

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, 5th Appellate District]

Court of Appeals Case No. 2009-CA-19

Trial Court Case No. 04-CR-464

Supplemental Merit Brief of State of Ohio,
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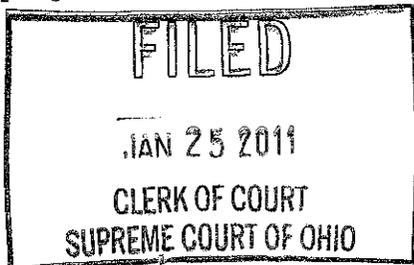


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COMBINED STATEMENT OF CASE AND FACTS

The Statement of the Case as well as the Statement of Facts are set forth in the Appellee's original merit brief. This supplemental brief is intended to address the issue that Court has asked the parties to brief.

ARGUMENT

Proposition of Law

ALL APPEALS FROM A TRIAL COURT IN CASES WHERE THE DEATH PENALTY WAS IMPOSED ARE TO BE APPEALED DIRECTLY TO THE OHIO SUPREME COURT, AND A COURT OF APPEALS HAS NO JURISDICTION TO HEAR ANY APPEAL FROM ANY TRIAL COURT DECISION IN SUCH A CASE.

In 1994 Ohio voters chose to amend the Ohio Constitution to provide for "direct appeals" to the Ohio Supreme Court in cases where the death penalty is imposed – an amendment appearing on the ballot as Issue 1. After the 1994 amendments the Ohio Constitution provides in relevant part:

Article IV, § 2(B)(2)(c) – Jurisdiction of the Supreme Court.

(2) The supreme court shall have appellate jurisdiction as follows:

(c) In direct appeals from the courts of common pleas or other courts of record inferior to the court of appeals as a matter of right in cases in which the death penalty has been imposed;

Article IV, § 3(B)(2) – Jurisdiction of the Courts of Appeals.

Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that

imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

The question that this Court has requested the parties to brief requires a determination of what the electorate intended when it voted for these amendments. To be sure, these amendments were clearly intended to address an initial first appeal of right (a “first-tier” appeal) in cases involving the imposition of the death penalty. See, generally, *State v. Smith* (1997), 80 Ohio St.3d 89, 1997-Ohio-355. Indeed, Davis pursued such a first-tier appeal to this Court. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶¶ 17, 25, (*Davis I.*) The question this Court has asked the parties to brief is whether the electorate intended more.

When a court is called upon to interpret the meaning of a constitutional amendment that was enacted by the electorate “[s]uch interpretation will be given to a provision of the Constitution as will promote the object of the people in adopting it, when such object is clearly indicated in the context, and to this end narrow and technical definitions of particular words will be disregarded.” *Hupp v. Hock-Hocking Oil & Natural Gas Co.* (1913), 88 Ohio St. 61, syllabus of court. See also, *Cleveland Tel. Co. v. City of Cleveland* (1918), 98 Ohio St. 358, 368, (“[W]e must determine the intent of the electors of the state from the language used in the amendment itself.”); *Kraus v. City of Cleveland* (Com. Pl., 1950), 58 Ohio Law Abs. 353, 42 Ohio Op. 490, 94 N.E.2d 814; and, *State v. Knipp* (Muni. Ct., 2005), Cleveland Muni. Ct., No. 2004 CRB 039103, 2005 WL 1017620, unreported, p. 1 (“The task for this court is to determine if the intent of the electorate who adopted [the] Amendment can be ascertained.”)¹

Moreover, even in cases where a constitutional provision is deemed to be ambiguous “... it becomes [the court’s] duty to make every effort to resolve this dilemma in a way that will

¹ Davis’ citation to the case of *State v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, ¶ 12 (see supplement brief of appellant, p. 2) is inapposite for that case did not involve the construction of any constitutional provision.

preserve the amendment, and give it that effect which we conclude was the desire of the electorate at the time of its adoption.” *State ex rel. Rhodes v. Brown* (1973), 34 Ohio St.2d 101, 102-103. In order to glean the electorate’s intention in adopting Issue I, a review of the actual ballot language of Issue 1 is imperative.

