IN THE SUPREME COURT OF OHIO

07-0002

Steven R. Farley,	)	
	)	
Appellant,	)	On Appeal from Coshocton County
	)	Court of Appeals
v.	)	Fifth District Court of Appeals
	)	
State of Ohio,	)	Appeals No. 06-CA-010
	)	
Appellee.	)	
	)	

MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANT-APPELLANT, STEVEN R. FARLEY

Steven R. Farley # 462-937
Noble Correctional Institution
15708 McConnelsville Road
Caldwell, Ohio 43724

COunsel for Appellant, Steven R. Farley, pro se

Vs.

Robert J. Batchelor
Coshocton County Prosecutor
318 Chestnut Street
Coshocton, Ohio 43812

Counsel for Appellee, State of Ohio

FILED
JAN 03 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

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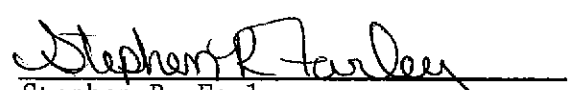
PROOF OF SERVICE

I hereby certify that a true and complete copy of the foregoing, including Appendix, was sent regular U.S. mail to the Coshocton County Prosecutor at 318 Chestnut Street, Coshocton, Ohio 43812 this 27th day of Decemeber, 2006.



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EXPLANATION WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES SUBSTANTIAL CONSTITUTIONAL AND FEDERAL QUESTION

This case will affirm four (4) critical constitutional issues for the future of criminal Defendant's in the State of Ohio who express their Constitutional Rights, only to have those rights denied.

The criminal Defendant was sentenced to more than the shortest concurrent term available for the offense without the facts and findings being submitted to a jury and proven beyond a reasonable doubt. This violates the principles found in Apprendi v New Jersey, (2000), 530 U.S. 466; Blakely v Washington, (2004), 524 U.S. , 124 S.Ct. 2531 as well as violating the Appellant's U.S.C.A. Amendment(s) V, VI, and XIV.

Trial counsel was rendered ineffective when failing to object to the unconstitutional sentence. Strickland v Washington, (1984) 104 S.Ct. 2052 at 2053; United States v Conley, 349 F.3d 837, (5th Cir. 2003).

This all took place after the Trial Court lost jurisdiction due to the expiration of the 90 day speedy trial time limit found in R.C. §2945.71 through 2945.73, thus violating the Appellant's U.S.C.A. Amendment(s) V, VI, and XIV.

The Fifth District Court of Appeals deprived the Appellant the right to a fair and fundamental appeal by denying the Appellant the relief sought through Procedural Default. The Appellate Court ruled against the Appellant without rebuttal from the Coshocton County Prosecutor in violation of App.R. 18 and Civ.R. 55. Furthermore the Fifth District Court of Appeals denied Appellant access to the court by denying the Appellant's pro se appeal due

to the negligence of the Coshocton County Clerk of Courts to timely file the Appellant's pro se "Notice of Appeal and Appellant Brief," for case number 06-CA-019, thus violating U.S.C.A. Amendment(s) V, VI, VIII, and XIV.

This case will establish basis to stop the madness and repeated Constitutional violations in the Ohio Judicial system.

STATEMENT OF CASE AND FACTS

On January 26, 2004, Appellant was indicted in a four (4) count indictment, being two counts of Burglary, in violation of R.C. §2911.12, felonies of the third degree and two counts of theft in violation of R.C. §2912.02, being felonies of the fourth and fifth degrees. Bond was set at $25,000.00 cash or surity. Appellant never paid bond, thus was held "in lieu of bail."

On February 5, 2004, the Appellant was brought before the Trial Court for arraignment. Subsequent to that, the Appellant was brought before the Trial Court on June 29, 2004, and entered a plea of guilty on all four counts of the indictment. This was 146 days after indictment. The Trial Court accepted Appellant's plea 56 days after they lost jurisdiction. A pre-sentence investigation was ordered and sentencing was set for August 11, 2004.

On August 11, 2004, the Trial Court made the following findings: "In imposing a term of imprisonment that is greater than the minimum term, the Court finds that the imposition of the shortest term available would demean the seriousness of the offense and not adequately protect the public. Also, the Court

finds that the Defendant has been previously imprisoned."

On March 10, 2006, Appellant filed a "Petition to vacate Sentence," to redress the unconstitutional sentence imposed by the Trial Court. The Trial Court denied said petition without an Evidentiary Hearing on June 15, 2006.

