

IN THE SUPREME COURT OF OHIO

ORIGINAL

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STATE OF OHIO,	Case No. 09-2028
Appellee,	On Appeal from the Court of
- against -	Appeals of Licking County,
ROLAND T. DAVIS	Fifth Appellate District,
Appellant.	Case No: 2009-CA-00019
	Death Penalty Case
----- X	

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

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INTRODUCTORY STATEMENT

The Innocence Network participated in this case as amicus curiae because the subject of Mr. Davis's appeal strikes at the very heart of the work done by its member organizations: providing pro bono legal and investigatory services to wrongly convicted defendants hoping to prove their claims of innocence. This work depends on the ability of these defendants to present new evidence to the courts notwithstanding the fact that, in most cases, their convictions have been affirmed on direct appeal. The decision of the court below effectively deprived those defendants of access to the courts, which is why the Innocence Network endeavored to show not only why the court below was wrong as a matter of law, but how the court's decision would have prevented several real-life defendants from winning their hard-earned freedom.

The State's opposition brief fails to address the fundamental question of whether the trial courts that have freed wrongly convicted defendants without first seeking special leave from the appellate courts that affirmed the defendants' convictions were wrong to do so. Rather, the State papers over this problem, and likewise ignores the fact that the judge who wrote the decision that is the subject of this appeal has since repudiated it as an overbroad reading of this Court's decision in State ex rel. Special Prosecutors v. Judges, Court of Common Pleas (1978), 55 Ohio St.2d 94, 9 O.O.3d 88, 378 N.E.2d 162. The State further argues that Mr. Davis has had his day in court and thus is barred from moving for a new trial on the grounds of new evidence. The State, however, confuses the merits of Mr. Davis's motion with the only real question before this Court—whether the trial court had jurisdiction to rule on the merits of Mr. Davis's motion.

In a desperate effort to argue that the trial court lacked jurisdiction to consider Mr. Davis's motion, but that other defendants in the future would not be disadvantaged, the State offers an utterly novel proposal: where a defendant whose conviction has been affirmed on

appeal wishes to move for a new trial on the grounds of newly discovered evidence, he should first present his motion to the highest appellate court to have affirmed his conviction, which will then consider the merits of the motion before deciding whether to remand it to the trial court for full consideration. This scheme is contrary to law, as it lacks any basis in Ohio's statutes or court rules, seeks to confer jurisdiction on the appellate courts where the legislature has not conferred it, and draws a distinction between pre- and post-appeal motions not found anywhere in Rule 33. It would also impose a tremendous burden on the courts of appeals and this Court, invert the traditional roles of the trial and appellate courts, and create a situation whereby the decisions of these appellate "gatekeepers" are effectively unreviewable. Indeed, that the State believes this construct is necessary only serves to demonstrate that its reading of Special Prosecutors is far too broad. Besides being unworkable, this system is unnecessary because the issuance of the mandate by the appellate courts returns the necessary jurisdiction to the trial courts to consider these very motions.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS WAS INCORRECT BECAUSE IT EFFECTIVELY FORECLOSES MOTIONS FOR NEW TRIAL ON THE BASIS OF NEWLY DISCOVERED EVIDENCE ONCE A CONVICTION HAS BEEN AFFIRMED ON DIRECT APPEAL

A. The State Fails to Address the Fact that the Decision Below Would Have Foreclosed Successful Efforts to Free Many Defendants Who Were Able to Prove Their Innocence.

