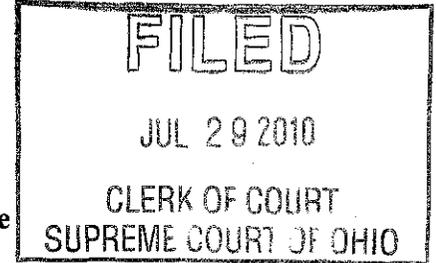


**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

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



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

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**Appellant Roland Davis's Reply Brief**

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## ARGUMENT

### PROPOSITION OF LAW

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

The State focuses on the merits of Roland Davis's new-trial motion whenever possible, but the only issue before this Court is a procedural/jurisdictional one. (See, e.g., State's Brief, Statement of Case and Facts, at 14 n.22, 18.)

Many of the State's responses to Davis's argument that the trial court had jurisdiction to consider his new-trial motion are internally inconsistent. For example, the State argues that the trial court could never hear the motion. (State's Brief at 12, 17.) Then the State argues that only the trial court could hear the motion, but only after the court of appeals remands the case. (*Id.* at 18–19.) None of the State's arguments are well taken.

#### **I. The Fifth Appellate District now recognizes that its decision was in error.**

The State presents a lengthy discourse on State ex rel. Special Prosecutors v. Judges, Court of Common Pleas (1978), 55 Ohio St. 2d 94, "to fully appreciate the *correctness* of the Fifth District's" opinion below. (State's Brief at 6–9; emphasis added.) But a recent opinion of the Fifth Appellate District questions the correctness of its previous decision in this case.

In State v. Aleshire, 5th Dist. No. 09-CA-132, 2010-Ohio-2566, at ¶¶67, 70, 72, the court of appeals acknowledged that the trial court has jurisdiction to address post-trial motions that do not raise issues that have already been raised on appeal. Like the present case, the defendant in Aleshire filed a post-trial motion after the court of appeals had decided his direct appeal. And like the trial court in this case, the trial court in Aleshire concluded that it did not have

jurisdiction to rule on the post-judgment motion because it lacked jurisdiction. Id. at ¶46. The Fifth District determined that the trial court erred when it did not consider the motion on account of a lack of jurisdiction:

Upon review, we find the trial court did not give full and fair consideration to appellant's motion to withdraw his guilty plea due to the trial court's belief that it lacked jurisdiction to consider the motion.

Id. at ¶72.

The decision in Aleshire implicitly if not expressly overrules the decision in Davis's case. Thus, the holding that this Court is now reviewing has ceased to be the law of the Fifth District. This Court should remand this case to the court of appeals for reconsideration in light of the holding in Aleshire.

Further, in State v. Davis, 5th Dist. No. 09-CA-0019, 2009-Ohio-5175, the Fifth District applied Special Prosecutors broadly, thus prohibiting the trial court from acting even when doing so would not be inconsistent with the appellate court's judgment. In a turnabout, the court stated in Aleshire, 2010-Ohio-2566, at ¶67, that the trial court has jurisdiction "to do an act 'not inconsistent' with [the appellate court's] prior exercise of jurisdiction"—a conclusion that comports with a practical understanding of Special Prosecutors, 55 Ohio St. 2d at 97.

Judge Hoffman wrote a concurring opinion in Aleshire in which he acknowledged that the panel's decision in Davis's appeal of his new-trial motion relied on an "overly broad" interpretation of Special Prosecutors. Id. at ¶76. Judge Hoffman wrote the opinion in Davis's case but now believes that the court "reached the wrong conclusion in *Davis*." Id. at ¶77. Other courts, and the other judges on Davis's panel, need this Court to clarify the application of Special Prosecutors to post-trial motions. See, e.g., State v. Parks, 7th Dist. No. 08 CA 857, 2009-Ohio-4817. Special Prosecutors does not limit the filing of a post-trial motion merely because an

appeal has been perfected. If it does, this Court should rectify this encroachment on the civil and criminal rules of procedure.

