

**COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO**

<b>STATE OF OHIO</b>	:	
Plaintiff	:	<b>CASE NO. 2009 CR 00755</b>
vs.	:	<b>Judge McBride</b>
<b>JOHN RICHARD THOMAS</b>	:	<b>DECISION/ENTRY</b>
Defendant	:	

David Hoffman, assistant prosecuting attorney for the state of Ohio, 123 North Third Street, Batavia, Ohio 45103.

John Richard Thomas, defendant *pro se*, #A619234, Chillicothe Correctional Institution, P.O. Box 5500, 15802 State Route 104 North, Chillicothe, Ohio 45601.

This cause is before the court for consideration of a “Petition to Vacate and Set Aside Sentence Pursuant to O.R.C. § 2953.23” filed by the defendant John Richard Thomas.

Petitions for post-conviction relief are governed by R.C. 2953.21, which states in pertinent part as follows:

“(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States \* \*

\* may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the

court to vacate or set aside the judgment or sentence or to grant other appropriate relief. \* \* \*

\* \* \*

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

The record of the defendant’s direct appeal to the Twelfth District Court of Appeals (case number 2010 CA 01 009) indicates that the trial transcript was filed with the appellate court on March 15, 2010. Therefore, the defendant was required to file any petition for post-conviction relief by September 13, 2010. The present petition was filed of record in this case on August 22, 2011; therefore, the petition is untimely.

R.C. 2953.23 provides several exceptions to the 180-day filing period and states as follows:

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

(1) Both of the following apply:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized

a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

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

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

As used in this division, 'actual innocence' has the same meaning as in division (A)(1)(b) of section 2953.21 of the Revised Code, and 'former section 2953.82 of the Revised Code' has the same meaning as in division (A)(1)(c) of section 2953.21 of the Revised Code."

The defendant's petition fails to establish that: (1) he was unavoidably prevented from discovery of the facts upon which he must rely to present the claim for relief; (2) 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; (3) but for constitutional error at trial, no reasonable factfinder would have found him guilty of the offense of which he was convicted; and/or (4) that DNA

testing establishes his actual innocence by clear and convincing evidence. Therefore, none of the exceptions allowing untimely petitions apply in the case at bar.

Due to the fact that the defendant's petition for post-conviction relief was filed after the expiration of the 180-day period set forth in R.C. 2953.21(A)(2), and because no exception set forth in R.C. 2953.23 applies, the defendant's petition was untimely filed. Consequently, this court is without jurisdiction to consider the merits of the petition.<sup>1</sup>

**IT IS SO ORDERED.**

DATED: \_\_\_\_\_  
Judge Jerry R. McBride

**CERTIFICATE OF SERVICE**

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/Regular U.S. Mail this \_\_\_\_ day of November 2011 to all counsel of record and unrepresented parties.

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<sup>1</sup> *State v. Strunk* (Jan. 31, 2011), 12<sup>th</sup> Dist. No. CA2010-09-085, 2011-Ohio-417, ¶ 14.