

IN THE SUPREME COURT OF OHIO

State of Ohio,

Plaintiff-Appellee,

v.

Larry M. Schlee,

Defendant-Appellant.

Case No. 2006-1608

(On Appeal From The Lake County
Court of Appeals, Eleventh Appellate
District)

Court of Appeals Case No. 2005-L-105

MERIT BRIEF OF
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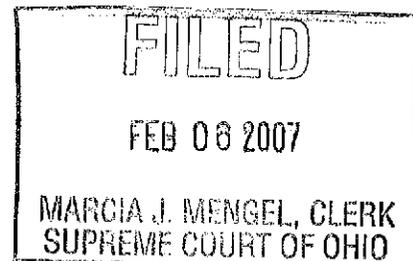


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INTRODUCTION

Larry Schlee's argument here rests on one simple proposition: Courts cannot unilaterally recast a party's motion in a way that deprives the litigant of the opportunity to have his or her claim heard on the merits. That proposition is reflected in this Court's jurisprudence, U.S. Supreme Court case law, fundamental understandings of the way our legal system works, and plain old common sense. Unfortunately, the court below ignored all of these when it recast Schlee's unambiguously labeled and timely filed Civil Rule 60(B) motion as an untimely post-conviction relief ("PCR") petition, and then dismissed it on timeliness grounds without so much as a glance at the merits.

Ohio's criminal justice system has not provided Larry Schlee a fair shake. Prosecutorial misconduct so badly marred his first trial that when the misconduct was discovered, his trial and conviction were thrown out. When a second trial resulted in a conviction, Schlee appealed. But while that appeal was pending, Schlee, as he had every right to do, pursued relief in the trial court through a motion under Ohio Rule of Civil Procedure 60(B), which allows a litigant (including a criminal defendant) to attack an already-entered judgment on certain grounds listed in the rule, including "newly discovered evidence," "fraud . . . , misrepresentation or other misconduct of an adverse party," and "any other reason justifying relief from the judgment." And, to avoid any confusion as to what rule he was relying on in presenting his motion, Schlee clearly and unambiguously labeled it as a "Motion for Relief From Judgment Pursuant to Civ. R. 60(B)."

The trial court, however, chose to recast Schlee's clearly labeled Civil Rule 60(B) motion as a PCR petition, a decision it made without even providing Schlee notice or an opportunity to be heard. And it did so not out of some misguided effort to *assist* Schlee in having his claims of

misconduct heard on the merits. Rather, it unilaterally recast Schlee's *timely* Civil Rule 60(B) motion as an *untimely* PCR petition, and then dismissed the petition on timeliness grounds. Adding insult to injury, the court expressly noted that Schlee had failed "to show that he was unavoidably prevented from discovery of the facts upon which his petition was based," i.e., the standard Schlee would need to meet to allow the filing of an untimely PCR petition. Of course he failed to make that showing—it was not necessary under Civil Rule 60(B), the rule that Schlee relied on in filing his motion. One can scarce imagine a better example of the unfair consequences that unilateral recasting can impose.

No doubt with an eye toward such concerns, this Court itself has rejected the idea that Ohio courts have any kind of sweeping authority to unilaterally recast motions. In *State v. Bush*, 96 Ohio St. 3d 235, 2002-Ohio-3993, the defendant had challenged his conviction through a Criminal Rule 32.1 motion, but the lower court simply ignored that label and instead treated the motion as a PCR petition. This Court reversed, noting that the two were separate vehicles, and giving credence to the defendant's choice of which vehicle to pursue. That rationale is even more pronounced here—Civil Rule 60(B) was not only a proper vehicle for relief, it was the *only* vehicle available to Schlee at the time.

The U.S. Supreme Court has similarly taken a dim view of such recasting, using its supervisory authority over the lower federal courts—a supervisory authority that this Court also has over the state courts in Ohio—to mandate that before any recasting occur, the trial court must at least give the defendant the benefit of notice and an opportunity to withdraw or amend the motion. *Castro v. United States* (2003), 540 U.S. 375.

What both of these decisions reflect, of course, is that our legal tradition makes the parties to the suit, not the court, the masters of their own cases. In our adversarial system, parties,

not judges, decide what motions to file and when. Schlee made his choice, and the court below was not free to simply ignore it, especially when ignoring Schlee's choice actually deprived him of his opportunity to have his claims heard on the merits.

Indeed, the court's action here violated basic due process guarantees. Recasting Schlee's timely-filed Civil Rule 60(B) motion into an untimely-filed PCR petition carried grave consequences for Schlee, triggering at least some kind of notice and hearing rights on the recasting decision. In fact, even a hearing may not have been enough to fully address the due process concerns, as the recasting effectively deprived Schlee of any hearing on the merits of his claim.

In short, this is not a hard case. There may be times when judicial labeling is necessary; for example, where a motion does not clearly indicate the rule on which it is based. There may even be times when judicial recasting serves the ultimate goal of justice; for example, when a court determines that a motion is clearly non-viable, informs the party of that, and with the party's permission recasts it into another vehicle that would allow the court to reach the merits of the claim. But here recasting was neither necessary nor appropriate. After careful deliberation of which vehicle he should use, Schlee chose to pursue his claim under Civil Rule 60(B), the only procedural vehicle available to him. He was entitled to have his motion judged on those standards, not on the PCR standards the court unilaterally chose to impose. This Court's case law has already recognized that right, and Schlee respectfully asks the Court to reaffirm it here.

STATEMENT OF THE FACTS AND CASE

I. SCHLEE FILED AN EXPRESSLY-LABELED MOTION FOR RELIEF FROM JUDGMENT, CLEARLY INVOKING CIVIL RULE 60(B).

A. After his first conviction, Schlee, acting *pro se*, obtained a new trial based on prosecutorial misconduct.

In 1992, Defendant-Appellant Larry M. Schlee (pronounced “Schlay”) was indicted for the 1980 murder of Frank Carroll. *State v. Schlee* (11th Dist.), 2005-Ohio-5117, at ¶¶ 1–2 (direct appeal from Schlee’s second trial). At trial, the State’s case primarily rested on one witness’s account of the twelve-year old crime. The witness, Amy Binns Woodsby, had at one point dated Carroll (i.e., the victim). At the time of the murder she was romantically involved with Schlee, and by the time of trial she had had a falling out with him. She testified that Schlee wanted to settle a personal dispute with Carroll and agreed to meet him at a local park to discuss their differences. *Id.* at ¶¶ 9–11. According to Woodsby, she accompanied Schlee and hid in his car while Schlee spoke with Carroll at the park. *Id.* at ¶ 12. Woodsby testified that Schlee shot and killed Carroll during their confrontation. *Id.* She further asserted that after the shooting, Woodsby and Schlee drove Carroll’s body to New York and disposed of it in a wooded area. *Id.* at ¶ 15. Along the return trip to Ohio, she said, they disposed of pieces of the gun used in the shooting. *Id.* New York authorities came across Carroll’s remains in 1981, but they remained unidentified for more than ten years. *Id.* at ¶ 20.

In 1983, Woodsby and Schlee parted ways, at which time Woodsby wrote a narrative of her story of the murder and gave it to her lawyer. *Id.* at ¶ 19. (Before 1983, she had not told anyone about the murder, except her boss. There was a dispute as to whether this conversation occurred a couple days or a couple weeks after the day on which the State claimed Carroll was murdered. *Id.* at ¶ 17.) Nine years later, in 1992, Woodsby finally contacted the local Ohio police

with her version of the events. Based on her claims, the police traveled to New York and identified items found with the skeletal remains as belonging to Frank Carroll. *Id.* at ¶ 20. Based almost exclusively on Woodsby’s story, a jury convicted Schlee of aggravated murder, and he received a life sentence with parole eligibility after 20 years.

Although his appeal of that conviction failed, Schlee filed a *pro se* motion for a new trial based on prosecutorial misconduct. In his motion, Schlee argued that prosecutors suppressed an exculpatory autopsy report. The report showed that in addition to gunshots to the head, Carroll’s body had also been horribly mutilated and nearly decapitated. This was inconsistent with the prosecutor’s theory—and Woodsby’s testimony—neither of which had mentioned anything about mutilation. The trial court granted Schlee’s motion for a new trial, reasoning that the wrongfully suppressed evidence was materially exculpatory because it was irreconcilable with the State’s theory of the case.

B. After his second trial, Schlee filed a motion for relief from judgment under Ohio Rule of Civil Procedure 60(B), challenging the constitutionality of his second trial.

Schlee’s second trial resulted in a conviction, which he appealed. While the case was pending before the court of appeals, Schlee filed a *pro se* motion for relief from judgment under Civil Rule 60(B). See Supplement to the Merits Brief of Defendant-Appellant Larry M. Schlee (“Supp.”) at S1–S17. In order to avoid any question about the basis for his motion, Schlee plainly captioned it as a “Motion for Relief from Judgment Pursuant to Civ. R. 60(B)” and requested an evidentiary hearing. *Id.* at S1.

In his *pro se* Rule 60(B) motion, Schlee described the facts that he contended met Rule 60(B)’s standard for relief from judgment including: (1) false and misleading grand jury testimony from some of the witnesses who testified at trial, which, along with other instances of

prosecutorial misconduct, resulted in Schlee's second trial violating the Double Jeopardy Clause, *id.* at S6–S9; (2) the fraud committed against Schlee and the court resulting from prosecutorial misconduct surrounding each of his trials, *id.* at S9–S12; and (3) the manifest injustice of trying Schlee a second time.

When the prosecution failed to serve Schlee with its responses to his Rule 60(B) motion, Schlee filed a motion for default judgment that unequivocally demonstrated both that Schlee knew what Rule 60(B) was and that he had expressly chosen Rule 60(B) rather than some other procedural vehicle for advancing his claims. In particular, in words that mirror the rule itself almost verbatim, he explained that a motion under Civil Rule 60(B) was “a civil motion . . . asking for relief from . . . judgment” for, among other things, “fraud . . . misrepresentation or other misconduct of an adverse party” and “any other reason justifying relief from the judgment.” Motion for Default Judgment, C.P. Case No. 92CR000517 (Apr. 21, 2005), at 1.

II. WITHOUT NOTICE OR A HEARING, THE JUDGE RECAST SCHLEE'S CIVIL RULE 60(B) MOTION AS A PETITION FOR POST-CONVICTION RELIEF AND DENIED THE MOTION ON TIMELINESS GROUNDS.

Instead of ruling on Schlee's Rule 60(B) motion as he presented it, the trial court instead (1) unilaterally recharacterized it as a PCR petition under Chapter 2953 of the Revised Code; (2) applied the more stringent timeliness requirements of R.C. 2953.21(A)(2); and (3) finding Schlee's motion untimely, dismissed the motion without reaching the merits of Schlee's claims. Order Dismissing Defendant's Motion for Relief From Judgment, C.P. Case No. 92CR000517, Appendix to the Merits Brief of Defendant-Appellant Larry M. Schlee (“App.”) at A41–A43. The judge undertook these actions without even providing Schlee the benefit of notice or an opportunity to be heard on the recasting issue.

In explaining why he elected to ignore Schlee's invocation of Rule 60(B), the judge began with Criminal Rule 57(B), which states that "[i]f no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists." App. at A55. But instead of following Criminal Rule 57(B)'s invitation to "look to the rules of civil procedure" and applying Civil Rule 60(B) as Schlee requested, the court held that Schlee's motion also met the definition of a PCR petition under R.C. 2953.21. App. at A41–A42. That statute describes a PCR petition as one filed by "[a]ny person who has been convicted of a criminal offense . . . and 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." R.C. 2953.21(A)(1)(a). "Because there [was] an applicable statute," in the court's view, i.e., the PCR statute, R.C. 2953.21, "it [was] not necessary to look to the civil rules." App. at A41. The court then held that Schlee's "motion for relief from judgment [was] really a petition for postconviction relief under." *Id.* at A42.

This recasting meant the difference between a timely motion and an untimely one. Rule 60(B) requires only that the movant file "within a reasonable time" subject to the proviso that some types of claims must be filed "not more than one year after" judgment. A PCR petition under R.C. 2953.21, by contrast, must be filed within 180 days of the filing of the transcript in the court of appeals for the defendant's direct criminal appeal. R.C. 2953.21(A)(2). The court entered Schlee's conviction on March 19, 2004, and the 180-day PCR period expired November 29, 2004. Schlee did not file his Rule 60(B) motion, however, until March 16, 2005. While a court may entertain a late-filed PCR petition, it may do so only if the petitioner meets the

stringent “unavoidably prevented” from discovering facts standard in R.C. 2953.23(A). Schlee (not surprisingly as he was not invoking the PCR statute) did not even allege that he met that standard. Accordingly, once the trial court unilaterally recharacterized Schlee’s motion, it quickly dismissed it on timeliness grounds, depriving Schlee of any chance at redress on his claims.

After the ruling, Schlee specifically protested the conversion of his Rule 60(B) motion. In his effort to vacate the court’s dismissal of his Rule 60(B) motion, Schlee argued that “[a] court may not recast a Civ. R. 60(B) motion as a petition for post conviction relief (P.C.R.) when Defendant unambiguously invoked [the] rule governing relief from judgment pursuant to Civ. R. 60(B).” Motion in Response to State’s Brief in Opposition Filed June 28, 2005 and Motion to Renew Defendant’s Motions to Vacate Filed June 20 and June 23, 2005, C.P. Case No. 92CR000517 (July 8, 2005). Schlee further cited *State v. Lehrfeld* (1st Dist.), 2004-Ohio-2277, at ¶ 6, in which the First District Court of Appeals “reject[ed] at the outset the state’s suggestion that [a] Civ. R. 60(B) motion may be reviewed as an R.C. 2953.21 petition for postconviction relief.” The trial court, however, denied his motion to vacate.

III. THE COURT OF APPEALS AFFIRMED THE TRIAL COURT’S JUDGMENT, MEANING SCHLEE WAS AGAIN DENIED A JUDGMENT ON THE MERITS OF HIS CIVIL RULE 60(B) CLAIMS.

Schlee, now represented by counsel, appealed the denial of his Rule 60(B) motion, again arguing that courts are not free to recast unambiguously presented motions into PCR petitions and to then dismiss them on procedural grounds without reaching the merits. In rejecting Schlee’s appeal, the court readily acknowledged that, under Criminal Rule 57(B), Civil Rule 60(B) “may be applied in criminal cases under certain circumstances.” *State v. Schlee* (11th Dist.), 2006-Ohio-3208, at ¶ 22, App. at A32–A33. Citing this Court’s decision in *State v.*

Reynolds, however, the court of appeals agreed with the trial court's conclusion that "because [Schlee's] motion for relief from judgment pursuant to Civ. R. 60(B) is a motion filed by a criminal defendant, subsequent to the filing of a direct appeal, seeking vacation of the judgment on the basis that his constitutional rights have been violated, it meets the definition of a petition for postconviction relief under R.C. 2953.21." *Id.* at ¶ 27 (quotation marks omitted). According to the court, because the motion met the definition of a PCR petition, it did not matter that it also fell within Rule 60(B) or that Schlee had expressly invoked the latter rule rather than the PCR statutes. Again using the court's words, the court of appeals held that because "there is an applicable statute, it is not necessary to look to the civil rules in this situation." *Id.* at ¶ 27 (quotation marks omitted).

The court of appeals likewise agreed with the trial court that, once recast as a PCR petition, the motion was untimely. The appellate court thus affirmed the trial court's dismissal of Schlee's Rule 60(B) motion, again depriving Schlee of a judgment on the merits of his claims.

Schlee filed a Motion to Certify a Conflict under Ohio Rule of Appellate Procedure 25 and identified the First District's decision in *State v. Lehrfeld*, 2004-Ohio-2277, as the conflicting case. On August 9, 2006, The court of appeals granted the motion and certified the following question for review: "Whether the trial court can recast [a]ppellant's Motion for Relief From Judgment as a petition for postconviction relief when it has been unambiguously presented as a Civil Rule 60(B) [motion]." Judgment Entry, Ct. App. Case No. 2005-L-105, (brackets in original), App. at A40.

Schlee, returning to his *pro se* status, filed a timely notice of certified conflict in this Court under Supreme Court Practice Rule IV, Section 1, on August 25, 2006. The Court agreed that the appeals court's judgment in Schlee's case conflicted with First District's decision in

Lehrfeld, and ordered the parties to brief the question certified by the Eleventh District. See *10/18/2006 Case Announcements*, 2006-Ohio-5351. The Court then appointed Schlee's present counsel. See *12/8/2006 Case Announcements*, 2006-Ohio-6442.

