

IN THE SUPREME COURT OF OHIO

STATE OF OHIO  
Plaintiff-Appellee

Case No. 13-1613

vs.

SCOTT D. CREECH  
Defendant-Appellant

On Appeal from the Scioto  
County Court of Appeals,  
Fourth Appellate District  
Court of Appeals Case No.  
12 CA 3500

2013-Ohio-3791  
(Trial Court No. 08 CR 461)

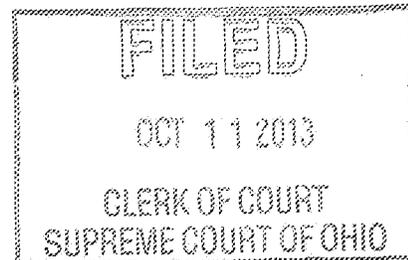
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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF DEFENDANT-APPELLANT  
SCOTT D. CREECH**

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## EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Scott Creech had two, 11-count, felony drug cases running simultaneously in Scioto County, 08 CR 291 and 08 CR 461. These cases were never merged or consolidated. A judgment that finds guilt is a prerequisite for a sentence to be pronounced. The failure to obtain a conviction in 461 prior to sentencing Defendant in 461 is a violation of the due process rights guaranteed by the Due Process Clause of the Fourteenth Amendment, United States Constitution. Scott Creech is sentenced to 19 years in prison on case 461 when the evidence shows that case 291 was set and tried to the jury. Due process of law requires that Defendant be discharged from imprisonment because he has never been found guilty in the 461 case. See *Powell v. Alabama*, (1932) 287 U.S. 45. The 291 case was dismissed by the Prosecutor after trial, but Creech is imprisoned nonetheless. Defendant is and has been held in violation of the Fourteenth Amendment.

## STATEMENT OF THE FACTS AND OF THE CASE.

On March 31, 2008, the Scioto County Prosecutor filed an 11-count Indictment naming Scott Creech as Defendant. He was charged with Illegal Possession of Chemicals for the Manufacture of Drugs, Illegal Manufacture of Drugs, 4 counts of Weapon Under Disability, 3 counts of Illegal Possession of Dangerous Ordnance, Illegally Manufacturing or Processing Explosives, and Trafficking in Methamphetamine. That Indictment was filed in Scioto County Common Pleas Court Case No. 08 CR 291.

On April 30, 2008, the Scioto County Prosecutor filed a second 11-count Indictment naming Scott Creech as Defendant. That Indictment was filed in Scioto County Case No. 08 CR 461. The April 30, 2008 Indictment is identical to the March 31,

2008 Indictment, with the exception of the word “recklessly” added to the description of the offense in Count 10, Illegally Manufacturing or Processing Explosives.

The 291 case and the 461 case were never merged or consolidated.<sup>1</sup> They existed as two separate cases that were both alive, up to, during and after the trial and conviction of Defendant. After April 30, 2008, the date when “the 461” Indictment was filed, the parties continued to file motions and the Court continued to set hearings and continued the jury trial in the 291 case. Finally, the Court on 8-20-08 signed a Court Order setting **the 291 case** for a 2-day jury trial to commence 9-29-08<sup>2</sup>.

A jury trial commenced on 9-29-08. The jury found defendant guilty of all but one count. When the verdict forms were signed by the jurors on October 1, 2008, the case number on each form read “Case Number 08 CR 291”.<sup>3</sup> On October 15, 2008, there was a certificate for Steno fees filed, and on October 30, 2008, there was a juror list filed of jurors to be paid, in the 291 case.<sup>4</sup>

Meanwhile, in the 461 case, the Court never set that case for either pretrial or jury trial. The State however filed subpoenas in 461 from time to time. On 7-1-08 the State moved to consolidate the 461 case with the cases of 2 presumed co-defendants, Lisa Pollitt (08 CR 555) and Terry Martin (08 CR 556), and on 8-12-08, the Court granted the Motion to consolidate 461 with 555 and 556.

**No jury trial was ever set in 461<sup>5</sup>, and therefore none was had.**

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<sup>1</sup> Dockets of both cases; also Tr. 11-9-11 hearing p.14, 14-6.

<sup>2</sup> Judgment Entry setting 291 for jury trial 9-29-08.

<sup>3</sup> Jury Verdict forms, originally from case “291”.

<sup>4</sup> steno payment and juror list, 291.

<sup>5</sup> Docket, 08-CR-461.

On 11-3-08, a month after the verdict forms were signed in 291, the Court issued an Order filed in the 291 case, to wit:

“Judgment Entry. This matter comes before the Court on the Court’s motion to correct the record. The Court finds the Defendant was originally indicted under Case Number 08-CR-291 and later indicted with a superseding indictment in Case Number 08-CR-461. Case Number 08-CR-461 was tried to a jury on September 29, 2008 and the Court erroneously submitted jury verdict forms to the jury with Case Number 08-CR-291. This Court finds the verdict forms, signed by the jury, contained the earlier case number and the Court hereby amends the verdict forms to read Case Number 08-CR-461. IT IS SO ORDERED.”<sup>6</sup>

The verdict forms now physically appear only in the 461 case, filed 10-2-08, and the “Case Number 08-CR-291” on each form is crossed out by hand, and the number “461” is handwritten on each verdict form. Pursuant to the Court’s 11-3-08 Judgment Entry, this alteration of the verdict forms occurred more than a month after the jury was discharged. The trial court may not amend verdict forms after a jury has been discharged. *State v. English*, 21 Ohio App.3d 130 (1985), 486 N.E.2d 1212.

A sentencing entry was filed 10-10-08 in the 461 case, sentencing Defendant to 19 years in prison.<sup>7</sup> The 291 case was dismissed by the State, **after the trial and conviction**, on 11-13-08.<sup>8</sup>

Defendant, unable to contact his trial counsel, filed an untimely notice of appeal of the sentencing entry on 11-3-08 in Case No. 08 CA 3262, and that case was dismissed 12-2-08. Finally, the State Public Defender filed an appearance and was permitted to file a delayed appeal in 09 CA 3291. That appeal argued only whether the trial court had erroneously sentenced Defendant for allied offenses of similar import, despite Defendant’s timely and impassioned written requests to the State Public Defender to deal

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<sup>6</sup> 11-3-08 sua sponte Court Order, 08-CR-291.

<sup>7</sup> *Judgment Entry* 10-10-08, 08-CR-461.

<sup>8</sup> *Dismissal Entry*, 11-13-08, 291.

with speedy trial failures, to file a postconviction for him, and to deal with his limited legal understanding of the controversies of the two-indictment issues.<sup>9</sup> On June 1, 2010, the Fourth District Court in 2010-Ohio-2553<sup>10</sup>, affirmed in part and reversed in part, the trial court's judgment, and remanded the case back to the trial court for further proceedings consistent with that opinion. Essentially, the Appeals court agreed in part with defendant that the trial court should have merged Counts four, five and six, the having a weapon while under disability convictions, and that the trial court should have merged Counts seven, eight and nine, the unlawful possession of dangerous ordnances convictions. The Appeals Court did not agree that Counts one and two should merge. However, after *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, it appears that R.C. 2941.25 now supports Defendant's argument regarding Counts one and two. The trial court has never resentenced Defendant subsequent to the Appeals' Court's remand.

Defendant finally hired undersigned counsel who drove to Portsmouth and looked at both the 291 and 461 cases. This Counsel noticed structural errors and inconsistencies and other issues, including speedy trial issues, regarding Defendant's cases and conviction.<sup>11</sup> Counsel prepared motions related to these issues, one a straight motion to vacate, claiming that the conviction and sentence of Defendant was void *ab initio*, and the

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<sup>9</sup> Letter from Defendant to Public Defender, 3-15-09; letter from Defendant received by Public Defender 5-26-09, attached as exhibits to *Affidavit and Exhibits of Defendant Scott Creech in Support of Motion Filed 6-1-11*, and *Affidavit and Exhibits of Defendant Scott Creech in Support of Motion for Leave to File Delayed Petition for Postconviction Relief*, both affidavits and exhibits filed 7-14-11.