Nowhere in its brief does the State respond to the fact shown by the Innocence Network in its initial brief that the decision of the court below would block claims for relief based on actual innocence, likely resulting in the continued incarceration or execution of innocent defendants. Rather than confront these cases head on, the State complains that the Innocence Network has "inundate[d]" the Court with "anecdotal examples." (Merit Brief of the State of

Ohio (“Opp’n”) at 19 n.30.) The State then contends that the easily verified historical facts discussed in the Innocence Network’s brief appear nowhere in the record (*id.*), even as the State itself relies on extra-record evidence from the Special Prosecutors case. Finally, the State misses the point when it contends that the decision below should not be read to preclude a motion for a new trial in all instances, even though that would be its practical effect. (*Id.*) Instead, the point is that the rule set forth by the court below cannot be correct if it would have prevented trial courts from acting to fix these manifest injustices, or even to consider evidence offered by defendants in such situations, where those trial courts did not first seek the permission of the appellate courts. That is especially true where, as in the cases discussed by the Innocence Network, the appellate courts never had occasion to consider that new evidence in affirming the defendants’ convictions, and thus any action by the trial courts in respect of that evidence could not, by definition, be inconsistent with the earlier decisions of the appellate courts.

B. The Author of the Decision Below Has Recognized that the Court’s Decision Was in Error and Should Be Reversed.

There is no better demonstration that State v. Davis, Licking App. No. 09-CA-0019, 2009-Ohio-5175, was wrongly decided than the fact that the judge who wrote the opinion has since repudiated it. In a case decided more than a month before the State filed its opposition brief—and which, amazingly, the State’s brief fails to mention—Judge William B. Hoffman wrote that his interpretation of Special Prosecutors was “overly broad” and, therefore, inapposite to the facts of Mr. Davis’s case. State v. Aleshire, Licking App. No. 09-CA-132, 2010-Ohio-2566, at ¶ 76 (Hoffman, J., concurring.) Accordingly, Judge Hoffman concluded, the Court of Appeals “reached the wrong conclusion in Davis.” *Id.* ¶ 77. While Judge Hoffman’s conscientious effort to correct his earlier error is not controlling on this Court, it militates

strongly in favor of vacating (if not reversing) the Court of Appeals' decision and remanding this case to that court.

C. The State's Reading of Special Prosecutors Is Unduly Broad and Raises Problematic Jurisdictional Questions.

As Judge Hoffman has belatedly recognized, Special Prosecutors does not bar the trial court from considering Mr. Davis's motion for a new trial on the grounds of newly discovered evidence merely because his conviction was affirmed on direct appeal. Special Prosecutors was clearly concerned with the relationship between the trial courts and the appellate courts, and specifically that trial courts not subsequently review determinations that were necessarily passed on by the appellate courts. To that end, Special Prosecutors only held that a trial court lacked jurisdiction to take actions "inconsistent" with the reviewing court's decision. 55 Ohio St.2d at 97. And while Special Prosecutors found that the trial court's decision granting a defendant's motion to withdraw his plea was inconsistent with the decision affirming his conviction on appeal, that conclusion by no means prevents a trial court from considering Mr. Davis's motion for a new trial on the basis of evidence that, being newly discovered, was not before the court that earlier affirmed his conviction on appeal.

The State's overly broad reading of Special Prosecutors—that trial courts may never entertain motions for new trial on the grounds of newly discovered evidence in the first instance after direct appeal—raises far more jurisdictional issues than it solves. The State clearly agrees that the trial court is vested with jurisdiction to consider such motions before direct appeal, and that Rule 33 also allows such motions to be brought after a conviction has been affirmed. But the State can point to nothing in the language or structure of Rule 33, or this Court's decision in Special Prosecutors, that even remotely suggests that the locus of jurisdiction over new-trial motions will change to the appellate courts simply because a conviction has been affirmed on

direct appeal. And while Special Prosecutors may be read to constrict trial court jurisdiction when it conflicts with a superior court's power to engage in appellate review, nothing in that decision can be read to confer jurisdiction on the appellate courts where none exists or to restrict the jurisdiction of the trial courts where such jurisdiction has been conferred by the legislature.

D. The Record of DNA Tests Performed in This Case Is Relevant Only to the Merits of Mr. Davis's Motion, Not to the Question of Jurisdiction Before this Court.

