[Cite as *State v. Sowards*, 2018-Ohio-4173.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 18CA2
vs.	:	
WILLIAM S. SOWARDS,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Kerry M. Donahue, Dublin, Ohio, for Appellant.

Jason Holdren, Gallia County Prosecuting Attorney, and Jeremy Fisher, Gallia County Assistant Prosecuting Attorney, Gallipolis, Ohio.

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 10-3-18
ABELE, J.

{¶ 1} This is an appeal from a Gallia County Common Pleas Court judgment that denied a petition for postconviction relief filed by William S. Sowards, defendant below and appellant herein. Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"IT WAS ERROR FOR THE LOWER COURT TO DENY THE PETITION FOR POST CONVICTION RELIEF."

SECOND ASSIGNMENT OF ERROR:

"IT WAS ERROR FOR THE COURT TO REFUSE, DESP[I]TE SPECIFIC REQUESTS, TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW."

THIRD ASSIGNMENT OF ERROR:

"IT WAS ERROR FOR THE COURT TO FAIL TO SET A HEARING, DESPITE REQUEST ON THE POST CONVICTION RELIEF MOTION AND/OR ERROR TO EXECUTE ON A 12 YEAR OLD SENTENCE WITHOUT A NEW SENTENCING HEARING CONSIDERING ALL THE CHANGE IN CIRCUMSTANCES."

FOURTH ASSIGNMENT OF ERROR:

"DEFEN[D]ANT'S SENTENCE IS PROPERLY FOR A MINOR MISDEMEANOR POSSESSION OF MARIJUANA SO THE SENTENCE EXCEEDS THE ALLOWABLE LAWFUL SENTENCE BY 8 YEARS AND IS THUS VOID ABINITIO [SIC]. DEFENDANT'S CONSTITUTIONAL RIGHTS HAVE BEEN SEVERLY [SIC] VIOLATED."

{¶ 2} In October 2006, a jury found appellant guilty of possession of drugs in violation of R.C. 2925.11(A).[1] The verdict form did not, however, specify the degree of the offense or any other additional elements. Instead, the verdict form stated that the jury found appellant "Guilty of Possession of Drugs in a manner and form as he stands charged in the Indictment." The verdict form also contained the caption, "COUNT ONE POSSESSION OF DRUGS." Count one of the indictment charged appellant with possession of marijuana "in an amount exceeding twenty thousand grams" and further indicated the offense is a second-degree felony.

[1] Our explanation of the facts is taken, almost verbatim, from our most recent decision in *State v. Sowards*, 4th Dist. Gallia No. 06CA13 (Nov. 18, 2017) (webcite unavailable).

Appellant did not object to the verdict form, and the trial court subsequently sentenced appellant to serve eight years in prison.

{¶ 3} Appellant appealed his conviction and asserted that the trial court erred by denying his motion to suppress evidence. He did not raise any argument concerning the verdict form. We affirmed the trial court's judgment. *State v. Sowards*, 4th Dist. Gallia No. 06CA13, 2007-Ohio-4863 (*Sowards I*).

{¶ 4} Appellant appealed our decision to the Ohio Supreme Court, and the court declined to hear the appeal. *State v. Sowards*, 116 Ohio St.3d 1508, 2008-Ohio-381, 880 N.E.2d 484 (*Sowards II*). He then appealed to the United States Supreme Court, which also declined to hear the appeal. *Sowards v. State*, 555 U.S. 816, 129 S.Ct. 69, 172 L.Ed.2d 26 (2008) (*Sowards III*).

{¶ 5} In 2008, appellant filed a motion to vacate his sentence. He asserted that the verdict form's failure to comply with R.C. 2945.75(A)(2),[2] as explained in *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735,[3] meant that the court could only impose a

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[2] R.C. 2945.75(A)(2) provides as follows:

> (A) When the presence of one or more additional elements makes an offense one of more serious degree:
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> * * *
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> (2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

[3] In *Pelfrey*, the court held:

> [P]ursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense.