<sup>10</sup> *State v. Creech*, 2010-Ohio-1553.

<sup>11</sup> The State Public Defender never looked at 291, and thus was unable to find the Motion to Suppress filed by trial counsel. See Letter from OPD, 9-22-09, attached to Defendant's Affidavits filed 7-14-11.

other, on a different and alternative theory, a motion for leave and petition for postconviction relief. On June 1, 2011, Defendant Scott Creech filed a motion entitled:

(1) *Defendant's Motion To Strike And Vacate The Supposed October 2, 2008 Jury Verdicts In Case 08 CR 461, Vacate The Conviction And Sentencing Entry Of October 10, 2008, And For The Immediate Release Of The Defendant From Prison, All For Cause Shown.*

On July 14, 2011, Defendant also filed a motion entitled:

(2) *Defendant's Motion for Leave to File Delayed Petition for Postconviction Relief.*

On July 14, 2011, Defendant filed affidavits and more exhibits in support of both motions. On November 11, 2011 the Court held a hearing regarding the facts of the matter. On July 5, 2012, the trial court filed its decision on the Defendant's motions, denying both<sup>12</sup>. Defendant timely appealed. The Fourth District Court of Appeals, in *State v Creech*, 2013-Ohio-3791, affirmed the trial court's judgment.

PROPOSITION OF LAW I. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY DENYING HIS MOTION TO VACATE THE CONVICTION AND FURTHER BY NOT FINDING THAT APPELLANT'S JUDGMENT OF CONVICTION AND SENTENCE IN 461 WAS VOID *AB INITIO* AND AS SUCH THAT THE COURT COULD VACATE THE VOID JUDGMENT AT ANY TIME. THE COURT'S ACTIONS VIOLATED APPELLANT'S 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION AND HIS RIGHTS UNDER ARTICLE 1, SECTIONS 10, 15 AND 16 OF THE OHIO CONSTITUTION.

"A Court has inherent power to vacate a void judgment because such an order simply recognizes the fact that the judgment was always a nullity." *State v. Bedford*, 184 Ohio App.3d 588, 2009-Ohio-3972, ¶ 12 (9th Dist.), quoting *Van DeRyt v. Van DeRyt*, 6 Ohio St.2d 31, 36 (1966).

A. THERE WAS NO JOURNAL ENTRY SETTING THE 461 CASE FOR JURY TRIAL; AND NUMEROUS JOURNAL ENTRIES SETTING AND RESETTING THE JURY TRIAL IN 291.

It is well settled that a court speaks through its journal entries. *State v. King*, 70 Ohio St.3d 158, 162, 1994-Ohio-412, 637 N.E.2d 903; *In re Adoption of Gibson* (1986),

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<sup>12</sup> *Decision and Entry*, 7-5-12.

23 Ohio St.3d 170, 173, 492 N.E.2d 146, fn. 3; *Schenley v. Kauth* (1953), 160 Ohio St. 109, 113 N.E.2d 625, paragraph one of the syllabus. The trial Court set the 291 case for jury trial and then rescheduled it a few times, ultimately setting the trial in 291 for September 29 2008. The jury could thus have only tried the 291 case, and it is evident from the fact that the Certificate for Court Stenographer's Fees and List of Jurors to be paid are both found in the 291 case, as well as all the jury verdicts stating "291" before they were altered, that it was 291 that the jury was trying, and that the Defense thought it was trying. <sup>13</sup> To state that it was the 461 case that was tried, rather than the 291 case, which was the only one truly set for trial, represents a structural error by the Court. Structural errors are constitutional errors that defy analysis by "harmless error" standards because they affect the framework in which the trial proceeds, rather than just being error in the trial process itself. *United States v. Gonzalez-Lopez* (2006), 548 U.S. 140, at 148. A structural error mandates a finding of "per se prejudice." *State v. Colon*, 118 Ohio St.3d 26, 30, 2008- Ohio-1624, 885 N.E.2d 917, and results in "automatic reversal." *State v. Payne*, 114 Ohio St.3d 502, 505, 2007-Ohio-4642, 873 N.E. 2d 306.

#### B. THE 291 CASE WAS DISMISSED BY THE STATE.

When someone hand-wrote "461" on the verdict forms after the discharge of the jury, and the Court erroneously transferred the jury verdicts to the 461 case, the 291 jury verdicts were nullified; they were made void by the Court. Further, the 291 case ceases to exist, as it was dismissed by the State 11-13-08. Defendant was tried in 291, and then 291 was dismissed.

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<sup>13</sup> See Trial Transcript v.1, p. 3, l.3 to l.17. L.17-19 appears to be the statement of the Prosecutor although it is attributed to Defense Counsel.

C. THE COURT'S ALTERATION OF THE JURY VERDICTS CREATED AN IMPERMISSIBLE SWITCH OF CASE TRIED, AFTER IT WAS TRIED

It is well established in Ohio that once a jury has returned its verdict and has been discharged, it cannot be reconvened to alter or amend its verdict. *Sargent v. Ohio* (1842), 11 Ohio 472, syllabus; *Am. Express Co. v. Catlin* (October 2, 1924), 7th Dist., 1924 Ohio Misc. LEXIS 1503, at \*2; *Boyer v. Maloney* (1927), 27 Ohio App. 52, 58. In the instant matter, the Court's change of the verdict forms to read a different case number, after the jury had been discharged, is more than the "correction of a clerical error". The Court had never set a suppression hearing, pretrial or trial in 461. The Court only set the suppression hearing, pretrial dates and trial dates in 291. The Court speaks through its journal entries. Indeed, the Court thinks at the beginning of the trial, that 291 is being tried.<sup>14</sup> The Court had no authority to change the case in which the jury rendered their verdicts, when *the only case set for trial was 291*. The Court had no authority to sentence Defendant in 461, when there was no true adjudication of guilt in case 461. The sentencing entry and conviction are void. A void judgment, order or decree may be attacked "at any time or in any court, either directly or collaterally - The law is well-settled that a void order or judgment is void even before reversal." *Valley v Northern Fire & Marine Ins. Co.*, 254 U.S. 348, 41 S.Ct. 116 (1920).

D. THE COURT'S CLAIM THAT IT WAS TRYING 461 INSTEAD OF 291, WHEN ONLY 291 WAS SET FOR TRIAL, THEN ALTERING THE JURY VERDICTS A MONTH AFTER THE FACT TO READ 461, IS BOTH PLAIN AND STRUCTURAL ERROR.

The error of the trial court, in setting 291 for trial, and trying 291, but then changing the verdict forms to read 461, and convicting and sentencing Defendant in 461, was both

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<sup>14</sup> See Trial Transcript, v.1, p.4, l.1-2.

plain and structural in nature. Structural error requires no showing of prejudice although Defendant *was* prejudiced by this action, because he may not have had a speedy trial issue to file in 291, and thus filed no pretrial motion regarding speedy trial, but he *did* have a speedy trial issue in 461. The 291 trial became the “461” trial after the fact, after it was too late to file a speedy trial motion, denying Defendant due process rights and sixth amendment rights to effective assistance of counsel. Structural errors “defy harmless-error analysis and are cause for automatic reversal” without a showing that a substantial right has been affected. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶ 16. A structural error is a “defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *State v. Hill*, 92 Ohio St.3d 191, 197, 2001-Ohio-141. The error is also plain, as articulated in *United States v Olano*, 507 U.S. 725 (1993). Appellant’s substantial rights were affected by the error, because he likely had no speedy trial issue to file in 291, and thus filed no pretrial motion regarding speedy trial, but he *did* have a speedy trial issue in 461. The 291 trial became the “461” trial after the fact, after it was too late to file a speedy trial motion, denying Defendant due process rights and sixth amendment rights to effective assistance. His speedy trial motion in 461 would have been granted, he had been incarcerated for more than 200 days before trial without motions or continuances in 461 to toll time, and the case would have been dismissed, thus “affecting the outcome’ of the trial proceedings.

