded into the custody of the Sheriff.

RECORDED  
INDEXED  
COMMUNICATIONS SECTION  
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FBI PHOENIX

ANTHONY M. VAVRA  
CLERK OF COURTS

June 9, 1975

(DEFENDANT'S MOTIONS TO SUPPRESS, FOR DISCOVERY, TO EXCLUDE THE PUBLIC, TO DISMISS, TO CHALLENGE THE ARRAY, AND FOR CHANGE OF VENUE - FIRST SESSION)

MR. SUSTERSIC: The Defendant has filed five separate Motions. I think the Court was already informed that one witness is not available today. We would ask that Motion be continued until Wednesday, if it is agreeable with the Court, with respect to change of venue. With respect to the other Motions...

THE COURT: How are you going to proceed?

MR. SUSTERSIC: The Defendant would like to proceed with his Motion to Exclude the Public, being that is probably the proper order.

THE COURT: That Motion will be overruled.

MR. SUSTERSIC: I would like to call the Court's attention to one aspect...

THE COURT: There will not be any photographs taken in the Courtroom or the Court House. This is a public trial. This is a public hearing.

MR. SUSTERSIC: It is done in Federal Courts for the simple reason what comes out at the pre-trial hearings may not be admissible in evidence.

If the public has been allowed to hear it, they will be prone to form an opinion that had it never been presented to them in the way of pre-trial, they would never have formed opinions. These are proceedings at which time elements can come in which have nothing to do with the trial of the case.

It is permitted, the American Bar Association, in Standards Relating to Fair Trial and Records, in Standard 31, that all Courts adopt

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ANTHONY V. VERA  
CLERK OF COURTS

a rule under which pre-trial hearings such as Bail Hearings or Motions to Suppress may be held in such manner as to exclude the public on Motion of Defendant on the ground that...the hearing may disclose matters that will be inadmissible, whether or not evidence at the trial, and therefore, likely, to interfere with his right to a fair trial by an impartial Jury. It is for the protection of Defendant that he can have a fair trial. I think the Court is aware there is much written on this particular case. Perhaps the public has already formed an opinion. What is said on the remainder can very well deny the Defendant of his right to a fair trial regardless of what the prospective Jurors may say, as far as their prejudice.

THE COURT: What evidence would be presented that would probably not be admissible at the trial?

MR. SUSTERSIC: On a Motion to Suppress any statements made, the fact the statements had been made,

THE COURT: Then any statement made by the present Defendant would not be admissible.

MR. SUSTERSIC: At the trial?

THE COURT: At the trial. I don't believe it would be admissible here.

MR. SUSTERSIC: It can be if the Defendant is prevented because of fearing the public may learn of his statement, he wouldn't be able to deal on that aspect. Perhaps the contents would reveal whether the statement was made voluntarily or not. Likewise on the Bill of Particulars...

THE COURT: The Supreme Court of Ohio has held in the matter of public trial or a public hearing, you could not exclude the public. That

ANTHONY M. VAVR  
CLERK OF COURT

is in cases similar to this case, I don't want to do anything that would prejudice your case.

MR. SUSTERSIC: That is Defendant's argument at any rate.

THE COURT: Prosecutor have anything to say?

MR. MALIK: With respect to that particular aspect, the Suppression of Evidence at a Pre-trial Hearing... we might call it the evidence that would be testified to on a Motion to Suppress... the taking of that evidence, the taking of the statement of any Defendant, any individuals, co-conspirators who might wish to testify, they will be given at the trial as well, and the Jury will hear those statements.

THE COURT: By the same token, at a Preliminary Hearing, I cannot see where the contents of a statement would be relevant to be read. I don't think it is necessary to read the contents of that statement. The only purpose of a Motion to Suppress is whether or not this statement was made voluntarily and the Defendant was apprised of his constitutional rights. The contents of that statement will not be revealed in this hearing.

It is incumbent upon the State of Ohio to show that it was voluntary, voluntarily made, and the contents of this statement are not going to be revealed at this hearing. If there is a statement, and I don't know if...

MR. SUSTERSIC: The contents of the statement can very well disclose as to whether or not it was voluntary. That is exceedingly damaging if it should be put into evidence before the public.

THE COURT: The contents of the statement, I don't see where that is relevant today. It is whether or not the statement was voluntarily

made.

MR. SUSTERSIC: It is whether or not the Court can exclude the public from pre-trial hearings. I am contending the Court can in the interest of preserving a fair trial for Ronald Asher exclude the public from pre-trial hearings.