Id. at ¶14. The *Pelfrey* court explained that R.C. 2945.75 is "a clear and complete statute" that "certainly imposes no unreasonable burden on lawyers or trial judges." *Id.* at ¶12. The court stated that "[t]he statute provides

sentence for a minor misdemeanor. The trial court denied appellant's motion, and we affirmed the trial court's judgment. *State v. Sowards*, 4th Dist. Gallia No. 09CA8, 2011-Ohio-1660 (*Sowards IV*).

{¶ 6} The Ohio Supreme Court declined to hear the appeal and further denied appellant's motion to reconsider its decision declining to hear the appeal. *State v. Sowards*, 129 Ohio St.3d 1475, 2011-Ohio-4751, 953 N.E.2d 842, and 130 Ohio St.3d 1441, 2011-Ohio-5883, 957 N.E.2d 301 (*Sowards V*).

{¶ 7} Appellant subsequently filed a petition for a writ of habeas corpus in the United States District Court for the Southern District. His petition mirrored the arguments he raised in his 2008 petition to vacate his sentence. The court denied his petition. *Sowards v. Attorney General of Ohio*, S.D. Ohio No. 2:11-CV-954 (Apr. 19, 2012) (magistrate report and recommendation), and *Sowards v. Attorney General of Ohio*, S.D. Ohio No. 2:11-CV-954 (Sept. 13, 2012) (adopting magistrate's report and recommendation) (*Sowards VI*).

{¶ 8} In May 2012, appellant filed an App.R. 26(B) application to reopen his appeal and asserted that appellate counsel performed ineffectively by failing to file a supplemental brief on

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explicitly what must be done by the courts [when R.C. 2945.75(A)(1) is not followed]: the 'guilty verdict constitutes a finding of guilty of the least degree of the offense charged.' R.C. 2945.75(A)(2)." *Id.* at ¶13.

The court further concluded:

> The express requirement of the statute cannot be fulfilled by demonstrating additional circumstances, such as that the verdict incorporates the language of the indictment, or by presenting evidence to show the presence of the aggravated element at trial or the incorporation of the indictment into the verdict form, or by showing that the defendant failed to raise the issue of the inadequacy of the verdict form. We hold that pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense.

Id. at ¶14.

direct appeal that raised the defective-verdict-form issue. Appellant contended that if appellate counsel had argued that *Pelfrey* and R.C. 2945.75 precluded the trial court from imposing an eight-year prison sentence for a second-degree felony, the outcome of his appeal would have been different. We subsequently granted appellant's application to reopen his appeal. (*Sowards VII*). We did not, however, agree with appellant that the outcome of his appeal would have been different if appellate counsel had filed a supplemental brief addressing *Pelfrey*. Instead, we relied upon the Ohio Supreme Court's 2012 decision in *State v. Eafford*, 132 Ohio St.3d 159, 2012-Ohio-2224, 970 N.E.2d 891, and determined that, although appellant's verdict form arguably did not strictly comply with R.C. 2945.75, *Eafford* created an exception to–or modified–the *Pelfrey* rule. We concluded that under *Eafford*, a verdict form is not defective when it includes language specifically referring to the indictment.[4] We pointed out that appellant's verdict form specifically indicated that the jury found him guilty "as he stands charged in the Indictment." We thus determined that the result of appellant's direct appeal would not have been different if appellate counsel had raised *Pelfrey*.

{¶ 9} Appellant subsequently requested us to reconsider our decision and claimed that we misapplied *Eafford* and that *Eafford* is distinguishable. Appellant further asserted that