**PROPOSITION OF LAW II. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY DENYING HIS MOTION TO VACATE THE CONVICTION AND FURTHER BY NOT FINDING THAT APPELLANT’S JUDGMENT OF CONVICTION AND SENTENCE IN 461 WAS VOID *AB INITIO*. AS A MATTER OF LAW, WHEN A TERMINATION ENTRY FAILS TO CONFORM TO THE MANDATES OF CRIM. R. 32(C), IT IS NOT A FINAL APPEALABLE ORDER AND THEREFORE THERE HAS NOT BEEN EITHER A SENTENCE OR A CONVICTION.**

In promulgating the Rules of Criminal Procedure the Ohio Supreme Court made it clear that the procedures therein were binding on every Court of this State. See Crim. R.

1. Ohio Rule of Criminal Procedure, Rule 32(C) specifically states:

A judgment of conviction shall **set forth the plea, the verdict or findings**, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.<sup>15</sup>

“Strict compliance” with Crim. R. 32(C) is required. See *State v. Lovelace*, (1-15-1999) Hamilton No. C-970983 (unreported), citing *State v. Klein* (Dec. 4, 1998), Hamilton App. No. C-970788, unreported; *State v. Miller*, 9th Dist. No. 06CA0046-M, 2007 Ohio 1353, 2007 Ohio App. LEXIS 1258, at \*; Crim. R. 1.

In that regard, we must next apply the mandates of Crim. R. 32(C) to the “Judgment Entry” of October 10, 2008 for the case. It is apparent that the Jury Verdicts belong to the 291 case which was subsequently dismissed. Succinctly put, without the “verdict” of guilt by the jury, the Entry fails to comply with Crim. R. 32(C) and therefore is not a final order. *State v. Ginocchio* (1987), 38 Ohio App.3d 105, 526 N.E.2d 1366. In sum, the complete record here is absent of any journalized entry setting 461 for trial; only 291 was set for jury trial. The jury came back in 291 with verdicts which were altered to read that they had made their findings in a different case. Defendant was never found guilty in 461 prior to the sentencing. Nevertheless, as evidenced by the October 10, 2008 Entry he was sentenced to imprisonment in the 461 case. Absent a jury verdict or finding of guilt prior to the sentencing of Defendant, that failure has rendered the sentence imposed upon him null and void.

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<sup>15</sup> Effective: July 1, 1973; amended effective July 1, 1992; July 1, 1998, July 1, 2004.

PROPOSITION OF LAW III. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY NOT FINDING THAT CASE 461 SHOULD HAVE BEEN DISMISSED FOR STATUTORY AND CONSTITUTIONAL SPEEDY TRIAL VIOLATIONS. THE COURT'S ACTIONS VIOLATED APPELLANT'S 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION AND HIS RIGHTS UNDER THE OHIO CONSTITUTION.

A. IF THE CASE THAT WAS TRIED IS BELATEDLY CALLED "461", THEN DEFENDANT HAS A STATUTORY AND CONSTITUTIONAL SPEEDY TRIAL ISSUE.

If the State and the Court say that 461 is the case that the Court was trying, on September 29, 2008, then Defendant prevails on a speedy trial issue. The Court never merged 291 and 461. Motions, continuances and journal entries setting trial dates were only filed in 291. Case 461 was filed April 30, 2008. Defendant was held in jail on 291 since the Indictment 3-31-08 (served 4-1-08).<sup>16</sup> Defendant was held in jail continuously until the trial September 29, 2008. Although motions filed, including motions for continuance, would perhaps toll time for speedy trial purposes in 291, nothing of the sort happened to trigger the tolling of time in 461. There were no motions for continuance or entries granting continuance in 461. Pursuant to the Court's own sentencing entry in 461, Defendant spent 200 days in jail until the trial.<sup>17</sup>

The requirement of *State v. Mincy* (1982), 2 Ohio St.3d 6, is that satisfactory reasons for the continuance of a trial date must be put upon the record before the speedy-trial time has expired. The requirement that the continuance, itself, must be the subject of a journal entry has been strictly upheld. *State v. Geraldo* (1983), 13 Ohio App.3d 27, 30-31. See, also, *Cleveland v. Jones* (1996), 110 Ohio App.3d 791, 793. If the State insists that it was the 461 case that was tried September 29, 2008, then the State and the Court

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<sup>16</sup> Defendant was originally arrested on a Felony complaint, Portsmouth Municipal Court CRA 0800577, 3-21-08.

<sup>17</sup> *Judgment Entry*, 10-10-08, 08-CR-461, p.9.

deprived Defendant of both his constitutional and statutory rights to a speedy trial. As the triple-count provision applies here and tolling no time for continuances, since none were filed in 461, two hundred actual days and six hundred statutory days elapsed. Thus, the state violated Defendant's statutory right to a speedy trial because it concluded his case beyond two hundred seventy statutory days. In the instant case, there was a 200-day delay while Defendant was incarcerated, more than double the statutory period permitted; the reason for the delay was the State's last-minute assertion that it was trying 461 despite the fact that no trial was ever set in that case, only in the 291 case; Defendant could not assert his speedy trial rights because he and his trial counsel, and the jury, were unaware that the Court belatedly referred to the trial as the "461" trial, changing the verdict forms; and all of the above are presumptively prejudicial to Defendant.

If on the other hand, 461 were the case that was tried, then Defendant would have been entitled to discharge based on statutory and constitutional rights to a speedy trial. Trial counsel did not file a motion to dismiss based on speedy trial rights because he thought he was trying 291. Appeals counsel did not look at both cases 291 and 461.

Counsels' performance then fell below an objective standard of reasonableness.

**PROPOSITION OF LAW IV: THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY DENYING HIS MOTION FOR LEAVE TO LATE-FILE FOR POSTCONVICTION RELIEF; MARTINEZ V RYAN, CONSTRUED AND EXTENDED.**

There is some caselaw that states that postconviction relief is limited to challenges of a constitutional nature:

"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." *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), syllabus.

Appellant is raising not just the statutory speedy trial issue here but multiple constitutional deprivations – federal constitutional errors under the Sixth Amendment Speedy Trial right and 14<sup>th</sup> Amendment Due Process rights and the Sixth Amendment right to effective counsel, and Ohio Constitutional rights. Therefore, postconviction relief is appropriate. A court may not entertain a petition filed after the expiration of the 180-day period on behalf of a petitioner **unless** one of two alternatives is met. R.C.

2953.23(A). The first of the two alternatives is:

"(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 \* \* \*.