The State discusses at considerable length the record of DNA testing and related litigation over the course of the defendant's case, in effect arguing that (1) Mr. Davis has not in fact presented new evidence on his motion, (2) the issues he seeks to raise by his motion were litigated previously, or (3) Mr. Davis has failed to show that he was "unavoidably prevented" from discovering the new evidence in question earlier. (See Opp'n at 1-4, 13-14, 28-32.) This discussion entirely misses the point of the only question this Court accepted on appeal, which is whether the trial court had jurisdiction to consider Mr. Davis's motion. Indeed, the State even concedes that such issues are irrelevant. (Id. at 14 n.22.) Whether Mr. Davis has actually come forward with new evidence or could have done so sooner are clearly questions of the merits of his motion, which a court can only decide if it is in fact vested with jurisdiction and therefore able to review and consider that evidence. Mr. Davis's supposed failure to satisfy these obligations does not mean that the trial court lacked jurisdiction to entertain his motion; to the contrary, it could only decide these issues if it had subject-matter jurisdiction, the only issue to be decided in this appeal.

Likewise, the question of whether the issues Mr. Davis raises were litigated previously is distinct from that of jurisdiction, as a court always has jurisdiction to decide whether an issue before it is res judicata. See State ex rel. Wilson-Simmons v. Lake County Sheriff's Dep't (1998), 82 Ohio St.3d 37, 40, 693 N.E.2d 789 ("Res judicata is an affirmative defense that does

not divest the second tribunal of subject-matter jurisdiction.”); accord Whitehall ex rel. Wolfe v. State Civil Rights Comm’n (1995), 74 Ohio St.3d 120, 122, 656 N.E.2d 684; State ex rel. Flower v. Rucker (1977), 52 Ohio St.2d 160, 162, 6 O.O.3d 375, 370 N.E.2d 479.¹

II. THE STATE’S NOVEL PROPOSAL TO REQUIRE DEFENDANTS TO SEEK REMAND BEFORE MOVING FOR A NEW TRIAL IS BOTH UNWORKABLE AND UNNECESSARY

Recognizing that a defendant cannot be deprived entirely of his right to move for a new trial if new evidence comes to light after his conviction has been affirmed on direct appeal, the State offers a novel and altogether peculiar proposal: that when a defendant wants to file a

¹ At the outset of this appeal, Mr. Davis asked this Court to accept jurisdiction to review both (1) the Court of Appeals’ decision that the trial court lacked jurisdiction to consider his motion and (2) the trial court’s decision denying that motion on the merits. The Court accepted jurisdiction only as to the first of these issues, specifically declining to address the second. Accordingly, it would be inequitable for the Court to accept the State’s suggestion (Opp’n at 28-33) that it affirm the decision below on the merits of Mr. Davis’s motion after having denied him the opportunity he sought to brief and argue those same issues. See State v. Peagler, 76 Ohio St.3d 496, 499 n.2, 1996-Ohio-73, 668 N.E.2d 489 (“This court has often held that if a reviewing court chooses to consider an issue not suggested by the parties on appeal but implicated by evidence in the record, the court of appeals should give the parties notice of its intention and an opportunity to brief the issue.”) (citations omitted); Ratchford v. Proprietors’ Ins. Co. (1989), 47 Ohio St.3d 1, 4, 546 N.E.2d 1299 (“It is unfair on appeal, and inappropriate, to decide a case on an issue that a party, losing by the decision, has not had an opportunity to refute by introducing evidence or argument.”).