**II. The holding of Special Prosecutors is not an absolute bar to the filing of post-appeal motions for a new trial.**

The State refers to documents filed in Special Prosecutors that purportedly undermine Davis's arguments. (State's Brief at 6–9.) But the law of Special Prosecutors is found in this Court's opinion, not in the briefs and motions filed by attorneys in the case. Appellate counsel in Special Prosecutors may not have brought portions of the record to this Court's attention, or this Court may have chosen to disregard certain arguments or documents in rendering its decision. The language of Special Prosecutors and how the Fifth District and other courts have applied it is at issue in this case.

The State contends that Davis cannot consistently argue that the lower court has jurisdiction but only to the extent that he does not have an appeal pending before an appellate court. (State's Brief at 12.) As a matter of judicial economy, however, two courts should not decide the same case at the same time.

This Court held that “[t]he judgment of the reviewing court is controlling upon the lower court as to all matters *within the compass of the judgment.*” Special Prosecutors, 55 Ohio St. 2d at 97 (emphasis added). This allows room for a trial court to decide issues that have not been reviewed by an appellate court, while respecting the relationship between superior and inferior courts. A broad reading of Special Prosecutors constricts lower courts and makes it impossible for defendants to exercise their rights to both a direct appeal and a post-trial motion under the rules of procedure. This appeal seeks to determine whether this Court, by its decision in Special Prosecutors, intended to prohibit all post-trial motions when an appeal has been perfected.

If this Court adopts the State's reasoning, a convicted defendant who files an appeal would never be able to file a new-trial motion because the reviewing court's stamp on "the validity of the underlying conviction" would always render the new-trial issue inconsistent with the appellate court's judgment, even when the particular issue was not raised on appeal. (State's Brief at 15.) As a result, there would be no state-court remedy for these claims.

**III. Appellant Davis's new-trial motion does not raise a claim that had been previously decided.**

**A. Direct Appeal of Right**

The State argues that Davis already raised his claim of ineffective assistance of counsel related to the State's DNA evidence. (State's Brief at 13.) The State incorrectly posits that Davis's direct appeal and his new-trial motion raise "the very same issues." (*Id.*) Davis did not raise the same issue in his direct appeal to this Court. The State implicitly reasons that whenever DNA evidence is mentioned, and regardless of the context in which it is raised, it encompasses all possible claims. Under this reasoning, a claim of ineffective assistance of counsel at the trial phase would automatically include all issues of ineffective assistance at the penalty phase, even if those claims were not specifically raised. Likewise, counsel's ineffectiveness for failing to object to hearsay would cover ineffectiveness for failing to investigate simply because an ineffective-assistance-of-counsel claim had been raised. But such claims must be raised independently and supported to be properly reviewed and preserved.

The State frames Davis's position as simply contending that Special Prosecutors bars post-trial litigation on the same issue. (*Id.*) But there are issues that could be raised in a post-trial motion after other issues based on the same legal principle have been litigated. For example, if an issue had been previously litigated under Brady v. Maryland (1963), 373 U.S. 83, the defendant could later file a new-trial motion based on the same legal principle upon

discovering that the State failed to disclose additional documents or evidence to the defense. Thus, Davis should not be precluded from filing a motion for a new trial that raises DNA evidence merely because he raised a direct-appeal issue involving DNA evidence.

In his direct appeal of right to this Court, Davis's appellate counsel raised only two issues pertaining to ineffective assistance of counsel and DNA evidence:

- (1) "Counsel failed to effectively investigate, prepare, and litigate their Motion in Limine To Preclude The Use Of Or Reference To DNA Evidence." (Appellant's Merit Brief, Case No. 2005-1656, filed 7/14/06, Prop. of Law XIII, at 184.)
- (2) "To the extent that trial counsel had not researched the admissibility of" Defense Exhibit L, an amended certificate of analysis prepared by the State's DNA expert witness, "prepared argument to rebut the trial court's reasoning and more zealously objected to its exclusion," counsel was ineffective. (Appellant's Merit Brief, Case No. 2005-1656, filed 7/14/06, Prop. of Law XIII, at 192.)