Creech's case is very similar to that of Defendant Martin in *State v Martin*, 2004-Ohio-73 (2nd District). Martin filed a late petition for postconviction relief that was ultimately ruled not time-barred. His trial counsel unreasonably failed to call alibi witnesses who would have testified that he was with them when the crimes were committed. Although Martin obviously knew of the alibi and the identity of the individuals who would have supported it, he nevertheless argued that he could not have raised the issue in a timely postconviction petition. ... Martin insisted that he diligently tried to locate the witnesses but could not do so. He contended they eventually contacted him in prison, providing affidavits to substantiate his claim, and he filed his petition promptly thereafter. Finally, Martin insisted that his own affidavit (which included the foregoing factual allegations) and the affidavits of the alibi witnesses constitute clear and convincing evidence that the jury would not have convicted him but for his attorney's

failure to call the witnesses at trial. As a result, Martin asserted that he had satisfied both of the requirements set forth in R.C. §2953.23(A). The appeals court explained:

“{¶11} In its ruling, the trial court rejected Martin’s argument that he was unavoidably prevented from discovering the facts upon which his claim depends, reasoning as follows:

{¶12} “Defendant seeks to raise the ineffectiveness of his trial counsel in his petition for post-conviction relief. However, Defendant Charles Martin admits in his affidavit that he requested ‘trial counsel to call several alibi witnesses who would have testified to my whereabouts during the time that these crimes were committed.’ Martin Affidavit, ¶2. It is clear that defendant was not unavoidably prevented from discovering the facts upon which his petition is based. Specifically, Defendant was immediately aware of the alleged ineffective counsel at the time of trial. ‘Based on R.C. §2953.23(A), the trial court may not entertain such a petition based on facts that were known by the defendant at trial.’ *Ohio v. Rogers*, 2000 Ohio App. LEXIS 3443 (Aug. 2, 2000), Summit App. No. 19885, unreported.

{¶13} “Defendant also relies on affidavits that purportedly establish an alibi for Defendant’s whereabouts during the time of the crime. Again, the facts contained in the affidavits were known to the defendant at the time of trial. Accordingly, Martin was not unavoidably prevented from discovering the facts of his alleged alibi. If a defendant is not unavoidably prevented from discovering facts relating to a claim of ineffective assistance of counsel based on a failure to present a possible defense, then the defendant fails to satisfy R.C. §2953.23(A)(1)(a). *State v. Collins*, 2001 Ohio App. LEXIS 4847 (Nov. 2, 2001), Montgomery App. No. 18796, unreported.

{¶14} “Because defendant fails to satisfy R.C. §2953.23(A)(1)(a) it is not necessary to determine if defendant satisfies R.C. §2953.23(A)(2). *Id.*” (Decision and Entry, Doc. #28 at 5-6).”

But the Second District **disagreed**. *Martin* 2004-Ohio-73 at ¶15-16:

“{¶15} Immediately after his trial, Martin certainly knew his attorney had failed to call alibi witnesses who purportedly would have testified that he was elsewhere when the crimes were committed. Thus, we agree that Martin was aware of the alleged ineffective assistance of counsel no later than the conclusion of his trial. Although he could have filed a timely post-conviction relief petition with only his own affidavit to support the claim, a self-serving affidavit often fails to establish sufficient substantive grounds for relief even to warrant an evidentiary hearing, much less to prevail on a post-conviction claim. Absent affidavits from the alibi witnesses themselves, the trial court almost certainly would have denied Martin’s claim on the basis that it was unsupported by anything other than his own self-serving affidavit. Furthermore, if Martin had filed a timely post-conviction relief petition relying on only his own affidavit, *res judicata* would have precluded him from re-litigating the issue after obtaining the needed affidavits from his alibi witnesses.

{¶16} Thus, we conclude that Martin was **unavoidably prevented from discovering the facts upon which his claim relies**, within the meaning of R.C. §2953.23(A)(1)(a), **until he obtained affidavits from his alibi witnesses**. Although Martin personally knew of

the alleged ineffective assistance of counsel, he could not have established substantive grounds for relief without the affidavits. In addition, the affidavits attached to Martin's post-conviction relief petition establish (and the State has not disputed) that he could not have obtained the affidavits from the alibi witnesses sooner. Therefore, we find that he has satisfied R.C. §2953.23(A)(1)(a)." (emphasis added)

In similar fashion, Creech thought there was a speedy trial issue that his trial attorney had not addressed. That attorney did not timely file a notice of appeal. He begged his Ohio Public Defender to take his appeal and file regarding numerous issues including speedy trial and ineffective assistance; but she failed to look at both cases 291 and 461; she was unable to locate motions filed in 461, such as the suppression motion, because she never traveled to Portsmouth to look at the other case, the 291 case, which was the repository of every defense motion (three are duplicated in 461) and the only repository of every trial notice. As such she failed to see the complex procedural and due process errors created by the State and the court. Creech had been incarcerated at that point since March 20, 2008; he was not free to travel and spend days gathering the evidence at the Scioto County Clerk's Office to prove his point. Like Martin, Creech was **unavoidably prevented from discovering the facts upon which his claim relies**, within the meaning of R.C. §2953.23(A)(1)(a). He further had been misled by the Ohio Public Defender as to when a postconviction petition would have been due. Had Creech filed a *pro se* postconviction petition without the appropriate evidence subsequently gathered by Undersigned Counsel after repeated trips to Portsmouth, the trial court would have denied his claim and *res judicata* would have precluded him from re-litigating the issue. Appellant has alleged, and shown, both of these two prerequisites. A prisoner is entitled to postconviction relief under Section 2953.21 et seq., Revised Code, if the court can find that there was such a denial or infringement of the rights of the prisoner as to render the

judgment void or voidable under the Ohio Constitution or the United States Constitution. *Keener v Ridenour*, U.S. Court of Appeals, 6<sup>th</sup> Circuit No, 78-3322, 594 F.2d 581. Such is the case here. The Fourth District stated that Creech’s request for leave to file his postconviction fails because, “No right to appointed counsel exists in postconviction proceedings. *State v. Chubb*, 10<sup>th</sup> Dist. No. No. 08AP-232, 2008-Ohio-4549, at ¶12;” *Creech* 2013-Ohio-3791 at ¶ 19. However, the U.S. Supreme Court in *Martinez v. Ryan*, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), held at Headnote 1(b):

“Allowing a federal habeas court to hear a claim of ineffective assistance at trial when an attorney's errors (or an attorney's absence) caused a procedural default in an initial-review collateral proceeding acknowledges, **as an equitable matter**, that a collateral proceeding, if undertaken with no counsel or ineffective counsel, **may not have been sufficient to ensure that proper consideration was given to a substantial claim**. It thus follows that, when a State requires a prisoner to raise a claim of ineffective assistance at trial in a collateral proceeding, a prisoner may establish cause for a procedural default of such claim in two circumstances: where the state courts did not appoint counsel in the initial-review collateral proceeding for an ineffective-assistance-at-trial claim; and where appointed counsel in the initial-review collateral proceeding, where that claim should have been raised, was ineffective under *Strickland v. Washington*, 466 U.S. 668.” (emphasis added)

Creech’s original appeals counsel was ineffective, disregarded his requests for postconviction, and missed important deadlines. By extension under *Martinez*, as an equitable matter, Creech should have been granted leave to file a delayed postconviction.

**CONCLUSION AND REQUEST FOR RELIEF:** Mr. Creech is incarcerated in violation of his rights under the United States and Ohio Constitutions. Appellant requests that this Court accept jurisdiction over his appeal, reverse the appellate court, and vacate his convictions and dismiss with prejudice the underlying criminal cases.

Respectfully Submitted,

  
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing document was served upon the Scioto County Prosecutor's Office, Mark Kuhn, Esq., at 602 Seventh Street, Room 310, Portsmouth, Ohio 45662 by ordinary U.S. Mail, postage prepaid, and/or facsimile transmission to (740) 354-5546 and/or email transmission this the 11<sup>th</sup> day of October, 2013.