ARGUMENT

Certified Conflict Question:

Whether the trial court can recast appellant's Motion For Relief From Judgment as a petition for postconviction relief when it has been unambiguously presented as a Civil Rule 60(B) motion.

Defendant-Appellant Larry M. Schlee's Proposition of Law:

When a criminal defendant presents a clearly labeled motion for relief from judgment under Civil Rule 60(B), a court cannot recast that motion as a petition for post-conviction relief and then decide the motion according to post-conviction relief standards, particularly where doing so deprives the defendant of the opportunity to have his claims considered on the merits.

I. STATE V. BUSH FORBIDS THE LOWER COURTS FROM RECASTING SCHLEE'S CLEARLY-LABELED CIVIL RULE 60(B) MOTION.

A. This Court's decision in *State v. Bush* required the courts below to honor Schlee's choice of which law to rely on when he filed his Civil Rule 60(B) motion.

In *State v. Bush*, 96 Ohio St. 3d 235, 2002-Ohio-3993, this Court reversed an appeals court decision that did precisely what the lower courts did here—recast a clearly-presented motion under a specific rule as a PCR petition and then summarily dismiss it on timeliness grounds without reaching the merits. There, Bush filed in the trial court a Criminal Rule 32.1 motion to withdraw his guilty plea, arguing that the trial court and his counsel incorrectly advised him of his sentence. *Id.* at ¶ 3. The lower courts, following the broad syllabus language from one of the Court's earlier decisions, *State v. Reynolds*, 79 Ohio St. 3d 158, 1997-Ohio-304, held that if any "motion to withdraw a guilty plea is filed outside the time for filing a direct appeal and it alleges a constitutional violation as its basis or requests to vacate a conviction and

sentence, the motion must be treated as one for post-conviction relief.” *Id.* at ¶ 4. Because Bush filed his Criminal Rule 32.1 motion to withdraw his guilty plea long after the 180-day time limit in R.C. 2953.21(A)(2) expired and otherwise failed to meet the exceptions to the timeliness requirement found in R.C. 2953.23(A), the lower courts dismissed his motion without reaching the merits. *Id.*

This Court rejected the lower courts’ belief that they had a sweeping power to recharacterize any motion that also fit the definition of a petition for postconviction relief despite the label and law used by the defendant. Rather, Criminal Rule 32.1, which allowed courts to “permit the defendant to withdraw his or her plea” in order “to correct manifest injustice” stood on its own despite the fact that a motion made under Rule 32.1 might also meet the definition of a PCR petition. That conclusion was consistent with the Court’s past decisions, which had “distinguish[ed] postsentence Crim.R. 32.1 motions from postconviction petitions.” *Id.* at 238 (citing, e.g., *State ex rel. Tran v. McGrath*, 78 Ohio St. 3d 45, 47, 1997-Ohio-245).

Most importantly, the *Bush* Court read its decision in *State v. Reynolds*—the case that the court below adopted an expansive reading of here—as narrowly limited to its facts. The Court noted that in *Reynolds* the defendant, invoking no rule of procedure or statute, filed a document ambiguously captioned as a “Motion to Correct or Vacate Sentence,” that sought to “vacate his sentence for a gun specification because the state allegedly did not prove” that the firearm Reynolds used in a robbery was operable. *Reynolds*, 79 Ohio St. 3d at 160. No doubt at a loss to identify a legal standard applicable to Reynolds’ filing (or even what the filing was), the lower courts treated the motion as a PCR petition, and the Court agreed with that characterization. *Id.* Treating the “Motion to Correct or Vacate Sentence” as a postconviction relief petition, the

Court concluded that *res judicata* barred its consideration because “there was nothing that precluded Reynolds from directly appealing the issues” raised in his motion. *Id.* at 162.

To be sure, language in the *Reynolds* syllabus could be construed to imply some broad rule that any motion attacking a criminal sentence filed after a direct appeal must be judged against the stringent standards for postconviction relief petitions: “Where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for post conviction relief as defined by R.C. 2953.21.” *Id.* at syllabus.

This Court in *Bush*, however, established that *Reynolds* could not be read that broadly. According to this Court, “[t]he *Reynolds* syllabus must be read in the context of the facts of that case.” 2002-Ohio-3993, at ¶ 10. “[W]hen read in context,” the *Bush* Court stressed, “the rule of *Reynolds* reaches *only* a motion *such as the one in that case*—a ‘Motion to Correct or Vacate Sentence’—that fails to delineate specifically” the grounds for relief. *Id.* (emphasis in original). Reynolds’s “Motion to Correct or Vacate Sentence” was an “irregular ‘no-name’ motion,” which the Court understood “must be characterized by a court in order for the court to know the criteria by which the motion should be judged.” *Id.* The Court’s syllabus in *Reynolds* merely “set forth a means by which courts can classify such irregular motions,” like Reynolds’ “Motion to Correct or Vacate Sentence,” which invoked no rule or statute as its procedural basis. *Id. Reynolds*, therefore, did not apply to Bush’s motion, which he filed under a specific procedural rule. *Reynolds* instead, “set[] forth a *narrow* rule of law *limited to the context of that case.*” *Id.* (emphasis added). After explaining the very limited reach of *Reynolds*, the *Bush* Court reversed and remanded for the lower court to consider Bush’s motion as he filed it: a motion to withdraw his guilty plea under Criminal Rule 32.1, *not* a PCR petition. *Id.* at ¶ 14.

The distinction between *Reynolds* and *Bush* is that the former involves *labeling* a “no-name” motion while the latter involves *recasting* a clearly labeled motion. Of course, in *Reynolds*-type situations, where the prisoner has not provided the lower courts with a legal framework to use in judging his motion, labeling the motion is a necessary step in resolving it. The lower courts in *Bush* (and in Schlee’s case here), however, already had a legal framework provided to them—*Bush* specifically invoked Criminal Rule 32.1, just as Schlee specifically invoked Civil Rule 60(B). This distinction between mere *labeling* and affirmative *recasting* illustrates the limits of *Reynolds*, and it also emphasizes why *Bush* must control here.

In the conflict case here, the First District properly recognized that *Bush*’s limitation on *Reynolds* applies equally when a criminal defendant files a Civil Rule 60(B) motion as when a criminal defendant files a Criminal Rule 32.1 motion. See *State v. Lehrfeld*, (1st Dist.), 2004-Ohio-2277, at ¶ 6 (“Only an irregular, ‘no-name’ motion, i.e. a motion that fails to delineate specifically the statute or rule under which relief is sought, may be classified or categorized by a court in order for the court to know the criteria by which the motion should be judged.” (quotation marks and brackets omitted)). Since Civil Rule 60(B), like Criminal Rule 32.1, is a viable procedural vehicle to seek relief from a criminal conviction, see *id.* at ¶ 7, the First District properly held that *Bush* precludes recasting a motion that unambiguously invoked Civil Rule 60(B), *id.* at ¶ 6. Unfortunately, the Eleventh District here, although admitting that Rule 60(B) is an available vehicle in criminal cases, failed to recognize this key distinction between *Reynolds* and *Bush*.

B. Applying *Bush*'s standard to Schlee's case, the lower court's should not have recast Schlee's motion, but instead should have treated it as Schlee filed it: under Civil Rule 60(B).

1. Schlee filed a viable, timely motion under Civil Rule 60(B), which is an available vehicle in criminal cases, and not an irregular, no-name motion in need of a legal framework.

(a) Criminal Rule 57(B) provides that Ohio Courts should follow civil rules of procedure or other statutes if no criminal rules of procedure apply.

A straightforward reading of Ohio's criminal rules shows that Civil Rule 60(B) is an available vehicle for criminal defendants to use in adjudicating claims like those Schlee made here. Ohio's criminal rules provide that if no criminal rule establishes a procedure to consider a motion before the court, the court must look to the Ohio Rules of Civil Procedure, or other applicable law, to guide the court's consideration of the motion. See Criminal Rule 57(B) ("If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists."). Because there is no criminal rule establishing a procedure to consider motions for relief from judgment for the reasons laid out in Civil Rule 60(B), courts in the First, Second, Fourth, Sixth, Tenth, Eleventh, and Twelfth Districts have heeded Criminal Rule 57(B)'s command and recognized that Civil Rule 60(B) does apply to criminal cases. See, e.g., *State v. Belknap* (11th Dist.), 2004-Ohio-5636, at ¶ 27; *State v. Lehrfeld* (1st Dist.), 2004-Ohio-2277, at ¶ 7; *State v. Plassman* (6th Dist.), 2004-Ohio-279, at ¶ 7; *State v. Scruggs* (10th Dist.), 2003-Ohio-2019, at ¶ 18; *State v. Wooden* (10th Dist.), 2002-Ohio-7363, at ¶ 8; *State v. Garcia* (10th Dist. Aug. 24, 1995), No. 94APA11-1646, 1995 WL 506024, at *1; *State v. Hasenmeier* (6th Dist. Mar. 18, 1994), No. E-93-33, 1994 WL 88769, at *3; *State v. Wells* (10th Dist. Mar. 20, 1993), No. 92AP-1462, 1993 WL 104858, at *2; *State v.*

Riggs (4th Dist. Oct. 4, 1993), Nos. 503, 506, 1993 WL 405491, at *7; *State v. Billheimer* (2d Dist. Dec. 3, 1992), No. 13281, 1992 WL 380578, at *2; *State v. Groves* (12th Dist. Dec. 23, 1991), No. CA91-02-014, 1991 WL 274317, at *2.

For example, in *Lehrfeld*, the conflict case here, the defendant filed a motion for relief specifically under Civil Rule 60(B), arguing that the trial court that sentenced him to community control failed to advise him of the specific prison term that would be imposed if he violated the community control provisions. 2004-Ohio-2277, at ¶ 3. The court rejected the idea that Civil Rule 60(B) “cannot afford a criminal defendant relief from a judgment of conviction.” *Id.* at ¶ 7. Citing Criminal Rule 57(B), the court instead concluded that the “criminal rules contemplate resort to the civil rules for procedures not anticipated by the criminal rules.” *Id.*

To be sure, a minority of Ohio appellate courts refuse to apply Civil Rule 60(B) in criminal cases. See, e.g., *State v. Szerlip* (5th Dist.), 2003-Ohio-6954, at ¶ 2; *State v. Bluford* (8th Dist.), 2003-Ohio-6818, at ¶ 15; *State v. Johnson* (5th Dist.), 2002-Ohio-254, 2002 WL 110571, at *1; *State v. Palmer*, (2d Dist.), 2001-Ohio-1393, 2001 WL 1142010, at *1; *State v. Windmiller* (9th Dist. Mar. 1, 2000), No. 99CA007347, 2000 WL 235555, at *1; *State v. Talley* (2d Dist. Jan. 30, 1998), No. 16479, 1998 WL 31516, at *3; *State v. Israfil* (2d Dist. Nov. 5, 1996), No. 15572, 1996 WL 665006, at *1. All but one of these cases, however, never mention Criminal Rule 57(B), let alone offer much analytical support for the minority’s position. They simply cite each other and make conclusory remarks—remarks directly contrary to the plain language of Criminal Rule 57(B)—that civil rules do not apply in criminal proceedings. See, e.g., *Bluford*, 2003-Ohio-6818, at ¶ 15 (“This case is a criminal matter, however, and, therefore, the civil rules are not applicable. Thus, any argument regarding the requirements of Civil Rule 60(B) and whether appellant has satisfied those requirements is irrelevant.”); *Israfil*, 1996 WL 665006, at *1

“Civ.R. 60(B) has no application to judgments in criminal cases. Accordingly, the trial court had a choice of considering Israfil’s motion for Civ.R.60(B) relief as a petition for post-conviction relief, and addressing its merits, or treating the motion as a nullity, and not considering it at all.”). And *Windmiller*, the one case that does mention Criminal Rule 57(B) in summarizing the defendant’s position, simply dismisses it out of hand with an unexplained citation of *Israfil*. See *Windmiller*, 2000 WL 235555, at *1. In short, as Ohio criminal rules do not provide a procedural mechanism for seeking relief from judgment, under Criminal Rule 57(B)’s plain language, Ohio courts may look to Civil Rule 60(B).

(b) Schlee’s motion satisfies Civil Rule 60’s thresholds.

In this case, as in *Lehrfeld*, Schlee filed a motion expressly seeking relief under Civil Rule 60(B). In fact, as in *Lehrfeld*, Schlee’s motion cited no criminal or civil rule or PCR statute other than Civil Rule 60(B). Schlee’s motion was typical of the motions that Criminal Rule 57(B) instructs should be handled by the civil rules or other applicable law. And although PCR may, in appropriate circumstances, offer an alternate method of attacking a conviction, as more fully explained below, see 19–20, nothing in Criminal Rule 57(B) prefers statutes to rules when both might be applicable to a given prisoner’s situation.

Schlee’s motion expressly called for application of Civil Rule 60(B). Moreover, not only did he expressly cite Civil Rule 60(B), but it may have been the only vehicle available to Schlee. He did not have the affidavits available to file a timely PCR petition, but Civil Rule 60(B), as this Court has suggested, does not require accompanying evidentiary material to be attached to the Civil Rule 60(B) motion in every case. See *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St. 3d 17, 20–21 (“[N]either Civ. R. 60(B) itself nor any decision from this court has required the movant to submit evidence, in the form of affidavits or otherwise, in support of the motion,

although such evidence is certainly advisable in most cases.”). Therefore, Schlee took the only route he saw available: a Civil Rule 60(B) motion with the later production of the necessary evidentiary material.

Moreover, unlike if treated as a motion for post-conviction relief, Schlee’s motion was timely on its face under Civil Rule 60(B). The rule requires filing “not more than one year after the judgment, order or proceeding was entered or taken.” Schlee’s second verdict was handed down on March 19, 2004. Schlee filed his Civil Rule 60(B) motion on March 16, 2005. Accordingly, under the procedural vehicle Schlee invoked—a vehicle recognized by a majority of the courts entertaining similar motions in criminal cases—Schlee satisfied the time threshold necessary to give his motion a day in court. But, in recasting that motion as a PCR petition, the trial court denied him the opportunity to have his claims resolved on their merits.

2. Because Schlee filed his motion under the well-defined strictures of Civil Rule 60(B), *Bush* required the lower courts to treat Schlee’s motion as he filed it.

On the facts here, a straightforward application of *Bush* requires a ruling in Schlee’s favor. Like the *Bush* defendant, Schlee invoked a specific procedural rule in seeking relief from judgment. Schlee’s motion was explicitly labeled as a “Motion for Relief From Judgment Pursuant to Civ. R. 60(B)” and contained no reference, either in the caption or elsewhere, to the PCR statutes, or any other procedural rule for that matter. And, like *Bush*, the lower courts here should have respected Schlee’s choice of which law to invoke in his motion instead of recasting it in a way that streamlined its dismissal.

Schlee’s Rule 60(B) motion bears no resemblance to the “irregular, no-name” motion like the “Motion to Correct or Vacate Sentence” at issue in *Reynolds*—a motion that by its very nature *required* judicial labeling. *Bush*, 2002-Ohio-3993, at ¶ 10. When, as in *Reynolds*, a

defendant gives the court no procedural framework to use, a court can resort to the PCR statutes as a “means by which courts can classify . . . irregular motions,” enabling the court “to know the criteria by which the motion should be judged.” *Id.* But Schlee’s Rule 60(B) motion invokes an entire body of procedural law generated from decades of applying a specific procedural rule. In that sense, the lower courts here were not left guessing as to what law should apply to Schlee’s motion—he clearly gave it to them in the motion’s caption and in its arguments. The courts below should have followed *Bush* and respected Schlee’s choice. They erred in not doing so.

C. The Eleventh District’s reasons for recasting Schlee’s Civil Rule 60(B) motion are mistaken.

1. Reynolds provides no basis for recasting Schlee’s Civil Rule 60(B) motion here.

As explained above at 10–13, *Bush* established that only with “irregular, ‘no-name’ motions” should courts, under *Reynolds*, treat motions to vacate convictions after appeal as motions for postconviction relief. Said differently, *Reynolds* stands for the limited proposition that courts can *label* motions when those motions are in need of a label. *Reynolds* does not allow courts to take clearly-labeled motions and *recast* them into something different. Thus, for example, when the First District in *Lehrfeld* found itself faced with a defendant’s motion for relief specifically under Civil Rule 60(B), the court “reject[ed] at the outset the state’s suggestion that [the] Civ.R. 60(B) motion may be reviewed as an R.C. 2953.21 petition for postconviction relief.” *Lehrfeld*, 2004-Ohio-2277, at ¶ 6.