On June 29, 2006, Appellant filed a timely "Notice of Appeal," August 11, 2006, Appellant filed a pro se "Appellant Brief." On August 23, 2006, Appellant's counsel filed an "Ander's Brief." This "counsel" being Jeffery Mullen of the Coshocton County Public Defenders Office. On August 29, 2006, Appellant filed a "Supplemental Appeal Brief."

On September 6, 2006, Appellant filed a "Motion to Dismiss" in the Trial Court, on speedy trial violation grounds and ineffective assistance of Trial counsel. On October 6, 2006, said motion was denied.

On October 6, 2006, Appellant was granted transcripts. To this date these transcripts has not been received by the Appellant.

On October 25, 2006, Appellant mailed a timely "Notice of Appeal and Appellant Brief" to the Coshocton County Clerk of Courts. These were not filed with the Fifth District Court of Appeals until November 5, 2006. The Clerk of Courts of Coshocton County filed these afor-mentioned documents untimely. On November 18, 2006, this appeal, case number 06-CA-019, was denied due to the negligence of the Clerk of Courts to timely file them, Throughout all proceedings in appeals on case number 06-CA_019, Appellant received no time-stamp copies of the appeal motions or the Judgment Entry and Opinion further denying Appellants access to the Courts. Appellant, only through numerous phone calls on

December 18, 2006, did Appellant discover that his appeal had indeed been filed and denied. When the request for this information was made by the Appellant's family it was told to them that it would cost 25¢ a page.

On December 4, 2006, in appeal case number 06-CA-010, the Fifth District Court of Appeals affirmed the Judgment of the Trial COurt.

On December 15, 2006, Appellant filed a "Motion for Reconsideration and Correct the Record," for case number 06-CA-010. Attached to said "Motion for Reconsideration" were copies of the "Notice of Appeal and Appellant's Brief" for case number 06-CA-019 and proof that Appellant timely mailed these documents on October 25, 2006, to the Coshocton County Clerk of Courts, Fifth District Court of Appeals.

Accordingly, Appellant asserts and complains that the three panel judges in the Court of Appeals have committed prejudicial reverseable error, failing to enter a judgment in favor of the Appellant due to the lack of rebuttal by the Coshocton County Prosecutor. Furthermore, the Coshocton County Common Pleas Court committed harmfull reverseable error when it failed to timely file the "Notice of Appeal and Appellant's Brief" in case number 06-CA-019. Appellant has effectively been denied access to the Fifth District Court of Appeals as well as the Ohio Supreme Court all due to the derelection of the Coshocton County Clerk of Courts.

Proposition of Law I: Defendant-Appellant that has been deprived his Constitutional right to effective assistance of trial and appellate counsel has been deprived of his Constitutional Right to Due Process of Law and Equal Protection of Law. U.S.C.A. Constitutional Amendment(s) V, VI, and XIV.

The Sixth Amendment of the United States Constitution protects and guarantees an accused criminal defendant the right to effective assistance of counsel, and that right extend's to one's appeal of right. Avery v Alabama, (194), 308 U.S. 444, 446, 60 S.Ct. 321-322, that a person just happens to be a lawyer at trial along side the accused, however, is not enough to satisfy the constitutional command. An accused is entitled to be assisted by an attorney, whether retained or appointed who plays the role necessary to ensure trial proceedings are fair. Strickland v Washington, (1984), 466 U.S. 668, 685, 104 S.Ct. 2052, 2063.

In the case at bar, counsel was rendered ineffective for failing to investigate regarding Defendant-Appellant's sentence. This is capable to render counsel ineffective. Hamilton v Mitchell, 354 F.3d 482 (6th Cir. 2002). Furthermore, Trial counsel failed to object to the sentence that exceeded the statutory maximum and failed "to conduct any adversarial challenges" or to put forward any meaningful evidence at sentencing. Groseclose v Bell, 130 F.3d 1161 (6th Cir. 1997).

Proposition of Law II: The Supreme Court of the United States has found that the Federal Sentencing Statutes to be unconstitutional. Ohio's sentencing Statutes are similar to the Federal system and are likewise unconstitutional.

Appellant directs the Court to the decision of the United States Supreme Court in Jones v United States (1999), 526 U.S.