  
**ELIZABETH N. GABA** (0063152)  
Attorney at Law

THE COURT OF APPEALS OF OHIO

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
SCIOTO COUNTY

SCIOTO COUNTY  
OHIO  
FILED

2013 AUG 27 PM 11 38

*Don Novinger*  
CLERK OF COURTS

STATE OF OHIO, :

Plaintiff-Appellee, : Case No. 12CA3500

vs. :

SCOTT D. CREECH, : DECISION AND JUDGMENT ENTRY

Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT: Elizabeth N. Gaba, 1231 East Broad Street, Columbus, Ohio 43205<sup>1</sup>

COUNSEL FOR APPELLEE: Mark E. Kuhn, Scioto County Prosecuting Attorney, and Julie Cooke Hutchinson, Scioto County Assistant Prosecuting Attorney, 602 Seventh Street, Portsmouth, Ohio 45662

CRIMINAL APPEAL FROM COMMON PLEAS COURT

DATE JOURNALIZED:

ABELE, J.

This is an appeal from a Scioto County Common Pleas Court judgment that overruled motions (1) to vacate sentence, and (2) to file a delayed motion for postconviction relief. Scott D. Creech, defendant below and appellant herein, assigns the following errors for review<sup>2</sup>:

<sup>1</sup>Different counsel represented appellant during the trial court proceedings.

<sup>2</sup>Appellant did not include in his brief a separate statement of the assignments of error as App.R. 16(A)(3) requires. We take these assignments of error from the brief's Table of Contents.

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FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY DENYING HIS MOTION TO VACATE THE CONVICTION, AND FURTHER BY NOT FINDING THAT APPELLANT'S JUDGMENT OF CONVICTION AND SENTENCE IN 461 WAS VOID AB INITIO AND AS SUCH THAT THE COURT COULD VACATE THE VOID JUDGMENT AT ANY TIME. THE COURT'S ACTIONS VIOLATED APPELLANT'S 5<sup>th</sup>, 6<sup>th</sup> AND 14<sup>th</sup> AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION AND HIS RIGHTS UNDER ARTICLE 1, SECTIONS 10, 15 AND 16 OF THE OHIO CONSTITUTION."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY DENYING HIS MOTION TO VACATE THE CONVICTION AND FURTHER BY NOT FINDING THAT APPELLANT'S JUDGMENT OF CONVICTION AND SENTENCE IN 461 WAS VOID AB INITIO. [sic] AS A MATTER OF LAW, WHEN A TERMINATION ENTRY FAILS TO CONFORM TO THE MANDATES OF CRIM.R. 32(C), IT IS NOT A FINAL APPEALABLE ORDER AND THEREFORE THERE HAS NOT BEEN EITHER A SENTENCE OR A CONVICTION."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY NOT FINDING THAT CASE 461 SHOULD HAVE BEEN DISMISSED FOR STATUTORY AND CONSTITUTIONAL SPEEDY TRIAL VIOLATIONS. THE COURT'S ACTIONS VIOLATED APPELLANT'S 5<sup>th</sup>, 6<sup>th</sup> AND 14<sup>th</sup> AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION AND HIS RIGHTS UNDER THE OHIO CONSTITUTION."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY DENYING HIS MOTION FOR LEAVE TO LATE-FILE [sic] FOR POSTCONVICTION RELIEF."

On March 31, 2008, the Scioto County Grand Jury returned an indictment that charged appellant with: (1) the illegal

possession of chemicals for the manufacture of methamphetamine in violation of R.C. 2925.041(A); (2) the illegal manufacture of methamphetamine in violation of R.C. 2925.04(A)/(C)(2); (3) four counts of possession of a weapon or dangerous ordinance while under a disability in violation of R.C. 2923.13(A); (4) the illegal manufacture of explosives in violation of R.C. 2923.17(B); and (5) trafficking of methamphetamine in violation of R.C. 2925.03(A)(C)(1)(a). That indictment was filed under Case Number 08-CR-291 (291).

On April 30, 2008, the Scioto County Grand Jury returned a second indictment. This indictment is virtually identical to 291, except for a change to the mens rea in count ten. The second indictment was filed in Case Number 08-CR-461 (461).<sup>3</sup> Apparently, as these proceedings wound their way through the trial court, some filings were made in 291 and some in 461.

On August 12, 2008, 461 was consolidated for trial with criminal cases against Lisa Pollitt and Terry L. Martin. The matter came on for trial in September and October 2008. At the conclusion of the trial, the jury found appellant guilty on ten of the eleven counts.<sup>4</sup> The verdict forms, however, all bore Case

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<sup>3</sup>We take our information about 291 from appellant's motion in the trial court. The record provided on appeal includes the original papers filed under 461.

<sup>4</sup>The charges on which appellant was ultimately convicted were the illegal possession of chemicals for the manufacture of drugs, illegal manufacture of drugs, four counts of having a

Number 291 rather than Case Number 461.<sup>5</sup>

On October 10, 2008, a judgment entry filed in 461 dismissed the remaining count and sentenced appellant to serve a cumulative total of nineteen years in prison. The trial court also filed a November 3, 2008 entry that ordered that the verdict forms be amended to include the correct 461 case number, rather than the earlier (291) case number.

A notice of appeal, bearing the 461 case number, was filed on November 13, 2008. We dismissed that appeal because it was filed out of rule. The Scioto County Clerk of Courts filed our dismissal entry with case number 461 hand-written on the entry. Later, we granted leave to pursue a delayed appeal. Materials filed in pursuit of such leave bear the trial court's 461 case number and display a handwritten case number of 09CA3291. We ultimately ruled that several of the offenses should have merged, as allied offenses of similar import, for purposes of sentencing and, thus, we affirmed in part and reversed in part the trial court's judgment. *State v. Creech*, 188 Ohio App.3d 513, 936 N.E.2d 79, 2010-Ohio- 2553 (4<sup>th</sup> Dist.) (*Creech I*).

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weapon under disability, three counts of unlawful possession of dangerous ordinance and illegal manufacture of explosives.

<sup>5</sup>As they appear in the record on appeal, however, the 291 case numbers have a line drawn through them and someone hand wrote the 461 case number(s).

On June 1, 2011, appellant commenced the instant actions that form the basis for this appeal. Appellant filed a motion "to strike and vacate the supposed" jury verdicts and sentencing entry in case number 461. The gist of appellant's argument is that cases 291 and 461 never merged, that the only entry that set the case for trial was filed in 291 and that no trial was held in that case. Appellant further argued that all motions and continuances that would have extended the speedy trial limit were filed in 291 and, thus, if 461 is the actual case tried (in which no such motions or continuances had been filed), appellant's speedy trial rights had been violated.

On July 14, 2011, appellant also filed a motion for leave to file "delayed petition for postconviction relief." In his motion, appellant stated that he adopted his arguments from the previous motion to vacate, but also sought leave if the court decided to treat that motion as a petition for postconviction relief. In view of the confusing nature of the two cases, the trial court held a hearing (November 9, 2011) to try to sort things out and get "a better understanding of the facts."

On July 5, 2012, the trial court issued a detailed decision and judgment that overruled the motion to vacate and denied leave of court to file a postconviction relief petition out of rule. Among other things, the court determined the two cases, in essence, merged into one another, the change of case numbers on

the verdict forms simply corrected a clerical error and that no structural deficiency occurred in the trial court proceedings. The court also held that appellant had not met the requirements for filing a delayed petition for postconviction relief. This appeal followed.

I

We first consider, out of order, appellant's second assignment of error that asserts that the October 10, 2008 sentencing entry is neither final nor appealable.

Appellate courts have appellate jurisdiction over final appealable orders. Ohio Constitution, Article IV, Section 3(B)(2). If the 2008 sentencing entry is not a final appealable order, we have no jurisdiction to consider this appeal and must dismiss the case.