But in this case, faced with a similar motion for relief specifically under Civil Rule 60(B), the lower court simply ignored *Bush*. Instead, it cited the syllabus law of *Reynolds*—the very syllabus law that *Bush* expressly limited to “no name” motions that do not themselves provide a procedural framework under which they can be evaluated. Had the lower courts

considered *Bush*, they would have had no choice but to conclude that the syllabus law of *Reynolds* no longer applies to this case. Schlee filed his motion specifically pursuant to Civil Rule 60(B) and offered no alternative or conflicting procedural framework.

2. The court of appeals was mistaken in concluding that Criminal Rule 57(B) supports the recasting.

The court compounded its error when it assumed that the PCR statute trumped Civil Rule 60(B) in this case. Rather than siding with the minority of courts that refuse without analysis to ever apply Civil Rule 60(B) in criminal proceedings, see above at 15–16, the Eleventh District in this case took a different tack to essentially arrive at the same wrong result. It *acknowledged* that “Civ.R. 60 may be applied in criminal cases under certain circumstances.” *State v. Schlee*, 2006-Ohio-3208, at ¶ 22 (citing, e.g., *Belknap*, 2004-Ohio-5636; *Plassman*, 2004-Ohio-279; and *Lehrfeld*, 2004-Ohio-2277). But then, it turned the language of Criminal Rule 57(B) on its head to conclude that another *statute*, the PCR statute, rendered Civil Rule 60(B) inapplicable *in this instance*. *Id.* at ¶ 27 (adopting the trial court’s reasoning that “[b]ecause there is an applicable *statute*, it is not necessary to look to the civil rules in this situation” (emphasis added)). It basically held that where the PCR statutes apply, they trump Civil Rule 60(B).

That approach, however, suffers from two fatal flaws here. First, as already explained, the PCR statutes do *not* apply in this case because Schlee lacked the evidentiary materials necessary for such a motion and thus specifically moved pursuant to Civil Rule 60(B). But second, even if the postconviction relief statute *did* apply, nothing in Criminal Rule 57(B) renders that statute—*itself governing a civil proceeding*, see *State v. Calhoun*, 86 Ohio St. 3d 279, 281, 999-Ohio-102 (“a postconviction proceeding . . . is a collateral civil attack on the judgment”)—preferable to the Rules of Civil Procedure when governing a motion for which no criminal rule applies. Recall the language of Criminal Rule 57(B): “If no procedure is specifically prescribed by rule, the court

may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists.” The rule sets forth a simple if/then progression: if there is no “A,” then follow either “B” or “C”. Specifically, if no “rule of criminal procedure” exists, then the criminal court must look to *either* the “rules of civil procedure” (e.g., Civil Rule 60(B)) *or* “applicable law” (e.g., purportedly, the PCR statute). The existence of other “applicable law” does not preclude reliance on civil rules; these sources are on equal footing, and both fall on the “then” side of the progression. To be sure, if a *criminal rule* applies, then a court may look to *neither* civil rules nor other “applicable law,” but here it is undisputed that no criminal rule applies.

In acknowledging that “Crim.R. 57 provides for the application of Civ.R. 60 in criminal cases in some circumstances,” the lower court cited *Lehrfeld. Schlee*, 2006-Ohio-3208, at ¶ 23. But the court provided no explanation for why it was proper to apply Civil Rule 60 in *Lehrfeld* but not in this case. Again, just as in this case, *Lehrfeld* presented a motion specifically pursuant to Civil Rule 60(B) that sought to vacate a conviction after appeal. Under the lower court’s analysis here, pursuant to *Reynolds* (and ignoring *Bush*), the PCR statutes would be “applicable law” in *Lehrfeld* and thus should (if the lower courts here were right) have trumped Civil Rule 60(B). Nonetheless, the lower court cited *Lehrfeld* as a proper example of applying Civil Rule 60(B) in criminal cases, even in the presence of other purportedly applicable law.

In sum, regardless of whether the PCR statutes were “applicable law” under Criminal Rule 57(B), nothing in Criminal Rule 57(B) states, or even implies, that the PCR statutes should take precedence over the civil rule that *Schlee* used to make his motion. And *Bush* establishes that when a motion is clearly labeled under a viable procedural rule, trial courts *must* prefer that rule to any other statutory or rule-based procedure.

* * *

As a matter of *stare decisis* under *Bush*, Schlee was entitled to have his Civil Rule 60(B) motion ruled on as filed. This Court made clear in *Bush* that judicial labeling is limited to those occasions when the court must provide a legal framework to address “irregular, no-name” motions that invoke no procedural rule. Schlee’s motion, however, plainly invoked Civil Rule 60(B) in seeking relief. Therefore, *Bush* required the lower courts to judge Schlee’s motion under Civil Rule 60(B) standards. In this sense, the Court’s past decisions resolve this case, and it need go no further. But as the following section demonstrates, even if *Bush* did not resolve this case, the same result would follow from sound application of this Court’s supervisory powers over Ohio’s lower courts.

II. AS THE U.S. SUPREME COURT RECOGNIZES, RECASTING A MOTION IN THE POST-CONVICTION RELIEF CONTEXT CAN DEVASTATE A PRISONER’S ABILITY TO OBTAIN RELIEF.

A. Federal courts must give *pro se* prisoners notice and an opportunity to be heard before recasting their motions.

The U.S. Supreme Court has dealt with the same recasting concerns facing the Court here and has resolved those concerns in a way that respects a defendant’s choice of which law to use in support of his claims for relief. In *Castro v. United States* (2003), 540 U.S. 375, the U.S. Supreme Court used its supervisory authority over the lower federal courts to limit those courts’ ability to recast a prisoner’s *pro se* motion as a petition for habeas corpus.

1. Federal courts recharacterize *pro se* prisoner motions as habeas corpus petitions only for the benefit, not harm, of prisoners.

In the past, the federal courts freely recast prisoner *pro se* motions as habeas corpus petitions for the benefit of the prisoner. Notably, unlike here, this recasting was done with the intent to help, not hinder, the *pro se* movant. The practice allowed courts to “avoid an

unnecessary dismissal,” resulting from “inappropriately stringent application of formal labeling requirements” or “to create a better correspondence between the substance of a *pro se* motion’s claim and its underlying legal basis.” *Id.* at 381–82. As one circuit court observed, this recasting practice served *pro se* prisoners and the courts well. It avoided “obligating [prisoners] to replead their motions” and “relax[ed] formalities that might needlessly frustrate *pro se* petitioners.”

Adams v. United States (2d Cir. 1998), 155 F.3d 582, 583; see also *United States v. Miller* (3rd Cir. 1999), 197 F.3d 644, 646 (“This [recasting] practice developed both for efficiency’s sake and out of a sense of fairness to *pro se* petitioners, whose claims are construed quite liberally.”); *id.* at 648 (“Courts engaged in this practice in order to reach the merits of *pro se* petitions, while avoiding the wasted time and expense of forcing petitioners to redraft their pleadings.”).

The practice also did little to affect a prisoner’s ability to bring a second habeas petition including all of the claims he would have brought if he knew his earlier motion was to be recast by the courts. For many years, the only limit on filing a second or successive petition containing a new claims was the U.S. Supreme Court’s “abuse of the writ” doctrine, whereby courts could refuse to hear second or successive petitions if a petitioner deliberately withheld claims from an earlier petition or otherwise filed a petition for vexatious or harassing purposes. *Sanders v. United States* (1963), 373 U.S. 1, 17–18. And in those situations, the decision to hear the petition on the merits was still left to the district court’s discretion. *Id.* In more recent years, the U.S. Supreme Court adopted the more demanding “cause and prejudice” standard—the same standard it applied to procedural defaults in state-court proceedings—for raising new claims in a second or successive petition. *McCleskey v. Zant* (1991), 499 U.S. 467, 493–96. Although bringing a second or successive petition in the past grew more difficult over time, a prisoner still had the opportunity to convince a trial court to hear his claims based on applicable standards, and the

trial court could make the decision to excuse, for example, the prisoner's failure to bring a claim in a previous habeas petition when that "petition" was actually a motion relying on a different body of law but recast unilaterally by a court.

2. The Anti-Terrorism and Effective Death Penalty Act placed more severe restrictions on filing second and successive habeas petitions.

The consequences of the *pro se* motion recasting process changed dramatically with the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. AEDPA placed nearly-insurmountable restrictions on second and successive habeas petitions. Radically departing from previous habeas corpus practice, Congress began with a bar to all second or successive habeas petitions unless the prisoner receives permission from a federal court of appeals to file the petition. See 28 U.S.C. §§ 2244 & 2255. Before a prisoner can press his claims, the court of appeals must conclude that the second or successive petition contains either (1) "newly discovered evidence that . . . would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense"; or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255.

In light of AEDPA's new mandates, the federal courts' practice of recasting motions as habeas petitions effectively denied unknowing prisoners of an opportunity to present, and have considered on the merits, all of their claims in one complete habeas petition. Thus, if a prisoner intended to file a habeas petition in the future, raising five claims for relief, but had previously filed a narrow motion on other grounds which the district court recast and denied as a habeas corpus petition, the prisoner's only hope of receiving a hearing on the merits of his other five claims lay in convincing a federal appeals court that he meets the stringent requirements in 28 U.S.C. § 2244. Because most prisoners cannot meet that standard, the result means that the

federal courts' recasting policy has deprived the prisoner the one opportunity to have all of his habeas claims considered on their merits.

Prior to the U.S. Supreme Court's decision in *Castro*, nine of the twelve federal circuits had identified the unfairness under AEDPA of recasting *pro se* prisoner motions as habeas petitions. See *Castro*, 540 U.S. at 382 (listing cases including *In re Shelton* (6th Cir. 2002), 295 F.3d 620, 621–22 (recognizing that “re-characterization of a *pro se* post-conviction filing as a § 2255 motion involves an inherent risk under AEDPA”). To remedy the problem, the federal circuit courts resolved to warn *pro se* litigants of the pitfalls of recasting and to provide them an opportunity to object to the recasting or withdraw the motion, i.e., notice and a hearing instead of unilateral recasting. By affording *pro se* prisoners these simple safeguards, the federal courts avoided subjecting prisoners to AEDPA's second and successive petition requirements without their consent.

The notice standard, as articulated by the Third Circuit in *Miller*, required the district courts “upon receipt of a *pro se* pleading challenging an inmate's conviction or incarceration—whether styled as a § 2255 motion or not” to “advise the petitioner that he can”

(1) have his motion ruled upon as filed; (2) have his motion recharacterized as a § 2255 motion and heard as such, but lose his ability to file successive petitions absent certification by the court of appeals; or (3) withdraw his motion, and file one all-inclusive § 2255 petition within the one-year statutory period.

197 F.3d at 652. This standard serves the interests of *pro se* litigants, protecting them from the untoward consequences of AEDPA's ban on second or successive habeas petitions while giving them the freedom to rely on the law of their choosing in filing papers in the federal courts.

3. The U.S. Supreme Court's *Castro* decision requires courts to warn prisoners and give them an opportunity to respond before recasting a *pro se* prisoner motion.

In *Castro*, the U.S. Supreme Court made the lower courts' practice of warning *pro se* prisoners a national one, holding "as almost every Court of Appeals has already held, that the lower courts' recharacterization powers are limited in the following way:"

The limitation applies when a court recharacterizes a *pro se* litigant's motion as a first § 2255 motion. In such circumstances the district court must [1.] notify the *pro se* litigant that it intends to recharacterize the pleading, [2.] warn the litigant that this recharacterization means that any subsequent § 2255 motion will be subject to the restrictions on "second or successive" motions, and [3.] provide the litigant an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believes he has.

540 U.S. at 383. And although the Government objected to the application of this holding in *Castro*, the Government did not "contest[] the lawfulness of this judicially created requirement" and suggested that the Supreme Court had "the authority to regulate the practice through the exercise of [its] supervisory powers over the federal judiciary." *Id.* at 382 (quotation marks omitted). Indeed, the Government endorsed the practice as "likely to reduce and simplify litigation over questions of characterization, which are often quite difficult." *Id.* at 383.

Justice Scalia wrote a concurring opinion that made explicit what was at least implicit in the majority's opinion: courts should, if at all possible, rule on a motion *as filed* instead of recasting it into something more agreeable to the court. Justice Scalia believed, in the first instance, that "pleadings should *never* be recharacterized into first [habeas corpus petitions]" because to do so may harm the litigant in unintended ways. *Id.* at 388. For example, a district court could recharacterize in a way that it believes helps the prisoner, but the court of appeals may disagree, the result being that the prisoner is "stuck with the consequences of a § 2255 motion that he never filed." *Id.* at 387. The better approach, and one "available under the

[*Castro*] Court’s opinion,” is not to recharacterize a motion at all, but instead to judge it as filed. *Id.* at 388. Justice Scalia’s view is implicit in the Court’s *Castro* opinion and in the opinions of the federal circuits before *Castro*—it goes without saying that if a prisoner files a motion cognizable under an existing procedural rule, e.g., *State v. Bush*, the court has no need to engage in judicial reworking, and thus the court can forego recasting and the procedures that go with it.

B. This Court’s supervisory powers over Ohio’s lower courts provides ample authority for the Court to apply *Castro* in Ohio.

This Court’s supervisory authority over the lower state courts is at least coextensive with the U.S. Supreme Court’s authority, exercised in *Castro*, over the lower federal courts. Section 5(A)(1), Article IV of the Ohio Constitution gives the Court “general superintendence over all courts in the state.” And while that supervisory authority most often extends to rule-making and bar governance, the Court has exercised its supervisory authority in the criminal procedure context to avoid what it sees as patently unfair practices. For example, in *State v. Howard* (1989), 42 Ohio St. 3d 18, 23, the Court used its supervisory authority to provide a new jury charge to replace a version of the *Allen* jury charge that the Court believed coerced jury members with minority views to acquiesce in the majority’s views. After “determin[ing] that the use of the traditional *Allen* charge is improper” because of its coercive effect, the Court noted that it “would be remiss in [its] responsibility of supervising lower courts if [it] did not provide a supplemental instruction that, in [the Court’s] opinion, avoids the pitfalls of the traditional *Allen* charge.” *Id.* Exercising its supervisory powers, the Court then set out an approved supplemental charge for deadlocked juries. *Id.* at 25–26.

The *Howard* Court cited no rule, statute, or constitutional ruling requiring its holding; nor did it need to—rather, the Court’s holding was based on its supervisory powers. Those same

supervisory powers enable the Court here to prevent the patent unfairness that can and does result from judicial recasting.

C. *Castro's reasoning applies equally in Ohio because Ohio's postconviction scheme contains the same pitfalls as the federal habeas corpus scheme.*

The fundamental fairness concerns at work in *Castro* apply with the same force to Ohio's PCR statutes because Ohio's statutes impose similarly stringent burdens on prisoners filing second and successive PCR petitions. Prisoners in Ohio courts, like prisoners in federal courts post-AEDPA, lose their right to bring one all-inclusive PCR petition whenever a court, like the lower courts in Schlee's case, unilaterally convert a prisoner's motion into his first (and often only meaningful) PCR petition.

Like the old federal habeas scheme, Ohio's past PCR statutes placed few restrictions on second or successive petitions. Before 1995, R.C. 2953.23(A), much like the pre-AEDPA version of 28 U.S.C. § 2255, allowed judges to consider second or successive petitions in their discretion. Ohio's second or successive provision said simply: "Whether a hearing is or is not held, the court may, in its discretion and for good cause shown, entertain a second or successive petitions for similar relief on behalf of the petitioner based upon the same facts or on newly discovered evidence." R.C. 2953.23(A) (1994). So if a trial court had previously converted a prisoner's motion into a PCR petition, the court (likely the same judge) would have the discretion to hear not only all of the petitioner's other claims in a second PCR petition, but indeed the same claim brought in the first motion, too. In this sense, recasting motions as PCR petitions, like recasting motions as petitions for habeas corpus in the federal courts, did little to harm a prisoner's future prospects of bringing an all-inclusive PCR petition.