THE COURT: I am going to overrule that Motion.

By the same token, irrespective of what is testified to today, the statements are admitted. It is not suppressed. The press has a right to go to this file. There is no way you can... this is a public file. There is no way I know of you could prevent the press from reviewing the file.

MR. SUSTERSIC: We have kept all other statements to date out of the file.

THE COURT: But the contents of these statements should not be revealed here today. It is merely a matter of whether or not they were given voluntarily. May I speak to Counsel?

(WHEREUPON, Court and Counsel confer at Bench.)

MR. SUSTERSIC: Defendant's second Motion is a Motion to Challenge the Array.

Rule 24 G of the Ohio Rules of Criminal Procedure is relevant at this particular stage. Rule 24 is a rule pertaining to trial jurors and Rule 24 G states as its caption "Statement of Procedure in First Degree Murder Cases," reading from the law, Rule 24 G, "Until January 1, 1974, a Defendant charged with first degree murder, except a Defendant charged with violation of Revised Code 2901.09 or Revised Code 2901.10," and goes on pertaining to the assassination of a President or Governor, "shall not be

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entitled to the special venire provided in Revised Code 1945.18."

It is Defendant's contention that, first of all, that language is somewhat ambiguous to perhaps what it meant to say, that is, by the first word, "until." I think the Court is cognizant these rules came in effect January 1, 1974, and it could not possibly apply to anything that was prior to January 1, 1974. It is Defendant's contention until January 1, 1974 refers to, commencing with until, means the same thing as January 1, 1974. The effect of this Section is to abolish the right of special venire in Aggravated Murder cases, which was the only type capital offense that was entitled to special venire under the Statutes as presently written. Why should this be the purpose? Perhaps in the past, it has become quite apparent in this particular class of cases, the venire are specifically told in advance what type case they are going to be hearing... what Defendant is involved. In this particular case, all of the venire, prospective Jurors who were alive or who haven't moved away, have been served some as far back as May 13th, well over a month from the date of his trial. During that period of time, they have had an opportunity to form an opinion, to hassle it out with neighbors, to inform neighbors they are going to be on a particular Jury, and their neighbors perhaps attempting to influence them. They have to go back to their friends, neighbors and relatives and justify what they did. Perhaps their decision was based on the fact their reputation would be at stake more so than the guilt or innocence of the Defendant.

The particular type of Subpoena, of Summons served upon them I have marked as Exhibit A and very clearly advertises to the array exactly what they will come here to do on June 16th. The prospective Jurors

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. )  
Special Prosecutors Appointed in )  
Case No. 75-CR-054, Belmont )  
County Common Pleas Court )

RELATOR-APPELLANTS )

vs. ) Case No. 77-1447

JUDGES OF THE BELMONT COUNTY )  
COURT OF COMMON PLEAS )

RESPONDENT-APPELLEES )

APPEAL FROM COURT OF APPEALS  
FOR BELMONT COUNTY  
SEVENTH JUDICIAL DISTRICT

RECORD FOR APPELLANT

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3381 Belmont Street  
Bellairs, Ohio 43906

Keith Sommer  
4th & Walnut Street  
Martins Ferry, Ohio 43935

Attorneys for Relator-Appellants

Honorable William Irwin  
Judge of Belmont County  
Common Pleas Court  
St. Clairsville, Ohio 43950

Honorable William Iddings  
Judge of Belmont County  
Common Pleas Court  
St. Clairsville, Ohio 43950

Respondent-Appellees

Attorney Jerry Weiner  
305 South High Street  
Columbus, Ohio 43215

Attorney for Intervenor-  
Ronald Asher



CONTENTS OF RECORD FOR APPELLANTS

Complaint in Prohibition	R-I
Memorandum in Support of Complaint in Prohibition	R-II
Motion for Reconsideration in Court of Appeals	R-III
Assignments of Error Propounded By Intervenor's Counsel on Appeal to the Court of Appeals	R-IV
Opinion of Court of Appeals Dismiss- ing Intervenor's Appeal to the Court of Appeals	R-V
Opinion of Judge Merle Hoddinott, Sitting by Assignment in Belmont County, Granting Intervenors Motion to Withdraw Guilty Plea	R-VI
Partial Text of Brief of Intervenor's Counsel Addressing Issues of Trial Counsel's Effectiveness in Inform- ing and Representing Intervenor	R-VII
Certificate of Service	

"APPENDIX E"

STATE OF OHIO, COUNTY OF BELMONT, SS:  
IN THE COURT OF COMMON PLEAS

State of Ohio,

Plaintiff,

vs.