Crim.R. 32(C) provides, in pertinent part, that "[a] judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence. \* \* \* The judge shall sign the judgment and the clerk shall enter it on the journal." Appellant appears to assert that because the verdict forms bore Case Number 291, no verdicts were rendered in 461 and the trial court could not have complied with Crim.R. 32(C). We disagree.

The Ohio Supreme Court has stated that a judgment of conviction and sentence satisfies Crim.R. 32(C), and constitutes

a final, appealable order under R.C. 2505.02, if "it sets forth (1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk. *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, at paragraph one of the syllabus.<sup>6</sup> The October 10, 2008 judgment satisfies these requirements. The judgment sets out the verdicts on each count and specifies all of the sentences, the judge signed the judgment and the judgment contained a clerk of courts time stamp. The verdicts may, or may not, have come from another case, but this does not change the fact that the text of the entry satisfies the Crim.R. 32(C) requirements. Consequently, the judgment is a final order and we have jurisdiction over this appeal. Appellant's second assignment of error is hereby overruled to this extent, and we now address the remaining arguments under this assignment of error.

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<sup>6</sup>We acknowledge that *Lester* was decided years after appellant's conviction. Generally speaking, Ohio Supreme Court decisions apply retrospectively and "the effect is not that the former was bad law, but that it never was the law." *Peerless Elec. Co. v. Bowers*, 164 Ohio St. 209, 210, 129 N.E.2d 467 (1955). One exception to this general rule is for decisions that create new constitutional rights and such decisions are applied prospectively. See *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169, at ¶3, partially overruled on other grounds by *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, 2010-Ohio-3830, at paragraph one of the syllabus. The Ohio Supreme Court did not create any new right in *Lester*, but, rather, clarified and interpreted an existing rule and statute.

## II

We now turn to the fourth assignment of error wherein appellant argues that the trial court erred by not granting leave to file the postconviction relief petition out of rule. We disagree.

Before we address the merits of appellant's argument, we pause to note that a motion to vacate a conviction and sentence, if filed after an appeal or after time has expired for filing an appeal, and raises constitutional challenges to the conviction and sentence, will be treated as a petition for postconviction relief. *State v. Files*, 6<sup>th</sup> Dist. No. L-11-1226, 2012-Ohio-3295, at ¶5; *State v. Timmons*, 10<sup>th</sup> Dist. No. 11AP-895, 2012-Ohio-2079, at ¶6. The vast majority, although not all, of the arguments appellant raised in his motion to vacate were made on constitutional grounds. Thus, appellant's arguments could only be considered if the trial court granted leave to file a delayed petition for postconviction relief. Without such leave, none of appellant's constitutional arguments in his motion to vacate would properly be before the trial court.

Our analysis of the merits of the assignment of error begins with the proposition that a petition for postconviction relief must be filed no later than one hundred eighty days (180) days after trial transcripts are filed in the court of appeals. R.C. 2953.21(A)(2). In the case sub judice, the trial transcripts

both bear file stamps dated May 12, 2009. Thus, appellant's 2011 motions fall outside the statutory time limit. A trial court is prohibited from entertaining a post conviction relief petition unless the requirements of R.C. 2953.23(A)(1) are met:

"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."<sup>7</sup>

We agree, albeit for reasons different than the trial court, that appellant failed to satisfy these requirements. As to the first requirement, appellant concedes that the failure to file the petition in a timely manner occurred because his "prior attorneys [failed] to LOOK AT BOTH THE 291 AND THE 461 FILES." (Capitalization in original.) Assuming this to be true, and

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<sup>7</sup>R.C. 2953.23 also allows for petitions to be filed out of rule under subsection (A)(2), but that applies to DNA test results and has no bearing on this case.

further assuming there is merit to his underlying argument, we are not persuaded this amounts to being "unavoidably prevented" from discovering those facts.

For purposes of R.C. 2953.23(A)(1), Ohio courts have defined "unavoidably prevented" as meaning "a defendant was unaware of those facts and was unable to learn of them through reasonable diligence." *State v. Pianowski*, 2<sup>nd</sup> Dist. No. 25369, 2013-Ohio-2764, at ¶17; *State v. Brown*, 5<sup>th</sup> Dist. No. 2007-CA-00220, 2008-Ohio-639, at ¶21. Here, counsel was not prevented from discovering the discrepancies on which appellant relies to assert his claim(s). Instead, counsel may not have thoroughly examined the files. The fact that appellant raises claims of ineffective assistance of counsel suggests that the bases for his claims could have been uncovered if "reasonable diligence" had been exercised.

Moreover, appellant himself could have exercised reasonable diligence as well. No right to appointed counsel exists in postconviction proceedings. *State v. Chubb*, 10<sup>th</sup> Dist. No. No. 08AP-232, 2008-Ohio-4549, at ¶12; *State v. Smith*, 1<sup>st</sup> Dist. No. C-060387, 2007-Ohio-2796, at ¶7. Many petitioners file petitions pro se after they have researched their claims.<sup>8</sup>

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<sup>8</sup> Because there is no assertion of a new federal or state right recognized by the United States Supreme Court, we do not analyze that prong of R.C. 2953.23(A)(1)(a).

Appellant does not attempt to prove the second prong of R.C. 2953.23(A)(1) showing that no reasonable finder of fact would have found him guilty but for the alleged constitutional errors. Indeed, appellant's argument (both below and on appeal) is based on procedure rather than fact. In the absence of the alleged procedural errors, appellant does not argue that the trier of fact would have reached a different conclusion, and we cannot reach that conclusion after our review of the record.

For all of these reasons, we conclude that the trial court properly denied appellant leave to file a delayed postconviction relief petition.

Appellant, however, counters with two arguments. First, he contends that R.C. 2953.23(A) is not jurisdictional. We, however, have held on several occasions that it is. See e.g. *State v. Shadoan*, 4<sup>th</sup> Dist. No. 10CA904, 2011-Ohio-4400, at ¶16; *State v. Davis*, 4<sup>th</sup> Dist. No. 10CA25, 2011-Ohio-1706, at ¶9. Nothing in appellant's brief prompts us to change our position on that issue.

Second, even if R.C. 2953.23(A) is jurisdictional, appellant contends it is an unconstitutional statute of repose. Generally, statutory enactments enjoy a strong presumption of constitutionality. See *State v. Williams*, 126 Ohio St.3d 65, 2010-Ohio-2453, 930 N.E.2d 770, at ¶20; *State v. Cook*, 83 Ohio St.3d 404, 409, 700 N.E.2d 570 (1998). Although we have not

previously addressed this particular issue, our colleagues in *State v. Gulertekin*, 10<sup>th</sup> Dist. No. 99AP-900, 2000 WL 739431 (Jun. 8, 2000) concluded:

"In so concluding, we next determine appellant's claim that the jurisdictional provisions in R.C. 2953.21 and 2953.23(A) are unconstitutional statutes of repose in violation of Section 16, Article I of the Ohio Constitution. Section 16, Article I of the Ohio Constitution provides:

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. \* \* \*

The Ohio Supreme Court has held that Section 16, Article I of the Ohio Constitution does not provide:

\* \* \* [A]n unlimited, absolute guarantee that every cognizable claim filed in a court of general jurisdiction will be litigated to a final conclusion in such court. Litigants may find their claims barred by a reasonable statute of limitations, stayed by lawful injunction, dismissed by summary judgment and tempered by any number of other devices consonant with due process or "due course of law." \* \* \* [ *Chambers v. Merrell-Dow Pharmaceuticals, Inc.* (1988), 35 Ohio St.3d 123, 132, 519 N.E.2d 370.]

Rather, the Ohio Supreme Court has held that Section 16, Article I of the Ohio Constitution requires that individuals have a reasonable period of time to seek redress of their claimed injuries. *Brenneman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, 466, 639 N.E.2d 425. Thus, the provision prohibits the Ohio Legislature from depriving a claimant access to courts before he or she knew or should have known of her injury. *Id.*

In this case, we initially conclude that the jurisdictional provisions in R.C. 2953.21 and 2953.23(A) are not unconstitutional statutes of repose as applied to appellant. For the reasons noted above, appellant has not demonstrated that she was precluded from timely asserting claims in her post-conviction

relief petition.

Having so concluded, we generally determine that the jurisdictional provisions in R.C. 2953.21 and 2953.23(A) are not unconstitutional statutes of repose in violation of the Ohio Constitution. The provisions allow a defendant reasonable time to investigate his or her case, preserve all defenses and objections, and present all viable claims to court. Moreover, as noted above, the provisions contain procedures to allow a trial court to entertain untimely petitions. See R.C. 2953.23(A)."<sup>9</sup>

We find this reasoning highly persuasive. Appellant has not been denied "access to the courts" as he asserts in his brief. To the contrary, he prosecuted his appeal in *Creech I*, could have filed a timely postconviction relief petition and, as we discuss *infra*, may yet have another option open to assert his claims.

For all of these reasons, we find no merit to appellant's fourth assignment of error and it is hereby overruled.

### III

As we noted previously, our resolution of appellant's fourth assignment of error is largely dispositive of the entire case. The constitutional arguments advanced in his motion to vacate the conviction and sentence had to be considered as if they were made in a delayed petition for postconviction relief and, as we concluded, the trial court did not err by denying him leave to file such a petition out of rule. We now consider several issues

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<sup>9</sup>The Preble County Court of Appeals appears to have adopted the same reasoning, but does not expressly mention the notion of a statute of repose. See *State v. McGuire*, 12<sup>th</sup> Dist. No. CA2000-10-011, 2001 WL 409424 (Apr. 23, 2001).

from the first and third assignments of error, as well as the remainder of the second assignment of error.

First, as to the underlying premise of appellant's claims in the trial court and here on appeal, no doubt exists that the case sub judice has been fraught with procedural irregularities and mishaps.<sup>10</sup> However, we disagree with appellant's argument that these issues are "structural errors" of such magnitude as to deprive him of a fair trial and render all proceeding(s) void.

"Structural errors" are constitutional defects that defy "harmless error" analysis because they affect the entire framework within which a trial proceeds, rather than simply being an error in the trial process itself. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, at ¶17; also see generally *Arizona v. Fulminante*, 499 U.S. 279, 309-310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). In *Fulminante*, the United States Supreme Court listed examples of errors so great that they defy harmless error analysis and, thus, must be considered structural errors. Those examples include (1) a total deprivation of right to counsel, (2) a partial judge presiding over the case, (3) the illegal exclusion of members of one's own race from the jury, and

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<sup>10</sup>This seems to have been a recurring theme associated with appellant and his co-defendants. In Lisa Pollitt's direct appeal, we noted that the trial court's judgment erroneously identified Pollitt as "Scott D. Creech" (appellant herein). Because neither side raised the issue, we chose to ignore it. See *State v. Pollitt*, 4<sup>th</sup> Dist. No. 08CA3263, 2010-Ohio-2556, at ¶8, fn. 2.

(4) the deprivation of one's right to a public trial. 499 U.S. at 309-310. "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Id.* at 310; also see *Rose v. Clark*, 478 U.S. 570, 577-578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (Citations omitted.)

Both the Ohio and United States Supreme Courts have warned that structural error should be recognized in the rarest of circumstances. *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, at ¶47; *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Here, appellant has not persuaded us that the procedural irregularities and mishaps rose to the level of structural error.

The overall gist of appellant's argument appears to be that the 2008 jury trial was conducted in case number 291, but the judgment of conviction and sentence was entered in case number 461. Thus, appellant argues that he was convicted and sentenced without the panoply of trial rights that the Ohio and United States Constitutions affords him. We, however, disagree with appellant's argument that the trial was conducted in Case No. 291. On August 12, 2008, Case No. 461 was ordered consolidated with Lisa Pollitt's case. The 2008 transcripts reveal that counsel for both appellant and Pollitt appeared at the trial.

When the jury pool appeared for voir dire, the trial judge informed them the "style of this case is State of Ohio versus Scott Creech and State of Ohio versus Lisa Pollitt." Pollitt's case was not consolidated with 291, but rather consolidated with 461, the case that was tried.

We acknowledge, as appellant repeatedly emphasizes in his brief, that the notice scheduling the trial was filed in 291 rather than 461. The fact remains, however, that appellant and his trial counsel were present and participated at trial. Nothing in the record indicates that appellant objected to any misfiling of the notice, and appellant has not cited the record where he asked for, but was denied, additional time. Appellant also does not cite anything in the transcript or original papers to suggest that he was denied any other trial right guaranteed under the Ohio or United States constitutions. Consequently, we believe that the use of the 291 case number on the verdict forms (instead of 461) is a clerical mistake, and at worse a minor procedural error, that did not affect the "fundamental fairness of the entire proceeding."

Once again, as appellant points out in his brief, we acknowledge the trial court did not formally consolidate the two cases. Nevertheless, these procedural mishaps neither deprived appellant of any fundamental rights nor fundamental fairness. Mislabeled case numbers on the jury verdict forms, and the

placement of some filings in 291 and others in 461, are issues that could have been raised in the trial court where they could have been corrected and any alleged prejudice could have been alleviated. They were not. Appellant has not persuaded us that this rises to the level of plain error under Crim.R. 52(B), let alone structural, constitutional error.<sup>11</sup>

Appellant could also have raised these issues in *Creech I*, but did not. The Ohio Supreme Court has held that the doctrine of res judicata applies when determining whether postconviction relief is warranted under R.C. 2953.21. See *State v. Szefcyk*, 77 Ohio St.3d 93, 671 N.E.2d 233, at the syllabus (1996); *State v. Nichols*, 11 Ohio St.3d 40, 42, 463 N.E.2d 375 (1984); *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104, at paragraph eight of the syllabus (1967). In other words, a petitioner may not raise, for purposes of postconviction relief, any error that was raised, or could have been raised, on direct appeal. *State v. Franklin*, 4th Dist. No. 05CA9, 2006-Ohio-1198, at ¶10; *State v. Peeples*, 4th Dist. No. 05CA25, 2006-Ohio-218, at ¶11. Here, the alleged

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<sup>11</sup> Both the Ohio and United States Supreme Court have expressed doubt as to whether a "structural error" analysis would apply in the case of an alleged error made without an objection. See *State v. Hill*, 92 Ohio St.3d 191, 749 N.E.2d 274 (2001); also see generally *Johnson v. United*, 520 U.S. 461, 466, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997). Here, it appears that no objection was lodged to any of the alleged errors on which appellant relies and, thus, he asks us to go where both the state and federal supreme courts have warned courts to tread carefully. Fortunately, we need not do so because we do not believe that any of the alleged errors rise to the level of structural error.

errors could have been discovered and raised in *Creech I*.

We are mindful that the Ohio Supreme Court has restricted res judicata to voidable judgments only; it has no application to judgments that are void ab initio. *State v. Simpkins*, 117 Ohio St.3d 420, 884 N.E.2d 568, 2008-Ohio-1197, at ¶30. Thus, to raise the non-constitutional issues in this court or the trial court is to show that the 2008 judgment of conviction and sentence is void. See generally *State v. Sowards*, 4<sup>th</sup> Dist. No. 09CA8, 2011-Ohio-1660, at ¶10. Although appellant attempts to make that argument in his first assignment of error, we do not find it persuasive.