But the arrival of restrictions on second and successive PCR petitions in Ohio, which nearly paralleled the restrictions on federal habeas under AEDPA, eliminated any harmlessness

in recasting. In 1995, the year before Congress enacted AEDPA, the General Assembly passed Senate Bill 4, which rewrote R.C. 2953.23(A), Ohio's provision governing second and successive petitions for postconviction relief. Gone were the days of rehearing second and successive petitions at the trial court's discretion. In their place, the General Assembly placed restrictions on second or successive petitions similar to those in AEDPA. The S.B. 4 version of R.C. 2953.23(A) read, in relevant part, that:

(A) [A] court may not entertain a petition filed after the expiration of the [180-day period in R.C. 2953.21(A)(2)] or a second petition or successive petitions for similar relief on behalf of a petitioner unless . . . :

(1) Both of the following apply:

- (a) 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 [180-day period in R.C. 2953.21(A)(2)] or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.
- (b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

* * *

The post-AEDPA version of 28 U.S.C. § 2255, recall, required federal prisoners to convince a federal appeals court that the second or successive petition contains either (1) "newly discovered evidence that . . . would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense"; or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255. Ohio's post-S.B. 4 version of R.C. 2953.23(A) tracks

closely, requiring proof that the Ohio prisoner was “unavoidably prevented” from discovering what would amount to “newly discovered evidence” supporting a new claim for relief. And under both statutes, the prisoner must show by “clear and convincing evidence” that “no reasonable factfinder” would have found the prisoner guilty.

The striking similarities between the post-AEDPA version of 28 U.S.C. § 2255 in *Castro* and the post-S.B. 4 version of R.C. 2953.23(A) here mean that all of the fundamental fairness concerns compelling the federal courts to curtail recasting apply equally to recasting motions in Ohio courts as petitions for post-conviction relief. Take, for example, an Ohio prisoner who plans to file a timely petition for postconviction relief raising five claims but believes a sixth claim is better suited for a Civil Rule 60(B) motion. If the prisoner files the Rule 60(B) motion, and the court unilaterally recasts that motion as the prisoner’s first PCR petition, when the prisoner files what he intended to be his first PCR petition, he will have to meet the onerous burden of proving the second and successive petition prerequisites set out in the post-S.B. 4 version of R.C. 2953.23(A). For the vast majority of prisoners, this means that they have lost their only opportunity to present their PCR claims for a full hearing on the merits. As the federal courts have recognized, that result works a profound injustice on the rights of prisoners.

Moreover, that lost opportunity for state PCR relief would likely also turn into a lost opportunity in federal habeas. Federal courts typically will not hear a claim on habeas if the prisoner failed to present the claim to a state court in accord with the state court’s procedural rules. For Ohio prisoners, that means bringing all of the prisoner’s PCR claims in a single petition and doing so within the time limitations set out in R.C. 2953.21(A)(2). Failure to do so means the prisoner may be barred from later raising those claims by the bar on second and successive or untimely petitions in R.C. 2953.23(A). That bar, in turn, typically counts as an

adequate procedural rule justifying the state court's refusal to consider the petition on the merits. See *Broom v. Mitchell* (6th Cir. 2006), 441 F.3d 392, 400–01 & n.8. Thus, in habeas, the prisoner must first show “cause and prejudice” for the default or a “miscarriage of justice” in order to obtain a hearing on the merits of his claims. In this sense, the Eleventh District's recasting rule works a profound hardship on prisoners throughout all aspects of their postconviction proceedings.

Concerns about such consequences led the Illinois Supreme Court to follow the U.S. Supreme Court's lead in *Castro*, using its own supervisory powers to prevent trial courts from recasting a motion, without warning, as one for post-conviction relief. See *People v. Shellstrom* (Ill. 2005), 833 N.E.2d 863, 870. True, the *Shellstrom* court did not go so far as to say that the motion must be ruled on as filed, requiring only that trial courts give a *pro se* litigant a warning and opportunity to withdraw his motion before it counts as his first petition for post-conviction relief. Compare *id.*, with *Miller*, 197 F.3d at 646 (allowing the additional option of having the motion ruled upon as filed). But that is principally because the *Shellstrom* decision seems limited to those scenarios where recasting *helps*, not *hurts*, the *pro se* prisoner. The Illinois Supreme Court justified a limited use of recasting by explaining how courts have traditionally construed *pro se* prisoner pleadings to *help* prisoners. As the *Shellstrom* Court recognized, “[t]here are good reasons for allowing a . . . court to recharacterize” *pro se* pleadings. 833 N.E.2d at 867. Recharacterizing in the proper case, for example, “avoids the possible harshness of holding a *pro se* litigant to the letter of whatever label he happens to affix to his pleading.” *Id.* Properly understood, then, *Shellstrom*'s discussion of recasting suggests that the Illinois court would limit recasting to those situations where it benefits *pro se* prisoners, a far cry from the case here, where the recasting deprived Schlee of a hearing on the merits of his claims. In short, both the

U.S. Supreme Court and state courts have recognized that recasting can cause fundamental unfairness, and they have used their supervisory powers to curtail that harm.

D. By unilaterally recasting Schlee’s Civil Rule 60(B) motion as a PCR petition, the lower courts deprived Schlee of an opportunity to make a full and fair showing of his constitutional claims.

Nor are these concerns about recasting merely hypothetical. Schlee will directly suffer the unfair consequences of the trial court’s recasting of his Civil Rule 60(B) motion as a motion for post-conviction relief. True, at the time Schlee filed his Rule 60(B) motion and the trial court recharacterized it, the statutory 180-day time limit in R.C. 2953.21(A)(2) had long since passed for Schlee, meaning even if the trial court had not recharacterized Schlee’s Rule 60(B) motion, Schlee still would have had to meet the stringent requirements in R.C. 2953.23(A) in a later PCR petition. But Schlee still suffered from the recasting: he was never afforded an opportunity to argue that he met the R.C. 2953.23(A) requirements.

The trial court’s recasting of Schlee’s Rule 60(B) motion, and dismissal on timeliness grounds as a PCR petition, deprived Schlee of the opportunity to argue that, even if recharacterized as a PCR petition, he could meet the stringent requirements of R.C. 2953.23(A). The court of appeals below held that “the trial court did not abuse its discretion by dismissing as untimely appellant’s petition for postconviction relief. Further, appellant failed to show that he was unavoidably prevented from discovery of the facts upon which his petition was based.” *Schlee*, 2006-Ohio-3208, at ¶ 29. Of course, Schlee had no reason “to show that he was unavoidably prevented from discovery of the facts upon which his petition was based” because Schlee did not file a PCR petition; he filed a Rule 60(B) motion for which R.C. 2953.23(A) had no application. So by recasting Schlee’s Rule 60(B) motion, the lower courts set Schlee up for failure by invoking a statutory scheme that he had not sought and that he had no reason to expect

would be applied to him. If Schlee had the benefit of the U.S. Supreme Court's rule in *Castro*, he would not have suffered because, at a minimum, he could have amended or withdrew his motion.

More importantly—and regardless of the effect of the Eleventh District's recasting rule on Schlee—the lower court's recasting rule applies to all *pro se* prisoner motions, not simply ones filed by prisoners who face the R.C. 2953.23(A) hurdles regardless of whether the court recasts their motions. Said differently, the Eleventh District's rule requires the recasting of all *pro se* prisoner motions, regardless of the individual prisoner's circumstances with respect to timely filing their first PCR petition. That broad rule means that prisoners who could otherwise timely file their first PCR petition will lose that right upon having their *pro se* motion recast under the Eleventh District's rule. There is no reason this Court should countenance such an unjust result.

III. RECASTING HERE IS ANTITHETICAL TO THE TWIN PILLARS OF OUR ADVERSARIAL SYSTEM THAT PARTIES ARE THE MASTERS OF THEIR OWN SUITS AND THAT COURTS SHOULD REACH THE MERITS OF CLAIMS WHEN POSSIBLE.

A. Parties should be the masters of their own suits with the autonomy and responsibility to accept the consequences of the procedural and tactical choices they make.

Cases like *Bush* and *Castro* flow directly from an underlying principle that animates our legal system, namely, that parties are masters of their own suits. The U.S. Supreme Court, for example, has long recognized that each individual “is master to decide what law he will rely upon,” *The Fair v. Kohler Die & Specialty Co.* (1913), 228 U.S. 22, 25 (Holmes, J.), and because dire consequences often attach to the way an individual presents a claim, basic fairness dictates that the individual should have complete control over how to present his claim. “Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.” *Castro v. United*

States (2003), 540 U.S. 375, 386 (Scalia, J., concurring). But, as the *Bush* Court no doubt recognized, when a court substitutes its judgment of what a moving party “really” wants from a given motion, the personal autonomy so necessary to our system is lost. In this sense, cases like *Bush* and *Castro*, which curtail motion recasting practices, fit well with our common understanding of how this country’s judicial systems work.

The federal courts, for example, have long respected a plaintiff’s choice of what claims to bring and where to bring them when those courts decide issues of federal subject-matter jurisdiction. In addition to serving as “master to decide what law he will rely upon,” *The Fair*, 228 U.S. at 25, each individual “is absolute master of what jurisdiction he will appeal to,” *Healy v. Sea Gull Specialty Co.* (1915), 237 U.S. 479, 480. Even when a plaintiff could bring his claims under federal law, thus invoking a federal court’s subject-matter jurisdiction over cases arising under federal law, the courts respect a plaintiff’s decision to instead plead a state cause of action only and to file in state court. See *Redwood Theaters, Inc. v. Festival Enters., Inc.* (9th Cir. 1990), 908 F.2d 477, 479 (“It is well established that the party who brings a suit is master to decide what law he will rely upon, and if he can maintain his claim on both state and federal grounds, he may ignore the federal question and assert only a state law claim and defeat removal.” (quotation marks and citation omitted)). Indeed, “[a] different rule would seem most inappropriate in a judicial system such as ours: if a person is free not to vindicate his rights in court at all, then he should be free to assert in court only those rights he chooses.” *Hunter v. United Van Lines* (9th Cir. 1984), 746 F.2d 635, 640.

Ohio’s Rules of Criminal Procedure embody these personal autonomy principles. Criminal Rule 57(B), which the lower courts here oddly used to recast Schlee’s Civil Rule 60(B) motion, gives courts the go-ahead to honor the personal autonomy forming the foundation of our

legal system. Criminal Rule 57(B) says that “[i]f no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists.” The rule requires courts to act in a way consistent with the criminal rules, and Criminal Rule 1(B) makes clear that the “rules are intended to provide for the just determination of every criminal proceeding” and “to secure the fair, impartial, speedy, and sure administration of justice.” Crim. R. 1(B). Honoring a criminal defendant’s choice of which law to invoke in his motion, especially in a criminal case where his personal freedom is at stake, falls into any meaningful concept of the “fair, impartial, speedy, and sure administration of justice.” Crim. R. 1(B). Therefore, Criminal Rule 57(B) readily follows our tradition of allowing individuals to be masters of their claims for relief, free from unilateral recasting by the courts.

B. When possible, courts should strive to reach the merits of the claims before them, and any court influence on the form and procedure of litigation should work toward this goal, not against it.

A second notion that defines our legal system is the idea that where possible, a court should reach the merits of a party’s claims. As the U.S. Supreme Court puts it, “mere technicalities should not stand in the way of consideration of a case on its merits.” *Torres v. Oakland Scavenger Co.* (1988), 487 U.S. 312, 316, superseded by statute on other grounds, see, e.g., *Johnson v. Teamsters Local 559* (1st Cir. 1996), 102 F.3d 21, 29 n.4; see also, e.g., *Foman v. Davis* (1962), 371 U.S. 178, 181 (“It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities.”); *Carey v. Saffold* (2002), 536 U.S. 214, 225; *Conley v. Gibson* (1957), 355 U.S. 41, 48.

The Ohio Supreme Court has similarly declared the “basic tenet of Ohio jurisprudence that cases should be decided on their merits.” *Sazima v. Chalko*, 86 Ohio St. 3d 151, 158, 1999-Ohio-92 (quoting *Perotti v. Ferguson* (1983), 7 Ohio St. 3d 1, 3). See also, e.g., *Int’l Periodical Distribs. v. Bizmart, Inc.*, 95 Ohio St. 3d 452, 2002-Ohio-2488, at ¶ 7; *Ohio Furniture Co. v. Mindala* (1986), 22 Ohio St. 3d 99, 101. In the Rule 60(B) context, this Court has noted that when the judgment from which relief is sought was decided other than on the merits, “[a]ny doubt should be resolved in favor of the motion to vacate so that cases may be decided on the merits.” *Moore v. Emmanuel Family Training Center, Inc.* (1985), 18 Ohio St. 3d 64, 67 n.1.

The Ohio Constitution expresses this idea most directly in the Open Courts provision of Section 16, Article I (“All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.”). This section—whose “due course of law” provision parallels the federal Constitution’s due process guarantees, see, e.g., *Direct Plumbing Supply Co. v. City of Dayton* (1941), 138 Ohio St. 540, 544—goes beyond the well-known due process concepts of fundamental rights and notice and opportunity to be heard to specifically ensure that an injured party gets a fair chance to present *the merits* of his or her claim in court. Actions that “effectively close[] the courthouse” doors to injured parties, *Brennaman v. R.M.I. Co.*, 70 Ohio St. 3d 460, 466, 1994-Ohio-322, can violate this provision.

Schlee prepared a motion, pursuant to Civil Rule 60(B), timely seeking redress for a wrongful conviction. In essence, Schlee, representing himself, was prepared to present evidence on the merits of his motion and had chosen an acceptable procedural vehicle to do so. Nonetheless, the court recast his motion as a PCR petition, allowing the court to dismiss it out of hand as untimely without even a glance at the merits of Schlee’s claims. The court’s

intervention, steering the proceeding away from Schlee’s chosen process to avoid an otherwise available merits hearing, was in direct conflict with the pillar that courts should, if anything, work to *reach* the merits of a claim, not to avoid them.

* * *

Of course, on occasion these twin pillars—party autonomy and the bias in favor of reaching the merits of a claim—may push in opposite directions. For example, reaching the merits of a claim may require a court to put aside a prisoner’s choice of vehicle and instead consider the motion under a legal framework that will allow consideration on the merits. In other words, there may be times when honoring a party’s choice of a certain procedural vehicle may result in the court not reaching the claims on the merits. But Schlee’s case does not present the difficult question of what to do in such situations, for here both forces push in the same direction. Schlee’s case offered the lower courts the opportunity both to honor Schlee’s choice of law *and* to reach the merits of his claims. In rejecting that opportunity and choosing to recast Schlee’s motion in a way that *prevented* consideration of his claims on the merits, the courts below plainly erred.

IV. DUE PROCESS PREVENTED THE LOWER COURTS FROM RECASTING SCHLEE’S MOTION IN A WAY THAT DENIED HIM AN OPPORTUNITY TO BE HEARD ON THE MERITS OF HIS CLAIMS.

A. The lower courts violated procedural due process by recasting Schlee’s motion without at least giving him notice and an opportunity to be heard.

1. Procedural due process requires notice and an opportunity to be heard before a court deprives a party of a substantive right.

In depriving Schlee of the opportunity to have his claims heard on the merits, the courts below also violated the Constitution. The Fourteenth Amendment’s Due Process Clause says that “[n]o State shall . . . deprive any person of life, liberty, or property without due process of law.”

The U.S. Supreme Court has long characterized this provision as requiring states to implement minimal procedural safeguards in any decision-making process resulting in the deprivation of a person's liberty or property. "The fundamental requisite of due process," the Court has held "is the opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Goldberg v. Kelly* (1970), 397 U.S. 254, 267 (quotation marks and citation omitted). This right to be heard in a "meaningful manner," moreover, "prevent[s] the States from denying potential litigants use of established adjudicatory procedures, when such an action would be the equivalent of denying them an opportunity to be heard upon their claimed rights." *Logan v. Zimmerman Brush Co.* (1982), 455 U.S. 422, 429–30 (citation and quotation marks omitted).

The Due Process Clause plays a critical role in all forms of government decision-making, including the decision of whether to deprive someone of their liberty for committing a crime. "[T]he Due Process Clause . . . require[s] application during the adjudicatory hearing of the essentials of due process and fair treatment," which "play[] a vital role in the American scheme of criminal procedure." *In re Winship* (1970), 397 U.S. 358, 359, 363 (quotation marks omitted). As a defendant in a criminal matter (like Schlee here), "[t]he accused . . . has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." *Id.* at 363. Those weighty concerns heighten the need to provide due process protections to criminal defendants like Schlee.