Neither of these issues involves defense counsel's failure to challenge the State's DNA evidence with trial testimony from a qualified DNA expert. Davis could not have raised the issue in his direct appeal because it relies on evidence outside the record. State v. Ishmail (1978), 54 Ohio St. 2d 402, 406. Appellate counsel even noted the need for evidence outside the record to litigate claims of ineffective assistance of counsel. (Appellant's Merit Brief, Case No. 2005-1656, filed 7/14/06, Prop. of Law XIII, at 186 n.59.) Davis's direct-appeal claims dealt with the *admissibility* of evidence, along with the chain of custody, not whether DNA evidence should have been challenged by an expert witness for the defense at trial. See State v. Davis, 116 Ohio St. 3d 404, 2008-Ohio-2, at ¶341-342.

After the trial court ruled on defense counsel's motion in limine and admitted the DNA evidence, counsel had a duty to challenge the evidence presented by the State's expert witness at trial with testimony from their own expert. Defense counsel's failure to do so is the basis of the new-trial motion. A court can only determine the merits of the issue with evidence outside the

record—an expert’s affidavit with the proposed expert testimony that the jury should have heard. Therefore this Court could not—and did not—decide the issue.

The State refers to the history of Special Prosecutors and argues that the defendant’s motion to withdraw his guilty plea relied on evidence that was not part of his direct appeal. (State’s Brief at 10.) This Court identified the issue raised by the defendant as pertaining to “the voluntariness of the plea.” Special Prosecutors, 55 Ohio St. 2d at 96. That issue encompassed the motion to withdraw the guilty plea. In Davis’s case, not only was the new evidence not presented to this Court, but also *the issue itself* was not raised in the direct appeal.

**B. R.C. 2953.21 Postconviction Petition**

Davis’s postconviction petition does not prevent him from filing a motion for a new trial. The postconviction claim involving DNA evidence is not relevant to this appeal. Special Prosecutors addressed the issue of jurisdiction when a *direct appeal* had been perfected, not a petition for postconviction relief. *Id.* Still, Davis will reply to the State’s argument regarding the postconviction claim.

On July 20, 2006, Davis filed an amended petition in the trial court. In his Sixteenth Ground for Relief, he raised a claim of ineffective assistance of counsel based on trial counsel’s failure to challenge the State’s Y-STR DNA evidence. Davis supported his claim with an affidavit from an attorney. The trial court concluded that the claim was barred by res judicata. Further, the court noted that Davis did not offer the expert testimony that he asserted counsel should have presented at trial. (Court of Common Pleas, Judgment Entry, Nov. 14, 2007, at 5–6.)

On appeal of the postconviction petition, the Fifth District found that the claim lacked appropriate supporting evidence, namely an affidavit from a qualified expert in the field of DNA.

State v. Davis, 5th Dist. No. 08-CA-16, 2008-Ohio-6841, at ¶156. The attorney-expert affidavit was insufficient to evaluate whether trial counsel were ineffective. The court of appeals determined that the claim needed a supporting affidavit from an expert in DNA science that proffered the expert's probable testimony. Id. at ¶158. As presented in the petition, the court could not properly evaluate the claim:

It would seem that in most cases a more objective standard than simply a countervailing opinion of another attorney is a more appropriate standard by which to determine whether counsel's performance fell "below an objective standard of reasonableness," "under prevailing professional norms." Strickland v. Washington, 466 U.S. at 688, 104 S. Ct. 2052.

Id. at ¶162.

