

IN THE SUPREME COURT OF OHIO
2007

STATE OF OHIO,

Case No. 06-1608

Plaintiff-Appellee,

-vs-

On Certified Conflict
from the Lake County
Court of Appeals, Eleventh
Appellate District

LARRY M. SCHLEE,

Court of Appeals
No. 2005-L-105

Defendant-Appellant.

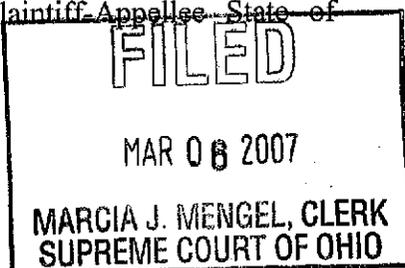
**BRIEF OF *AMICUS CURIAE* FRANKLIN COUNTY PROSECUTOR RON O'BRIEN
IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF <i>AMICUS</i> INTEREST	1
STATEMENT OF FACTS	1
ARGUMENT	2
PROPOSITION OF LAW	
THE STANDARDS FOR POST-CONVICTION RELIEF GOVERN ANY POST-JUDGMENT MOTION THAT CONSTITUTES A COLLATERAL CHALLENGE TO THE VALIDITY OF THE CONVICTION. A MOTION FOR RELIEF FROM JUDGMENT RELYING UPON CIV.R. 60(B) IS A COLLATERAL CHALLENGE UPON THE CONVICTION AND THEREFORE IS APPROPRIATELY TREATED AS A POST-CONVICTION PETITION.	2
A. An Improvident Case	3
B. Finality Concerns and Post-Conviction Limits	5
C. Defendant Attempted to Circumvent Post-Conviction Limits	7
D. Crim.R. 57(B) is Inapplicable	8
E. R.C. 2953.21(J) is Applicable	9
1. Defendant's Motion "Challenged" the Conviction	10
2. The Motion Constituted a "Collateral Challenge"	11
F. <i>Bush</i> is Distinguishable	15
G. <i>Bush</i> is Flawed and Should Not Be Extended Beyond its Narrow Context	16
H. No Separation of Powers Problem	22
I. <i>Gonzalez v. Crosby</i>	26

J. Castro is Inapposite	28
CONCLUSION	31
CERTIFICATE OF SERVICE	32

TABLE OF AUTHORITIES

CASES

<i>Barker v. Sacks</i> (1962), 173 Ohio St. 413.....	5
<i>Castro v. United States</i> (2003), 540 U.S. 375.....	28, 29, 30
<i>Chapman v. United States</i> (1991), 500 U.S. 453	21
<i>Crouser v. Crouser</i> (1988), 39 Ohio St.3d 177	22, 23, 24
<i>Doe v. Trumbull Cty. Children Serv. Bd.</i> (1986), 28 Ohio St.3d 128.....	4, 6
<i>Gonzalez v. Crosby</i> (2005), 545 U.S. 524	26, 27
<i>Logan v. Zimmerman Brush Co.</i> (1982), 455 U.S. 422	25
<i>Massachusetts v. United States</i> (1948), 333 U.S. 611	23
<i>Michel v. Louisiana</i> (1955), 350 U.S. 91.....	25
<i>Miley v. STS Systems</i> , 153 Ohio App.3d 752, 2003-Ohio-4409.....	11
<i>Morgan v. Eads</i> , 104 Ohio St.3d 142, 2004-Ohio-6110	11, 12, 18
<i>People v. Ingram</i> (1992), 439 Mich. 288, 484 N.W.2d 241.....	11
<i>People v. Wiedemer</i> (Colo. 1993), 852 P.2d 424.....	18, 19, 23, 24
<i>Pliler v. Ford</i> (2004), 542 U.S. 225	29
<i>Sears v. Weimer</i> (1944), 143 Ohio St. 312.....	20

<i>Security Ins. Co. v. Regional Transit Auth.</i> (1982), 4 Ohio App.3d 24	11
<i>State v. Bush</i> , 96 Ohio St.3d 235, 2002-Ohio-3993	passim
<i>State v. Calhoun</i> (1999), 86 Ohio St.3d 279	12
<i>State v. Frase</i> (1999), 87 Ohio St.3d 1412	9
<i>State v. Gill</i> (1992), 63 Ohio St.3d 53	25
<i>State v. Hankerson</i> (1989), 52 Ohio App.3d 73	3
<i>State v. Keenan</i> (1998), 81 Ohio St.3d 133	4
<i>State v. Lehrfeld</i> , 1 st Dist. No. C-030390, 2004-Ohio-2277	3
<i>State v. Lloyd</i> (1966), 8 Ohio App.2d 155	12
<i>State v. Perry</i> (1967), 10 Ohio St.2d 175	7
<i>State v. Reynolds</i> (1997), 79 Ohio St.3d 158	15
<i>State v. Smith</i> , 9 th Dist. No. 04CA008546, 2005-Ohio-2571	24
<i>State v. Steffen</i> (1994), 70 Ohio St.3d 399	6, 25
<i>State v. Sway</i> (1984), 15 Ohio St.3d 112	21
<i>State v. Szefcyk</i> (1996), 77 Ohio St.3d 93	7
<i>State v. Wilson</i> (1997), 77 Ohio St.3d 334	20, 21
<i>State, ex rel. Wall v. Grossman</i> (1980), 61 Ohio St.2d 4	5
<i>United States v. Benchimol</i> (1985), 471 U.S. 453	11
<i>United States v. Harrington</i> (C.A. 9, 2005), 410 F.3d 598	11
<i>United States v. Morena</i> (1918), 245 U.S. 392	25
<i>United States v. Title Ins. & Trust Co.</i> (1924), 265 U.S. 472	23

Whitelock v. Gilbane Bldg. Co. (1993), 66 Ohio St.3d 5943
Wilson v. Rogers (1993), 68 Ohio St.3d 130.....5

STATUTES

28 U.S.C. § 2255.....11, 28, 29
Former R.C. 2953.21(I).....6
R.C. 2953.211, 9
R.C. 2953.21(A)(1)(a).....12
R.C. 2953.21(A)(2).....5
R.C. 2953.21(C).....13
R.C. 2953.21(E)13
R.C. 2953.21(G).....13
R.C. 2953.21(J) passim
R.C. 2953.23(A).....1, 5
R.C. 2953.23(A)(1)(a).....5
R.C. 2953.23(A)(1)(b)6

OTHER AUTHORITIES

146 Ohio Laws, Part IV, at 78155
Amended Substitute Senate Bill 4.....5, 6, 13
Black’s Law Dictionary (7th ed., 1999).....17
Black’s Law Dictionary (8th ed., 2004).....17

RULES

Civ.R. 60(B) passim
Civ.R. 60(B)(4) 22, 23
Civ.R. 60(B)(5) 22
Crim.R. 12(D) 3
Crim.R. 32.1 8, 16
Crim.R. 33 8
Crim.R. 34 8
Crim.R. 35 8
Crim.R. 57(B) 8, 9
Colo. Crim.R. 35(c) 18
Fed.R.Civ.P. 60(B) 26

CONSTITUTIONAL PROVISIONS

Article IV, Section 4(B), Ohio Constitution 24

STATEMENT OF *AMICUS* INTEREST

The Office of the Franklin County Prosecutor prosecutes thousands of cases every year. Current Franklin County Prosecutor Ron O'Brien therefore has a strong interest in issues implicating the finality of felony convictions and the availability of post-judgment relief and regarding whether relief will be available outside the confines allowed by the post-conviction relief statutes in R.C. 2953.21 et seq.

The issue certified here is whether a common pleas court may treat a motion for relief from judgment under Civ.R. 60(B) as a post-conviction petition. Given R.C. 2953.21(J) and the strict standards in R.C. 2953.23(A) that should apply to post-judgment motions seeking the vacating or nullifying of a conviction, the common pleas court acted properly here in rejecting defendant's attempted end-run around the strict standards. In the interest of aiding this Court's review, Franklin County Prosecutor Ron O'Brien offers the following amicus brief in support of the position of the State.

STATEMENT OF FACTS

Amicus Franklin County Prosecutor Ron O'Brien adopts by reference the statement of facts set forth in the brief of plaintiff-appellee State of Ohio.

ARGUMENT

PROPOSITION OF LAW

THE STANDARDS FOR POST-CONVICTION RELIEF GOVERN ANY POST-JUDGMENT MOTION THAT CONSTITUTES A COLLATERAL CHALLENGE TO THE VALIDITY OF THE CONVICTION. A MOTION FOR RELIEF FROM JUDGMENT RELYING UPON CIV.R. 60(B) IS A COLLATERAL CHALLENGE UPON THE CONVICTION AND THEREFORE IS APPROPRIATELY TREATED AS A POST-CONVICTION PETITION.

Certified 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.

The chief flaw in defendant's brief is that it assumes a freedom that a defendant does not have. It assumes that a defendant is "master of his suit," but post-judgment motions are not causes of action, and defendant does not possess unfettered freedom to pick and choose when and how he will challenge his conviction. Concerns about delays in post-conviction litigation long ago caused the General Assembly and this Court to recognize that defendants should not control the timing and nature of post-conviction litigation.

The present brief will first address why it would be improvident to use this case as the vehicle to address the issue presented. The brief will then address why R.C. 2953.21(J) supports the action of the trial court, why the decision in *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, does not control here, and why, if Civ.R. 60(B) motions are to be entertained at all, they should be limited in the same way that the United States Supreme Court has limited them in federal habeas litigation.

A. An Improvident Case

This case represents a poor vehicle in which to address the certified question. It is doubtful that a certifiable “conflict” exists. While the reasoning of Eleventh District’s decision in the present case conflicts with reasoning in the First District’s decision in *State v. Lehrfeld*, 1st Dist. No. C-030390, 2004-Ohio-2277, “[i]t is not enough that the reasoning expressed in the opinions of the two courts of appeals be inconsistent; the judgments of the two courts must be in conflict.” *State v. Hankerson* (1989), 52 Ohio App.3d 73. The conflict must arise from conflicting *judgments*: “the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be ‘upon the same question.’” *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596 (emphasis sic). The judgments here do not conflict, as the First District in *Lehrfeld* had *affirmed* the lower court’s order denying relief, just as the Eleventh District *affirmed* the denial of relief in the present case. Certification of the conflict was improvident.

Moreover, even in a best-case scenario of defendant’s claims being addressed under standards for Civ.R. 60(B), those claims were not cognizable even under that rule. The “motion for relief from judgment” argued that a series of instances of prosecutorial misconduct had denied defendant’s right against double jeopardy and denied him due process by depriving him of his statutory right to speedy trial. (Trial Ct. Rec. 343) Defendant demanded the reversal of his conviction and the dismissal of his indictment. (*Id.*) But claims seeking dismissal are required to be raised before trial, see Crim.R. 12(D), and defendant provided no excuse for failing to raise these claims before trial. In fact, defendant conceded throughout his motion that he was aware *before* the 2004 retrial of the

purported instances of misconduct. (See, e.g., Motion, at 5-8 – citing, inter alia, his 2002 motion for new trial; see, also, Trial Ct. Rec. 345, State’s Motion to Dismiss, at 8) Defendant described a single instance of misconduct that he apparently was not aware of before trial, but that instance involved purported intimidation of an unnamed witness, and defendant conceded that the defense was aware of that purported issue *during* the 2004 retrial. (See Motion, at 9-10)

Given the knowledge of the defense regarding the purported prosecutorial misconduct before and/or during the 2004 trial, the double-jeopardy and due-process/speedy-trial claims should have been raised by motion before or during the 2004 trial, and if said motion was denied, the defense was duty-bound to appeal on those issues to the Court of Appeals. “A party may not use a Civ. R. 60(B) motion as a substitute for a timely appeal.” *Doe v. Trumbull Cty. Children Serv. Bd.* (1986), 28 Ohio St.3d 128, paragraph two of the syllabus.

Nor can a litigant obtain Civ.R. 60(B) relief by contending that the law has changed in his favor after judgment. *Doe*, at paragraph one of the syllabus. “There is simply no question that a change in the decisional law is not grounds for vacating a final judgment entered on the merits.” *Id.* at 130 (quoting federal district court case). Double jeopardy generally does not bar a new trial when that new trial is granted at the request of the defense, and this Court has repeatedly rejected the argument that prosecutorial misconduct leading to the new trial creates an exception to the general rule. *State v. Keenan* (1998), 81 Ohio St.3d 133, 141 (“we have twice declined to adopt this exception to the general rule.”). Just as a party cannot seek to employ Civ.R. 60(B) to have new decisional law applied to vacate his judgment, equally so a party cannot use such a motion to seek a change in law in

his very case.¹

Since defendant's motion fails even as a Civ.R. 60(B) motion, and in the absence of a certifiable conflict, there is little point to entertaining the question of whether the motion should have been treated as a Civ.R. 60(B) motion or as a post-conviction petition.

Defendant's "motion" fails either way.

B. Finality Concerns and Post-Conviction Limits

In the interest of promoting the finality of criminal convictions, the 121st General Assembly passed Amended Substitute Senate Bill 4 in 1995 to impose time limits and successive-petition limits on post-conviction review. 146 Ohio Laws, Part IV, at 7815. A petition for post-conviction review must be filed within 180 days after the transcript is filed in the defendant's direct appeal or within 180 days after the time for direct appeal has expired. R.C. 2953.21(A)(2). A court may not entertain an untimely petition, nor can it entertain a second or successive petition, unless narrow exceptions for untimely or successive filing are satisfied. R.C. 2953.23(A).

To justify untimely or successive filing, the defendant must show that he was unavoidably prevented from the discovering the facts upon which he bases his claim or that he is relying on a new federal or state right recognized by the United States Supreme Court that applies retroactively to persons in his situation. R.C. 2953.23(A)(1)(a). To further justify untimely or successive filing, the defendant must further show that, but for constitutional error at trial, no reasonable factfinder would have found him guilty. R.C.

¹ Defendant claimed that the double-jeopardy issue was jurisdictional, but this Court has rejected that view. See, e.g., *Wilson v. Rogers* (1993), 68 Ohio St.3d 130, 131; *State, ex rel. Wall v. Grossman* (1980), 61 Ohio St.2d 4; *Barker v. Sacks* (1962), 173 Ohio St. 413, 414-15.

2953.23(A)(1)(b).

In anticipation that some defendants would seek creative ways around these limits on post-conviction review, the General Assembly in Am.Sub.S.B. 4 made the remedy in R.C. 2953.21 the exclusive remedy for collaterally attacking a conviction: “[T]he 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 * * *.” Former R.C. 2953.21(I) (now (J)). By providing for exclusivity, the General Assembly ensured that its time limits and successive-petition limits would have teeth. Absent exclusivity, the time limits and successive-petition limits would be easily avoided. Allowing delays through other procedural mechanisms “would nullify the obvious legislative intent of S.B. No. 4 to place time limitations on bringing postconviction petitions.” *State v. Bird* (2000), 138 Ohio App.3d 400, 404 (delayed-appeal procedure does not delay 180-day time frame).

The General Assembly is not alone in having concerns about delays in post-conviction litigation. In *State v. Steffen* (1994), 70 Ohio St.3d 399, this Court recognized that, “[c]oncurrent with this court’s supervisory power is our responsibility to assure finality to judgments. The purpose of a court is to resolve controversies, not to prolong them.” *Id.* at 409. “[T]he erosion of the finality of judgments in criminal cases undermines the deterrent effect of criminal law.” *Id.* at 411. Lax standards can “give litigants incentives to withhold claims in order to manipulate the system and create disincentives to present fresh claims.” *Id.* at 411-12. Ohio has the “inherent power to impose finality on its judgments.” *Id.* at 412. Even the case law under Civ.R. 60(B) recognizes “the strong interest in the finality of judgments.” *Doe*, 28 Ohio St.3d at 131.

Concerns about finality have animated this Court’s strict application of res judicata

in criminal cases. As stated in *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus:

Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at the trial*, which resulted in that judgment of conviction, *or on an appeal from that judgment*.

Res judicata “underscores the importance of finality of judgments of conviction.” *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 95. “Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We have stressed that the doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts.” *Id.* at 95 (internal quotation marks and brackets omitted).

C. Defendant Attempted to Circumvent Post-Conviction Limits

As defendant concedes, his time limit for post-conviction review expired in November 29, 2004, which was three and one-half months before defendant filed his motion for relief from judgment on March 16, 2005. Defendant very likely chose to invoke Civ.R. 60(B) because he knew that: (1) his time limit for post-conviction relief had expired; (2) he could not invoke the exceptions for untimely filing, since his motion conceded knowledge of the purported acts of prosecutorial misconduct before or during trial; and (3)

res judicata would bar his double jeopardy and due process/speedy trial claims anyway.

Whether or not defendant intended to circumvent these post-conviction limits, the common pleas court acted correctly in treating the “motion for relief from judgment” as a petition for post-conviction relief.

D. Crim.R. 57(B) is Inapplicable

Civil Rule 60(B) can enter this criminal case only via Crim.R. 57(B), which provides that:

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.

This rule allows a common pleas court to rely on civil rules in a criminal case, but it may do so only under narrow circumstances. First, the court must find that “no procedure is specifically prescribed by rule.” Second, the court must find that “no rule of criminal procedure exists.” If both of those conditions are met, then 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 * * *.”

A court cannot legitimately find that the two conditions are satisfied here. The Criminal Rules already provide procedures for a defendant to challenge his convictions by way of a motion to withdraw plea (Crim.R. 32.1), a motion for new trial (Crim.R. 33), a motion for arrest of judgment (Crim.R. 34), and a post-conviction petition (Crim.R. 35). Since Crim.R. 57(B) allows reliance on the Civil Rules only when there is an absence of procedure in the Criminal Rules, defendant cannot rightly rely on the Civil Rules here, since there is ample procedure set forth in the Criminal Rules for a defendant to challenge his

criminal conviction.²

Moreover, even if the two conditions were satisfied, Crim.R. 57(B) would not give defendant the unfettered right to have his motion heard as a Civ.R. 60(B) motion. Crim.R. 57(B) allows the court to proceed “in *any* lawful manner not inconsistent with these rules of criminal procedure” and requires the court to “*look to* the rules of civil procedure *and* to the applicable law * * *.” (Emphasis added) The phrase “any lawful manner” gives a court a wide breadth of discretion in deciding how to proceed when the Criminal Rules are silent on procedure, and, furthermore, the Civil Rules are merely one possible source that the court shall “look to.” The “applicable law” would include the statutory law for the challenging of a conviction, i.e., R.C. 2953.21 et seq. In light of the wide discretion afforded by Crim.R. 57(B), defendant cannot contend that he had an entitlement to the application of Civ.R. 60(B) to his case, as the court possessed the discretion under Crim.R. 57(B) to proceed “in any lawful manner” and to proceed in a manner consistent with “applicable law.”

E. R.C. 2953.21(J) is Applicable

Paragraph (J) of the post-conviction statute, R.C. 2953.21, provides in pertinent part that “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 * * *.” This exclusivity provision shows that the General Assembly believes that a

² The question of whether the Criminal Rules set forth a procedure is different from the question of whether one or more of such procedures may be barred by the exclusivity provision in R.C. 2953.21(J). See Part E, *infra*. For example, the Criminal Rules provide a procedure for considering motions for new trial, but a substantial question exists whether such a motion is barred by R.C. 2953.21(J) as an unauthorized “collateral challenge” to a conviction. See *State v. Frase* (1999), 87 Ohio St.3d 1412.

post-conviction petition is a “collateral challenge,” since the provision deems such a petition to be the exclusive means by which to pursue such a challenge. The exclusivity provision also shows that, if a motion or other pleading is deemed to be a “collateral challenge to the validity” of a conviction or sentence, then the common pleas court can address it only as a post-conviction petition.

1. Defendant’s Motion “Challenged” the Conviction

Defendant’s Civ.R. 60(B) motion qualified as a challenge to his conviction and sentence. Defendant expressly asked the court to “reverse his conviction and dismiss the indictment against him with prejudice.” See Motion, at 1, 16. The challenge to the validity of the conviction was patent, and the validity of the conviction was at stake.