[4] In *Eafford*, the court upheld a defendant's conviction for possession of cocaine, a felony of the fifth degree, even though the verdict form contained neither the degree of the offense nor specified that the defendant had possessed cocaine. In doing so, the court majority seemingly retreated from (but did not mention) *Pelfrey* and evaluated the defendant's challenge to the verdict form using a plain-error analysis. *Id.* at ¶¶11-12. The *Eafford* court observed that the verdict form stated that the jury found the defendant "'guilty of Possession of Drugs in violation of § 2925.11(A) of the Ohio Revised Code, as charged in Count Two of the indictment'" and determined that this finding could not "be described as error, let alone an obvious defect in the trial proceedings." *Id.* at ¶18 The court further concluded that any error did not affect the defendant's substantial rights. *Id.* The court explained that the defendant "knew from the outset that the state intended to prove his guilt of possession of cocaine" and that "[t]he form of the jury verdict did not affect the outcome of the trial." *Id.* The court further pointed out that if the defendant had timely objected, "the court could have modified the verdict form, but [the defendant] still would have been found guilty of possession of cocaine, because the only evidence in the case demonstrated his possession of cocaine, as he did not offer any defense in this case." *Id.* at ¶19.

upholding a verdict form that fails to contain enhancing elements violates his constitutional right to a jury trial. Appellant additionally argued that, because *Eafford* had not been decided while his original appeal was pending, we would have relied upon *Pelfrey* and would have vacated his eight-year prison sentence. We denied appellant's application to reconsider. *Sowards VIII*.

{¶ 10} Appellant also filed a motion to certify a conflict. He claimed that our decision on reopening conflicted with cases from the Third, Eighth, and Ninth District Court of Appeals. We denied appellant's motion to certify a conflict. *Sowards IX*.

{¶ 11} Appellant appealed our decision on reopening to the Ohio Supreme Court. On December 24, 2013, the court accepted appellant's appeal and reversed and remanded our decision "for application of *State v. McDonald*, [137] Ohio St.3d [517], 2013-Ohio-5042, [1] N.E.3d [374]."[5] *State v. Sowards*, 137 Ohio St.3d 1440, 2013-Ohio-5678, 999 N.E.2d 695 (*Sowards X*).

{¶ 12} On October 3, 2014, we issued our decision pursuant to the Ohio Supreme Court's remand, *State v. Sowards*, 4th Dist. Gallia No. 06CA13 (Oct. 10, 2014) (webcite unavailable) (*Sowards XI*), and determined that *McDonald* is distinguishable and *Eafford* controlling. We thus continued to adhere to our conclusion that appellant's eight-year prison sentence is valid.

{¶ 13} Appellant appealed our decision after remand to the Ohio Supreme Court. The court declined to hear the appeal and also rejected appellant's motion to reconsider. *State v.*

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[5] In *McDonald*, the court held that "a jury verdict that includes a finding of 'substantial risk of serious physical harm to persons or property,' the enhancement element of R.C. 2921.331(C)(5)(a)(ii), is [not] sufficient to sustain a third-degree-felony conviction for a violation of R.C. 2921.331(B) when the verdict fails to set forth the degree of the offense and also fails to refer to or include language from R.C. 2921.331(B)." *Id.* at ¶1. The court explained that "in cases involving offenses for which the addition of an element or elements can elevate the offense to a more serious degree, the verdict form itself is the only relevant thing to consider in determining whether the dictates of R.C. 2945.75 have been followed." *Id.* at ¶17.

Sowards, 142 Ohio St.3d 1449, 2015-Ohio-1591, 29 N.E.3d 1004, and 143 Ohio St.3d 1407, 2015-Ohio-2747, 34 N.E.3d 134 (*Sowards XII*).

{¶ 14} Appellant additionally requested that we certify a conflict between our decision after remand and various other Ohio appellate court decisions. We denied his motion as untimely. *State v. Sowards*, 4th Dist. Gallia No. 06CA13 (Oct. 22, 2015) (webcite unavailable) (*Sowards XIII*). Appellant appealed this decision to the Ohio Supreme Court, and the court declined to hear the appeal. *State v. Sowards*, 143 Ohio St.3d 1408, 2016-Ohio-899, 46 N.E.3d 702 (*Sowards XIV*).

{¶ 15} On August 31, 2017, appellant filed a second App.R. 26(B) application to reopen his appeal. Appellant, in essence, raised the same argument that he has been raising since his 2008 motion to vacate sentence: that the verdict form fails to comply with R.C. 2945.75 and *Pelfrey*, and that his eight-year prison sentence is therefore invalid.