2. In recasting Schlee's Civil Rule 60(B) motion as a PCR petition, the lower courts deprived Schlee of a substantial right and did so without providing either notice or an opportunity to be heard.

The Eleventh District's practice of recasting *pro se* prisoner motions, which the court practiced on Schlee's Rule 60(B) motion, violates the due process principles recognized by the

U.S. Supreme Court in cases like *Goldberg, Logan, Winship*, and, implicitly, *Castro*. Without giving Schlee any meaningful opportunity to be heard on the recasting question, the lower courts employed a recasting procedure that created an unacceptably high risk that Schlee would lose the right to invoke his procedural rule of choice—Civil Rule 60(B). The faulty recasting procedure, as *Castro* recognized, also risks erroneously pinning the consequences of a first PCR petition on a prisoner who never intended to file a PCR petition in the first place. The Eleventh District’s unilateral recasting practice fails to offer the minimal procedural safeguards necessary before a court deprives *pro se* prisoners of their right to choose a procedural vehicle for their cases and their right to file a first, all-inclusive PCR petition. As such, the Eleventh District’s rule violates the procedural protections of the Due Process Clause.

B. The trial judge violated Schlee’s substantive due process rights by recasting the motion in a manner that allowed the court to deny it on procedural grounds without reaching the merits of his claim.

The Eleventh District’s practice of rewriting a prisoner’s pleading by recasting it as a PCR petition also raises substantive due process concerns—particularly where that rewriting results in the petitioner being deprived of *any* opportunity to have his claims heard on the merits. The U.S. Supreme Court has recognized that access to the judicial system qualifies as a “basic constitutional guarantee[]” protected by the Due Process Clause of the Fourteenth Amendment, “infringements of which are subject to more searching judicial review.” *Tennessee v. Lane* (2004), 541 U.S. 509, 522–23. Indeed, the Due Process Clause protects an extremely broad range of judicial-access rights. As the Court recently observed in *Lane*, the Due Process Clause guarantees the substantive fairness of all judicial proceedings, by affording, for example, “the right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings,” *id.* at 523 (quoting *Faretta v. California* (1975), 422 U.S. 806, 891 n.15), and “a

meaningful opportunity to be heard by removing obstacles to [to some litigants'] full participation in judicial proceedings," *id.* (quoting *Boddie v. Connecticut* (1971), 401 U.S. 371, 379). And the Constitution goes further, affording inmates a meaningful right to file legal claims in court, which may be vindicated through access to a law library or assistance from other inmates with legal experience. *Bounds v. Smith* (1977), 430 U.S. 817, 828, holding limited by *Lewis v. Casey* (1996), 518 U.S. 343; *Wolff v. McDonnell* (1974), 418 U.S. 539, 578–79; cf. also *Taylor v. Louisiana* (1975), 419 U.S. 522, 530 (the exclusion of “identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial”); *Press-Enterprise Co. v. Super. Ct. of California* (1986), 478 U.S. 1, 8–15 (the First Amendment protects public access to criminal proceedings). These specific applications of the Due Process Clause serve to illustrate the breadth of the Constitution’s protection of access to the courts. That protection, moreover, extends to any substantive act that, in effect, deprives a litigant, especially a *pro se* prisoner, of access to a fair judicial process.

Recasting motions filed under one rule as motions filed under another, where such recasting results in the *pro se* petitioner losing the opportunity to have his claims heard on the merits, deprives the prisoner of his fundamental right of access to the courts. Far from comporting with the spirit of due process, the Eleventh District’s decision deprived Schlee of access to an established adjudicatory process—Civil Rule 60(B) in Schlee’s case—to resolve his claims. This flies in the face of the U.S. Supreme Court’s judicial-access cases. If the Due Process Clause, as the U.S. Supreme Court has held, protects the right to be physically present during judicial proceedings and even requires the elimination of filing fees for some indigent litigants, then the Due Process Clause must also protect an individual from having his pleadings rewritten without his consent and to his detriment. The court’s job is to provide a neutral and

disinterested evaluation of a case, not to become the decisionmaker as to which laws the parties should rely upon, particularly where the court elects to impose a legal framework that directly and concretely harms the party whose papers it rewrites. Compared to the extremely broad array of situations where the U.S. Supreme Court has enforced the fundamental right of access to the courts, Schlee's simple request to have his pleadings considered as filed easily falls within even the narrowest concept of access to the courts.

C. Such due process concerns take on special significance in situations where a criminal defendant is acting without the benefit of counsel.

The decision here is also directly contrary to the general due process notion that courts are to be helpful to *pro se* litigants where possible. The courts have long recognized the profound disadvantage that prisoners face when litigating their claims from behind prison walls, especially when they are doing so on their own. Recognition of this hardship comes in several forms. For example, in practice, courts routinely “hold [*pro se* pleadings] to less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner* (1972), 404 U.S. 519, 520; see also *Castro*, 540 U.S. at 381–82 (noting the liberal construction of *pro se* prisoner filings in order “to create a better correspondence between the substance of a *pro se* motion’s claim and its underlying legal basis”); *State v. Perry* (1967), 10 Ohio St. 2d 175, 178 n.1 (“Where [a pleading] is filed without the assistance of counsel, the court must be much more liberal in determining whether the petition alleges facts which may entitle the petitioner to postconviction relief.”). And the federal courts have a special “prison mailbox” rule for prisoners appealing judgments against them: the notice of appeal is considered filed when delivered to prison mail officials, not when the court clerk files the notice. *Houston v. Lack* (1988), 487 U.S. 266, 270 (noting that “[t]he situation of prisoners seeking to appeal without the aid of counsel is unique” and describing the obstacles facing incarcerated *pro se* litigants).

The U.S. Supreme Court's due process cases also recognize the disadvantages *pro se* prisoners face when navigating the legal system alone, and guarantees them assistance in their efforts for legal relief. For example, the Constitution guarantees a prisoner access to the courts and a meaningful opportunity to present his legal claims, *Lewis*, 518 U.S. at 350, a right that may be vindicated through access to a law library, *Bounds*, 430 U.S. at 828, or assistance from other inmates with legal experience, *Wolff*, 418 U.S. at 578–79. And in recognition of the financial hardship incarcerated defendants face, the Constitution prohibits states from requiring indigent defendants to pay a docketing fee to appeal their conviction, *Burns v. Ohio* (1959), 360 U.S. 252, 257, or to pay for a trial transcript necessary for appeal, *Griffin v. Illinois* (1956), 351 U.S. 12, 20.

The Eleventh District's recasting rule works at cross-purposes with this widely-shared understanding that incarcerated litigants face severe disadvantages when representing themselves in court. When faced with Schlee's Rule 60(B) motion, the lower courts had two choices: (1) confront the merits of Schlee's claims by ruling on the motion under the well-defined Civil Rule 60(B) standards; or (2) avoid the merits of Schlee's motion by recasting it as a PCR petition, which was clearly untimely. By choosing to dismiss Schlee's motion on procedural grounds rather than reaching its merits, the lower courts did not honor the practice—one implicit in the Due Process Clause—of treating *pro se* prisoners fairly in light of their circumstances.

CONCLUSION

For the above reasons, the Court should reverse the judgment of the court of appeals and remand for determination of Schlee's motion on the merits under Ohio Rule of Civil Procedure 60(B).

Respectfully submitted,



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Counsel for Defendant-Appellant

Larry M. Schlee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Defendant-Appellant Larry M. Schlee was served by regular U.S. mail this 6th day of February, 2007, upon the following:

Charles E. Coulson
Lake County Prosecutor
P.O. Box 490
105 Main Street
Painesville, OH 44077

Counsel for Plaintiff-Appellee
State of Ohio



One of the Attorneys for Defendant-Appellant
Larry M. Schlee

APPENDIX

IN THE SUPREME COURT OF OHIO

CASE NO: ~~06-1608~~

STATE OF OHIO
Plaintiff-Appellee,

-vs-

LARRY SCHLEE
Defendant-Appellant,

:
: On Appeal from the Lake
: County Court of Appeals,
: Eleventh Appellate District
:
:
: Court of Appeals
: Case No. 2005-L-105CA
:

NOTICE THAT THE COURT OF APPEALS DETERMINED
THAT A CONFLICT DOES EXIST

ATTORNEY FOR DEFENDANT-APPELLANT:

Larry Schlee, pro se.
2075 S. Avon-Belden Rd.
Grafton, Ohio 44044

ATTORNEY FOR PLAINTIFF-APPELLEE:

Charles Coulson; Lake County Prosecutor
P.O. Box 490
Painesville, Ohio 44077
Phone: (216) 357-2683

FILED
AUG 25 2006
MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

MEMORANDUM

On June 26, 2006, the Eleventh District Court of Appeals, in Case No. 2005-L-105CA, filed a Judgment Entry affirming the judgment of the Lake County Court of Common Pleas.¹

On July 6, 2006, Appellant filed "A Motion To Certify A Conflict" with the Eleventh District Court of Appeals, pursuant to Ohio App. Rule 25.

On July 20, 2006, Appellant filed in the Supreme Court of Ohio,² a "Notice Of Appeal," a "Memorandum In Support Of Jurisdiction" and a "Notice That A Motion To Certify A Conflict Is Pending In The Court Of Appeals."

On August 9, 2006, the Eleventh District Court of Appeals filed a Judgment Entry granting Appellant's Motion To Certify A Conflict.³ The appellate court determined that its decision in Case No. 2005-L-105, 2006-Ohio-3208, was "in conflict with a decision of the First District Court of Appeals, State v. Lehrfeld, 1st Dist. No. C-030390, 2004-Ohio-2277,"⁴ on the following issue of law: "Whether the trial court can recast [a]ppellant's Motion For Relief From Judgment as a petition for postconviction relief when it has been unambiguously presented as a Civ. Rule 60(B) [motion]."

Pursuant to The Supreme Court of Ohio Rules of Practice, Rule IV, Section 1, Appellant is providing notice that on August 9, 2006, the Eleventh District Court of Appeals determined that a conflict does exist.

Respectfully submitted,



Larry Schlee #273-258
2075 S. Avon-Belden Rd.
Grafton, Ohio 44044

¹ See Ex#1.
² Case No. 06-1374.
³ See Ex#2.
⁴ See Ex#3.

CERTIFICATE OF SERVICE

A copy of this notice that the court of appeals determined that a conflict does exist was sent by U.S. Mail on this 23rd day of August, 2006, to Counsel for Appellee, State of Ohio, Charles Coulson, Lake County Prosecutor, at 105 Main Street, Painesville, Ohio 44077.

Larry Schlee
Larry Schlee

A P P E N D I X

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

STATE OF OHIO, : OPINION

Plaintiff-Appellee, FILED:
COURT OF APPEALS
JUN 26 2006
LYNNE L. MAZEIKA
CLERK OF COURT
LAKE COUNTY, OHIO

CASE NO. 2005-L-105

- vs -

LARRY M. SCHLEE,

Defendant-Appellant

Civil Appeal from the Court of Common Pleas, Case No. 92 CR 000517.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Craig A. Swenson*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

James S. Callender, Jr., McNamara, Hanrahan, Callender & Loxterman, 8440 Station Street, Mentor, OH 44060 (For Defendant-Appellant).

DONALD R. FORD, P.J.

{¶1} Appellant, Larry M. Schlee, appeals from the June 14, 2005 judgment entry of the Lake County Court of Common Pleas, dismissing his motion for relief from judgment.

{¶2} The instant matter arises from the conviction and sentence of appellant on one count of aggravated murder for the murder of Frank Carroll ("Carroll") in 1980, in which appellant was given a life sentence. A brief review of the procedural history of this case is necessary.

{¶3} On September 28, 1992, appellant was initially indicted by the Lake County Grand Jury on one count of aggravated murder in violation of R.C. 2903.01.¹ He pleaded not guilty and the matter proceeded to a jury trial. On March 31, 1993, the jury returned a guilty verdict, and appellant was sentenced to life imprisonment with parole eligibility after twenty years.

{¶4} Appellant appealed his conviction to this court. In *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, we affirmed his conviction.

{¶5} Subsequently, appellant filed two motions for postconviction relief. His first motion for postconviction relief was filed on September 23, 1996, alleging ineffective assistance of counsel. Pursuant to its May 15, 1997 judgment entry, the trial court overruled appellant's petition without holding an evidential hearing. Appellant appealed to this court. In *State v. Schlee* (Dec. 31, 1998), 11th Dist. No. 97-L-121, 1998 Ohio App. LEXIS 6363, we reversed and remanded the matter to the trial court to file findings of fact and conclusions of law that addressed each of his claims that were not barred by *res judicata*.

{¶6} While the foregoing appeal was still pending, appellant filed a second petition for postconviction relief on December 18, 1997, alleging that he had newly discovered evidence to prove that appellee, the state of Ohio, committed a Crim.R. 16 discovery violation during his trial. Appellee filed a motion to dismiss appellant's second petition. Pursuant to its July 22, 1998 judgment entry, the trial court denied appellant's petition for postconviction relief, and granted appellee's motion to dismiss without an evidential hearing. The trial court determined that it could not entertain the petition

1. Although Carroll was murdered in 1980, his body was discovered in New York in 1981, and remained unidentified until 1992.

because the submission failed to satisfy the requirements governing a second or successive petition for postconviction relief under R.C. 2953.23. From that judgment, appellant filed another notice of appeal with this court on August 21, 1998, which we affirmed in *State v. Schlee* (Dec. 17, 1999), 11th Dist. No. 98-L-187, 1999 Ohio App. LEXIS 6136.

{¶7} With respect to appellant's first petition for postconviction relief, on remand, the trial court issued findings of fact and conclusions of law and entered a judgment entry on June 21, 1999. In that entry, the trial court addressed the three claims that were not barred by *res judicata*, and ultimately dismissed appellant's petition without holding an evidential hearing because he failed to demonstrate substantive grounds for relief on his ineffective assistance of counsel claims. Appellant timely filed an appeal on July 21, 1999. This court in *State v. Schlee* (Sept. 22, 2000), 11th Dist. No. 99-L-112, 2000 Ohio App. LEXIS 4354, affirmed the judgment of the trial court.

{¶8} On July 2, 2002, appellant filed a motion for new trial based upon newly discovered evidence and prosecutorial misconduct. The trial court granted this motion on August 21, 2002. Appellee filed a notice of appeal and a motion for leave to appeal on September 20, 2002, but this court denied its motion on March 24, 2003. On June 19, 2003, the trial court set a trial date of November 3, 2003. On October 3, 2003, upon joint motion, the trial court continued the new trial until March 8, 2004.²

{¶9} The new trial began as scheduled on March 8, 2004. Prior to commencement of the trial, appellant filed a motion to dismiss the charge on speedy trial grounds. The trial court denied appellant's motion and proceeded with the trial. On

2. The trial court permitted the delay for the purpose of DNA testing.

March 19, 2004, the jury returned a guilty verdict. On March 26, 2004, appellant was sentenced to life imprisonment with parole eligibility after fifteen years.

{¶10} On April 2, 2004, appellant filed a motion for new trial, which was overruled by the trial court on April 15, 2004, after a hearing. Appellant timely filed a notice of appeal. This court affirmed appellant's conviction in *State v. Schlee*, 11th Dist No. 2004-L-070, 2005-Ohio-5117.

{¶11} On October 26, 2004, appellant filed an application for DNA testing. Pursuant to its November 16, 2004 judgment entry, the trial court denied his application. The trial court determined, pursuant to R.C. 2953.74, that a prior inconclusive DNA test was conducted regarding the same biological evidence that appellant sought to have tested. Appellant filed a timely notice of appeal, alleging that the trial court erred by denying his application for DNA testing. We affirmed the trial court's judgment in *State v. Schlee*, 11th Dist. No. 2004-L-207, 2006-Ohio-2391.

{¶12} On March 16, 2005, appellant filed a pro se motion for relief from judgment, pursuant to Civ.R. 60(B), in which he alleged violations of his Fifth, Sixth, and Fourteenth Amendment rights, including prosecutorial misconduct and the right to a fair trial. Appellee filed a motion to dismiss on April 8, 2005.³ On April 21, 2005, appellant filed a pro se motion to have appellee's motion to dismiss stricken from the record as well as a pro se motion for default judgment. Appellee filed briefs in opposition on May 5, 2005.⁴ On May 23, 2005, appellant filed a pro se motion to strike and to renew his motion for default judgment. Pursuant to its May 24, 2005 judgment entry, the trial court ordered appellee to serve upon appellant, instead of his counsel of record, all past and

3. Counsel of record for appellant, Attorney Carolyn Kucharski ("Attorney Kucharski") and Attorney Charles Grieshammer ("Attorney Grieshammer"), were served appellee's motion to dismiss.