The Issue 1 ballot language told voters that the amendment was designed to: “1. Remove jurisdiction from the courts of appeals to review death penalty cases on direct appeal. [and] 2. Provide for direct appeals of death penalty cases to the Ohio Supreme Court from the court of common pleas or other courts of record inferior to the court of appeals.” See, 1994 ballot language of Issue 1 to amend Sections 2 and 3 of Article IV of the Constitution of the State of Ohio. (Attached). The Explanation for Issue 1 as prepared by the Ohio Ballot Board (also attached) further provided:

Currently, a case in which the death penalty is imposed is reviewed for legal sufficiency by a district court of appeals consisting of at least three judges. This portion of the appeals process takes on the average from one to two years. If the death penalty is upheld, the case is then reviewed by the Ohio Supreme Court. If the death penalty is overturned by the Court of Appeals, appeal to the Ohio Supreme Court is discretionary.

If adopted, the amendment will eliminate the review of death penalty cases by the district court of appeals and provide that these cases be reviewed directly by the Ohio Supreme Court. This may increase the Ohio Supreme Court’s burden and caseload in these mandated appeals. ***The adoption of this amendment would not affect review of death penalty cases by federal courts.***

(Emphasis added.)

How plain can this be: “If adopted, the amendment will eliminate the review of death penalty cases by the district court of appeals and provide that these cases be reviewed directly by the Ohio Supreme Court”? This language talks about “eliminating”, not “limiting” court of appeals’ review in “death penalty cases”. Moreover, to the extent it expressly speaks to a continued review process by “federal courts”, one can only come to the conclusion that the

general electorate had to understand that the court of appeals would no longer be involved in appellate review of death penalty cases *at all*, and that all appeals in such cases would be reviewed “directly” by the Supreme Court. Indeed, this Court recognized that “the general public, both in Ohio and across the nation, has been increasingly dissatisfied with inordinate delays that pervade the death penalty system.” *Smith*, *supra*, at 95. Taking the court of appeals out of the equation entirely when the death penalty is imposed would go a long way to address that frustration.

In his supplemental brief Davis argues that the language of Article IV, § 3(B)(2) (defining the jurisdiction of the courts of appeals) refers to an appeal from “a judgment that imposes a sentence of death” and that a decision to deny a motion for new trial, or for that matter any post-conviction pleading, is not a judgment that imposes a death sentence. (Supplemental brief of appellant, pp. 2-3.) In doing so, Davis clearly advocates for a distinction between an initial “direct appeal” from the imposition of the death penalty which must be appealed straight to this Court; and other, presumably later, appeals from various ancillary proceedings that post-date the actual imposition of the death penalty. These “non-direct” appeals then would be subject to appeal to the court of appeals. Several observations are in order that make this proposed reading of the constitutional provisions inaccurate.²

First, while Davis’s efforts to make a distinction between some “direct appeal” and some ancillary or “second-tier appeal” may have some basis in the legal parlance that courts and lawyers discuss from time to time, common sense tells us that the general electorate who voted to enact the Constitutional amendments at issue had no concept of any possible legal distinction between a “direct appeal” and some “second-tier” or “collateral” appeal. To think otherwise is

² The same concerns that serve to demonstrate the fallacy of Davis’ arguments also serve to show that the Eleventh District’s opinion in *State v. Jackson* (cited in appellant’s supplemental brief at p. 4 and attached to his brief) is misguided.

ludicrous. Accordingly, “[t]he duty of the court, and its only proper purpose, in the construction of these amendments, is to ascertain and give effect to the intent of the people when they wrote them into their Constitution. In the endeavor to promote the objects for which they were framed and adopted, *rules which are merely technical should not be permitted to thwart the attainment of those objects, by forcing from them a meaning which their framers never held.*” *Hupp*, 88 Ohio St. at 65. (Emphasis added.) “It is not the province of a court to write Constitutions or to give to the language used such forced construction as would warp the meaning to coincide with the court’s notion of what should have been written therein. On the contrary, *the language used must be given its usual and ordinary meaning.*” *Cleveland Telephone*, 98 Ohio St. at 368. (Emphasis added.) Can one honestly say that the voters in favor of the passage of Issue 1 had any possible, remote understanding of the peculiarly “legal” distinctions Davis attempts to draw?