{¶ 16} We denied appellant's second application to reopen. *State v. Sowards*, Fourth Dist. Gallia 06CA13 (Nov. 18, 2017) (webcite unavailable) (*Sowards XV*). We explained:

> First and foremost, nowhere in his application does [appellant] argue ineffective assistance of appellate counsel. Rather, he claims that we wrongly relied upon *Eafford* when we should have found *Pelfrey* and *McDonald* controlling. He asserts that if we had correctly applied *Pelfrey* and *McDonald*, we would have concluded that his eight-year prison sentence is invalid. Appellant's application does not raise any new issues whatsoever or any issue of appellate counsel's ineffectiveness. Instead, he simply rehashes the same basic argument he has been raising since 2008.
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> Second, "[n]either App.R. 26(B) nor *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, provides for second and subsequent applications for reopening." *State v. Richardson*, 74 Ohio St.3d 235, 236, 658 N.E.2d 273 (1996); *see State v. Williams*, 99 Ohio St.3d 179, 2003-Ohio-3079, 790 N.E.2d 299, ¶10, quoting *State v. Cheren*, 73 Ohio St.3d 137, 138, 652 N.E.2d 707 (1995) ("'Once ineffective assistance of [appellate] counsel has been raised and adjudicated, res judicata bars its relitigation.'"). App.R. 26(B) is not "an open

invitation for persons sentenced to long periods of incarceration to concoct new theories of ineffective assistance of appellate counsel in order to have a new round of appeals." *State v. Reddick*, 72 Ohio St.3d 88, 90-91, 647 N.E.2d 784 (1995).

Third, we have considered the issue appellant raises multiple times. Thus, res judicata bars further litigation of the issue. The doctrine of res judicata generally states that "a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Perry*, 10 Ohio St.2d 175, 176, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. Consequently, "the doctrine serves to preclude a defendant who has had his day in court from seeking a second on that same issue. In so doing, res judicata promotes the principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard." *State v. Saxon,* 109 Ohio St.3d 176, 2006–Ohio–1245, 846 N.E.2d 824, ¶18. Appellant already received multiple full and fair opportunities to be heard. Thus, res judicata bars him from seeking to endlessly relitigate the issue. *Smith v. Buchanan*, 138 Ohio St.3d 364, 2014-Ohio-459, 7 N.E.3d 1134, ¶20 (noting that defendant "has had ample opportunity to litigate this claim, and res judicata now bars his latest attempt").

Fourth, even if appellant could file a successive application to reopen, he did not file it within the ninety-day time frame specified in the rule and he did not argue that good cause excuses the late filing. Thus, appellant's application to reopen also is untimely.

Fifth, appellant's application does not contain "[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." As we have already indicated, appellant's application does not raise any new issues whatsoever. Rather, he raises issues that we previously considered and rejected.

Furthermore, the Ohio Supreme Court declined to review our decision following its remand. That decision is, therefore, the law of the case. *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 405, 659 N.E.2d 781 (1996), citing *Transamerica Ins. Co. v. Nolan*, 72 Ohio St.3d 320, 649 N.E.2d 1229 (1995) (explaining that when Ohio Supreme Court "refuses jurisdiction following the issuance of an opinion by a court of appeals, the court of appeals opinion becomes the law of the case"). "The law-of-the-case doctrine requires a court to follow rulings on issues previously resolved within the same case." *Reid v. Cleveland Police Dept.*, — Ohio St.3d —, 2017-Ohio-7527, — N.E.3d —, ¶11. "Thus, the decision of an appellate court in a prior appeal will ordinarily be followed in a later appeal in the same case and court." *Nolan v. Nolan*, 11 Ohio St.3d 1, 4, 462

> N.E.2d 410 (1984). "'[T]he rule is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution.'" *Id.* at 3. Granting appellant's second application to reopen thus would violate the law-of-the-case doctrine.