4. Appellee served appellant's counsel of record with the briefs in opposition.

future motions and briefs relating to his motion for relief from judgment. Appellee complied with the trial court's order on May 26, 2005.

{¶13} Pursuant to its June 14, 2005 judgment entry, the trial court determined the following: appellee's motion to dismiss was granted; appellant's motion for relief from judgment was dismissed; appellant's motion to have appellee's motion to dismiss was denied; appellant's motion for default judgment was denied; and appellant's motion to strike and renew his motion for default judgment was denied. It is from that judgment that appellant filed a timely notice of appeal and makes the following assignments of error:⁵

{¶14} "[1.] The trial court erred and/or abused its discretion to the prejudice of [appellant] when it ruled on his Civ.R. 60(B) motion.

{¶15} "[2.] The trial court erred and/or abused its discretion to the prejudice of [appellant] when it recast his Civ.R. 60(B) as, and reviewed it under the standards applicable to a postconviction petition.

{¶16} "[3.] The trial court erred and/or abused its discretion to the prejudice of [appellant] when it granted [appellee's] untimely responses."

{¶17} In his first assignment of error, appellant argues that the trial court erred and/or abused its discretion when it ruled on his Civ.R. 60(B) motion. He alleges that

5. Prior to filing his appeal, on June 20, 2005, appellant filed a pro se motion to vacate, in part, the trial court's May 24, 2005 judgment entry, as well as to strike appellee's answers from the record, and to stay further proceedings. On June 23, 2005, appellant filed a pro se motion to vacate the trial court's June 14, 2005 judgment entry regarding his Civ.R. 60(B) motion. Appellee filed briefs in opposition on June 28, 2005, and on July 5, 2005. Pursuant to its July 8, 2005 judgment entry, the trial court denied appellant's June 20, 2005 motion. Also, on July 8, 2005, appellant filed a pro se motion in response to appellee's brief in opposition filed June 28, 2005, as well as a motion to renew his motions to vacate filed June 20 and June 23, 2005. Appellant filed a timely notice of appeal on July 11, 2005. On August 17, 2005, appellant filed with this court a pro se motion to dismiss his notice of appeal and to vacate the trial court's June 14, 2005 judgment entry because of a lack of jurisdiction. Appellee filed a brief in opposition on August 29, 2005. On September 7, 2005, appellant filed a pro se reply brief. Pursuant to this court's January 23, 2006 judgment entry, we overruled appellant's August 17, 2005 pro se motion to vacate the appealed judgment.

the trial court did not possess subject matter jurisdiction to take any action during the pendency of his direct appeal, *Schlee*, supra, 11th Dist. No 2004-L-207, 2006-Ohio-2391, until jurisdiction was remanded by this court.

{¶18} In his second assignment of error, appellant contends that the trial court erred and/or abused its discretion when it recast his Civ.R. 60(B) as, and reviewed it under, the standards applicable to a postconviction petition. He stresses that the trial court did not have jurisdiction to take any action; it was improper for the trial court to recast his motion for relief from judgment as a postconviction petition; and a Civ.R. 60(B) motion was the proper vehicle for the quality of evidence presented.

{¶19} Because appellant's first and second assignments of error are interrelated, we will address them in a consolidated fashion.

{¶20} "[W]ith respect to a Civ.R. 60(B) motion for relief from judgment, an appeal divests the trial court of jurisdiction to consider the motion, and *** "jurisdiction may be conferred on the trial court only through an order by the reviewing court remanding the matter for consideration of the Civ.R. 60(B) motion." *State v. Lorraine* (Dec. 12, 1997), 11th Dist. No. 96-T-5494, 1997 Ohio App. LEXIS 5564, at 6-7. However, petitions for postconviction relief, as codified in R.C. 2953.21(C), provides that trial courts "shall consider a petition that is timely filed *** even if a direct appeal of the judgment is pending."

{¶21} This court stated in *State v. Harrison*, 11th Dist. No. 2004-P-0068, 2005-Ohio-4212, at ¶10-12:

{¶22} "Ohio courts have taken a variety of approaches regarding the application of Civ.R. 60 to criminal proceedings. Some courts have simply held that it does not apply to criminal proceedings. See *State v. Bluford*, 8th Dist. No. 83112, 2003-Ohio-

6181, at ¶15. Other courts have ruled that a Civ.R. 60 motion filed in a criminal matter must be treated as [a] motion for postconviction relief. *State v. Szerlip*, 5th Dist. No. 02CA45, 2003-Ohio-6954, at ¶22. However, for the reasons that follow, we hold Civ.R. 60 may be applied in criminal cases under certain circumstances.

{¶23} "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists." Crim.R. 57(B). Therefore, if the criminal rules address an issue, the civil rules do not apply in criminal matters, but the civil rules may apply where there is no criminal rule on point. *State v. Belknap*, 11th Dist. No. 2002-P-0021, 2004-Ohio-5636, at ¶25. See, also, e.g., *State v. Bush*, 11th Dist. No. 97-T-0035, 1998 Ohio App. LEXIS 427, at 4, fn.1. As such, courts have held that Crim.R. 57 provides for the application of Civ.R. 60 in criminal cases in some circumstances. See *State v. Plassman*, 6th Dist. No. F-03-017, 2004-Ohio-279, at ¶7; *State v. Lehrfeld*, 1st Dist. No. C-030390, 2004-Ohio-2277, at ¶7; See, also, e.g., *State v. Bush*, at 4, fn.1

{¶24} "Accordingly, in certain circumstances, Civ.R. 60 may be applicable to criminal matters. ****"

{¶25} The Supreme Court of Ohio in *State v. Reynolds* (1997), 79 Ohio St.3d 158, 160, stated: "[w]here a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21." Also, it is well-settled that prosecutorial misconduct may support a R.C. 2953.21 petition for postconviction relief.

State v. Singerman (1996), 115 Ohio App.3d 273, 276, citing *State v. Walden* (1984), 19 Ohio App.3d 141.

{¶26} In the case at bar, the trial court properly determined that appellant's pro se motion for relief from judgment, despite its caption, was really a petition for postconviction relief under R.C. 2953.21.

{¶27} In its June 14, 2005 judgment entry, the trial court, citing to *Reynolds*, supra, stated that "because [appellant's] motion for relief from judgment pursuant to Civ.R. 60(B) is a motion filed by a criminal defendant, subsequent to the filing of a direct appeal, seeking vacation of the judgment on the basis that his constitutional rights have been violated, it meets the definition of a petition for postconviction relief under R.C. 2953.21. Because there is an applicable statute, it is not necessary to look to the civil rules in this situation." (Footnote omitted.) The trial court further indicated that "Civ.R. 60(B) motions have been permitted when a trial court overrules a petition for postconviction relief pursuant to R.C. 2953.21 to seek reconsideration of the order overruling the petition because postconviction relief is a civil proceeding. [Appellant's] motion in this case does not seek reconsideration of an order overruling a petition for postconviction relief." (Footnote omitted.)

{¶28} Additionally, the trial court stated that "R.C. 2953.21(A)(2) provides that a petition for postconviction relief shall be filed no later than one hundred eighty days after the date the trial transcript is filed in the court of appeals in the direct appeal. The transcript was filed in the court of appeals on June 2, 2004. The statute of limitations for a petition for postconviction relief expired on November 29, 2004. Therefore, [appellant's] petition for postconviction relief is untimely and cannot be considered by the court unless the petitioner shows that he was unavoidably prevented from discovery

of the facts upon which the petition is based, or that the United States Supreme Court has recognized a new federal or state right that applies retroactively, and shows by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the petitioner guilty of the offense. [Appellant] has not alleged that these circumstances exist. Additionally, [appellant's] brief indicates that the facts upon which he bases his petition were known to him prior to the expiration of the time period for the filing of a petition for postconviction relief. Thus, the court finds that [appellant's] petition for postconviction relief is untimely, and is hereby dismissed." (Footnote omitted.)

{¶29} We note that appellant's pro se motion for relief from judgment includes alleged instances of prosecutorial misconduct occurring prior to his 1993 and 2004 jury trials. Appellant had an opportunity in his direct DNA appeal and/or post-conviction exercises, which was a completely separate subject matter having no relationship whatsoever with the issues raised in this appeal, to address the alleged prejudicial and constitutional violations committed by appellee. See *Reynolds, Singerman, and Walden*, supra. The trial court properly did not resort to the Civil Rules of Procedure, and treated appellant's Civ.R. 60(B) motion as a petition for postconviction relief. As such, the trial court was not divested of jurisdiction when it ruled on appellant's Civ.R. 60(B) motion. See R.C. 2953.21(C). Also, based on the record, the trial court did not abuse its discretion by dismissing as untimely appellant's petition for postconviction relief. Further, appellant failed to show that he was unavoidably prevented from discovery of the facts upon which his petition was based.

{¶30} Appellant's first and second assignments of error are without merit.

{¶31} In his third assignment of error, appellant contends that the trial court abused its discretion when it granted appellee's untimely responses, filed on April 8, 2005, and on May 5, 2005. He claims that appellee failed to serve him directly with those responses. Appellant stresses that the trial court erred when it allowed appellee to put its untimely responses on the record, and when it considered them in making its decision. He argues that the trial court did not have jurisdiction to take any action or the authority to allow appellee to file and serve its late responses.

{¶32} Crim.R. 49(B) provides: "[w]henver under these rules or by court order service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon the party shall be made in the manner provided in Civil Rule 5(B)."

{¶33} In the instant matter, the record establishes that appellee complied with its service requirements, pursuant to Crim.R. 49(B), when it initially served its responses in a timely manner upon appellant's counsel of record, Attorney Kucharski and Attorney Grieshammer. Because there is nothing in the record that appellant ever dismissed his counsel of record, appellee properly served its responses upon his counsel of record until the trial court ordered it to do otherwise.

{¶34} Again, on March 16, 2005, appellant filed a pro se motion for relief from judgment pursuant to Civ.R. 60(B). Appellee filed a motion to dismiss on April 8, 2005, in which it served appellant's counsel of record. On April 21, 2005, appellant filed a pro se motion to have appellee's motion to dismiss stricken from the record as well as a pro se motion for default judgment. Appellee filed briefs in opposition on May 5, 2005, again serving upon appellant's counsel of record. On May 23, 2005, appellant filed a

pro se motion to strike and to renew his motion for default judgment. According to its May 24, 2005 judgment entry, the trial court ordered appellee, pursuant to Crim.R. 49(B), to serve upon appellant, instead of his counsel of record, all past and future motions and briefs relating to his motion for relief from judgment. Appellee promptly complied with the trial court's order on May 26, 2005. Thus, appellee's responses were not untimely. We do not agree with appellant that the trial court should have stricken them from the record.

{¶35} Appellant's third assignment of error is without merit.

{¶36} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Lake County Court of Common Pleas is affirmed.

WILLIAM M. O'NEILL, J.,

DIANE V. GRENDALL, J.,

concur.

STATE OF OHIO
COUNTY OF LAKE

)
)SS.
)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

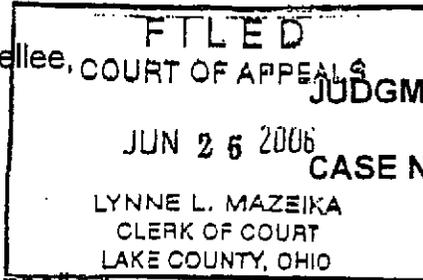
STATE OF OHIO,

Plaintiff-Appellee,

- vs -

LARRY M. SCHLEE,

Defendant-Appellant.



JUDGMENT ENTRY

CASE NO. 2005-L-105

For the reasons stated in the opinion of this court, appellant's assignments of error are not well-taken. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

Donald R. Ford

PRESIDING JUDGE DONALD R. FORD

FOR THE COURT

STATE OF OHIO) IN THE COURT OF APPEALS
) SS.
 COUNTY OF LAKE) ELEVENTH DISTRICT

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

LARRY M. SCHLEE,

Defendant-Appellant.

FILED **JUDGMENT ENTRY**
COURT OF APPEALS **CASE NO. 2005-L-105**
 JUL 6 2006
 LYNNE L. MAZEIKA
 CLERK OF COURT
 LAKE COUNTY, OHIO

On July 6, 2006, appellant, Larry M. Schlee, filed a motion pursuant to App.R. 25 to certify this case to the Supreme Court of Ohio on the basis of a conflict. Appellant asserts that this court's decision in *State v. Schlee*, 11th Dist. No. 2005-L-105, 2006-Ohio-3208, is in conflict with a decision of the First District Court of Appeals, *State v. Lehrfeld*, 1st Dist. No. C-030390, 2004-Ohio-2277.

Appellant contends that in *Lehrfeld*, the court determined that a Civ.R. 60(B) motion shall not be reviewed as an R.C. 2953.21 petition for postconviction relief.

The First District in *Lehrfeld* stated at ¶6:

"[w]e reject at the outset the state's suggestion that *Lehrfeld's* Civ.R. 60(B) motion may be reviewed as an R.C. 2953.21 petition for postconviction relief. Only 'an irregular "no-name" motion(),' i.e., a motion that 'fails to delineate specifically' the statute or rule under which relief is sought, may be 'classified' or 'categorized by a court in order for the court to know the criteria by which the

motion should be judged.’ *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993
***, at ¶10. In the proceedings below, Lehrfeld unambiguously invoked Civ.R.
60(B) in seeking relief ***. Therefore, Lehrfeld’s motion may not be recast as, or
reviewed under the standards applicable to, a postconviction petition. ***”
(Citations and parallel citations omitted.)

In *Schlee*, supra, at ¶22, this court, quoting *State v. Harrison*, 11th Dist.
No. 2004-P-0068, 2005-Ohio-4212, at ¶10, stated:

“Ohio courts have taken a variety of approaches regarding the application
of Civ.R. 60 to criminal proceedings. Some courts have simply held that it does
not apply to criminal proceedings. See *State v. Bluford*, 8th Dist. No. 83112,
2003-Ohio-6181, at ¶15. Other courts have ruled that a Civ.R. 60 motion filed in
a criminal matter must be treated as (a) motion for postconviction relief. *State v.*
Szerlip, 5th Dist. No. 02CA45, 2003-Ohio-6954, at ¶22. However, *** we hold
Civ.R. 60 may be applied in criminal cases under certain circumstances.”

In *Schlee*, we indicated that “*** the trial court properly determined that
appellant’s pro se motion for relief from judgment [pursuant to Civ.R. 60(B)],
despite its caption, was really a petition for postconviction relief under R.C.
2953.21.” *Id.* at ¶26. This court also held that “the trial court properly did not
resort to the Civil Rules of Procedure, and treated appellant’s Civ.R. 60(B)
motion as a petition for postconviction relief.” *Id.* at ¶29.

Based upon the foregoing conflict, we certify the following issue for review,
as presented by appellant, to the Supreme Court of Ohio:

"Whether the trial court can recast [a]ppellant's Motion For Relief From Judgment as a petition for postconviction relief when it has been unambiguously presented as a Civil Rule 60(B) [motion]."

Appellant's motion to certify a conflict is granted.

Donald R. Ford

PRESIDING JUDGE DONALD R. FORD

WILLIAM M. O'NEILL, J.,

DIANE V. GRENDALL, J.,

concur.

[Cite as *State v. Lehrfeld*, 2004-Ohio-2277.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-030390
	:	TRIAL NO. B-9900433
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
MATTHEW LEHRFELD,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: May 7, 2004

Michael K. Allen, Hamilton County Prosecuting Attorney, and Scott M. Heenan,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Matt Lehrfeld, pro se.

Please note: We have sua sponte removed this case from the accelerated calendar.

Per Curiam.

{¶1} Defendant-appellant Matthew Lehrfeld appeals from the judgment of the common pleas court overruling his Civ.R. 60(B) motion for relief from judgment. Upon our determination that Civ.R. 60(B) did not afford Lehrfeld an avenue for relief, we affirm the judgment of the court below.

I

{¶2} In June of 1999, Lehrfeld was found guilty in a bench trial of burglary. The trial court sentenced him to three years' community control. Lehrfeld appealed. In August of 1999, while his appeal was pending, Lehrfeld violated his community control. On September 28, 1999, the trial court found him guilty of violating his community control and sentenced him to six years in prison. Lehrfeld again appealed, and we consolidated his appeal from the community-control violation with his appeal from the June 1999 burglary conviction. On appeal, Lehrfeld challenged his trial counsel's effectiveness and the weight and sufficiency of the evidence to support his conviction. Finding no merit to any aspect of the challenges presented on appeal, we affirmed the judgments of conviction. See *State v. Lehrfeld* (June 28, 2000), 1st Dist. Nos. C-990754 and C-990501.