227; Apprendi v New Jersey (2000), 530 U.S. 466; Ring v Arizona (2002), 536 U.S. 584; Blakely v Washington (2004), 542 U.S. , 124 S.Ct. 2531; United States v Booker (2005), 543 U.S. , 125 S.Ct. 738. These decisions, individually and collectively stand for the position that, "[I]f a State makes an increase in a defendant's punishment contingent on the finding of fact, that fact, no matter how the state labels it, must be found by a jury beyond a reasonable doubt." Ring supra. at 602. A defendant has, the Court has held, a "right to have a jury find the existence of 'any particular fact' that the law makes essential to his punishment.*** That right is implicated whenever a judge seeks to impose a sentence that is not solely based on "facts reflected in the jury verdict or admitted by the defendant." Booker, supra., slip op. at 7 (quoting Blakely, supra., at , 124 S.Ct. at 2536-2537).

A defendant simply may not receive a sentence greater than that which may be imposed solely based on the basis of facts as charged by the indictment or information, and proven beyond a reasonable doubt to a jury (or to a Court bench trial) or admission by the defendant. Id. Sixth and Fourteenth Amendments U.S. Constitution; Section 10 Article I, Ohio Constitution.

Furthermore, there is no mechinism in Ohio Law for a jury to make sentencing findings except in capital cases and a judge determines facts relevant to sentencing. The Court alone has exclusive authority under Ohio law to make such determinations, and if they cannot be made in compliance with the constitution, then a person may not be sentenced on those facts. (see Mason v Griffin, 104 Ohio St.3d 279, 2004-Ohio-6384).

Wherefore, Ohio's sentencing statutes are unconstitutional, and [a]n Trial Court may impose a prison sentence unless there is a statutory presumption in favor of prison but may otherwise receive community control, may on receive the shortest statutory prison term available for the offense committed, may not receive consecutive sentences, and may not receive a sentence which includes any period of incarceration based on Judicial determination that the defendant committed the worst from of the offense, or poses the greatest likelihood of committing future crimes.

Any sentence imposed contrary to these principles will violate the rights to jury trial and Due Process of Law as protected by the Constitution of the United States and of the State of Ohio.

To wit: Appellant was convicted of Burglary, OR.C. §2911.12, the highest degree felony, a felony of the third degree, the prison term shall be one (1) year without jury findings.

Appellant asserts and complains that the Trial Court exceeded its authority in imposing a 3 year prison term based on its own findings, as opposed to facts found by a jury or admitted by the defendant. Blakely supra., , 124 S.Ct. at 2537. Accord.

> Proposition of Law Number III: Defendant-Appellant has been deprived his Constitutional Right of Due Process of Law and Equal Protection of Law for a fair and fundamental appeal. U.S.C.A. Constitution Amendment(s) V, VI, and XIV.

Appellant asserts and complains that the Fifth District Court of APpeals erred and deprived Appellant a fair and fundamental appeal, as they have denied his 1, 2, and 3 claims in his Direct Appeal as of Right without rebuttal from the State.

Proposition of Law Number IV: Defendant-Appellant has been deprived of his Constitutional Right to a Fast and Speedy Trial, thus violating Equal Protection of Law and Due Process of Law. U.S.C.A. Amendment(s) V, VI, and XIV.

Ohio Revised COde §2945.71(C)(2) provides:

> "A person charged with a felony shall be brought to trial within 270 days."

Ohio Revised Code §2945.71(E) provides:

> "An offender shall be credited with three days for each day he is held in lieu of bail."

For speedy trial computation purposes, "Delay is measured from the date of indictment. Dowling v United States, 493 U.S. at 352.

On January 26, 2004, Appellant was indicted. Bond was set at $25,000.00 cash or surity. Appellant never paid bond and bond was never released, thus, was held "in lieu of bail."

On June 29, 2004, Appellant was brought before the Trial Court and entered a plea of guilty, 146 days after indictment. The Trial Court lost jurisdiction to accept this guilty plea 56 days prior to being made.

The Appellant never moved the Trial Court for continuance to allow the Trial Court to extend the statutory 90 day period.

In Stamps v Stamps, 712 N.E.2d 762, the Court held:

> "Due to the fact that the state did not comply with the speedy trial statute, the Trial Court SHALL dismiss all charges with prejudice and order the defendant's immediate release."

Furthermore, Appellant's release should have been ordered due to the lack of rebuttal from the prosecution. Cleveland v Jones, (1996), 675 N.E.2d 498.

Appellant asserts and complains that the trial Court extended

its authority by accepting a coerced guilty plea without jurisdiction, due to this plea being made beyond the 90 day statutory limit.