{¶ 17} Appellant appealed our judgment that denied his second application to reopen, as well as another judgment in which we determined that we lacked jurisdiction to consider his appeal from the trial court's decision denying his motion to stay execution of sentence. *State v. Sowards*, 4th Dist. Gallia No. 17CA13, 2017-Ohio-8568. Appellant also filed two motions to stay execution of sentence. The Ohio Supreme Court declined to hear either appeal and denied his motions to stay execution of sentence. *State v. Sowards*, 152 Ohio St.3d 1447, 2018-Ohio-1600, 96 N.E.3d 301; *State v. Sowards*, 152 Ohio St.3d 1425, 2018-Ohio-923, 93 N.E.3d 1005; *State v. Sowards*, 151 Ohio St.3d 1526, 2018-Ohio-557, 91 N.E.3d 757; *State v. Sowards*, 151 Ohio St.3d 1526, 2018-Ohio-557, 91 N.E.3d 757.

{¶ 18} Appellant also filed the postconviction relief petition that is the subject of the current appeal. Appellant sought relief "based on a clear change in the law," and asserted that his conviction violates the rules espoused in *Pelfrey* and *McDonald*, and that this court wrongly determined in the re-opening of his direct appeal and subsequent remand that *Pelfrey* and *McDonald* do not mandate a reversal of his conviction. The trial court denied appellant's motion without a hearing. This appeal followed.

{¶ 19} All of appellant's assignments of error challenge the trial court's decision to deny his postconviction relief petition. For ease of discussion, we combine our review of appellant's assignments of error.

A

STANDARD OF REVIEW

{¶ 20} "[A] trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence." *State v. Gondor*, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶ 58; *accord State v. Broom*, 146 Ohio St.3d 60, 2016-Ohio-1028, 51 N.E.3d 620, ¶ 30; *State v. McNamara*, 4th Dist. Pickaway No. 17CA13, 2018-Ohio-2880, 2018 WL 3539803, ¶ 4. In general, "[a] trial court abuses its discretion when its decision is unreasonable, arbitrary, or unconscionable." *State v. Knauff*, 4th Dist. Adams No. 13CA976, 2014–Ohio–308, ¶ 19, citing *Cullen v. State Farm Mut. Auto Ins. Co.*, 137 Ohio St.3d 373, 2013–Ohio–4733, 999 N.E.2d 614, ¶ 19.

B

R.C. 2953.21

{¶ 21} A petition for postconviction relief brought pursuant to R.C. 2953.21[6] provides convicted individuals with a means to collaterally attack their convictions. *E.g., State v. Noling*,

[6] R.C. 2953.21 provides:

> (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. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.
> * * *
>
> (D) * * * Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized record of

149 Ohio St.3d 327, 2016-Ohio-8252, ¶ 16, quoting *Broom* at ¶ 28 (stating that "'a postconviction proceeding is not an appeal of a criminal conviction but rather, is a collateral, civil attack on a criminal judgment'"); *In re B.C.S.*, 4th Dist. Washington No. 07CA60, 2008–Ohio–5771, ¶ 9. A postconviction proceeding "is a civil proceeding designed to determine whether 'there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States.' R.C. 2953.21(A). Thus, a petitioner must demonstrate errors of a constitutional magnitude and resulting prejudice before being entitled to relief under the statute." *B.C.S.* at ¶ 9; *accord State v. Silsby*, 119 Ohio St.3d 370, 2008-Ohio-3834, 894 N.E.2d 667, ¶ 16 (explaining that postconviction proceeding asserts judgment void due to petitioner's claimed "actual innocence or deprivation of constitutional rights"); *State v. Smith*, 4th Dist. Scioto No. 16CA3774, 2017-Ohio-7659, 2017 WL 4117891, ¶ 9.