{¶3} In October of 2002, Lehrfeld filed with the common pleas court the first of three motions seeking relief under Civ.R. 60(B) from the September 1999 judgment of conviction, on the ground that the trial court, when it had sentenced him to community control for burglary in June of 1999, had failed to advise him of the specific prison term that would be imposed as a sanction for violating his community control. From the entry denying the third of these motions, Lehrfeld has appealed.

II

{¶4} On appeal, Lehrfeld advances two assignments of error. The assignments of error, when reduced to their essence, challenge the denial of his Civ.R. 60(B) motion. This challenge is untenable.

A.

{¶5} The state contends that the court below properly overruled Lehrfeld's Civ.R. 60(B) motion, because Civ.R. 60(B) does not apply to criminal proceedings, and because, to the extent that the motion may be cognizable as a postconviction petition, the claim was barred under the doctrine of res judicata.

{¶6} We reject at the outset the state's suggestion that Lehrfeld's Civ.R. 60(B) motion may be reviewed as an R.C. 2953.21 petition for postconviction relief. Only "an irregular 'no-name' motion[.]" i.e., a motion that "fails to delineate specifically" the statute or rule under which relief is sought, may be "classif[ied]" or "categorized by a court in order for the court to know the criteria by which the motion should be judged." *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, at ¶10. In the proceedings below, Lehrfeld unambiguously invoked Civ.R. 60(B) in seeking relief from the prison sentence imposed for his community-control violation. Therefore, Lehrfeld's motion may not be recast as, or reviewed under the standards applicable to, a postconviction petition. Contra *State v. Szerlip*, 5th Dist. No. 02CA45, 2003-Ohio-6954; *State v. Palmer*, 2nd Dist. No. 18778, 2001-Ohio-1393.

{¶7} We also reject the proposition that Civ.R. 60(B) cannot afford a criminal defendant relief from a judgment of conviction. Crim.R. 57(B) provides that "[i]f no procedure is specifically prescribed by rule, [a] court may proceed in any lawful manner

not inconsistent with these rules of criminal procedure, and *shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists.*" (Emphasis added.) Thus, the criminal rules contemplate resort to the civil rules for procedures not anticipated by the criminal rules. See *State v. Plassman*, 6th Dist. No. F-03-017, 2004-Ohio-279; *State v. Scruggs*, 10th Dist. No. 02AP-621, 2003-Ohio-2019; *State v. Riggs* (Oct. 4, 1993), 4th Dist. Nos. 503 and 506. Contra *State v. Bluford*, 8th Dist. No. 83112, 2003-Ohio-6181; *State v. Szerlip*, supra; *State v. Palmer*, supra.

B.

{¶8} In the proceedings below, Lehrfeld sought relief under Civ.R. 60(B) from the six-year prison term imposed in September of 1999 for his violation of the conditions of his community control. He argued in support of his motion that the trial court could not have imposed a prison term for his community-control violation, because the court, when it had sentenced him to community control in June of 1999, had failed, in contravention of R.C. 2929.19(B)(5), to advise him of the specific prison term that it would impose if he violated the conditions of his community control.

{¶9} R.C. 2929.19(B)(5) requires a trial court, when sentencing a defendant to community control, to notify the defendant of "the specific prison term that may be imposed as a sanction for [a] violation" of a condition of his community control. In *State v. Mynhier* (Sept. 28, 2001), 1st Dist. No. C-000849, we relied, in part, upon our decision in *State v. Craig* (1998), 130 Ohio App.3d 639, 720 N.E.2d 966, to hold that the sentencing court had satisfied R.C. 2929.19(B)(5), when the court, in sentencing Mynhier to community control, had explained to the defendant the maximum sentence of imprisonment that could be imposed for a violation of a condition of his community

control. The rule of substantial compliance set down in *Mynhier* was overturned a year later in *State v. Giles*, 1st Dist. No. C-010582, 2002-Ohio-3297. In *Giles*, we demanded “literal compliance with R.C. 2929.19(B)(5) * * * as a precondition to imposing a prison sentence for a violation of [a] community-control sanction[.]”¹ Thus, we held that R.C. 2929.19(B)(5) precluded the trial court from sentencing Giles to prison for violating her community control, because the court had failed, when imposing the community-control sanction, to indicate the “specific prison term” that it would impose if she violated a condition of her community control.

{¶10} The court below, in sentencing Lehrfeld to community control, offered nothing in the way of an explanation of the consequences to Lehrfeld of his violation of the conditions of his community control. Not only did the court not “literal[ly]” comply with R.C. 2929.19(B)(5), as *Giles* now requires, it did not even substantially comply with the statute, as contemplated by our earlier decisions in *Craig* and *Mynhier*.

{¶11} The statutory violation upon which Lehrfeld based his Civ.R. 60(B) motion was thus manifest on the record. Therefore, Lehrfeld could have raised the matter in his consolidated appeals from his June 1999 burglary conviction and his September 1999 community-control violation. Consequently, Crim.R. 57(B) did not operate to permit Lehrfeld to seek relief from the September 1999 sentence under Civ.R. 60(B).

III

{¶12} We, therefore, hold that the common pleas court properly overruled Lehrfeld’s Civ.R. 60(B) motion. Accordingly, we overrule the assignments of error and affirm the judgment of the court below.

¹ A conflict on this issue among the appellate districts has been certified to the Ohio Supreme Court. See

JUDGMENT AFFIRMED.

WINKLER, P.J., DOAN and GORMAN, JJ., CONCUR.

Please Note:

The court has placed of record its own entry in this case on the date of the release of this Decision.

State v. Brooks, 100 Ohio St.3d 1407, 796 N.E.2d 535, 2003-Ohio-4948.

STATE OF OHIO
COUNTY OF LAKE

)
)SS.
)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

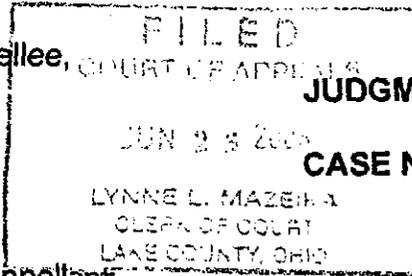
STATE OF OHIO,

Plaintiff-Appellee,

- vs -

LARRY M. SCHLEE,

Defendant-Appellant.



JUDGMENT ENTRY

CASE NO. 2005-L-105

For the reasons stated in the opinion of this court, appellant's assignments of error are not well-taken. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

Donald R. Ford

PRESIDING JUDGE DONALD R. FORD

FOR THE COURT

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

VOL 0065 PAGE 0512

STATE OF OHIO,

:

OPINION

Plaintiff-Appellee, **FILED:**
COURT OF APPEALS **CASE NO. 2005-L-105**
- vs -
LARRY M. SCHLEE, JUN 14 2006
Defendant-Appellant, **DOCKETED**
LYNNE L. MAZEIKA
CLERK OF COURT
LAKE COUNTY, OHIO

Civil Appeal from the Court of Common Pleas, Case No. 92 CR 000517.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Craig A. Swenson*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

James S. Callender, Jr., McNamara, Hanrahan, Callender & Loxterman, 8440 Station Street, Mentor, OH 44060 (For Defendant-Appellant).

DONALD R. FORD, P.J.

{¶1} Appellant, Larry M. Schlee, appeals from the June 14, 2005 judgment entry of the Lake County Court of Common Pleas, dismissing his motion for relief from judgment.

{¶2} The instant matter arises from the conviction and sentence of appellant on one count of aggravated murder for the murder of Frank Carroll ("Carroll") in 1980, in which appellant was given a life sentence. A brief review of the procedural history of this case is necessary.

{¶3} On September 28, 1992, appellant was initially indicted by the Lake County Grand Jury on one count of aggravated murder in violation of R.C. 2903.01.¹ He pleaded not guilty and the matter proceeded to a jury trial. On March 31, 1993, the jury returned a guilty verdict, and appellant was sentenced to life imprisonment with parole eligibility after twenty years.

{¶4} Appellant appealed his conviction to this court. In *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, we affirmed his conviction.

{¶5} Subsequently, appellant filed two motions for postconviction relief. His first motion for postconviction relief was filed on September 23, 1996, alleging ineffective assistance of counsel. Pursuant to its May 15, 1997 judgment entry, the trial court overruled appellant's petition without holding an evidential hearing. Appellant appealed to this court. In *State v. Schlee* (Dec. 31, 1998), 11th Dist. No. 97-L-121, 1998 Ohio App. LEXIS 6363, we reversed and remanded the matter to the trial court to file findings of fact and conclusions of law that addressed each of his claims that were not barred by res judicata.

{¶6} While the foregoing appeal was still pending, appellant filed a second petition for postconviction relief on December 18, 1997, alleging that he had newly discovered evidence to prove that appellee, the state of Ohio, committed a Crim.R. 16 discovery violation during his trial. Appellee filed a motion to dismiss appellant's second petition. Pursuant to its July 22, 1998 judgment entry, the trial court denied appellant's petition for postconviction relief, and granted appellee's motion to dismiss without an evidential hearing. The trial court determined that it could not entertain the petition

1. Although Carroll was murdered in 1980, his body was discovered in New York in 1981, and remained unidentified until 1992.

because the submission failed to satisfy the requirements governing a second or successive petition for postconviction relief under R.C. 2953.23. From that judgment, appellant filed another notice of appeal with this court on August 21, 1998, which we affirmed in *State v. Schlee* (Dec. 17, 1999), 11th Dist. No. 98-L-187, 1999 Ohio App. LEXIS 6136.

{¶7} With respect to appellant's first petition for postconviction relief, on remand, the trial court issued findings of fact and conclusions of law and entered a judgment entry on June 21, 1999. In that entry, the trial court addressed the three claims that were not barred by res judicata, and ultimately dismissed appellant's petition without holding an evidential hearing because he failed to demonstrate substantive grounds for relief on his ineffective assistance of counsel claims. Appellant timely filed an appeal on July 21, 1999. This court in *State v. Schlee* (Sept. 22, 2000), 11th Dist. No. 99-L-112, 2000 Ohio App. LEXIS 4354, affirmed the judgment of the trial court.

{¶8} On July 2, 2002, appellant filed a motion for new trial based upon newly discovered evidence and prosecutorial misconduct. The trial court granted this motion on August 21, 2002. Appellee filed a notice of appeal and a motion for leave to appeal on September 20, 2002, but this court denied its motion on March 24, 2003. On June 19, 2003, the trial court set a trial date of November 3, 2003. On October 3, 2003, upon joint motion, the trial court continued the new trial until March 8, 2004.²

{¶9} The new trial began as scheduled on March 8, 2004. Prior to commencement of the trial, appellant filed a motion to dismiss the charge on speedy trial grounds. The trial court denied appellant's motion and proceeded with the trial. On

2. The trial court permitted the delay for the purpose of DNA testing.

March 19, 2004, the jury returned a guilty verdict. On March 26, 2004, appellant was sentenced to life imprisonment with parole eligibility after fifteen years.

{¶10} On April 2, 2004, appellant filed a motion for new trial, which was overruled by the trial court on April 15, 2004, after a hearing. Appellant timely filed a notice of appeal. This court affirmed appellant's conviction in *State v. Schlee*, 11th Dist No. 2004-L-070, 2005-Ohio-5117.

{¶11} On October 26, 2004, appellant filed an application for DNA testing. Pursuant to its November 16, 2004 judgment entry, the trial court denied his application. The trial court determined, pursuant to R.C. 2953.74, that a prior inconclusive DNA test was conducted regarding the same biological evidence that appellant sought to have tested. Appellant filed a timely notice of appeal, alleging that the trial court erred by denying his application for DNA testing. We affirmed the trial court's judgment in *State v. Schlee*, 11th Dist. No. 2004-L-207, 2006-Ohio-2391.

{¶12} On March 16, 2005, appellant filed a pro se motion for relief from judgment, pursuant to Civ.R. 60(B), in which he alleged violations of his Fifth, Sixth, and Fourteenth Amendment rights, including prosecutorial misconduct and the right to a fair trial. Appellee filed a motion to dismiss on April 8, 2005.³ On April 21, 2005, appellant filed a pro se motion to have appellee's motion to dismiss stricken from the record as well as a pro se motion for default judgment. Appellee filed briefs in opposition on May 5, 2005.⁴ On May 23, 2005, appellant filed a pro se motion to strike and to renew his motion for default judgment. Pursuant to its May 24, 2005 judgment entry, the trial court ordered appellee to serve upon appellant, instead of his counsel of record, all past and

3. Counsel of record for appellant, Attorney Carolyn Kucharski ("Attorney Kucharski") and Attorney Charles Grieshammer ("Attorney Grieshammer"), were served appellee's motion to dismiss.

4. Appellee served appellant's counsel of record with the briefs in opposition.

future motions and briefs relating to his motion for relief from judgment. Appellee complied with the trial court's order on May 26, 2005.

{¶13} Pursuant to its June 14, 2005 judgment entry, the trial court determined the following: appellee's motion to dismiss was granted; appellant's motion for relief from judgment was dismissed; appellant's motion to have appellee's motion to dismiss was denied; appellant's motion for default judgment was denied; and appellant's motion to strike and renew his motion for default judgment was denied. It is from that judgment that appellant filed a timely notice of appeal and makes the following assignments of error:⁵

{¶14} “[1.] The trial court erred and/or abused its discretion to the prejudice of [appellant] when it ruled on his Civ.R. 60(B) motion.

{¶15} “[2.] The trial court erred and/or abused its discretion to the prejudice of [appellant] when it recast his Civ.R. 60(B) as, and reviewed it under the standards applicable to a postconviction petition.

{¶16} “[3.] The trial court erred and/or abused its discretion to the prejudice of [appellant] when it granted [appellee's] untimely responses.”

{¶17} In his first assignment of error, appellant argues that the trial court erred and/or abused its discretion when it ruled on his Civ.R. 60(B) motion. He alleges that

5. Prior to filing his appeal, on June 20, 2005, appellant filed a pro se motion to vacate, in part, the trial court's May 24, 2005 judgment entry, as well as to strike appellee's answers from the record, and to stay further proceedings. On June 23, 2005, appellant filed a pro se motion to vacate the trial court's June 14, 2005 judgment entry regarding his Civ.R. 60(B) motion. Appellee filed briefs in opposition on June 28, 2005, and on July 5, 2005. Pursuant to its July 8, 2005 judgment entry, the trial court denied appellant's June 20, 2005 motion. Also, on July 8, 2005, appellant filed a pro se motion in response to appellee's brief in opposition filed June 28, 2005, as well as a motion to renew his motions to vacate filed June 20 and June 23, 2005. Appellant filed a timely notice of appeal on July 11, 2005. On August 17, 2005, appellant filed with this court a pro se motion to dismiss his notice of appeal and to vacate the trial court's June 14, 2005 judgment entry because of a lack of jurisdiction. Appellee filed a brief in opposition on August 29, 2005. On September 7, 2005, appellant filed a pro se reply brief. Pursuant to this court's January 23, 2006 judgment entry, we overruled appellant's August 17, 2005 pro se motion to vacate the appealed judgment.

the trial court did not possess subject matter jurisdiction to take any action during the pendency of his direct appeal, *Schlee*, supra, 11th Dist. No 2004-L-207, 2006-Ohio-2391, until jurisdiction was remanded by this court.

{¶18} In his second assignment of error, appellant contends that the trial court erred and/or abused its discretion when it recast his Civ.R. 60(B) as, and reviewed it under, the standards applicable to a postconviction petition. He stresses that the trial court did not have jurisdiction to take any action; it was improper for the trial court to recast his motion for relief from judgment as a postconviction petition; and a Civ.R. 60(B) motion was the proper vehicle for the quality of evidence presented.

{¶19} Because appellant's first and seconds assignments of error are interrelated, we will address them in a consolidated fashion.

{¶20} "[W]ith respect to a Civ.R. 60(B) motion for relief from judgment, an appeal divests the trial court of jurisdiction to consider the motion, and *** "jurisdiction may be conferred on the trial court only through an order by the reviewing court remanding the matter for consideration of the Civ.R. 60(B) motion.'" *State v. Lorraine* (Dec. 12, 1997), 11th Dist. No. 96-T-5494, 1997 Ohio App. LEXIS 5564, at 6-7. However, petitions for postconviction relief, as codified in R.C. 2953.21(C), provides that trial courts "shall consider a petition that is timely filed *** even if a direct appeal of the judgment is pending."