Defendant’s amici suggest that the motion did not “attack the merits of the underlying judgment,” but, rather “aim[ed] at protecting the integrity of the court and its proceedings in the case.” OPD and OACDL Amicus Brief, at 4-5. But this argument overlooks defendant’s express request for relief to vacate the judgment. It also overlooks the express purpose of a motion under Civ.R. 60(B), which provides that the motion, if granted, operates to “relieve a party * * * from a final judgment, order, or proceeding.” Although the amici argue that the purpose of the rule is to protect the integrity of the proceedings, their own argument concedes that such protection takes place through the *setting aside* of the judgment. OPD and OACDL Amicus Brief, at 5 (motion is “a means to inquire whether equity requires the judgment to be set aside * * *”). The amici do not explain how it is possible to attack the integrity of the judgment without also attacking the validity of the judgment.

2. The Motion Constituted a “Collateral Challenge”

The applicability of R.C. 2953.21(J) boils down to the question of whether a Civ.R. 60(B) motion is a “collateral challenge” to the validity of the conviction. Several factors point to the conclusion that it is a collateral challenge.

First, in civil cases, Ohio courts have routinely referred to Civ.R. 60(B) motions as collateral attacks on the judgment. See *Miley v. STS Systems*, 153 Ohio App.3d 752, 2003-Ohio-4409, at ¶ 7 (“Civ.R. 60(B) motion is a collateral attack upon a judgment”); *Security Ins. Co. v. Regional Transit Auth.* (1982), 4 Ohio App.3d 24, 28 (“Civ. R. 60(B) [motion] is a collateral attack”).

Second, in criminal cases, “collateral attack” has taken on a specialized meaning as involving any proceeding other than a direct appeal from the judgment. See *People v. Ingram* (1992), 439 Mich. 288, 291 n. 1, 484 N.W.2d 241, 242 n. 1. Therefore, courts routinely recognize that “collateral” includes post-judgment motions filed in the same case as the judgment of conviction. See *United States v. Benchimol* (1985), 471 U.S. 453, 456-57 (federal § 2255 motion is “collateral”); *United States v. Harrington* (C.A. 9, 2005), 410 F.3d 598, 600 (“Motion for New Trial is in essence a collateral attack.”).

Third, defendant is attempting to employ a civil rule in the criminal case, and even if this is allowed, the civil nature of the rule adds significant weight to the notion that the motion is “collateral.” In *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, at ¶ 25, this Court determined that an application for reopening is a “collateral postconviction remedy” and “civil, post-conviction matter.”

We have ourselves explicitly and consistently recognized that the App.R. 26(B) process represents a collateral postconviction remedy. See, e.g., *State v. Robinson* (1996),

74 Ohio St.3d 1518, 660 N.E.2d 472 (describing the App.R. 26(B) process as a “civil, post-conviction matter”); *State v. Boone* (1996), 74 Ohio St.3d 1491, 658 N.E.2d 788 (also describing the App.R. 26(B) process as a “civil, post-conviction matter”). Accord *State v. Sproat* (1995), 74 Ohio St.3d 1442, 656 N.E.2d 342; *State v. Alexander* (1995), 74 Ohio St.3d 1470, 657 N.E.2d 511; *State v. Kirby* (1995), 72 Ohio St.3d 1534, 650 N.E.2d 111. We have used the same descriptive term in numerous other orders. *

* *

In light of *Morgan*'s equating of “civil” and “collateral,” the civil nature of a Civ.R. 60(B) motion supports the view that such a motion is a “collateral postconviction remedy.”

Finally, and most importantly, the language in R.C. 2953.21(J) confirms that the General Assembly agreed with the understanding that “collateral” includes any motion or proceeding brought in the trial court other than the direct appeal from the judgment. The General Assembly plainly thought that a post-conviction petition is a “collateral challenge” because paragraph (J) provides that such petitions are the exclusive remedy to bring such a challenge. This Court has recognized that “a postconviction proceeding is * * * a collateral civil attack on the judgment.” *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281.

This “collateral” characterization has long applied to post-conviction petitions even though such petitions are filed in the same case as the judgment of conviction. Although one case considering the original 1965 version of R.C. 2953.21 indicated that a post-conviction petition may be filed in the same case or in a separate case number in the court that imposed sentence, see *State v. Lloyd* (1966), 8 Ohio App.2d 155, 156, that view was questionable at the time and bears no relevance to the current statutory scheme.

Several parts of the statutory text indicate that a post-conviction petition is filed in the same “case” as the original judgment of conviction. See R.C. 2953.21(A)(1)(a)

("may file a petition in the court that imposed sentence"); R.C. 2953.21(C) ("the court shall consider * * * all the files and records pertaining to the proceedings against the petitioner"); R.C. 2953.21(E) ("files and records of the case").

Most indicative are the provisions that were effective with the passage of Am.Sub.S.B. 4 addressing when "the case" must be remanded from the Court of Appeals when a direct appeal is pending. If a direct appeal of the judgment of conviction is pending, then the statute requires a remand of "the case" as a precondition to the common pleas court granting the petition. R.C. 2953.21(G) ("if a pending direct appeal of the case has been remanded"). The precondition of a remand of "the case" shows that the petition is filed in the same "case" as the original judgment being appealed.

Given that a post-conviction petition itself is a collateral civil attack on the judgment, it is difficult to see how a Civ.R. 60(B) motion fails to qualify as a collateral civil attack as well. A post-conviction petition and a Civ.R. 60(B) motion both are filed in the same case as the judgment. Both are civil in nature. Both attack the validity of the judgment. With the civil case law indicating that a Civ.R. 60(B) is a "collateral attack," and with a post-conviction petition being treated as collateral as well, one searches in vain for a principled way to distinguish a Civ.R. 60(B) motion from a post-conviction petition for purposes of determining whether the motion is a "collateral challenge."

Defendant would likely contend that the grounds for relief under Civ.R. 60(B) are different and broader than the standard for post-conviction petitions, which are limited to constitutional claims. But such an argument would miss the mark here for two reasons. Defendant's arguments were specifically based upon claims of prosecutorial misconduct leading to double-jeopardy and due-process violations, which were plainly claims of

constitutional error. Defendant repeatedly cited constitutional provisions in his motion. See Motion, at 1-3. Given the constitutional nature of defendant's claims, the present case provides no basis for making a distinction between Civ.R. 60(B) motions and post-conviction petitions.

Defendant likely would next contend that Civ.R. 60(B) is more favorable to him because it does not apply res judicata and because it has a longer time limit. But Civ.R. 60(B) has a form of res judicata bar, since it bars relief when the motion is merely being used as a substitute for appeal. It is also doubtful that Civ.R. 60(B) has a longer time limit here, since the rule requires that all Civ.R. 60(B) motions be filed within a "reasonable time," and it was not reasonable for defendant to wait almost one year to raise issues that he could have raised before or during trial. See Staff Note to Civ.R. 60(B) ("reasonable time" provision "applies to all of the five grounds for vacation"; if substantial delay after discovery of grounds for relief, "the court in its discretion might hold that the motion was brought too late because although made within one year [it was] not made within a 'reasonable time.'").