{¶ 22} A petitioner seeking postconviction relief is not automatically entitled to an evidentiary hearing. *State v. Calhoun*, 86 Ohio St.3d 279, 282, 714 N.E.2d 905 (1999); *State v. Slagle*, 4th Dist. Highland No. 11CA22, 2012–Ohio–1936, ¶ 13. Rather, before a trial court may grant a hearing, the trial court "shall determine whether * * * substantive grounds for relief" exist. R.C. 2953.21(D). "Substantive grounds for relief exist and a hearing is warranted if the petitioner produces sufficient credible evidence that demonstrates the petitioner suffered a

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> the clerk of the court, and the court reporter's transcript. * * * * If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.
> * * *
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> (F) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending.

violation of the petitioner's constitutional rights." *B.C.S.* at ¶ 11; *Smith* at ¶ 10. Thus, a trial court need not hold an evidentiary hearing if the petitioner fails to "set forth sufficient operative facts to establish substantive grounds for relief." *Calhoun*, paragraph two of the syllabus; *State v. Gavin*, 4th Dist. Scioto No. 16CA3757, 2017-Ohio-134, 2017 WL 168823, ¶ 10.

{¶ 23} Additionally, a petition for postconviction relief must be filed "no later than three hundred sixty-five 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). Otherwise, a trial court may not entertain a postconviction relief petition unless the petitioner first demonstrates one of the following: (1) the petitioner was unavoidably prevented from discovering the facts necessary for the claim for relief; or (2) the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation. R.C. 2953.23(A)(1)(a). If the petitioner demonstrates one of the foregoing threshold findings, the petitioner then must establish that but for the constitutional error at trial no reasonable finder of fact would have found him guilty. R.C. 2953.23(A)(1)(b); *accord State v. Rinehart*, 4th Dist. Ross No. 17CA3606, 2018-Ohio-1261, 2018 WL 1597411, ¶ 14. Another exception, not applicable here, excuses an untimely petition if DNA testing results "establish, by clear and convincing evidence" the petitioner's "actual innocence." R.C. 2953.23(A)(2).

{¶ 24} "A defendant is 'unavoidably prevented' from the discovery of facts if he had no knowledge of the existence of those facts and could not have, in the exercise of reasonable diligence, learned of their existence within the time specified for filing his petition for postconviction relief." *State v. Cunningham*, 3d Dist. Allen No. 1–15–61, 2016–Ohio–3106, ¶ 19, citing *State v. Holnapy*, 11th Dist. Lake No.2013–L–002, 2013–Ohio–4307, ¶ 32, and *State v.*

Roark, 10th Dist. Franklin No. 15AP–142, 2015–Ohio–3206, ¶ 11. Moreover, "[t]he 'facts' contemplated by this provision are the historical facts of the case, which occurred up to and including the time of conviction." *State v. Williamitis*, 2nd Dist. Montgomery No. 21321, 2006-Ohio-2904, 2006 WL 1574844, ¶ 18. Thus, "[s]imply being unaware of the law * * * does not equate with being unavoidably prevented from discovering the facts upon which the petition is based." *State v. Sturbois*, 4th Dist. Athens No. 99CA16, 1999 WL 786318 (Sept. 27, 1999), *2. Furthermore, a newly-discovered legal theory is not a newly-discovered fact. *State v. Allen*, 6th Dist. Lucas No. L-15-1191, 2016-Ohio-2666, 2016 WL 1615421, ¶ 10.

{¶ 25} In the case sub judice, appellant filed his postconviction relief petition well-over the three hundred sixty-five day time limit set forth in the statute. The trial court entered its judgment of conviction in 2006, and we decided appellant's direct appeal the following year. Thus, more than ten years have elapsed since the date the trial transcript was filed in appellant's direct appeal. Ten years obviously falls well-outside of the 365-day time period set forth in R.C. 2953.21.

{¶ 26} Furthermore, appellant cannot show that he was unavoidably prevented from discovery of the facts upon which he bases his claim for relief. Appellant's claim for relief is based upon the allegedly defective verdict form. At the time of his conviction and at the time of his direct appeal, appellant knew that his verdict form did not specify the degree of the offense. Although appellant may not have been aware of the *Pelfrey* decision at the time of his conviction or when he filed his direct appeal, the postconviction statute does not allow an exception when a petitioner claims that he was unavoidably prevented from discovering the legal issue upon which he bases his claim for relief. Instead, the postconviction statute requires a petitioner to be