{¶21} This court stated in *State v. Harrison*, 11th Dist. No. 2004-P-0068, 2005-Ohio-4212, at ¶10-12:

{¶22} "Ohio courts have taken a variety of approaches regarding the application of Civ.R. 60 to criminal proceedings. Some courts have simply held that it does not apply to criminal proceedings. See *State v. Bluford*, 8th Dist. No. 83112, 2003-Ohio-

6181, at ¶15. Other courts have ruled that a Civ.R. 60 motion filed in a criminal matter must be treated as [a] motion for postconviction relief. *State v. Szerlip*, 5th Dist. No. 02CA45, 2003-Ohio-6954, at ¶22. However, for the reasons that follow, we hold Civ.R. 60 may be applied in criminal cases under certain circumstances.

{¶23} "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists." Crim.R. 57(B). Therefore, if the criminal rules address an issue, the civil rules do not apply in criminal matters, but the civil rules may apply where there is no criminal rule on point. *State v. Belknap*, 11th Dist. No. 2002-P-0021, 2004-Ohio-5636, at ¶25. See, also, e.g., *State v. Bush*, 11th Dist. No. 97-T-0035, 1998 Ohio App. LEXIS 427, at 4, fn.1. As such, courts have held that Crim.R. 57 provides for the application of Civ.R. 60 in criminal cases in some circumstances. See *State v. Plassman*, 6th Dist. No. F-03-017, 2004-Ohio-279, at ¶7; *State v. Lehrfeld*, 1st Dist. No. C-030390, 2004-Ohio-2277, at ¶7; See, also, e.g., *State v. Bush*, at 4, fn.1

{¶24} "Accordingly, in certain circumstances, Civ.R. 60 may be applicable to criminal matters. ***"

{¶25} The Supreme Court of Ohio in *State v. Reynolds* (1997), 79 Ohio St.3d 158, 160, stated: "[w]here a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21." Also, it is well-settled that prosecutorial misconduct may support a R.C. 2953.21 petition for postconviction relief.

State v. Singerman (1996), 115 Ohio App.3d 273, 276, citing *State v. Walden* (1984), 19 Ohio App.3d 141.

{¶26} In the case at bar, the trial court properly determined that appellant's pro se motion for relief from judgment, despite its caption, was really a petition for postconviction relief under R.C. 2953.21.

{¶27} In its June 14, 2005 judgment entry, the trial court, citing to *Reynolds*, supra, stated that "because [appellant's] motion for relief from judgment pursuant to Civ.R. 60(B) is a motion filed by a criminal defendant, subsequent to the filing of a direct appeal, seeking vacation of the judgment on the basis that his constitutional rights have been violated, it meets the definition of a petition for postconviction relief under R.C. 2953.21. Because there is an applicable statute, it is not necessary to look to the civil rules in this situation." (Footnote omitted.) The trial court further indicated that "Civ.R. 60(B) motions have been permitted when a trial court overrules a petition for postconviction relief pursuant to R.C. 2953.21 to seek reconsideration of the order overruling the petition because postconviction relief is a civil proceeding. [Appellant's] motion in this case does not seek reconsideration of an order overruling a petition for postconviction relief." (Footnote omitted.)

{¶28} Additionally, the trial court stated that "R.C. 2953.21(A)(2) provides that a petition for postconviction relief shall be filed no later than one hundred eighty days after the date the trial transcript is filed in the court of appeals in the direct appeal. The transcript was filed in the court of appeals on June 2, 2004. The statute of limitations for a petition for postconviction relief expired on November 29, 2004. Therefore, [appellant's] petition for postconviction relief is untimely and cannot be considered by the court unless the petitioner shows that he was unavoidably prevented from discovery

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0065 PAGE 0519

of the facts upon which the petition is based, or that the United States Supreme Court has recognized a new federal or state right that applies retroactively, and shows by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the petitioner guilty of the offense. [Appellant] has not alleged that these circumstances exist. Additionally, [appellant's] brief indicates that the facts upon which he bases his petition were known to him prior to the expiration of the time period for the filing of a petition for postconviction relief. Thus, the court finds that [appellant's] petition for postconviction relief is untimely, and is hereby dismissed." (Footnote omitted.)

{¶29} We note that appellant's pro se motion for relief from judgment includes alleged instances of prosecutorial misconduct occurring prior to his 1993 and 2004 jury trials. Appellant had an opportunity in his direct DNA appeal and/or post-conviction exercises, which was a completely separate subject matter having no relationship whatsoever with the issues raised in this appeal, to address the alleged prejudicial and constitutional violations committed by appellee. See *Reynolds*, *Singerman*, and *Walden*, supra. The trial court properly did not resort to the Civil Rules of Procedure, and treated appellant's Civ.R. 60(B) motion as a petition for postconviction relief. As such, the trial court was not divested of jurisdiction when it ruled on appellant's Civ.R. 60(B) motion. See R.C. 2953.21(C). Also, based on the record, the trial court did not abuse its discretion by dismissing as untimely appellant's petition for postconviction relief. Further, appellant failed to show that he was unavoidably prevented from discovery of the facts upon which his petition was based.

{¶30} Appellant's first and second assignments of error are without merit.

{¶31} In his third assignment of error, appellant contends that the trial court abused its discretion when it granted appellee's untimely responses, filed on April 8, 2005, and on May 5, 2005. He claims that appellee failed to serve him directly with those responses. Appellant stresses that the trial court erred when it allowed appellee to put its untimely responses on the record, and when it considered them in making its decision. He argues that the trial court did not have jurisdiction to take any action or the authority to allow appellee to file and serve its late responses.

{¶32} Crim.R. 49(B) provides: "[w]henver under these rules or by court order service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon the party shall be made in the manner provided in Civil Rule 5(B)."

{¶33} In the instant matter, the record establishes that appellee complied with its service requirements, pursuant to Crim.R. 49(B), when it initially served its responses in a timely manner upon appellant's counsel of record, Attorney Kucharski and Attorney Grieshammer. Because there is nothing in the record that appellant ever dismissed his counsel of record, appellee properly served its responses upon his counsel of record until the trial court ordered it to do otherwise.

{¶34} Again, on March 16, 2005, appellant filed a pro se motion for relief from judgment pursuant to Civ.R. 60(B). Appellee filed a motion to dismiss on April 8, 2005, in which it served appellant's counsel of record. On April 21, 2005, appellant filed a pro se motion to have appellee's motion to dismiss stricken from the record as well as a pro se motion for default judgment. Appellee filed briefs in opposition on May 5, 2005, again serving upon appellant's counsel of record. On May 23, 2005, appellant filed a

pro se motion to strike and to renew his motion for default judgment. According to its May 24, 2005 judgment entry, the trial court ordered appellee, pursuant to Crim.R. 49(B), to serve upon appellant, instead of his counsel of record, all past and future motions and briefs relating to his motion for relief from judgment. Appellee promptly complied with the trial court's order on May 26, 2005. Thus, appellee's responses were not untimely. We do not agree with appellant that the trial court should have stricken them from the record.

{¶35} Appellant's third assignment of error is without merit.

{¶36} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Lake County Court of Common Pleas is affirmed.

WILLIAM M. O'NEILL, J.,

DIANE V. GRENDALL, J.,

concur.

STATE OF OHIO
COUNTY OF LAKE

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IN THE COURT OF APPEALS
ELEVENTH DISTRICT

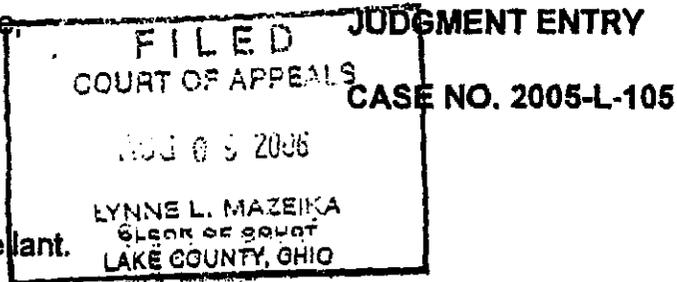
STATE OF OHIO,

Plaintiff-Appellee,

- vs -

LARRY M. SCHLEE,

Defendant-Appellant.



On July 6, 2006, appellant, Larry M. Schlee, filed a motion pursuant to App.R. 25 to certify this case to the Supreme Court of Ohio on the basis of a conflict. Appellant asserts that this court's decision in *State v. Schlee*, 11th Dist. No. 2005-L-105, 2006-Ohio-3208, is in conflict with a decision of the First District Court of Appeals, *State v. Lehrfeld*, 1st Dist. No. C-030390, 2004-Ohio-2277.

Appellant contends that in *Lehrfeld*, the court determined that a Civ.R. 60(B) motion shall not be reviewed as an R.C. 2953.21 petition for postconviction relief.

The First District in *Lehrfeld* stated at ¶6:

"[w]e reject at the outset the state's suggestion that *Lehrfeld's* Civ.R. 60(B) motion may be reviewed as an R.C. 2953.21 petition for postconviction relief. Only 'an irregular "no-name" motion(),' i.e., a motion that 'fails to delineate specifically' the statute or rule under which relief is sought, may be 'classified' or 'categorized by a court in order for the court to know the criteria by which the

motion should be judged.' *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993 ***, at ¶10. In the proceedings below, Lehrfeld unambiguously invoked Civ.R. 60(B) in seeking relief ***. Therefore, Lehrfeld's motion may not be recast as, or reviewed under the standards applicable to, a postconviction petition. **** (Citations and parallel citations omitted.)

In *Schlee*, supra, at ¶22, this court, quoting *State v. Hamison*, 11th Dist. No. 2004-P-0068, 2005-Ohio-4212, at ¶10, stated:

"Ohio courts have taken a variety of approaches regarding the application of Civ.R. 60 to criminal proceedings. Some courts have simply held that it does not apply to criminal proceedings. See *State v. Bluford*, 8th Dist. No. 83112, 2003-Ohio-6181, at ¶15. Other courts have ruled that a Civ.R. 60 motion filed in a criminal matter must be treated as (a) motion for postconviction relief. *State v. Szerlip*, 5th Dist. No. 02CA45, 2003-Ohio-6954, at ¶22. However, *** we hold Civ.R. 60 may be applied in criminal cases under certain circumstances."

In *Schlee*, we indicated that **** the trial court properly determined that appellant's pro se motion for relief from judgment [pursuant to Civ.R. 60(B)], despite its caption, was really a petition for postconviction relief under R.C. 2953.21." *Id.* at ¶26. This court also held that "the trial court properly did not resort to the Civil Rules of Procedure, and treated appellant's Civ.R. 60(B) motion as a petition for postconviction relief." *Id.* at ¶29.

Based upon the foregoing conflict, we certify the following issue for review, as presented by appellant, to the Supreme Court of Ohio:

"Whether the trial court can recast [a]ppellant's Motion For Relief From Judgment as a petition for postconviction relief when it has been unambiguously presented as a Civil Rule 60(B) [motion]."

Appellant's motion to certify a conflict is granted.

Donald R. Ford

PRESIDING JUDGE DONALD R. FORD

WILLIAM M. O'NEILL, J.,

DIANE V. GRENDALL, J.,

concur.

postconviction relief.² Finally, the court notes that “[c]ourts have allowed the use of Civ.R. 60(B) motion in a criminal case in very limited circumstances.”³ Civ.R. 60(B) motions have been permitted when a trial court overrules a petition for postconviction relief pursuant to R.C. 2953.21 to seek reconsideration of the order overruling the petition because postconviction relief is a civil proceeding.⁴ The defendant’s motion in this case does not seek reconsideration of an order overruling a petition for postconviction relief. Therefore, the court finds that the defendant’s motion for relief from judgment is really a petition for postconviction relief under R.C. 2953.21.

R.C. 2953.21(A)(2) provides that a petition for postconviction relief shall be filed no later than one hundred eighty days after the date the trial transcript is filed in the court of appeals in the direct appeal. The transcript was filed in the court of appeals on June 2, 2004. The statute of limitations for a petition for postconviction relief expired on November 29, 2004. Therefore, the defendant’s petition for postconviction relief is untimely and cannot be considered by the court unless the petitioner shows that he was unavoidably prevented from discovery of the facts upon which the petition is based, or that the United State Supreme Court has recognized a new federal or state right that applies retroactively, and shows by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the petitioner guilty of the offense.⁵ The petitioner has not alleged that these circumstances exist. Additionally, petitioner’s brief indicates that the facts upon which he bases his petition were known to him prior to the expiration of the time period for the filing of a petition for postconviction relief. Thus, the court finds that the defendant’s petition for postconviction relief is untimely, and is hereby dismissed.

Accordingly, it is the order of the court that the state’s motion to dismiss is hereby granted and the defendant’s motion for relief from judgment is hereby dismissed. It is the further order of the court that the defendant’s motion to have the state’s motion to dismiss stricken, motion for default, and motion to strike and renew motion for default are hereby denied.

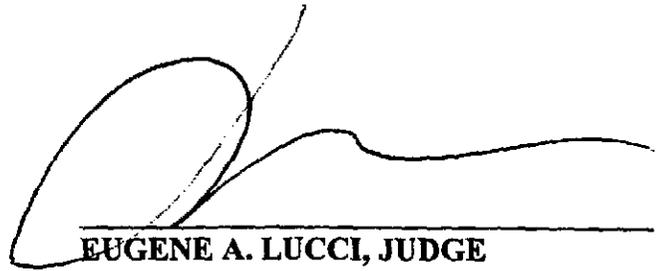
² *State v. Kirkland* (Jan. 24, 2000), Stark App. No. 1999CA00308.

³ *State v. Rojas* (Jul. 1, 2004), Tuscarawas App. No. 2004-AP-03-0018, 2004-Ohio-3642.

⁴ *Id.*

⁵ R.C. 2953.23(A).

IT IS SO ORDERED.



EUGENE A. LUCCI, JUDGE

c: Eric A. Condon, Esq., Assistant Prosecuting Attorney
Larry Schlee, pro se

FINAL APPEALABLE ORDER
Clerk to serve pursuant
to Civ.R. 58 (B)

Constitution of The United States of America
Amendment 14

Sec. 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of The State of Ohio
Article I. Bill Of Rights

§ 16. Redress in courts

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

28 U.S.C. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

R.C. 2953.21. Petition for postconviction relief

(A) (1) (a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of 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, and for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. 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 the appeal.

(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to

maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of the court. The clerk of the court in which the petition is filed immediately shall forward a copy of the petition to the prosecuting attorney of that county.

(C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

(F) At any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings. The petitioner may amend the petition with leave of court at any time thereafter.

(G) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (E) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. The court also may make supplementary orders to the relief granted, concerning such matters as arraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (E) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(H) Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(I) (1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (I)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (I)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (I) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06, 120.16, 120.26, or 120.33 of the Revised Code and those appointed counsel meet the requirements of division (I)(2) of this section.

(J) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

R.C. 2953.23. Time for filing petition; appeals

(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

(1) Both of the following apply:

(a) 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 persons in the petitioner's situation, and the petition asserts a claim based on that right.

(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

(2) The petitioner was convicted of a felony, the petitioner is an inmate for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.

As used in this division, "actual innocence" has the same meaning as in division (A)(1)(b) of section 2953.21 of the Revised Code.

(B) An order awarding or denying relief sought in a petition filed pursuant to section 2953.21 of the Revised Code is a final judgment and may be appealed pursuant to Chapter 2953. of the Revised Code.

Ohio Rule of Civil Procedure 60. Relief From Judgment or Order

(A) Clerical mistakes. —Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc. —On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

Ohio Rule of Criminal Procedure 57. Rule of Court; Procedure Not Otherwise Specified

(A) Rule of court.

(1) The expression “rule of court” as used in these rules means a rule promulgated by the Supreme Court or a rule concerning local practice adopted by another court that is not inconsistent with the rules promulgated by the Supreme Court and is filed with the Supreme Court.

(2) Local rules shall be adopted only after the court gives appropriate notice and an opportunity for comment. If the court determines that there is an immediate need for a rule, the court may adopt the rule without prior notice and opportunity for comment, but promptly shall afford notice and opportunity for comment.

(B) Procedure not otherwise specified. —If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists.