

IN THE SUPREME COURT OF OHIO

State of Ohio, :
 :
 :
 Plaintiff-Appellee, : Case No. **09-0222**
 :
 :
 v. : On Appeal from the
 : Medina County Court of Appeals,
 William O'Neal, : Ninth Appellate District,
 : Case No. 08-CA0028-M
 :
 Defendant-Appellant. :

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT WILLIAM O'NEAL**

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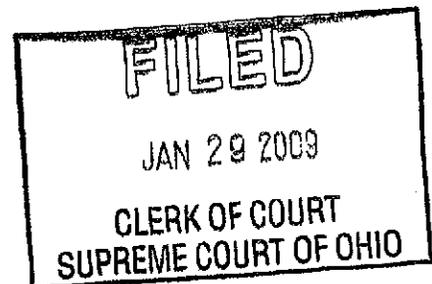


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**EXPLANATION OF WHY THIS CASE RAISES
SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND IS A CASE OF
GREAT GENERAL AND PUBLIC INTEREST**

This Court should take this case to resolve a conflict among the districts about when a defendant must file a postconviction petition when the original judgment has been vacated. The Eleventh¹ and Twelfth² Districts have held that the challenge is not ripe until the trial court enters a valid judgment entry. By contrast, the Eighth,³ Ninth,⁴ and Tenth⁵ Districts have held that the statute of limitations begins to run when the transcript is filed in an appeal of the first judgment entry, even if that entry is later vacated.

The Fifth District has created a Catch-22 by adopting both conflicting positions—a defendant’s challenge to the first judgment entry is barred as “premature,”⁶ but a challenge to a subsequent judgment entry is barred by the statute of limitations:⁷

¹ “As a basic proposition, a final judgment has not been issued in a criminal case unless the trial court has journalized a formal entry which, inter alia, contains a statement of the verdict and the imposition of sentence. State v. Ginocchio (1987), 38 Ohio App.3d 105. As a result, when the Supreme Court released the Roberts opinion, its holding had the obvious effect of vacating the final order in the underlying case. That is, even though a proper final judgment was released at one point in appellant's criminal case, such a judgment does not exist at this time.” State v. Roberts, 11th Dist. No. 2005-T-0034, 2007-Ohio-5616.

² State v. Hancock (Feb. 6, 2006), Warren App. No. CA2005-03-040 (“Entry of Dismissal”).

³ State v. Casalicchio, 8th Dist. No. 89555, 2008 Ohio 2362, at P22.

⁴ State v. O’Neal, 9th Dist. No. C.A. No. 08CA0028-M, 2008-Ohio-6572.

⁵ State v. Laws, 10th Dist. No. 04AP-283, 2004-Ohio-6446.

⁶ State v. Gross, 5th Dist. No. CT2002-0037, 2003-Ohio-6295, at ¶21.

⁷ State v. Gross, 5th Dist. No. CT2006-0006, 2006-Ohio-6941, at ¶34.

Appeal from Postconviction Petition Challenging the First, Vacated Judgment⁸	Appeal from Postconviction Petition Challenging the Second, Valid Judgment⁹
“[E]ach Assignment of Error is premature and each is denied at this time and this appeal is dismissed.”	As set forth above, 2953.21(A) clearly afforded appellant 180 days from the date the trial transcripts were filed in his first <i>direct appeal</i> or no later than 180 days after the expiration of time for filing the appeal.”

Heads I win.¹⁰ Tails you lose.¹¹

The Eleventh and Twelfth Districts are correct. A postconviction petition challenges a “judgment,” not a “conviction.” R.C. 2953.21(A). When the first judgment is vacated for any reason, there is nothing left for a defendant to challenge. When the trial court files a second judgment, the statute of limitations to challenge that judgment begins when the judgment is entered. If an appeal is filed from the judgment, the deadline is 180 days from when the transcript is filed. If an appeal is not filed, the deadline is 180 days from when the notice of appeal could have been filed from that judgment.

In this case, the court of appeals ruled that, since the legislature sought to put a limit on postconviction petitions, the limit must be the deadline for challenging the first judgment must somehow apply to all future judgments. As explained above, that holding puts policy over the clear language of the statute, but it also gets the policy wrong. The rule of the Eleventh and Twelfth

⁸ State v. Gross, 2003-Ohio-6295, at ¶21.

⁹ State v. Gross, 2006-Ohio-6941, at ¶34 (emphasis in original).

¹⁰ State v. Gross, 2003-Ohio-6295, at ¶21.

¹¹ State v. Gross, 2006-Ohio-6941, at ¶34.

District puts clear time limits on postconviction challenges, and those limits begin to run when the trial court enters the challenged judgment.

The question of when filing deadlines begin in cases with vacated judgments affects more than postconviction petitions. It affects all collateral challenges in civil and criminal cases. Do the deadlines in Civil Rule 60(B) begin with the original judgment entry or when a trial court issues a new judgment after a successful appeal? Or a new trial motion under Civil Rule 59? When is a new trial motion due under Criminal Rule 33? The conflicting court of appeals decisions leave all these questions unanswered, and threaten to undermine the finality of judgments.

Litigants need to know when to file a postconviction petition, or any other collateral challenge. The conflict among the districts makes collateral challenges premature until they are barred by the statute of limitations. That makes no sense, and makes it impossible for any litigant to get judicial review on a single, timely petition.

This Court should accept jurisdiction to decide when a collateral challenge should be filed in cases in which the original judgment is invalid.

STATEMENT OF THE CASE AND THE FACTS

William O'Neal was charged with two counts of attempted murder, three counts of kidnapping, felonious assault, carrying a concealed weapon, possession of a firearm on a liquor permit premises, and eight firearm specifications. He pleaded guilty to three counts of kidnapping, two counts of felonious assault, carrying a concealed weapon, and possession of a firearm on a liquor permit premises. He has alleged that was not informed about postrelease control at the plea hearing. He was sentenced to a total of thirteen years in prison.

On direct appeal, the court of appeals vacated his sentence under State v. Foster, 109 Ohio St.3d 1, 2006-Ohio-256. After the journalization of a valid entry on remand, he filed a timely postconviction petition. The trial court dismissed the petition as untimely, and the court of appeals affirmed. This timely appeal follows.

ARGUMENT

Proposition of Law No. I:

When a trial court's original judgment is vacated, collateral challenges must be filed within the statute of limitations for the subsequent, valid judgment.

The Eleventh and Twelfth Districts are correct.¹² A postconviction petition challenges a “judgment,” not a “conviction.” R.C. 2953.21(A). When the first judgment is vacated for any reason, there is nothing left for a defendant to challenge. When a court files a second judgment, the statute of limitations to challenge that judgment begins when the judgment is entered. If an appeal is filed from the judgment, the deadline is 180 days from when the transcript is filed. If an appeal is not filed, the deadline is 180 days from when the notice of appeal could have been filed from the second judgment.

The court of appeals misconstrues the statutory language regarding the filing of the transcript. The language does not say that all petitions must be filed within 180 days of the filing of the transcript in the first appeal. The statute states that the deadline is 180 days from when the transcript is filed in the appeal of the “judgment” that the petition is challenging:

[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. . . .

R.C. 2953.21(A)(2). The first part of the sentence refers to division (A)(1), and that division addresses filing a petition against a “judgment[,]” not a

¹² State v. Roberts, 11th Dist. No. 2005-T-0034, 2007-Ohio-5616. State v. Hancock (Feb. 6, 2006), Warren App. No. CA2005-03-040 (“Entry of Dismissal”).

“conviction.” R.C. 2953.21(A)(1)(a). When a new judgment is issued, the old judgment no longer exists. The defendant cannot challenge something that does not exist. He or she can only challenge the existing judgment, and the statute of limitations for the new judgment begins to run when the transcript is filed in the appeal of that judgment. As the Eleventh and Twelfth Districts have correctly ruled, a defendant cannot collaterally challenge a judgment that no longer exists.

Proposition of Law No. II:

The trial court should have granted Mr. O’Neal’s timely postconviction petition.

Mr. O’Neal’s plea was not knowing, intelligent and voluntary and his sentence was illegal because 1) the State failed to provide the defense with exculpatory information, thereby rendering appellate counsel ineffective; and 2) the State used false information at Mr. O’Neal’s sentencing and resentencing hearings. U.S. v. Bagley (1985), 473 U.S. 667; Brady v. Maryland (1963), 373 U.S. 83; Strickland v. Washington (1984), 466 U.S. 668; State v. Raglin (1998), 83 Ohio St.3d 253, 262; Boykin v. Alabama (1969), 395 U.S. 238; State v. Keene (1998), 81 Ohio St.3d 646; Mooney v. Holohan (1972), 294 U.S. 103; Napue v. Illinois (1942), 360 U.S. 264. Right to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution. Specifically, the State did not disclose that information in the FBI, NCIC, and OBCI criminal history reports contradicted information in the presentence investigation reports, giving the trial court an inaccurately negative view of Mr. O’Neal’s

criminal history. The State denies the allegation, but the only way to test the State's assertion is to hold an evidentiary hearing.

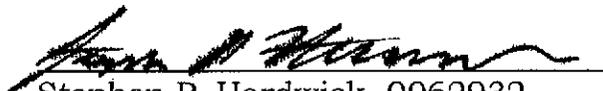
This Court should accept this case, vacate the plea, and remand for trial. In the alternative, this Court should accept this case, reverse the decision of the court of appeals, and remand this case to the trial court for an evidentiary hearing on Mr. O'Neal's claims.

CONCLUSION

This Court should accept jurisdiction, reverse the decision of the court of appeals, and remand this case to the trial court for an evidentiary hearing. In the alternative, this Court should accept this case on Proposition of Law No. I, reverse the decision of the court of appeals, and remand this case to the court of appeals for resolution of Mr. O'Neal's substantive issue.

Respectfully submitted,

Office of the Ohio Public Defender



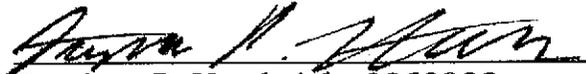
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CERTIFICATE OF SERVICE

I certify a copy of the foregoing **MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT WILLIAM O'NEAL** has been sent by regular U.S. mail, postage-prepaid, to Russell Hopkins, Assistant Medina County Prosecutor, 72 Public Square, Medina, Ohio 44256 on this 29th day of January, 2009.



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IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
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Plaintiff-Appellee,	:	Case No.
	:	
v.	:	On Appeal from the
	:	Medina County Court of Appeals,
William O'Neal,	:	Ninth Appellate District,
	:	Case No. 08-CA0028-M
Defendant-Appellant.	:	

APPENDIX TO

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT WILLIAM O'NEAL**

STATE OF OHIO
 COUNTY OF MEDINA

COURT OF APPEALS IN THE COURT OF APPEALS
)ss: 08 DEC 15 PM 12:35 NINTH JUDICIAL DISTRICT

STATE OF OHIO

FILED
 KATHY FORTNEY C.A. No. 08CA0028-M
 MEDINA COUNTY
 CLERK OF COURTS

Appellee

v.

WILLIAM B. O'NEAL

Appellant

APPEAL FROM JUDGMENT
 ENTERED IN THE
 COURT OF COMMON PLEAS
 COUNTY OF MEDINA, OHIO
 CASE No. 04 CR 0547

DECISION AND JOURNAL ENTRY

Dated: December 15, 2008

MOORE, Judge.

{¶1} Appellant, William O'Neal, appeals the judgment of the Medina County Court of Common Pleas. This Court affirms.

I.

{¶2} On October 13, 2004, Appellant, William O'Neal ("O'Neal"), was involved in the shooting of Tina Harrell at Christie's Cabaret in Brunswick, Ohio. Harrell survived the shooting, and O'Neal was indicted on several counts including: (1) two counts of attempted murder; (2) three counts of kidnapping; (3) one count of felonious assault; (4) one count of carrying a concealed weapon; (5) one count of illegal possession of a firearm in a liquor permit premises; and (6) eight firearm specifications. O'Neal initially pled not guilty to all of the charges.

{¶3} On May 17, 2005, O'Neal withdrew his not guilty plea and pled guilty to the following charges: (1) two counts of kidnapping pursuant to R.C. 2905.01(A)(2); (2) one count of kidnapping pursuant to R.C. 2905.01(A)(3); (3) one count of felonious assault pursuant to

R.C. 2903.11(A)(1); (4) one count of felonious assault pursuant to R.C. 2903.11(A)(2); (5) one count of carrying a concealed weapon pursuant to R.C. 2923.12(A)(2); and (6) one count of illegal possession of a firearm in a liquor permit premises pursuant to R.C. 2923.121(A). All of the charges except for the carrying a concealed weapon charge also contained firearm specifications to which O'Neal pled guilty. The trial court sentenced O'Neal to a total prison term of 13 years.

{¶4} On April 9, 2006, this Court affirmed O'Neal's conviction, but reversed his sentence pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. See *State v. O'Neal*, 9th Dist. No. 05CA0076-M, 2006-Ohio-1904. Following re-sentencing, on May 14, 2007, this Court dismissed O'Neal's appeal for lack of a final, appealable order. See *State v. O'Neal*, 9th Dist. No. 06CA0056-M, 2007-Ohio-2266. Upon remand, the trial court entered a judgment entry that complied with Crim.R. 32(C). On May 22, 2007, O'Neal filed a notice of appeal from the nunc pro tunc journal entry. On March 24, 2008, this Court affirmed the trial court's judgment and sentence. See *State v. O'Neal*, 9th Dist. No. 07CA0050-M, 2008-Ohio-1325.

{¶5} On October 31, 2007, O'Neal filed a motion for post-conviction relief ("PCR"), challenging both his conviction and sentence. The trial court denied O'Neal's petition as untimely. O'Neal timely appealed from this judgment entry, asserting two assignments of error for review.

II.

ASSIGNMENT OF ERROR I

"THE COURT ERRED IN DENYING [O'NEAL'S] PETITION FOR POST-CONVICTION RELIEF, FOR FAILURE TO TIMELY FILE SAID PETITION, AS REQUIRED BY R.C. 2953.21(A)(2)."

{¶6} In his first assignment of error, O'Neal contends that the trial court erred in denying his petition for PCR for failure to timely file, as required by R.C. 2953.21(A)(2). We disagree.

{¶7} An appellate court reviews the denial of a petition for PCR for an abuse of discretion. *State v. Stallings*, 9th Dist. No. 21969, 2004-Ohio-4571, at ¶5. An abuse of discretion is more than an error of judgment; rather it necessitates a finding that the trial court was unreasonable, arbitrary or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶8} Pursuant to R.C. 2953.21(A)(2), a petition for PCR must be filed no later than 180 days after the day the trial transcript is filed in the direct appeal from the judgment of conviction and sentence, or, if no direct appeal is taken, 180 days after the expiration of the time to file an appeal. See App.R. 3(A) & 4(A).

{¶9} In its order denying O'Neal's PCR petition as untimely, the trial court found that O'Neal's PCR petition was due on December 9, 2006. The trial court erroneously counted 180 days from June 9, 2006 - the date on which the trial court re-sentenced O'Neal. While we disagree with the trial court's reasoning regarding the deadline for O'Neal's PCR petition, as we further explain herein, we agree with its finding that the petition was untimely. See *Co Le'Mon, L.L.C. v. Host Marriott Corp.*, 9th Dist. No. 05CA008797, 2006-Ohio-2685, at ¶17, quoting *State ex rel. Carter v. Schotten* (1994), 70 Ohio St.3d 89, 92 ("It is well established in Ohio that 'a reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as a basis thereof'"). "The trial court's ultimate judgment in this case was correct, and it is the court's ultimate judgment we are affirming in this Opinion." *Abdalla's*

Tavern v. Dept. Of Commerce, Div. Of State Fire Marshal, 7th Dist. No. 02 JE 34, 2003-Ohio-3295, at ¶83.

{¶10} O'Neal contends that the trial judge erred in finding that his PCR petition was untimely. He argues that the trial court should have used the filing date for the transcripts filed in his most recent appeal, not the filing date from any of his first three appeals which were filed prior to the trial court's compliance with this Court's May 14, 2007 decision. See *State v. O'Neal*, 9th Dist. No. 06CA0056-M, 2007-Ohio-2266. He asserts that, without a proper final judgment, there could be no proper appeal or petition for PCR because any PCR petition filed before the trial court complied with Crim.R. 32(C) would have been premature.

{¶11} O'Neal cites *State v. Tripodo* (1977), 50 Ohio St.2d 124, in support of his assertion that each of his previous notices of appeal was premature because they were never made mature by the entry of a final, appealable judgment. We find the within matter factually distinguishable from *Tripodo*. In contrast to this matter, *Tripodo* did not involve a PCR petition and therefore, the Court did not consider the interplay of final, appealable orders and PCR petitions.

{¶12} We are persuaded by the Eighth District Court of Appeals decision in a factually similar case. In *State v. Casalicchio*, 8th Dist. No. 89555, 2008-Ohio-2362, at ¶22, the Eighth District held that resentencing under *Foster* does not "restart the clock" for a PCR petition. Specifically, the *Casalicchio* court explained:

"The Tenth District was faced with a petitioner's post-conviction relief petition filed after he was resentenced pursuant to a remand in his first appeal. See *State v. Laws*, 10th Dist. No. 04AP-283, 2004-Ohio-6446. It explained that '[w]hile R.C. 2953.21(A)(2) does not specifically address the present situation, we are guided by the purpose of the amendments to R.C. 2953.21(A)(2) [limiting the time to file to 180 days] and the case law interpreting it. *** [I]f we were to determine that the time for filing a defendant's post-conviction did not begin to run until the last of the direct appeals from the trial court's judgments, the time for filing post-

convictions petitions would be extended well beyond the time limits set forth in R.C. 2953.21(A)(2) to an undetermined time in the future, all contrary to the intent of the legislature.’ Id. at ¶6.

“The Tenth District held, ‘under the circumstances of this case, the time limits of R.C. 2953.21(A)(2) began to run at the time defendant’s transcript was filed in his first appeal. The transcript in defendant’s initial appeal was filed on January 28, 1998 and *** [h]is petition therefore was due on July 27, 1998. Defendant, however, filed his petition for post-conviction relief on April 1, 2002. As a result, his petition was untimely. The trial court properly recognized it lacked jurisdiction to entertain defendant’s untimely petition unless defendant satisfied the mandatory jurisdictional requirements set forth in R.C. 2953.23(A).’ (Internal citations omitted). Id. at ¶7.” *Casalicchio*, supra, at ¶24-25.

The prevailing case law indicates that the time limit for a PCR petition runs from the original appeal from the conviction.

{¶13} O’Neal filed the transcript of the docket and journal entries from his appeal of his conviction and sentence on September 7, 2005. See *State v. O’Neal*, 9th Dist. No. 05CA0076-M, 2006-Ohio-1904. Therefore, the time limitation period for PCR began to run on that date. When the trial court imposed his “second” sentence at the resentencing hearing and later filed a corrected judgment entry after this Court dismissed O’Neal’s appeal in Case No. 06CA0056-M for lack of a final, appealable order, “it [did] not serve to restart the clock for postconviction relief purposes as to any claims attacking his underlying conviction.” *Casalicchio*, supra, at ¶26, quoting *State v. Gross*, 5th Dist. No. CT2006-0006, 2006-Ohio-6941, at ¶34. His motion for PCR was filed on October 31, 2007- two years after the expiration of the time to file an appeal - and was therefore, clearly untimely.

{¶14} Further, a review of R.C. 2953.21 reflects that there is no connection between the status of the PCR petition and the status of the appeal. Indeed, the time period for filing a PCR petition runs even if no appeal is filed.

{¶15} R.C. 2953.23(A) provides certain factors that, if present, would except a petition from the prescribed filing time. Pursuant to R.C. 2953.23(A)(1), a court has no jurisdiction to hear an untimely filed petition for post-conviction relief unless 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.”

{¶16} O’Neal did not argue in his PCR petition that he met any of the requirements to file an untimely petition under R.C. 2953.23(A). Further, O’Neal did not allege that he was unavoidably prevented from discovering facts upon which his petition is based, or that after the 180-day time limit expired, the U.S. Supreme Court recognized a new federal or state right that retroactively applied to him. O’Neal has not alleged nor demonstrated that either of those conditions would have prevented him from being convicted. Accordingly, the trial court did not have jurisdiction to consider his untimely petition under this statute. See *State v. Childs* (Feb. 16, 2000), 9th Dist. No. 19757; *Laws*, supra.

{¶17} Thus, we conclude that, under the specific facts presented herein, the trial court did not abuse its discretion when it dismissed O’Neal’s petition as untimely. O’Neal’s first assignment of error is not well taken.

ASSIGNMENT OF ERROR II

"THE COURT ERRED IN DENYING [O'NEAL'S] CONSTITUTIONALLY GUARANTEED RIGHT TO DUE PROCESS, UNDER ARTICLE I, §1 AND §16 OF THE OHIO CONSTITUTION AND THE FIFTH AND FOURTEEN [SIC] AMENDMENTS TO THE UNITED STATES CONSTITUTION."

{¶18} In his second assignment of error, O'Neal contends that the trial court erred in denying his constitutionally guaranteed right to due process. In light of our disposition of O'Neal's first assignment of error, we need not address his second assignment of error.

III.

{¶19} O'Neal's assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.



CARLA MOORE
FOR THE COURT

CARR, P. J.
DICKINSON, J.
CONCUR

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