Davis did not present the identical claim in his new-trial motion. That claim included an affidavit from a qualified DNA expert, Dr. Laurence Mueller. Dr. Mueller addressed the State's DNA evidence and found it to be questionable for several reasons:

- A. Mr. Davis was identified as a suspect by using a database search; however, the State's DNA experts did not account for the database "hit" in its statistical analysis of the DNA test results.
- B. There is no mention of the other major source of uncertainty in DNA profiling, namely laboratory error.
- C. Meghan Clement, one of the State's DNA experts, testified that it was impossible for non-identical twin siblings to have the same DNA; however, this testimony is false.
- D. The genetic profiles developed from the bed sheets were mixed samples, with a partial profile, and the statistical analysis of the weight of this evidence by the State's DNA experts overstated its value.

New Trial Motion, Exhibit 1, Affidavit of Laurence D. Mueller, Ph.D., at 2. No qualified defense expert had previously analyzed this information. Neither the trial court nor the court of appeals could evaluate whether trial counsel had been ineffective for failing to present the

testimony of a qualified DNA expert without knowing what such an expert's testimony would entail. The new-trial motion offers that evidence.

Further, the ground for relief in the postconviction petition is predicated on trial counsel's substandard cross-examination and closing argument, and failure to object to the testimony of the State's witnesses. (See Amended Postconviction Petition, July 20, 2006, Exhibit X, Affidavit of Attorney Gregory W. Meyers, at ¶¶11, 19, 20, 33, 51.) The new-trial motion presents a claim of ineffective assistance of counsel for failing "to employ an expert such as Dr. Mueller" and presenting the expert's explanations of DNA science to the jury. (Motion for leave to file new-trial motion, Oct. 31, 2008, Exhibit A, at 3, 7.)

As the State mentions, R.C. 2953.21(C) confers jurisdiction on the trial court to hear a postconviction petition even when a direct appeal is pending. (State's Brief at 20–21.) Davis's new-trial motion should not be subjected to a jurisdictional bar because he previously filed a postconviction petition. The trial court's authority to consider a postconviction petition exists independently of other actions, and a postconviction appeal therefore should not impose a jurisdictional bar to post-trial motions filed in the trial court.

Criminal Rule 33 provides a 120-day window in which to file a new-trial motion based on newly discovered evidence but permits a later filing with leave of court. The postconviction statute requires a petition to be filed within 180 days after the trial transcript is filed in the direct appeal. R.C. 2953.21(A)(2). The discrepancy in these filing deadlines implies that these actions run independent of each other. Further, if necessary, an appellant could request a stay of the postconviction appeal while the trial court considers a post-trial motion.

If the new-trial motion is subject to res judicata in the court below, Davis will have to overcome that hurdle. This Court should remand this case to the court of appeals with

instructions to employ the correct standard, rather than engaging in the error correction that the State suggests. (State's Brief at 28–33.)

The State also argues that Davis's new-trial motion is moot because the State tested the DNA of Davis's brother Randy (who the defense at trial had argued was the possible principal offender) and can exclude him as the source of the DNA found in Elizabeth Sheeler's home. (State's Brief at 17 n.27.) Davis filed motions in the trial court to preserve Randy Davis's DNA and for independent testing. The trial court denied Davis's motion for independent testing by a DNA expert but did grant his request to preserve the DNA sample. (Common Pleas Court, Entry, March 10, 2009.) To date, Davis has not been able to conduct his own testing of Randy Davis's DNA. Further, it is not known whether there are other potential suspects who could match the DNA profile from the evidence collected at the crime scene.

#### **IV. Finality is protected by other legal doctrines.**

This Court should use this case to direct lower courts to return to basic black-letter concepts of law such as the law-of-the-case doctrine and res judicata when evaluating potentially repetitious claims that threaten the finality of judgments. Lower courts have used this Court's decision in Special Prosecutors to disrupt the balance between finality and certain exceptions provided under the civil and criminal rules of procedure. The State berates Davis for exercising his right to appeal his conviction and death sentence, and make a collateral attack on the judgment. (State's Brief at 5–6, 13, 17, 28.) Davis's attempt to file a new-trial motion does not perpetuate endless litigation. The specific wording of Ohio R. Crim. P. 33(B) limits the filing of a new-trial motion while accounting for exceptional circumstances:

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.