Even if Civ.R. 60(B) would allow relief that would be barred by R.C. 2953.21(J), that would be no basis for misreading the phrase "collateral challenge" in R.C. 2953.21(J). The very purpose of the exclusivity provision is to funnel all collateral challenges into the standards for post-conviction review. A defendant showing that the exclusivity provision is denying him relief that would otherwise be available is merely showing that the exclusivity provision is serving its intended purpose. R.C. 2953.21(J) reflects the proper legislative judgment that collateral challenges should be limited to post-conviction review and thus should be limited to claims of constitutional dimension that could not have been raised

earlier.

In the final analysis, defendant's Civ.R. 60(B) motion amounted to a "collateral challenge to the validity of a conviction," and, therefore, the exclusivity provision in R.C. 2953.21(J) barred defendant from obtaining any relief under his motion except as construed as a post-conviction petition. Defendant's motion was properly "recast" as a post-conviction petition and properly denied as such.

F. *Bush* is Distinguishable

A discussion of *State v. Bush* should begin with a discussion of *State v. Reynolds* (1997), 79 Ohio St.3d 158. In *Reynolds*, the defendant had filed a "motion to correct or vacate sentence" contending that the evidence had been insufficient to show the element of operability on his firearm specification. The common pleas court granted the motion, and the court of appeals affirmed. This Court reversed, holding that, "despite its caption," the motion qualified as a post-conviction petition because it was filed after direct appeal, it claimed a denial of constitutional rights, it sought to render the judgment void, and asked for vacation of the judgment and sentence. *Id.* at 160. This Court set forth the following syllabus in *Reynolds*:

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 postconviction relief as defined in R.C. 2953.21.

In *Bush*, the defendants had filed motions to withdraw their pleas, and the lower courts had treated the motions as post-conviction petitions. This Court reversed, concluding that *Reynolds* was limited to cases in which a "no-name motion" had been filed that did not cite a specified rule of criminal procedure. *Bush*, at ¶ 10. *Bush* also cited case

law for the proposition that a motion to withdraw plea filed pursuant to Crim.R. 32.1 and a post-conviction petition were “separate remedies.” Id. at ¶ 10.

The *Bush* Court also addressed R.C. 2953.21(J) and concluded that a motion to withdraw plea was “not collateral” and was not a challenge to the conviction but rather a challenge to the plea. As stated in *Bush*:

{¶ 13} R.C. 2953.21(J), part of the postconviction relief statutory scheme, provides that “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 * * *.” Given that a postsentence Crim.R. 32.1 motion is not collateral but is filed in the underlying criminal case and that it targets the withdrawal of a *plea*, it is not a “collateral challenge to the validity of a conviction or sentence.” See *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (“a postconviction proceeding is* * * a collateral civil attack on the judgment”); Black's Law Dictionary (7th Ed.Rev.1999) 255 (defining “collateral attack” as “an attack on a judgment entered in a different proceeding”). We thus reject the state's contention that the statutory scheme set forth in R.C. 2953.21 and 2953.23 provides the exclusive means by which a criminal defendant can raise a constitutional attack on his or her plea.

As can be seen, *Bush* did not address a civil motion like Civ.R. 60(B), and the defendants in *Bush* had been relying on a specified Criminal Rule (Crim.R. 32.1) as a basis for their motions. Moreover, *Bush* emphasized that a motion to withdraw plea targets the *plea* rather than the *conviction and sentence*, whereas the motion here targeted the conviction. Given the substantial differences that exist between the present case and *Bush*, *Bush* is not controlling.

G. *Bush* is Flawed and Should Not Be Extended Beyond its Narrow Context

Significant flaws in the *Bush* analysis weigh heavily against extending that analysis to the present case. *Bush* stated that the Crim.R. 32.1 motion “is not collateral but is filed in

the underlying criminal case.” However, *Bush* further acknowledged that post-conviction petitions are collateral civil matters, and yet those petitions are also filed in the underlying criminal case and are addressed in a specified criminal rule (Crim.R. 35). Since even post-conviction petitions themselves are filed under the same case as the judgment of conviction, and since the General Assembly clearly thought that a post-conviction petition is a “collateral challenge” because it said so in R.C. 2953.21(J), it is respectfully submitted that *Bush* misunderstood the meaning of “collateral” as set forth in R.C. 2953.21(J).

To be sure, *Bush* quoted the 7th edition of Black’s Law Dictionary for a definition of “collateral attack” as “an attack on a judgment in a different proceeding.” *Bush*, at ¶ 13. Notably, however, the eighth edition of that dictionary includes a definition of “collateral attack” as meaning “[a]n attack on a judgment in a proceeding other than a direct appeal * * *.” Black’s Law Dictionary (8th ed., 2004), at 278. Thus, “collateral” can include both the narrow definition of “different proceeding” as mentioned in *Bush* and the broader definition as including any attack on conviction other than direct appeal.

If the General Assembly’s intent were ambiguous, it might be understandable for a court to choose the narrow definition as the guide. But the legislative intent is clear here because General Assembly stated in R.C. 2953.21(J) that a post-conviction petition is a “collateral challenge,” and said so even though such petitions are filed in the same case as the judgment of conviction.

Adding to the incongruity of *Bush*’s approach to “collateral” is *Bush*’s treatment of “no-name motions.” A no-name motion is filed in the same case, and yet *Bush* approved the treatment of such motions as post-conviction petitions, i.e., as “collateral civil attacks” on the conviction. Given this approved treatment of no-name motions as collateral civil

post-conviction attacks, and given the legislative intent evinced in R.C. 2953.21(J), *Bush* erred in excluding from “collateral” motions that are filed in the same case.

This Court’s decision in *Morgan v. Eads* confirms that *Bush* erred. In *Morgan*, this Court concluded that an application for reopening is “a distinct collateral postconviction process separate from the original appeal.” *Morgan*, at ¶ 17. Since an application for reopening will be deemed “collateral” to the direct appeal even though the application is filed in the same appeals case as the judgment of affirmance, it follows that motions filed in the trial court will be deemed “collateral” when they are filed in the same case as the judgment of conviction.

The Colorado Supreme Court faced a similar issue in *People v. Wiedemer* (Colo. 1993), 852 P.2d 424. A Colorado statute imposed various time limits on defendants who brought “collateral attacks” on their convictions. The defendant in *Wiedemer* filed a motion pursuant to Colorado’s Criminal Rule 35(c) to set aside his conviction. When the prosecution contended that the motion was untimely under the time limits for “collateral attacks,” the defendant contended that his motion pursuant to a criminal rule in the same case was a direct attack and not a “collateral attack” that was subject to the time limits.