CONCLUSION

For the foregoing reasons and Constitutional violations, Appellant requests that his immediate release be ordered.

PROOF OF SERVICE

I hereby certify that a true and complete copy of the foregoing , including Appendix, was sent regular U.S. mail to the Coshocton County Prosecutor at, 318 Chestnut Street, Coshocton, Ohio 43812 on this 27th day of December, 2006.

Stephen R. Farley, pro se
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COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- STEVEN R. FARLEY Defendant-Appellant	:	CASE NO. 06-CA-10 JUDGMENT ENTRY

{¶31} For the reasons stated in the Memorandum-Opinion on file, the judgment of the Coshocton County Court of Common Pleas, General Division, is affirmed.

{¶32} Attorney Jeffrey A. Mullen's motion to withdraw as counsel for Appellant, Steven R. Farley is hereby granted.

IT IS SO ORDERED.

FILED
DATE DEC 4 2006
TIME 4:00 P.M.
Fifth District Court of Appeals
State of Ohio
County of Coshocton

William B. Hoffman

Julie A. Edwards

JUDGES

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	JUDGES:
Plaintiff-Appellee	:	Hon. John W. Wise, P.J.
-vs-	:	Hon. William B. Hoffman, J.
	:	Hon. Julie A. Edwards, J.
STEVEN R. FARLEY	:	
	:	
Defendant-Appellant	:	Case No. 06-CA-10
	:	
	:	OPINION

CHARACTER OF PROCEEDING: Appeal from the Common Pleas Court - Case Number 04 CR 006

JUDGMENT: Affirmed

FILED
DATE DEC 4 2006
TIME 4:00 P.M.
Fifth District Court of Appeals
State of Ohio
County of Coshocton

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee:

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318 Chestnut Street
Coshocton, Ohio 43812

For Defendant-Appellant:

JEFFREY A. MULLEN
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Hoffman, *J.*

{¶1} Appellant, Steven Farley, appeals from the trial court's dismissal of his petition to vacate sentence. A timely Notice of Appeal was filed on June 28, 2006. On August 24, 2006, counsel for Appellant filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, *rehearing den.* (1967) 388 U.S. 924, indicating the within appeal was wholly frivolous. However, in said brief, counsel for Appellant raised three potential Assignments of Error as follows:

I.

{¶2} "THE JUDGMENT DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II.

{¶3} "INEFFECTIVE ASSISTANCE OF COUNSEL.

III.

{¶4} "THE COURT VIOLATED CONSTITUTIONAL RIGHTS AT SENTENCING"

{¶5} Appellant's counsel further stated Appellant had been notified of his right to file a pro se merit brief. Appellant filed a pro se brief and supplemental brief setting forth three Assignments of Error as follows:

I.

{¶6} "THE TRIAL COURT ERRED BY VIOLATING DEFENDANT-APPELLANT'S SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY ENHANCING THE DEFENDANT-APPELLANT'S SENTENCE ABOVE THE PRESUMPTIVE STATUTORY MINIMUM

CONCURRENT WITHOUT SUBMITTING FACT FINDING TO A JURY AND PROVEN BEYOND A REASONABLE DOUBT OR ADMITTED BY THE DEFENDANT.

II.

{¶7} "THE TRIAL COURT ERRED BY ALLOWING THE DEFENDANT-APPELLANT'S SIXTH AMENDMENT RIGHT OF THE UNITED STATES CONSTITUTION TO BE DENIED HIM DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL WHOM WAS RENDERED INEFFECTIVE AS COUNSEL FAILED TO OBJECT TO THE COURT SENTENCING DEFENDANT-APPELLANT ABOVE THE MINIMUM CONCURRENT SENTENCE.

III.

{¶8} "THE TRIAL COURT ERRED COMMITTING PLAIN ERROR PURSUANT TO CRIMINAL RULE 52(B) BY DEPRIVING THE DEFENDANT-APPELLANT'S RIGHT TO FAST AND SPEEDY TRIAL, VIOLATING THE 5TH, 6TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY BRINGING DEFENDANT-APPELLANT TO TRIAL BEYOND THE 90 DAY STATUTORY LIMIT."

STATEMENT OF THE FACTS AND CASE

{¶9} On January 26, 2004, Appellant was indicted by the Coshocton County Grand Jury for two counts of Burglary, in violation of R.C. 2911.12(A)(3), each third degree felonies; one count of Theft, in violation of R.C. 2913.02(A)(1),

a fifth degree felony; and one count of Grand Theft of a Motor Vehicle, in violation of R.C. 2913.02(A)(1), a fourth degree felony.