Ronald E. Asher,

Defendant.

CASE NO. 75-CR-054

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For the State of Ohio: Mr. Charles F. Knapp,  
Mr. Keith Sommer, Appointed Special  
Prosecutors in and for Belmont County, Ohio.

For the Defendant: Mr. Jerry Weiner of the  
firm Weiner, Lippe, Cromley & McGinley Co.,  
L.P.A., Attorneys at Law, 505 S. High Street,  
Columbus, Ohio 43215

REPORTED BY:

Victoria J. Streski, Asst. Official Shorthand Reporter; and  
Alice W. Reilly, Official Shorthand Reporter, Belmont County,  
Ohio. February 15 and 16, 1977

the questions asked back in September of Mr. Sustersic were clearly, clear and concise and his answers were clear and concise, and he had been relating all these things to Mr. Asher, and I think he stated on the stand yesterday Mr. Asher could not have gotten a fair trial in this community.

THE COURT: It is about noon. I am going to recess and we will take up again, shall we say, 1:15? I will announce my decision at that time, or about that time.

- R E C E S S -

THE COURT: Well, the Defendant's Motion to Withdraw his Plea will be granted. The Court will find manifest injustice would result otherwise.

The basis for this ruling is that I think the evidence is that the Plea was not knowingly and intelligently and voluntarily made, and I think it was not a valid Plea, because of the representation that the Defendant had up until the time of the Plea of Guilty. The Defendant's Counsel did quote to the Defendant certain purported statements of Judge Iddings having to do with the great advisability of pleading Guilty to a Lesser Included Offense, as to what the Charge to a Jury would contain, as to how sentences would be imposed, consecutive rather than concurrently. The Court finds that Judge Iddings did not make the statements. Nevertheless, the Defendant was under the impression that the Judge had made those statements, but I think that is a small part of the picture really. I do not think that there was an adequate analysis of the expected evidence in this case presented to the Defendant before he decided whether to make a Plea. I do not think there was an adequate analysis of the law which would apply to this case.

Now, I am well aware of the fact that the New Criminal Code was very new at that time. We have had a couple years' experience with it now. The problem of the law at that time was not gaps in the law, absent of Court interpretation of the law, rather it is the other way. I think the New Criminal Code admirably tries to cover the whole sweep and variety of human misconduct and wrongdoing. Wrongdoing is very complicated. The New Criminal Code is very complicated. It well strains the best ability of the lawyer to interpret the criminal code and apply it to the facts in any particular case, but in this case, I do not think that was adequately done so that the Defendant could knowingly, intelligently and voluntarily make a Plea.

The Defendant at the time of making his Plea did make a statement, but I cannot see that that statement really came out with a clear unmistakable denial that he was Guilty, so that I do not think that objection to the Plea is adequate, but I am basing my decision on what I have just discussed so I shall order that the Defendant be remanded to the Sheriff of Belmont County and that he be transported to this Court to make a Plea at a reasonably prompt time in the future, and too that the arraignment will be held in a reasonably prompt time.

Now, I would like to go into this matter of Bail for in the meantime. Counsel wish to say anything about that?

MR. WEINER: Yes. I would respectfully submit to the Court there is a good question based on the Sixth Circuit U. S. Court of Appeals as to whether or not the Defendant could be tried for any higher crime than Murder twice even though the Court has set aside the Plea. That would be the position he

X

COURT OF COMMON PLEAS OF BELMONT COUNTY, OHIO

DOCKET AND JOURNAL ENTRY

STATE OF OHIO

Case No. 75-CR-054

vs.

RONALD E. ASHER

Defendant:

Date of Entry February 16, 19 77

Journal Vol. 20 Page 428-K

Motion of Defendant to Withdraw his former plea of Guilty finally heard. Motion of Defendant Sustained. Exceptions to the State of Ohio. Defendant remanded to the Belmont County Sheriff until arraignment before this Court, at a reasonably prompt time. On the matter of bail for the Defendant, Court finds that Defendant is charged with two capital offenses, and that a presumption of guilt is evident and presumption thereof great, and it is ordered the Defendant be held without bail.

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OHIO COURT REPORTERS AND SHRIFFS ASSOCIATION

JOURNALIZED

Approved: A

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