Emphasis added. The Fifth District did not address Crim. R. 33, however.

The State misapprehends Davis's argument on controlling litigation. (State's Brief at 17.) Appellate courts' far-reaching use of Special Prosecutors precludes convicted defendants from raising new issues that are relevant to their convictions and sentences. It is not necessary for courts to rely on Special Prosecutors to curb excessive litigation. Adequate mechanisms exist in the rules of procedure and legal doctrines to eliminate frivolous or repetitious filings. The State even acknowledges this. (State's Brief at 16.) This Court could not have intended its decision in Special Prosecutors to be used to undermine the procedural rules or other legal concepts. Established legal doctrines provide a check on repetitious litigation. For example:

- res judicata
- law of the case
- collateral estoppel

A jurisdictional bar, however, prohibits defendants from raising new issues and the trial court from considering new evidence, even in cases where the defendant asserts his actual innocence.

The State attempts to narrow the reach of Special Prosecutors by arguing that it is "only a conditional bar to jurisdiction." (State's Brief at 18.) But to have the appellate court remand the case to the trial court to consider the post-trial motion, the issue would first have to be raised on appeal. In Davis's case, the issue raised in his new-trial motion was not raised in his direct appeal. Therefore his case could never be remanded and his claim never decided on the merits.

**V. The trial court is the most fitting gatekeeper.**

The State further misapprehends Davis's argument on the trial court as a gatekeeper. The State proposes that the appellate court act as a trial court by entertaining post-trial motions in the first instance—an unorthodox approach that is not contemplated by the procedural rules. (*Id.*) The Court's Rules of Practice indicate that this Court prefers to have the trial court be the first court to consider a new-trial motion. See S. Ct. Prac. R. 19.2(A).

Lower appellate courts are misusing Special Prosecutors as a tool to prevent trial-court judges from acting at all on post-trial motions. See e.g., State v. Hill, 6th Dist. No. L-09-1226, 2009-Ohio-5187. But it is the trial judge, the appropriate and logical gatekeeper, who is best suited to halt litigation on issues that were previously raised or could have been raised (*res judicata*); where the appellate court has rendered a decision on legal issues in the case (law of the case); or when a party relitigates settled issues (collateral estoppel). The door to filing a new-trial motion remains open to defendants who have previously filed an appeal, but it can be effectively shut if the trial court determines that the motion is not viable.

**CONCLUSION**

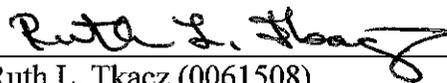
Ohio Rule of Criminal Procedure 33(B) gives the trial court authority to consider a motion for a new trial. The trial court had jurisdiction to consider Davis's motion because he had not raised the issue in his direct appeal. Further, evidence outside the record is required to fully litigate the claim of ineffective assistance of counsel that Davis raised in his new-trial motion; therefore Davis could not have raised the issue in his previous appeal to this Court.

The court of appeals judge who authored the opinion in Davis's case now concludes that the court's decision was wrong. Special Prosecutors should not be used to limit a defendant's Fourteenth Amendment right to due process in his state-sanctioned post-trial motions. This

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

Respectfully submitted,

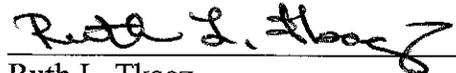
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Reply Brief was forwarded by regular U.S. mail to Kenneth W. Oswalt, Prosecuting Attorney, Licking County, 20 South Second Street, Newark, Ohio 43055, on the 29<sup>th</sup> day of July, 2010, and also via e-mail to amicus counsel.



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