The Colorado Supreme Court recognized that there is a narrow definition of “collateral attack” that applies only when the attack is being brought in a separate proceeding. *Id.* at 429. The Court further recognized that a strict application of that narrow definition “would cause us to characterize a Crim. P. 35(c) motion as a direct attack, for it is filed in the case that resulted in the judgment of conviction and its very purpose is to vacate that judgment.” *Id.* at 430.

Even so, because of the legislative intent expressed in the statute, the Court believed

that “it is necessary to recognize a more expansive definition of ‘collateral attack’ as that phrase is used in the statute.” *Id.* at 430. The legislative intent to limit the time for attacking convictions would be frustrated if such motions were not subject to the time limits. *Id.* at 430.

In addition, the criminal rule itself referred to such motions as collateral attacks, and the Colorado case law had recognized in dicta that such motions were collateral attacks. *Id.* at 430. “These cases establish that ‘collateral attack’ is not a novel characterization of a Crim. P. 35(c) motion. It expresses the intuition that all attacks on a conviction that are raised outside the process of adjudication and appeal by which a judgment achieves finality are in a sense collateral to that process.” *Id.* at 430. “[O]ur cases and analogous federal authorities have commonly used the term ‘collateral attack’ to include motions to set aside convictions.” *Id.* at 431. Accordingly, the *Wiedemer* Court agreed that “a common sense reading of the plain language of [the statute] dictates the conclusion that the General Assembly intended not a technical definition of ‘collateral,’ but its commonly accepted meaning within a criminal law context.” *Id.* at 431 (quoting appellate case). “[S]uch a reading is essential to give effect to the legislature’s explicitly expressed purposes in enacting the statute.” *Id.*

The same analysis should apply to “collateral challenge” in R.C. 2953.21(J). The General Assembly’s careful setting of time limits and setting of nuanced exceptions to those time limits would go for naught if a defendant could evade those limits and exceptions by merely changing the label on his pleading. The desire to avoid such evasion explains why the General Assembly adopted the exclusivity provision. Giving “collateral challenge” the broader meaning as recognized in criminal cases furthers the legislative intent.

More importantly, the text of the exclusivity provision directly points to the broader meaning. Again, the General Assembly treats a post-conviction petition as a “collateral challenge,” even though such petitions are filed in the same case as the judgment of conviction. To apply a narrower view of “collateral challenge” would defy the legislative intent.

In determining the meaning of “collateral challenge,” this Court’s sole office is “to give effect to the intent of the legislature.” *State v. Wilson* (1997), 77 Ohio St.3d 334, 336. “In reviewing a statute, a court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body.” *Id.* at 336. “Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted.” *Sears v. Weimer* (1944), 143 Ohio St. 312, paragraph five of the syllabus. Given the context here, the plain meaning of “collateral challenge” in R.C. 2953.21(J) includes a motion challenging the validity of the conviction that is filed in the same case as the judgment of conviction.

Even if a rule of strict construction were applicable here, such a rule would not lead to a different result. The rule of strict construction, otherwise known as the rule of lenity, “is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act, such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute. The rule of lenity comes into operation at the end of the process of construing what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to

wrongdoers.” *Chapman v. United States* (1991), 500 U.S. 453, 463 (internal quotation marks and brackets omitted). “The canon in favor of strict construction of criminal statutes is not an obstinate rule which overrides common sense and evident statutory purpose. The canon is satisfied if the statutory language is given fair meaning in accord with the manifest intent of the General Assembly.” *State v. Sway* (1984), 15 Ohio St.3d 112, 116.

No grievous ambiguity is involved here. “Collateral challenge” includes post-judgment motions filed in the same case because the General Assembly specified that “collateral challenge” includes post-conviction petitions, which are filed in the same case. *Bush* erred in excluding post-judgment motions from the meaning of “collateral.” Just as this Court in *Bush* limited the reach of *Reynolds* to “no-name motions,” this Court should limit *Bush* to the context of motions to withdraw plea.

Finally, *Bush* erred in inquiring into whether motions to withdraw plea and post-conviction petitions have been previously treated as “separate” or as “distinct avenue[s] of relief.” *Bush*, at ¶ 11. Any number of remedies may exist “separately” in that the law has recognized distinctions between them and a post-conviction petition. But the very purpose of R.C. 2953.21(J) is to bar *all* other collateral attacks on convictions, since post-conviction relief is made the *exclusive* remedy for collateral attacks. The exclusivity provision must bar *something* that was previously “distinct” or “separate,” or else the exclusivity provision would accomplish nothing. “In looking to the face of a statute or Act to determine legislative intent, significance and effect should be accorded to every word, phrase, sentence and part thereof, if possible.” *Wilson*, 77 Ohio St.3d at 336-37.

H. No Separation of Powers Problem

Defendant's amici wrongly contend that application of R.C. 2953.21(J) to bar relief under Civ.R. 60(B) would violate separation of powers. This contention is exactly backwards, for it attempts to turn this Court's procedural rules into a font of substantive law governing the finality of convictions, and this Court's procedural rules are not allowed to create substantive rights.

A case in point is *Crouser v. Crouser* (1988), 39 Ohio St.3d 177, in which the plaintiff in a divorce sought to employ Civ.R. 60(B)(4) to modify and extend the length of an alimony award. This Court determined that the issue of modification of alimony is a substantive matter, and that the General Assembly's statutory provision governing such modification would control over Civ.R. 60(B)(4) and (B)(5). As stated in *Crouser*:

This case can be characterized as a choice between use of substantive law adopted by the General Assembly through R.C. 3105.18 and 3105.65, and use of a procedural mechanism provided by this court under Civ. R. 60(B)(4) and (5). We have consistently held that when the General Assembly expresses its intent, procedural rules may "not abridge, enlarge, or modify any substantive right." Section 5(B), Article IV of the Ohio Constitution; *State v. Slatter* (1981), 66 Ohio St.2d 452, 454, 20 O.O. 3d 383, 385, 423 N.E.2d 100, 102. The issue before us -- modification of a periodic alimony award -- *falls within that body of law traditionally denominated as substantive*, since the authority to grant or modify an alimony award in a divorce proceeding is provided under R.C. 3105.18. The standards or requirements established by the General Assembly under this substantive law will control since the legislature has specifically provided, by statute, mechanisms for review and modification of periodic sustenance alimony awards. In contrast, Civ. R. 60(B)(4) is a *procedural mechanism* which allows parties to seek relief from judgments that are unmodifiable through substantive law.

Crouser, 38 Ohio St.3d at 178 (emphasis added). The Court determined that the plaintiff

did not satisfy the prerequisites for Civ.R. 60(B)(4) relief and further determined that “[t]his is clearly a case in which a litigant, being dissatisfied with the results after utilizing the substantive law, resorts to a procedural mechanism in order to circumvent the judgment.”