First, appellant cites no authority with the unusual procedural posture of this case and we have found nothing like it in our research. Second, as to appellant's reliance on the phrase "due process of law," we do not find that appellant was denied due process rights by any of the alleged procedural errors.

The guarantee that no one will be deprived of their liberty without "due process of law" ensures rights of notice, as well as an opportunity to be heard and to offer testimony. See e.g. *State v. Warmus*, 197 Ohio App.3d 383, 2011- Ohio-5827, 967 N.E.2d 1223, at ¶63 (8<sup>th</sup> Dist.); *In re E.J.M.*, 5<sup>th</sup> Dist. No. 2010CA171, 2011- Ohio-977, at ¶17; *State v. Coyle*, 2<sup>nd</sup> Dist. No. 23450, 2010-Ohio- 2130, at ¶12. Here, appellant and his co-defendant

participated in a three day trial. He obviously had notice of the trial. Appellant called no witnesses to testify on his behalf, and cites nothing in the transcript to show that he was denied that right or not provided sufficient time to issue a subpoena. In short, we fail to see how appellant was denied any element of due process under the Fourteenth Amendment to the United States Constitution. For these reasons, we are not persuaded the judgment against him is void ab initio.

Appellant also cites *State v. English*, 21 Ohio App.3d 130, 486 N.E.2d 1212 (1985) for the proposition that the court erroneously corrected the jury verdict forms after the jury was discharged. However, we find *English* distinguishable from the case at bar for several reasons. First, *English* was before the Court on a first appeal of right. The case sub judice was before us on a direct of appeal of right in *Creech I*. The question now is whether the issue of an amended verdict form can be raised at this late date and we hold that it cannot under the doctrine of res judicata. More important, the modification to the verdict in *English* changed the actual crime for which appellant was found guilty. Here, the change to the verdict form only involved the case number.<sup>12</sup>

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<sup>12</sup>The Hamilton County Court of Appeals in *English* noted that there exists "no authority directly on point" with its decision in that case. 21 Ohio App.3d at 130.

We also agree with the trial court that its November 3, 2008 entry that ordered that the verdict forms be amended to reflect the correct 461 case number, rather than the 291 case number, is in the nature of a permissible nunc pro tunc judgment. The Ohio Supreme Court has indicated such entries may be used at any time to correct errors in the record that arise from oversight or omission. See generally *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, at ¶13. Nunc pro tunc entries may generally be used to correct clerical mistakes and errors. See *State v. Messenger*, 4<sup>th</sup> Dist. No. 10CA34, 2011-Ohio-2017, at ¶9; *State v. Damron*, 4<sup>th</sup> Dist. 10CA3375, 2011-Ohio-165, at ¶10; *State v. Johnson*, 4<sup>th</sup> Dist. Nos. 07CA3135 & 07CA3136, 2007-Ohio-7173, at ¶11.

As we noted above, we readily acknowledge that this case has, unfortunately, suffered from many clerical errors. However, the number of those errors does not change the fact that they are clerical in nature. Undoubtably, the better practice would have been to consolidate the two cases, to dismiss 291 after 461 was created, or at least take some measure to ensure that all the filings were made with the correct case number and bore the correct case number. Nevertheless, nothing in the record indicates that the trial court intended to maintain two parallel cases (that would have negated its ability to use a nunc pro tunc entry), nor do we find anything in the record to show that

appellant was somehow prejudiced.

Appellant also argues that he was denied the effective assistance of trial counsel, as well as the effective assistance of appellate counsel. As to appellant's first claim, that claim cannot be raised for several reasons. First, it is a constitutional claim that, as we discuss above, could be raised in the trial court if appellant was granted leave to file a delayed postconviction relief petition.<sup>13</sup> He was not and he cannot raise it now. Furthermore, appellant's claim could have been raised during the first appeal of right, but was not, and is now barred from being raised in these proceedings by the doctrine of res judicata. See *State v. Lofton*, 4<sup>th</sup> Dist. No. 12CA21, 2013-Ohio-1121, at ¶8.

Insofar as appellant's argument that he was denied effective assistance from appellate counsel, the proper vehicle to raise that issue is an application to reopen appeal. App.R. 26(B); *Sowards*, supra, at ¶21, fn. 4; *State v. Brown*, 2<sup>nd</sup> Dist. No. 24602, 2012-Ohio-1425, at ¶14. Claims regarding ineffective assistance of appellate counsel are not cognizable in petitions for postconviction relief. *State v. Murnahan*, 63 Ohio St.3d 60,

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<sup>13</sup>The seminal case on ineffective assistance of counsel, *Strickland v. Washington*, 466 U . S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is based the right of counsel contained in the Sixth Amendment to the United States Constitution.

584 N.E.2d 1204 (1992).<sup>14</sup>

Finally, we address appellant's speedy trial arguments. To the extent that those arguments are based on his constitutional speedy trial rights, such arguments could only be asserted in a delayed postconviction relief petition that the trial court denied, and we affirm that denial. As for appellant's statutory speedy trial rights, this is an issue that could have been raised, but was not, in *Creech I* and is now barred from consideration by res judicata. See generally *State v. Pasturzak*, 4<sup>th</sup> Dist. No. 98CA2587, 1999 WL 914 (Dec. 17, 1998).

We also note that all of appellant's speedy trial arguments appear to be based on the premise that he was tried in case number 461 (even though appellant spends most of his brief arguing he was tried in 291), whereas the filings that would have tolled speedy trial time were filed in case number 291. In other words, had the two cases been combined it does not appear that appellant would claim any speedy trial violation. Obviously, we need not, and do not, address this issue here, but it does lend support to the fact appellant that has suffered no prejudice springing from the clerical or procedural mishaps.

For all of these reasons, we find no merit to appellant's first and third assignments of error, or to the remainder of his

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<sup>14</sup>Here again, appellant is required to show "good cause" why he could not file such an application within the ninety day deadline. App.R. 26(B)(1). Id. at (B)(2)(a).

second assignment of error and they are, for these reasons, hereby overruled.

Before we conclude, we emphasize that if appellant could, in any way, demonstrate prejudice in any of these procedural missteps, our ruling may well have been different. However, despite his counsel's expert and thorough arguments, we fail to see error of such magnitude to persuade us that appellant endured any deprivation of a constitutional right. We are also unpersuaded that any true structural error occurred during the proceedings or, as mentioned above, that he suffered any prejudice from the misfilings in these two cases.

According, having considered all of the errors assigned and argued, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

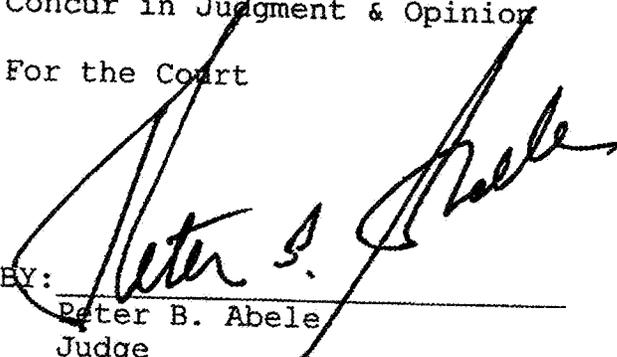
It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

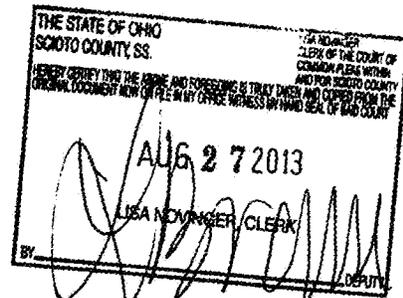
A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Exceptions.

McFarland, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY:   
Peter B. Abele  
Judge



NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.