{¶10} On June 29, 2004, Appellant pled guilty as charged in the indictment. At the time of the plea, Appellant had been convicted and was serving a sentence on an unrelated Noble County conviction. On August 11, 2004, Appellant was sentenced to serve a three-year definite sentence for each count of burglary and, an eleven-month sentence on each theft offense. The Court further ordered the sentences to be served concurrently with each other, but consecutive to the criminal conviction and sentence out of Noble County.

{¶11} In the trial court's judgment entry of conviction and sentence, the trial court stated it took into consideration the matters set forth in Ohio Revised Code Sections 2929.12 and 2929.13 and further found that "imposition of the shortest prison term available would demean the seriousness of the offense and not adequately protect the public." Appellant did not pursue a direct appeal from his conviction and sentence.

{¶12} On March 10, 2006, Appellant filed a pro se "Petition to Vacate Sentence, Appoint Counsel and Schedule Evidentiary Hearing". In the petition, Appellant argued, in part, the trial court's non-minimum and consecutive sentences violated his constitutional right to a jury trial pursuant to *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, *Blakely v. Washington* (2004), 524 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 and, *Apprendi v. New Jersey* (2004), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435.

Appellant further argued his counsel was ineffective for failing to object to the non-minimum and consecutive sentences.

{¶13} On June 15, 2006, the trial court dismissed the petition to vacate stating although the Ohio Supreme Court has held Ohio Revised Code Section 2929.14(B) to be unconstitutional as it relates to imposition of more than the minimum prison term, the trial court nevertheless has full discretion to impose a prison sentence within the statutory range and is not required to make findings or give reasons for imposing more than the minimum sentence. The trial court also held the petitioner had failed to establish his counsel's representation was deficient. As a result, the trial court found "no grounds for granting the relief sought". It is from this decision Appellant now seeks to appeal.

I, II, III, and pro se I, II, III

{¶14} In the proposed Assignments of Error set forth by and through counsel for Appellant, and Appellant's pro se Assignments of Error, Appellant essentially argues his sentence is unconstitutional and void pursuant to *Blakely v. Washington* and its progeny of cases. Appellant further argues his speedy trial right was violated and his counsel was ineffective for failing to object to the imposed sentences.

{¶15} In the trial court, Appellant captioned his motion as a petition to vacate sentence. However, the caption of a pro se pleading does not definitively define the nature of a pleading. *State v. Reynolds,* 79 Ohio St.3d 158, 1997-Ohio-304, 679 N.E.2d 1131. In *State v. Reynolds,* the Ohio Supreme Court found despite its caption, an appellant's pleading which (1) is filed subsequent to

appellant's time for filing a direct appeal; (2) claims the denial of constitutional rights; (3) seeks to render the judgment void or voidable; and, (4) asks the trial court to vacate the judgment and sentence, is a petition for post-conviction relief pursuant to R.C. 2953.21(A)(1). Upon review, this Court finds Appellant's motion to vacate meets the criteria set forth in *State v. Reynolds* and, therefore, should have been properly considered by the trial court as a petition for post-conviction relief.

{¶16} Post-conviction efforts to vacate a criminal conviction or sentence on constitutional grounds are governed by R.C. 2953.21 which provides:

{¶17} "[A]ny person who has been convicted of a criminal offense * * * who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, * * *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. R.C. 2953.21(A)(1).

{¶18} "Except as provided in section 2953.23 of the Ohio Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date in which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication, or * * * If no appeal is taken, except as otherwise provided in section 2953.23 of the

Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing an appeal."

{¶19} In this case, Appellant was sentenced on August 11, 2004. Appellant's motion to vacate sentence on constitutional grounds was filed on March 10, 2006, nearly 14 months after the expiration of the time for filing an appeal and was, therefore, untimely. Because Appellant's petition was untimely filed, the trial court was required to entertain Appellant's petition only if he could meet the requirements of 2953.23(A).

{¶20} 2953.23(A) provides that with regard to a petition filed pursuant to R.C. 2953.21:

{¶21} "A court may not entertain a petition filed after the expiration of the period prescribed in division (A) * * * unless * * * both of the following apply (1) "Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to person's in the petitioner's situation, and the petition asserts a claim based on that right; and (2) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact finder would have found the petitioner guilty of the offense of which the petitioner was convicted * * *."

{¶22} In *State v. Foster,* the Ohio Supreme Court found that R.C. 2929.14(B), 2929.14(E)(4) and 2929.19(B)(2), as well as other sections of the Ohio Revised Code, violated the Sixth Amendment to the extent they required judicial fact finding for the imposition of certain sentences. However, the *Foster* decision did not eliminate the procedural requirements pertaining to petitions for post-conviction relief. *State v. Hall*, Putnam App. No. 12-06-08, 2006-Ohio-5155, See also, *State v. Troglin,* Putnam App. No. 14-05-56, 2006-Ohio-2791.

{¶23} In this case, pursuant to 2953.23(A)(1)(a) and (b), even if Appellant could assert a newly recognized federal or state right, Appellant still fails on the second prong of the analysis which requires a showing that "but for the constitutional error at trial, no reasonable fact finder would have found the petitioner guilty of the offense * * *". It appears R.C. 2953.23(A)(1)(b) allows a defendant to challenge his conviction outside the initial 180-day period, but the offender has no means of challenging the sentence under the exception. *State v. Hall,* supra.

{¶24} Furthermore, and more specifically, although the Supreme Court of Ohio held in *Foster* certain Ohio felony sentencing statutes violate the Sixth Amendment to the United States Constitution, the *Foster* ruling only applies to those cases pending on direct review or not yet final as of the date *Foster* was decided. *State v. Foster*, supra; *State v. Wilson*, Franklin App. No. 05AP-939, 2006-Ohio-2750, at para.15, citing *State v. Luther,* Lorain App. No. 05CA008770, 2006-Ohio-2280, at para.12; *State v. Jones,* Miami App. No.2005-

CA-26, 2006-Ohio-2360, at para.18; and *State v. Rawlins,* Scioto App. No. 05CA3012, 2006-Ohio-1901, at para.12.

{¶25} This case does not present itself on direct review from Appellant's conviction and sentence in 1994.

{¶26} Additionally, Appellant's claims would have been barred by res judicata because Appellant could have raised both the *Blakely* and *Apprendi* issues on direct appeal. It is established, pursuant to res judicata, a defendant cannot raise an issue in a motion for post-conviction relief if he or she could have raised the issue on direct appeal. *State v. Dulling* (1970), 21 Ohio St.2d 13, 254 N.E.2d 270. Res judicata is available in all post-conviction relief proceedings. *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 95, 671 N.E.2d 233. It makes no difference the United States Supreme Court had not yet decided *Apprendi* and *Blakely* at the time Appellant was convicted and sentenced because the issue of a purported right to a jury trial on sentencing findings could have been raised. *State v. Reynolds,* 79 Ohio St.3d at 161-162.

{¶27} The arguments that Appellant's right to a speedy trial was denied and that Appellant was denied effective assistance of counsel at sentencing fail under both 2953.23 (A)(1)(a) and 2923.53(A)(1)(b) and are barred by res judicata.

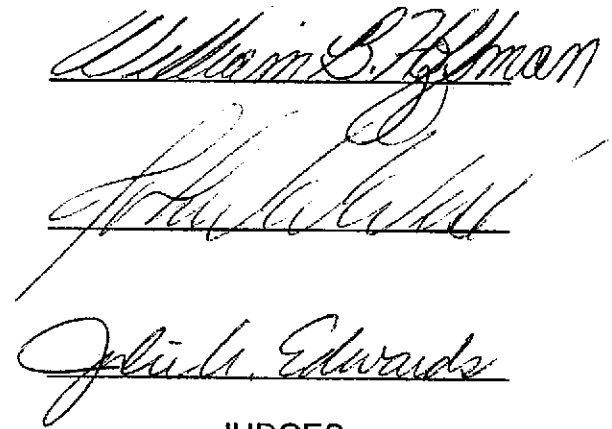
{¶28} Accordingly, Appellant's proposed Assignments of Error and pro se Assignments of Error are hereby overruled.

{¶29} For these reasons, after independently reviewing the record, we agree with counsel's conclusion that no arguably meritorious claims exist upon

which to base an appeal. Hence, we find the appeal to be wholly frivolous under *Anders*, grant counsel's request to withdraw, and affirm the judgment of the trial court.

{¶30} The judgment of the Coshocton County Court of Common Pleas, General Division, is affirmed.

By: Hoffman, J.
Wise, PJ. and
Edwards, J. concur.



JUDGES