Id. at 180. The Court further emphasized that:

Plaintiff had her day in court and an opportunity to have that judgment reviewed. The mechanism for review and modification of an alimony award is properly under the substantive law of R.C. 3105.18. Civ. R. 60(B)(4) is a procedural mechanism that should be reserved for relief when parties have no substantive remedy available to them for the review of judgments, and where the parties’ circumstances have indeed changed sufficiently to make prospective application inequitable.

Crouser, 38 Ohio St.3d at 181. This Court concluded that the original alimony order should not have been vacated.

Crouser shows that the regulation of the finality of judgments is a matter of substantive law and that Civ.R. 60(B) cannot be used to invade finality in a way disapproved by the General Assembly. Although defendant might argue that the *Crouser* “substantive law” discussion was dicta because the Court also found that Civ.R. 60(B)(4) did not provide a basis for relief, that discussion is not dicta. When a court cites two grounds for its decision, each ground constitutes the holding of the court, and neither is dicta. *Massachusetts v. United States* (1948), 333 U.S. 611, 622-23; *United States v. Title Ins. & Trust Co.* (1924), 265 U.S. 472, 486.

The Colorado Supreme Court rejected the same separation-of-powers argument in *Wiedemer*. The defendant contended that the Colorado statute violated separation of powers by usurping the Court’s rule-making power. The Court disagreed, concluding that the statute “has its source in important considerations of public policy” and that the

statute “is a substantive statute, is an appropriate subject for legislative action, and does not infringe on the rule making power of the judiciary.” *Wiedemer*, 852 P.2d at 436. In light of *Crouser* and *Wiedemer*, R.C. 2953.21(J) controls as regulating the substantive matter of the finality of judgments.

Defendant’s amici claim that the exclusivity provision might also conflict with a court’s inherent power to protect the integrity of its proceedings. However, no such conflict exists, particularly in this case where defendant had ample opportunity before and during trial to raise the issues he wishes to raise now. As *Crouser* recognizes, regulating the finality of judgments is a substantive matter on which the General Assembly would have the final say. Since common pleas courts have such jurisdiction “as may be provided by law,” see Article IV, Section 4(B), Ohio Constitution, it follows that the General Assembly may properly impose substantive, jurisdictional limits on the common pleas court’s post-judgment authority. Ohio courts have consistently rejected separation-of-powers and other constitutional objections to the limits on post-conviction review. *State v. Smith*, 9th Dist. No. 04CA008546, 2005-Ohio-2571, at ¶ 8.

The standards for post-conviction review properly funnel constitutional litigation into proper and prompt channels. If a defendant can raise the issue before or during trial, then the issue cannot be raised on post-conviction review. If a defendant can raise the issue on appeal, then the issue cannot be raised on post-conviction review. If a defendant can raise the issue in post-conviction review, the statute requires promptness in raising the issue, with appropriate safety valves for claims that could not have been raised in a prompt fashion. These regulations are reasonable and do not violate a court’s power to decide a case or protect the integrity of its proceedings. If anything, these regulations ensure that

attacks on the integrity of the proceedings will be brought in a prompt fashion so that the court can address them.

A constitutional challenge to the exclusivity provision would lack merit. It is well settled:

that all enactments enjoy a strong presumption of constitutionality, and before a court may declare the statute unconstitutional, it must appear beyond a reasonable doubt that the legislation and constitutional provision are clearly incapable of coexisting. *State ex rel. Dickman, v. Defenbacher* (1955), 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59, paragraph one of the syllabus. Further, doubts regarding the validity of a legislative enactment are to be resolved in favor of the statute. *State, ex rel. Swetland, v. Kinney* (1982), 69 Ohio St.2d 567, 23 O.O.3d 479, 433 N.E.2d 217.

State v. Gill (1992), 63 Ohio St.3d 53, 55.

“[P]ostconviction state collateral review itself is not a constitutional right, even in capital cases,” and Ohio has the “inherent power to impose finality on its judgments.” *Steffen*, 70 Ohio St.3d at 410, 412. The states can place reasonable time limits on the assertion of rights by criminal defendants, even constitutional rights. See *Michel v. Louisiana* (1955), 350 U.S. 91, 97 & n. 4, 99. “It is no destruction of a right or privilege to limit the time for its assertion * * *.” *United States v. Morena* (1918), 245 U.S. 392, 396. At most, due process requires a meaningful *opportunity* to litigate a claim, not an endless opportunity. *Logan v. Zimmerman Brush Co.* (1982), 455 U.S. 422, 437.

In the final analysis, the exclusivity provision in R.C. 2953.21(J) is consistent with the proper regulation of the finality of judgments and with the proper regulation of the timely pursuit of constitutional rights. The General Assembly was not required to allow criminal judgments to be subject to unending challenge. Any constitutional challenge to

R.C. 2953.21(J) would particularly fail in the present case, given the defense knowledge of the purported claims before or during the 2004 retrial.

I. *Gonzalez v. Crosby*

Application of the exclusivity provision to bar defendant's reliance on Civ.R. 60(B) would be consistent with the decision of the United States Supreme Court in *Gonzalez v. Crosby* (2005), 545 U.S. 524. In *Gonzalez*, the question was whether a Fed.R.Civ.P. 60(B) motion would be subject to the additional restrictions that apply to second or successive habeas petitions. The *Gonzalez* Court cited three instances when the motion would qualify as a second or successive habeas petition. Each of these instances involved the petitioner raising anew or re-raising a federal "claim" that challenged his state-court judgment of conviction. *Id.* at 530-31. The *Gonzalez* Court agreed with "[v]irtually every Court of Appeals to consider the question" and held that "a pleading, although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly." *Id.* at 531. The Court recognized that "[a] habeas petitioner's filing that seeks vindication of such a claim is, if not in substance a 'habeas corpus application,' at least similar enough that failing to subject it to the same requirements would be 'inconsistent with' the statute." *Id.* at 531.

The *Gonzalez* Court recognized that allowing relief under Fed.R.Civ.P. 60(B) would improperly circumvent various restrictions applicable to second or successive habeas petitions. For example, "[u]sing Rule 60(b) to present new claims for relief from a state court's judgment of conviction -- even claims couched in the language of a true Rule 60(b) motion -- circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." *Id.* at 531.

Application of the *Gonzalez* framework here would lead to the rejection of defendant's "motion." Defendant's claims challenged the validity of the judgment of conviction and fell within the prohibition against other collateral challenges to the conviction. Allowing defendant to pursue these claims under Civ.R. 60(B) would allow defendant to circumvent the various limitations on post-conviction collateral review.