Second, and perhaps more importantly, Davis fails to even mention the language of Article IV, § 2(B)(2)(c) (defining the jurisdiction of the Supreme Court) anywhere in his supplemental brief. That provision as noted above grants to the Ohio Supreme Court “...appellate jurisdiction ... [i]n direct appeals from the courts of common pleas or other courts of record inferior to the court of appeals as a matter of right *in cases* in which the death penalty has been imposed”. (Emphasis added.) Regardless of what pleading led to the appeal in this case, this case clearly is “a *case* in which the death penalty has been imposed”.

Article IV, § 2(B)(2)(c) (which speaks generally of “cases” wherein the death penalty was imposed) and Article IV, § 3(B)(2) (which speaks to a “judgment that imposes a sentence of death”) must be read *in pari materia*. “Where provisions of the Constitution address the same subject matter, they must be read *in pari materia* and harmonized if possible.” *State ex rel. Toledo v. Lucas Cty. Bd. of Elections* (2002), 95 Ohio St.3d 73, 78, quoting *Toledo Edison Co. v. Bryan* (2000), 90 Ohio St.3d 288, 292. Thus, if the two articles appear to be ambiguous when

read together, this Court must “make every effort to resolve this dilemma in a way that will preserve the amendment[s], and give [them] that effect which we conclude was the desire of the electorate at the time of its adoption.” *State ex rel. Rhodes*, supra. Davis’ reliance on *one* interpretation of *one* provision of the constitution over *another* interpretation of that provision and ignoring the terms of *another* provision dealing with the same subject matter gives his argument no safe harbor.

Third, Davis fails to mention that the statutory provisions that were designed to implement Issue 1 provide for appeals to this Court beyond simply *the* judgment that actually imposed the death penalty.³ After Issue 1 was approved, R.C. § 2953.02 was amended to state, in relevant part:

In a capital case in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the judgment *or final order* may be appealed from the trial court directly to the supreme court as a matter of right.

(Emphasis added.)

Is not the decision of the trial court in this matter that denied Davis’ motion for new trial a “judgment or final order” “in a capital case”? Clearly it is! This implementing statutory provision includes appealing to the Supreme Court a “final order” “in a capital case”. “An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following: (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment.” *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, ¶¶ 7-8. This Court has held that a trial court’s ruling on a motion for new trial in a criminal case is a “final order”. *State v. Matthews* (1998), 81 Ohio St.3d 375, 378, (“[W]e hold

³ Similarly, he fails to address the actual ballot language the electors would have seen or the explanation the Ohio Ballot Board provided those electors – both discussed, supra.

that pursuant to R.C. 2505.02 and 2505.03(A), a trial court's order granting the defendant a new trial in a criminal case is a final appealable order.")

Likewise, this Court has defined "a capital case" to include jurisdiction to hear even issues related to noncapital crimes observing that "the plain language of the [1994] amendments speaks of 'cases in which the death penalty has been imposed'..." *Smith*, supra at 104. (Emphasis in original.) Indeed the Court went so far as to observe:

... Thus the Supreme Court has jurisdiction over the whole case, instead of counts, charges, or sentences.

However, "courts must interpret the Constitution broadly in order to accomplish the manifest purpose of an amendment [to the Constitution]." ... "In the interpretation of an amendment to the Constitution, the object of the people in adopting it should be given effect * * *." Indeed, to so separate the convictions and appeals would lead to further delay, confusion in record transmittal, waste of judicial resources, possible inconsistency in decisions, and a further wait for the appeal to the Supreme Court from the appellate court on noncapital cases (albeit now only a two to three percent chance of being accepted instead of the current certainty of review). Such absurd consequences were surely never intended by the voters in passing such amendments and would thwart the very purpose of expeditious review of capital cases.

Id. (Internal citation omitted.)

Fourth, since any type of attack on a criminal conviction, be it a petition for post-conviction relief, a motion to withdraw a plea, or a motion for new trial, attacks the legality of the conviction, any decision of a trial court that addressed the legality of the conviction, becomes a judgment that is clearly envisioned as being one that, for all practical purposes, imposes a sentence of death.

Fifth, Davis' claim that only *the* judgment that imposes the death penalty is appealable directly to this case ignores the cases where this Court affirmed a death penalty on initial appeal, but remanded the case to the trial court for resentencing on *non*-capital offenses resulting in a judgment that did not impose the death penalty, only to thereafter have a renewed appeal to *this*

Court relating to the judgment that imposed sentences on the non-capital crimes. In such instances, by definition, those appeals were not from a “judgment” that imposed the death penalty, but they nonetheless came to this Court. See, *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, ¶ 4, (“[T]he three-judge panel conducted a resentencing hearing on the noncapital offenses and resentedenced Ketterer to the same sentence as originally imposed. Ketterer appealed *as a matter of right* to challenge his resentencing.”) (Emphasis added.) See also, *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶¶ 2-3, (“Consequently, this court remanded Elmore’s case to the trial court for a new sentencing hearing on the noncapital offenses in accordance with Foster. . . . On remand, the trial court resentedenced Elmore to exactly the same sentence. . . . Elmore then filed this appeal *as a matter of right* to challenge his resentencing.”) (Emphasis added.)

*Why Making All Appeals In Cases Where
The Death Penalty Was Imposed Only Subject to Appeal
To the Ohio Supreme Court Makes Sense*

Aside from the fact that having all appeals in capital cases appealed directly to this Court is clearly what the electorate understood they were voting for in 1994, there are practical concerns that justify such a result.

First, after an initial appeal of right to this Court, in any type of post-sentencing challenge that results in a second-tier appeal, a court of appeals would be put in the position of having to interpret what this Court did, or did not, decide, or what it could or could not have decided in that initial appeal in order to properly apply the doctrine of *res judicata*. See, generally *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus. (Pursuant to *res judicata*, a defendant cannot raise an issue in a petition for post conviction relief if he or she *could have* raised the issue on direct appeal.) Indeed the court of appeals applied that doctrine in

this case and repeatedly observed that Davis' issues had been previously litigated in his earlier appeal to this Court, but nonetheless was required to sift through Davis' arguments, compare them to this Court's prior decision, and then determine if – in their view – Davis had overcome a *res judicata* bar. See, *State v. Davis* (December 23, 2008), Licking App. No. 08-CA-16, 2008-Ohio-6841, ¶¶ 37, 50, 60, 61, 71, 90, 107, 124, 131, 155, juris. denied 122 Ohio St.3d 1409, 2009-Ohio-2751, (*Davis II*), (denial of post-conviction relief).

Requiring all appeals in death penalty cases to be appealed to the Ohio Supreme Court would avoid the dilemma of a court of appeals hazarding a wrong opinion as to what is, or is not, within the gambit of a Supreme Court death penalty decision. If all appeals come to this Court, this Court could decide for itself what they did, or did not, actually decide, or what it could have decided in the initial appeal. Simply put, the same court – this one – would be interpreting the parameters of its own prior appellate decision.

The second practical concern with allowing some appeals to be litigated directly to this Court while others are litigated to the court of appeals depending upon what is and what is not deemed to be a “direct appeal” as that term is used by lawyers, is the confusion it could entail based upon whether the proceedings being appealed from is deemed to be some collateral challenge to the conviction, or they are deemed to be some “direct” attack on the conviction. Although Davis does not overly advocate such a distinction, the State must nonetheless be cognizant of the fact that since the constitutional provisions at issue in this case use the phrase “direct appeal” that one or more of the court members may chose to focus on this terminology and define a “direct appeal” in terms similar to the dichotomy this Court has itself drawn between a “direct attack” on a conviction, and a “collateral attack” on a conviction.

For example, in *State v. Bush* (2002), 96 Ohio St.3d 235, 2002-Ohio-3993, ¶ 13, this Court distinguished a petition for post-conviction relief under R.C. § 2953.21, from a motion to

withdraw a plea under Crim.R. 32.1, on the basis that the former was a “collateral” challenge of the conviction, while the latter was some “direct” challenge to it.⁴ Assuming that this collateral versus direct “**attack**” distinction carried over to defining to what court a death penalty defendant was expected to perfect his appeal to, thus helping to define what is a collateral versus a direct “**appeal**”, absurd results would be reached.

For example, the exact same factual or legal grounds may be presented to a trial court by way of a motion for a new trial as well as a petition for post-conviction relief. In fact, the argument presented by Davis both in his petition for post-conviction relief, as well as in his motion for new trial, involved raising supposedly “newly discovered” DNA- related evidence. See, *Davis II*, and *State v. Davis* (Sept. 24, 2009), Licking App. No. 09-CA-19, 2009-Ohio-5175, (*Davis III*). Are we to expect that because one of them may be some “collateral challenge” to the conviction (i.e. the petition for post-conviction relief) that it should not be appealed directly to this Court, but the other (i.e. the motion for new trial) could be seen as a “direct attack” on the conviction and thus must be appealed directly to this Court? Wouldn’t this allow a defendant to forum-shop for his or her preferred appellate court by the simple expediency of filing the exact same claims either as a post-conviction relief petition or a motion for new trial as he or she saw fit? As if that is not scary enough, what are we to do with a pleading that, like in *Bush*, seeks remedies under more than one provision of law? Is the “collateral attack” part of that pleading subject to appeal to the court of appeals, but the “direct attack” portion of the same pleading appealable directly to this Court? For obvious reasons, the State would hope not.

⁴ While *Bush* involved a motion to withdraw a plea under Crim.R. 32.1, and this case involves a motion for new trial under Crim.R. 33, if the *Bush* distinction continues to be a viable distinction and is that distinction is then deemed to be relevant to determining what constitutes a “direct appeal” as that phrase is used in the constitutional amendments at issue herein, undersigned counsel can see no reasoned distinction between a motion to withdraw a plea under Crim.R. 32.1 and a motion for new trial under Crim.R. 33. They are either both collateral attacks (a result that would require the overruling of *Bush* on this point), or they are both direct attacks.

For these reasons, focusing on the “direct appeal” language of these constitutional amendments in terms of what some **legal** definition of that phrase may mean in other contexts, is rife for confusion.

Previous Appeals Wrongly Filed In the Court of Appeals.

Because Davis has raised concerns regarding possible adverse effects on previously litigated “second-tier” appeals that would flow from this Court now deciding that all appeals should be litigated to this Court in death penalty cases rather than to the courts of appeals, a further observation is in order.

The State would agree with Davis that a whole host of possible problems could surface in the event it is now decided that all appeals in death penalty cases should go to this Court in light of the numerous cases where courts of appeals have entertained such “second-tier” appeals. (See, supplemental brief of appellant, pp. 6-8.) With that said, however, the State would not agree with Davis that the way around those problems is to simply ignore the intent of the electors in passing Issue 1. Instead, the way around those problems is to make the decision in this case (i.e. that all appeals from the trial court wherein the death penalty is imposed are to be appealed to this Court) only prospective in application – that is, make it applicable to only those appeals ***filed after the date this Court’s decision is announced.***

The retrospective application of a law is required only when the principle to be applied goes to the “fairness of the trial – the very integrity of the fact-finding process.” *State v. Leroy* (1972), 30 Ohio St.2d 138, 140, quoting *Linkletter v. Walker* (1965), 381 U.S. 618, 639.⁵ To

⁵ The rule of *Linkletter* was later modified in *Griffith v. Kentucky* (discussed further, *infra*) to essentially require as the general rule the application of a new constitutional rule to not just future cases, but also to cases then pending upon direct review. This case is not on “direct

what court one should properly pursue an appeal – a second-tier appeal, no less – is hardly something that goes to “the very integrity of the fact-finding process.”⁶

In *Griffith v. Kentucky* (1987), 479 U.S. 314, the court further recognized that prospective application of a new pronouncement should be the normal course when the new rule may be termed a “clear break” from past practice. “Under this exception, a new constitutional rule [is] not applied retroactively, even to cases on direct review, if the new rule explicitly overruled a past precedent of [the Supreme Court], or *disapproved a practice [the Supreme Court] had arguably sanctioned in prior cases, or overturned a longstanding practice that lower courts had uniformly approved.*” *Id.*, 479 U.S. at 325. (Emphasis added.)

review” as defined in that case. This case, and all appeals within the scope of the position advocated by the State (i.e. that they all should be appealed directly to this Court), by definition, are second-tier review cases. Thus *Griffin’s* “widening” of the sweep of retroactivity does not cover this case, nor cases like it. Moreover, even in the more modern standard to be applied to determine whether a decision should be retroactive versus prospective as set out in *Teague v. Lane* (1989), 489 U.S. 288, the standard employs a factor which focuses on the “accuracy” and “fairness” of the trial in arriving at a just verdict. *Id.* at 312 (“We believe it desirable to combine the *accuracy* element of the *Desist* [v. United States] version of the second exception with the *Mackey* [v. United States] requirement that the procedure at issue must implicate the fundamental *fairness* of the *trial.*”)(Emphasis added.) Thus, in all of its versions the test of retroactivity has focused on the trial-level fact-finding process, not a second-tier appellate review process.

⁶ This phraseology has had other permutations over the years. See, cases cited in *Brown v. Louisiana* (1980), 447 U.S. 323, f.n. 6. Nonetheless, they all deal with new rules that give rise to serious concerns that the guilt-determination in the first place may have been wrong.

Moreover, applying this “prospective-only” standard to the Court’s ruling in this case it should be noted that the effect on what would *now* be known to have been wrongly perfected past appeals to the various courts of appeals should not give any defendant a valid claim regarding the denial of any constitutional rights as a criminal defendant has no constitutional right to these types of second-tier appeals. See, *Coleman v. Thompson* (1991), 501 U.S. 722, 752. Thus, if they had no such constitutional right to such second-tier appellate review, then they have no right to challenge their attorneys for being ineffective for perfecting an appeal to what *now* would be known to have been the wrong court. *Id.* (Defendant has no constitutional claim for ineffective assistance of appellate counsel where attorney failed to properly file notice of appeal in a second-tier appeal.) See also, *Baker v. Bradshaw* (N.D. Ohio, September 16, 2008), Case no. 4:05-CV-1566, 2008 WL 4283349, unreported, p. 5.

The emphasized part of this last quote tells us precisely this: Davis' concerns about how this Court may have over the years implicitly sanctioned having the courts of appeals review second-tier appeals in death penalty cases; and/or how over the years the various courts of appeals around the state have chosen to adopt some "long-standing practice" of hearing such appeals, are precisely the concerns that militate toward making any decision to require that all appeals in death penalty cases be perfected to this Court only *prospective* in nature. Davis' concerns thus actually support the State's position on the matter of prospective application of any ruling in favor of making all appeals in death penalty cases the appellate province of this Court.

Simply put, making the decision in this case applicable only to appeals filed after the decision in this case is announced avoids any concerns regarding prior appellate litigation that Davis wants to rely upon for the Court reaching the decision they now advocate, while at the same time allowing this new appellate process to finally recognize (after nearly 17 years since Issue 1 was adopted) the electorate's intent that all death penalty-related appeals should go directly to this Court. The decision of this Court to apply such a rule prospectively only would be nearly unassailable by any defendant. As this Court has observed, "[t]he United States Supreme Court recognized in *Great N. Ry. Co. v. Sunburst Oil & Refining Co.* (1932), 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360, that state courts have broad authority to determine whether their decisions should operate prospectively only." See, *Medcorp, Inc. v. Ohio Dept. of Job & Family Services*, 124 Ohio St.3d 1215, 2009-Ohio- 6425, ¶ 3, (applying new ruling to appeals filed after date of Supreme Court's decision.)

**CONCLUSION, AND URGENT CLARIFICATION
OF ACTUAL REMEDY SOUGHT BY STATE.**

Based upon the foregoing the State of Ohio has shown that Davis was not entitled to having the denial of a motion for new trial considered by the court of appeals. With that said, however, the State wants to make clear that the position it is advocating herein is that this Court make both of two holdings, not one without the other. Those are: (1) that **all** appeals in death penalty cases must be perfected from the trial court to this Court regardless of what type of trial court pleading(s) leads to the need for the appeal; and, (2) that such ruling is prospective in nature and only applies to appeals filed after the date the decision herein is rendered.

The State would *strongly encourage* the Court NOT to make the first holding without also making the second, for if that were to be the case, Davis's concerns regarding such a holding on past appellate litigation, and/or federal habeas actions may very well come to fruition – with disastrous results.⁷ SIMPLY PUT, THE STATE SEEKS TO WIN THE DAY ON BOTH POINTS, OR NEITHER!

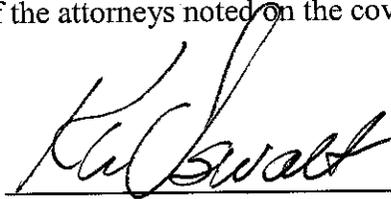
Respectfully submitted,

Kenneth W. Oswalt, Reg. #0037208
Prosecuting Attorney

⁷ Indeed it was undersigned counsel's grave concern that a court may reach the first of these conclusions, but not also immediately take the necessary step of making that decision prospective in nature, that caused undersigned counsel to forego raising the jurisdictional issue under the 1994 constitutional amendments in the first place, although having considered doing so.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been sent by regular U.S. Mail this 21st day of January 2011 to each of the attorneys noted on the coverage hereto.

A handwritten signature in black ink, appearing to read "K. Oswalt", written over a horizontal line.

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.

DEATH PENALTY CASE

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

Court of Appeals Case No. 2009-CA-19

Trial Court Case No. 04-CR-464

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

- a. Ballot language for 1994 Constitutional Amendments “Issue 1”;
- b. Explanation of 1994 Issue 1 as prepared by the Ohio Ballot Board

ISSUE 1

PROPOSED CONSTITUTIONAL AMENDMENT

1 (Proposed by Resolution of the General Assembly of Ohio)
To amend Sections 2 and 3 of Article IV of the Constitution of the State of Ohio.

TO CHANGE THE PROCEDURE FOR APPEALS OF CASES IN WHICH THE DEATH PENALTY IS IMPOSED, THIS AMENDMENT WILL:

- 1. REMOVE JURISDICTION FROM THE COURTS OF APPEALS TO REVIEW DEATH PENALTY CASES ON DIRECT APPEAL.**
- 2. PROVIDE FOR DIRECT APPEALS OF DEATH PENALTY CASES TO THE OHIO SUPREME COURT FROM THE COURTS OF COMMON PLEAS OR OTHER COURTS OF RECORD INFERIOR TO THE COURT OF APPEALS.**
- 3. APPLY TO CASES IN WHICH THE DEATH PENALTY IS IMPOSED FOR OFFENSES COMMITTED ON OR AFTER JANUARY 1, 1995.**

IF ADOPTED, THIS AMENDMENT WILL BE EFFECTIVE JANUARY 1, 1995.

A majority yes vote is necessary for passage.

	<input type="checkbox"/>	YES	SHALL THE PROPOSED AMENDMENT BE ADOPTED?	
	<input type="checkbox"/>	NO		

EXPLANATION FOR STATE ISSUE 1
(as prepared by the Ohio Ballot Board)

Currently, a case in which the death penalty is imposed is reviewed for legal sufficiency by a district court of appeals consisting of at least three judges. This portion of the appeals process takes on the average from one to two years. If the death penalty is upheld, the case is then reviewed by the Ohio Supreme Court. If the death penalty is overturned by the Court of Appeals, appeal to the Ohio Supreme Court is discretionary.

If adopted, the amendment will eliminate the review of death penalty cases by a district court of appeals and provide that these cases be reviewed directly by the Ohio Supreme Court. This may increase the Ohio Supreme Court's burden and caseload in these mandated appeals. The adoption of the amendment would not affect review of death penalty cases by federal courts.