In addition, despite the State’s frequent insinuations to the contrary (see, e.g., Opp’n at 6, 14), it is irrelevant that at the time of his motion for a new trial, Mr. Davis had already filed a petition for post-conviction relief and appealed the denial of that petition to the Court of Appeals. As the State recognizes (id. at 20-22), a petition for post-conviction relief is a civil proceeding separate from the underlying criminal action and governed by different statutes and rules. See State v. Farley, Lawrence App. No. 00CA25, 2001-Ohio-2460. Accordingly, the pendency of such a petition or an appeal from the denial of such a petition has no bearing on whether a defendant can bring a motion for a new trial in the original criminal action. Moreover, while motions for new trial on the grounds of newly discovered evidence can be brought on the basis of any type of newly discovered evidence, Crim.R. 33(A)(6), petitions for post-conviction relief are limited to claims of the denial or infringement of constitutional rights (or for claims of innocence based on DNA testing performed in a manner not applicable here), R.C. 2953.21(A)(1)(a). Thus, there is unlikely to be any conflict even if separate courts were to consider requests for both forms of relief at the same time.

motion for a new trial on the grounds of newly discovered evidence, he should first file a motion in the highest appellate court to have assumed jurisdiction in his case, make a showing that his grounds for a new trial have merit, and request remand of the case to the trial court to consider his motion for a new trial. (Opp'n at 18-20.) The State's proposal is inconsistent with applicable statutes and rules, unworkable as a matter of practice, and would impose new and likely unwelcome burdens on this Court, the courts of appeals, and defendants. In addition, this procedure is unnecessary because the issuance of the mandate suffices to vest the trial court with jurisdiction to consider motions for new trial on the grounds of newly discovered evidence.

A. The State's Proposed Rule Lacks Any Basis in Statutes or Court Rules and Would Prove Unworkable in Practice.

The State's proposal to require a defendant seeking to move for a new trial to first petition for remand from the highest appellate court to have taken jurisdiction over his case is impractical for several reasons.

First, such a procedural rule has no basis in any statute, rule, or court decision concerning the relationship between appellate and trial courts, as demonstrated by the fact that the State does not cite any authority for its proposal. Simply put, there is nothing in any law governing the judiciary that permits an appellate court to hear a defendant's motion for a new trial in the first instance. The State does not contest that, prior to appeal, Rule 33 motions may only be heard in the trial courts, not in the appellate courts, but it cannot point to any statute or rule that would confer exclusive jurisdiction on the appellate courts to make findings or rule on these motions in the first instance after appeal. In addition, the State concedes that the legislature, by providing no definite time limit on motions for new trial based on newly discovered evidence, clearly contemplated that such motions might be filed after the conclusion of direct appeal. (Id. at 15.) But the legislature never provided any mechanism for motions filed after direct appeal to be filed

anywhere other than in the trial courts. Finally, among other defects, it is unclear what showing defendants would have to make to the appellate courts, what standard those courts would apply to their initial review of the merits of defendants' motions for new trials, and whether individual judges or entire panels would rule on each such motion. These questions are properly decided by the legislature, not by the Court, and demonstrate that the State's proposed solution in fact creates more problems than it purports to solve.

Second, the State's proposed rule would significantly burden this Court—on top of its existing caseload—with mandatory review of new-trial motions in all death penalty cases, as well as in other criminal cases for which this Court accepted jurisdiction over appeals from the intermediate appellate courts. This rule would impose an equally substantial burden on the courts of appeals in all other criminal cases where they exercised direct appellate review.

The State argues that the appellate courts should serve as gatekeepers because they “will always be in the best position to determine what issues were, and what issues were not, within the ‘compass of its [previous] judgment.’” (Id. at 19.) This statement lacks any rational basis. Trial courts are familiar with the entire record of a case, while the appellate courts only review the discrete legal issues raised on appeal, which may or may not be the same issues implicated by the defendant's new evidence. While the trial court can easily hold hearings to make sense of the defendant's claim and determine whether or not it has “arguable merit” (id.), the appellate courts are not equipped to handle the hearings necessary to resolve even preliminary issues in a case, much less complicated mixed questions of fact and law. Moreover, to charge the Supreme Court with gathering the complete records of the proceedings and any post-conviction materials would

impose on it a large and unnecessary burden.² The difficulty of uncovering the factual merits of a claim would be additionally complicated by the fact that many post-conviction motions are advanced by pro se litigants. Finally, the State's argument presupposes that the original appellate panel will be reconstituted in response to every motion, which will create an enormous logistical challenge for court administrators.

Third, the State's proposal would invert the traditional roles of the trial and appellate courts. Nowhere in centuries of American jurisprudence are we aware of any system in which appellate courts screen cases prior to and for the benefit of trial courts. A trial court is the more appropriate forum to consider such a motion in the first instance because such courts are greater in number, sit more frequently, and are more steeped in the evidentiary record than the appellate courts. (See Brief of Amicus Curiae The Innocence Network in Support of the Defendant-Appellant, Roland T. Davis ("Innocence Network Br.") at 14-15.) The fact that an appellate court has earlier decided a direct appeal of the defendant's conviction is of no consequence, as trial courts routinely decide cases that have been previously subject to appeal; the impact of the appellate court's decision is but one more factor to consider, just as the trial court decides the question of its own jurisdiction in every matter before it. The State also seems not to have considered that in some cases the highest court to have exercised appellate review will be the United States Supreme Court, which would not accept first review of defendants' new-trial motions as required by the State's proposal.

Fourth, the State's proposed rule would impose additional burdens on defendants, forcing them to overcome another obstacle before receiving a hearing on their motions and prolonging

² While the appellate courts have the record of the case before them during the pendency of the appeal, those records are returned to the courts below upon disposition of the case. See App.R. 30(B); S.Ct. Prac.R. 5.9.

an already lengthy judicial process. These additional burdens would make relief on the basis of newly discovered evidence more difficult than the legislature intended when it crafted this statutory remedy, and the State asks the Court to impose these burdens where the legislature declined to do so.

Finally, the State's proposed rule creates the intractable problem of how defendants might appeal from decisions of appellate courts in the exercise of their "gatekeeping" function. If a court of appeals decides that a defendant's motion lacks sufficient merit to be sent to a trial court for full consideration, then the defendant's only recourse is to pursue a discretionary appeal to this Court. Even more absurd, in a case where the Ohio Supreme Court exercised direct review—i.e., a death penalty case or one in which the Court accepted a discretionary appeal—a defendant could appeal denial of his motion only to the United States Supreme Court. Because these motions usually turn on questions of fact, they likely will not implicate the kinds of federal constitutional questions that would render U.S. Supreme Court review even a remote possibility; even if a defendant located a constitutional issue, the U.S. Supreme Court still accepts only about 1 percent of discretionary appeals. *The Supreme Court, 2008 Term—The Statistics*, 123 *Harv. L. Rev.* 382, 389 (2009). Thus, if a defendant's claim that new evidence could prove his innocence were wrongly turned away at the gate by the Ohio Supreme Court, he effectively would have no chance to appeal that decision.

B. The State's Proposed Solution Is Unnecessary Because Issuance of the Mandate Following a Decision of an Appellate Court Is Sufficient to Vest the Trial Court with Jurisdiction.

In its brief, the State twice asks why, if a defendant cannot move for a new trial on the grounds of newly discovered evidence while an appeal is pending, the same defendant could pursue the same motion after his conviction has been affirmed. (Opp'n at 12, 17.) Implicit in the State's question, as well as in its convoluted "appellate gatekeeper" proposal, is the notion

that after a case has been decided by an appellate court, control over that case continues to reside with the same court until it issues a decision with the magic word “remand.” That is not a correct statement of the law. Indeed, “[e]ven without a remand, a trial court could regain jurisdiction to do an act that was ‘not inconsistent’ with [the appellate court’s] prior exercise of jurisdiction.” Aleshire, 2010-Ohio-2566, at ¶ 67.

Contrary to the State’s assumption, jurisdiction over every case decided by an appellate court returns to the court from which the appeal was taken by operation of the mandate issued in all cases. It is for this reason that—notwithstanding the State’s incredulity—a defendant can, in fact, bring a motion for a new trial on the grounds of newly discovered evidence after his conviction has been affirmed on direct appeal, even when such a motion would be inappropriate during the pendency of the appeal.³

“A ‘mandate’ is the official notice of action of the appellate court, directed to the court below, advising that court of the action taken by the appellate court, and directing the lower court to have the appellate court’s judgment duly recognized, obeyed, and executed.” 5 Am. Jur. 2d Appellate Review § 725 (2010). When a court of appeals or the Supreme Court decides an appeal, it issues a decision, which serves as the mandate to the lower court. Under Rule 11.4 of the Supreme Court Rules of Practice, after the Supreme Court has decided an appeal on the merits, the Clerk is required to issue a mandate, consisting of a certified copy of the judgment

³ There are also strong policy reasons that render it impractical for trial courts to decide motions for new trial based on newly discovered evidence while a direct appeal is pending. As a matter of judicial economy, the appellate court may vacate the defendant’s conviction and remand the case for a new trial, rendering the trial court’s consideration of the new-trial motion unnecessary. In addition, the trial court may uncover facts not within the record that are in tension with facts or issues present in the record before the appellate court, resulting in needless confusion. That concern is far less pronounced in the case of petitions for post-conviction relief, which may be heard concurrently with direct appeal, because there are statutory procedures in place for the remand of those cases from the appellate courts to the trial courts whenever the trial court finds there are grounds for granting relief. See R.C. 2953.21(C), (E); App.R. 6(A).

entry, ten days after the entry of the judgment, unless a party files a motion for reconsideration within that time. S.Ct. Prac.R. 11.4(A), (C). Similarly, upon decisions by a court of appeals, “[a] certified copy of the judgment shall constitute the mandate.” App.R. 27.

The effect of the issuance of the mandate is to return jurisdiction over the case to the lower court, functionally the same as saying that the case is remanded. “The mandate of the appellate court is the order directing the action to be taken or disposition to be made of the cause by the lower court, returning the proceedings to the lower court, and reinvesting it with jurisdiction thereof.” Int’l Union of Operating Eng’rs, Local 18 v. Dan Wannemacher Masonry Co. (1990), 67 Ohio App.3d 672, 675, 588 N.E.2d 176 (quoting 5B C.J.S. Appeal & Error § 1958 (1958)⁴) (emphasis added); see also Janosek v. Janosek, Cuyahoga App. Nos. 91882, 91914, 2009-Ohio-3882, ¶ 54 (“After the Court of Appeals issues its mandate, the case returns to the trial court, ‘reinvesting’ it with jurisdiction.”). While a lower court must take any action directed by the mandate, it remains free to take other actions not specifically authorized but not inconsistent with the mandate. Local 18, 67 Ohio App.3d at 675. A trial court may, for example, grant a defendant a new trial, so long as it does so on a ground not decided by the appellate court. 5 C.J.S. Appeal and Error § 1139 (2010) (“Where the motion for a new trial presents a question not determined by the appeal, it may be granted.”).

It is for this reason that courts throughout the State of Ohio have so often decided motions for new trial on the grounds of newly discovered evidence even after those convictions have been affirmed on direct appeal. (See Innocence Network Br. at 8 (collecting cases).) Not surprisingly, the State’s brief does not address any of these cases directly, but instead issues a blanket objection on the grounds that “in none of those cases does it appear that the prosecution

⁴ Now 5 C.J.S. Appeal and Error § 1120 (2010).

actually raised the jurisdictional bar occasioned by the Special Prosecutors case in the context of a motion for new trial.” (Opp’n at 22.) That no prosecutor seems to have argued that a trial court lacks jurisdiction to consider a motion for a new trial after a defendant’s conviction has been affirmed on appeal, and no court prior to this case has ever so held on its own, speaks volumes about the novelty of—and indeed, the lack of merit in—the State’s position.⁵

In the present case, the decision of the Ohio Supreme Court affirming Mr. Davis’s conviction and sentence constituted the mandate to the trial court, constraining that court to act in

⁵ Prior to the adoption of the Ohio Revised Code and the Ohio Rules of Criminal Procedure, it was well-settled that a trial court had the power to grant a motion for a new trial on the grounds of newly discovered evidence even when doing so would upset the verdict that the appellate court had affirmed. In Townley v. A.C. Miller Co. (1946), 139 Ohio St. 153, 22 O.O. 131, 38 N.E.2d 578, this Court wrote:

[A]ny conflict between the finality of the judgment which the Court of Appeals is empowered to render . . . and the power of a trial court to grant a new trial . . . must be resolved by recognizing that the judgment is not final in the sense that it is immune from disturbance through the exercise by the trial court of its plenary power to vacate the verdict on which the judgment is founded. . . .

It may be added that this court sees no reason to question the wisdom of the Legislature in prescribing the procedure herein validated. The trial judge who has already had all the witnesses, the parties and the exhibits before him at the first trial, is in far the best position to determine the importance and probable effect of any newly discovered evidence. We, therefore, do not hesitate to effectuate what we believe to be the legislative intent that the trial court shall . . . have plenary power to pass on applications for new trial, even though this necessitates recognizing that the trial court will thereby have the resultant power to disturb the finality of a judgment of a superior court.

Id. at 165-66. That Townley was a civil case is of no consequence when the principle at issue—the power of a trial court to consider a motion for a new trial when presented with new evidence, notwithstanding the decision of an appellate court—is the same in both the civil and criminal settings. Moreover, while the particular statutes at issue in Townley have been superseded, there is no meaningful distinction to be drawn between the new and the old legislative language, and the more recent statutes and rules should be considered to have been enacted against the backdrop of earlier decisions such as Townley.

a manner consistent with this Court's judgment but leaving it free to take actions not inconsistent with the mandate. To that end, the trial court—like any and every trial court in Ohio following affirmance of a defendant's conviction on direct appeal—was free to entertain a motion for new trial on the grounds of newly discovered evidence. By definition, any new evidence would not have been before the appellate court that affirmed the defendant's conviction, so consideration of that evidence by the trial court could not be inconsistent with the appellate court's mandate.

Townley v. A.C. Miller Co. (1946), 139 Ohio St. 153, 165-66, 22 O.O. 131, 38 N.E.2d 578.

CONCLUSION

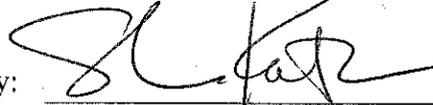
For the reasons set forth in the Brief of Amicus Curiae The Innocence Network in Support of the Defendant-Appellant, Roland T. Davis, and those set forth above, as well as the reasons contained in the brief of Appellant Roland T. Davis, amicus curiae the Innocence Network urges the Court to reverse the decision of the court below holding that the trial court lacked jurisdiction to hear Mr. Davis's motion under Rule 33(B) for a finding that he was unavoidably prevented from discovering new evidence within 120 days of his conviction.

Dated: July 30, 2010

Respectfully submitted,

DAVIS POLK & WARDWELL LLP

By:



Sharon Katz*

Edward Sherwin

Sagar K. Ravi

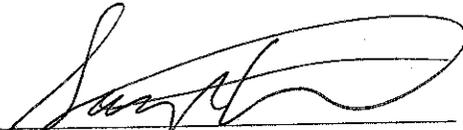
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** Admitted pro hac vice*

CERTIFICATE OF SERVICE

A copy of the foregoing document was served on this 30th day of July, 2010, by Federal Express overnight delivery services, on (1) Kenneth W. Oswalt, Prosecuting Attorney, Licking County Prosecutor's Office, 20 S. Second Street, Newark, Ohio, 43055; and (2) Ruth L. Tkacz, Assistant State Public Defender, Office of the Ohio Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215.


Sagar K. Raya