The *Gonzalez* framework would allow a defendant to proceed under Civ.R. 60(B) if he has been denied post-conviction relief and is seeking to reopen the *post-conviction* judgment on *post-conviction* issues such as untimeliness and res judicata. But defendant's motion here was not challenging a post-conviction judgment but rather was challenging the validity of the judgment of conviction itself. Just as *Gonzalez* would treat such a motion as a federal habeas petition, this Court should apply R.C. 2953.21(J) and treat such a motion as a post-conviction petition.

If Civ.R. 60(B) motions are to be entertained at all, the *Gonzalez* framework strikes the appropriate balance. As defendant concedes at pages 27 to 29 of his brief, Ohio's limits on post-conviction review mirror the federal limits on habeas review. The lesson of *Gonzalez* therefore has great relevance for Ohio courts addressing Civ.R. 60(B) motions. If such motions are to be entertained at all, they should be entertained only when the motion challenges a post-conviction judgment on a post-conviction issue. Such motions otherwise should be treated as post-conviction petitions. Entertaining a Civ.R. 60(B) motion attacking the judgment of conviction would circumvent the General Assembly's carefully-crafted limits on post-conviction review.

Defendant would likely try to distinguish *Gonzalez* because that case involved the issue of whether a motion should be treated as a *second* habeas petition. But such a

distinction should be unavailing. Given the legislative concerns about regulating and limiting multiple rounds of collateral review, the first round of collateral review must be regulated just as much as the second round, or else the regulations and limits would be avoided through the simple expedient of filing the “motion” first and the petition second. The order in which the documents are filed should be unimportant; what is important is that the defendant is inappropriately attempting to obtain multiple rounds of collateral attack on his judgment of conviction. If a Civ.R. 60(B) motion attacking the judgment of conviction would be a successive petition if filed second in order, then the same motion should be treated as an initial petition if it is filed first. In that way, the General Assembly’s time limits on initial collateral review will be honored, and any future pleading attacking the conviction will be appropriately treated as a successive petition.

J. *Castro* is Inapposite

Defendant and his amici devote much attention to the notify-and-warn procedure set forth in *Castro v. United States* (2003), 540 U.S. 375. But *Castro* is ultimately unavailing under these circumstances.

In *Castro*, the defendant filed a motion for new trial in 1994, and the government responded that the motion would be “more properly cognizable” as a petition under federal post-conviction statute, 28 U.S.C. § 2255. The government also indicated that it would not object to treating the motion as both a motion for new trial and as a § 2255 motion. The district court denied the motion, referring to the motion as a motion for new trial and as a § 2255 motion. The decision was affirmed.

The defendant later filed a § 2255 motion in 1997 and raised new claims that had not been raised in the 1994 motion. The district court eventually concluded that the 1997

motion was a second § 2255 motion and, as such, the subsequent motion was subject to dismissal because the defendant had not obtained leave from the Court of Appeals.

The United States Supreme Court concluded that the 1994 motion would not be treated as a first § 2255 motion because the defendant had not relied on that statute and because the district court had improperly recharacterized the 1994 motion. The Court recognized that recharacterization is allowed, but the Court concluded that such recharacterization powers should be exercised only after: (1) the court notifies the defendant that it intends to recharacterize the pleading as a § 2255 motion; (2) the court warns the defendant that any subsequent § 2255 motion would be subject to restrictions on “second or successive” motions; and (3) the court provides the movant with the opportunity to withdraw or amend the motion. *Castro*, 540 U.S. at 383. Absent those procedures, a motion recharacterized as a § 2255 motion will not count as a first § 2255 motion. *Id.*

Castro has no value here. As later discussed in *Pliler v. Ford* (2004), 542 U.S. 225, *Castro* “held that a federal district court cannot sua sponte recharacterize a pro se litigant’s motion as a first § 2255 motion unless it informs the litigant of the consequences of the recharacterization, thereby giving the litigant the opportunity to contest the recharacterization, or to withdraw or amend the motion.” *Pliler*, 542 U.S. at 233. As *Pliler* emphasized, “*Castro* dealt with a District Court, of its own volition, taking away a petitioner’s desired route – namely, a Federal Rule of Criminal Procedure 33 motion – and transforming it, against his will.” *Id.* at 233.

As discussed in *Pliler*, *Castro* only applies when a court sua sponte and “of its own volition” decides to recharacterize the motion. *Castro* connotes an element of discretion on the part of the trial court and implies that a defendant has a choice between methods for

attacking his conviction.

Castro would not apply when the prosecution contends that a motion must be treated as a post-conviction petition and must be dismissed on that basis *as a matter of law*, which is what occurred here. (Trial Ct. Rec. 345, State's Motion to Dismiss, at 5-6) No discretion is involved in such a contention, and no "volition" is involved on the part of the trial court. When the law requires that the motion be treated as a post-conviction petition and requires that the motion be dismissed as such, the notice-and-warning procedures of *Castro* are simply inapt.

Defendants receive notice of the prosecution's matter-of-law contentions by service of the prosecution's pleadings seeking dismissal. Defendants then can file memoranda opposing the prosecution's contentions. This provides adequate notice and opportunity for a defendant to dispute the prosecution's contentions and to withdraw or amend his "motion." Due process does not require more.

Although defendant complains about a lack of service in his case, defendant's lack-of-service contentions were rejected by the appellate court, which held that the prosecution's service of documents on defendant's counsel of record was sufficient. 11th Dist. Opinion, at ¶¶ 33-34. The record also shows that the State's pleadings were forwarded to defendant almost three weeks before the trial court ruled. (Trial Ct. Rec. 352) One suspects that defendant may have been aware of the contents of the State's pleadings even earlier than that, given his awareness of the filing of the prosecution's pleadings as shown by his filing of a motion to strike thirteen days after the State had filed its motion to dismiss. (Trial Ct. Rec. 346) In any event, defendant's complaints about lack of service are not a part of the certified question here.

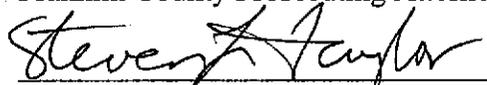
Finally, even if the court could not “recast” the motion as a post-conviction petition, that means that defendant’s motion received more review than it was due, since the court could summarily deny the Civ.R. 60(B) motion by citing R.C. 2953.21(J) alone. Even if such summary denial could not have been entered in June 2005 because an appeal was pending at the time, this Court could remand for such a summary denial now, as the direct appeal was apparently concluded in September 2005.

CONCLUSION

For the foregoing reasons, amicus curiae Franklin County Prosecutor Ron O’Brien supports plaintiff-appellee State of Ohio and urges that this Court affirm the judgment of the Eleventh District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

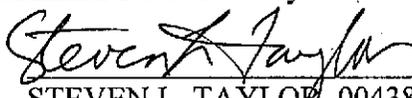
This is to certify that a copy of the foregoing was mailed by regular U.S. mail on this 6th day of Mar., 2007, to the following known counsel of record:

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