"unavoidably prevented from discovering facts, not the law." *State v. Clay*, 7th Dist. Mahoning No. 17 MA 0113, 2018-Ohio-985, 2018 WL 1342280, ¶ 12; *accord State v. Kane*, 10th Dist. Franklin No. 16AP-781, 2017-Ohio-7838, 2017 WL 4251759, ¶ 17 (stating that "the purpose of R.C. 2953.23(A) * * * is to permit a trial court to consider factual information that may come to light after a defendant's trial but not to permit petitioners to advance new legal theories using the same underlying facts"); *State v. Melhado*, 10th Dist. Franklin No. 05AP–272, 2006–Ohio–641, ¶ 19 ("R.C. 2953.23(A) contemplates the * * * discovery of new historical facts of the case, not new legal theories"); *State v. Brown*, 6th Dist. Lucas No. L–99–1251, 2000 WL 20557 (Jan. 14, 2000), *2 (stating "[a] newly discovered legal argument is not a 'newly discovered fact' as contemplated by R.C. 2953.23 to support a successive petition for post[-]conviction relief."). Appellant has therefore failed to show that he was unavoidably prevented from discovering the facts upon which he bases his petition. *See Allen, supra* (rejecting argument that appellant unavoidably prevented from presenting *Pelfrey*-type argument when verdict form "was known at the time of the conviction").

{¶ 27} Moreover, appellant has not established that the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in appellant's situation. Instead, appellant argues that after his conviction, the Ohio Supreme Court interpreted R.C. 2945.75 in a manner that appellant believes requires us to reverse his conviction. The postconviction relief statute does not specify that a decision from the Ohio Supreme Court constitutes grounds to excuse an untimely postconviction relief petition, however. Additionally, appellant has not identified a new federal or state right that applies retroactively to persons in his situation.

{¶ 28} Consequently, because appellant did not file his petition within the specified time period and has not established that any exception excuses his late filing, the trial court could not entertain the petition. *See State v. Salser*, 4th Dist. Meigs No. 14CA9, 2016-Ohio-2852, 2016 WL 2587433, ¶ 5 (stating that court lacked jurisdiction to entertain untimely petition); *State v. Gilliam*, 4th Dist. Lawrence No. 04CA13, 2005–Ohio–2470, at ¶ 11 (same).[7] Accordingly, the trial court did not err by dismissing appellant's petition without holding an evidentiary hearing.

{¶ 29} Furthermore, assuming *arguendo* that the trial court could entertain appellant's petition, the doctrine of res judicata bars appellant's most recent attempt to challenge the verdict form. *E.g., State v. Szefcyk*, 77 Ohio St.3d 93, 95, 671 N.E.2d 233 (1996); *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. Appellant's postconviction petition represents his latest attempt to convince this court to reverse its prior decision that rejected the argument he raised on the re-opening of his direct appeal: that appellate counsel performed ineffectively by failing to argue that the verdict form in the case sub judice did not comply with *Pelfrey* and R.C. 2945.75. Appellant once again requests this court to reverse its decision following the re-opening of his direct appeal. Appellant contends that we wrongly decided the re-opening of his direct appeal. Appellant has continuously litigated the same basic issue for the past ten years, in multiple proceedings, and in multiple courts. Res judicata thus patently bars further litigation of the issue. *State v. Keeley*, 4th Dist. Washington

[7] Ohio appellate courts have concluded that a trial court lacks jurisdiction to consider an untimely postconviction relief petition that does not satisfy the conditions listed in R.C. 2953.23(A). *E.g., State v. Baker*, 2d Dist. Montgomery No. 27596, 2017-Ohio-8602, ¶ 12; *State v. Battin*, 10th Dist. Franklin No. 17AP-911, 2018-Ohio-2533, 2018 WL 3201753, ¶ 11; *Salser*; *Gilliam*. We observe that this issue currently is pending before the Ohio Supreme Court. *State v. Apanovitch*, 152 Ohio St.3d 1439, 2018-Ohio-1600, 96 N.E.3d 296. In *Apanovitch*, the Ohio Supreme Court *sua sponte* ordered the parties to address whether a trial court lacks jurisdiction to consider an R.C. 2953.21 petition, if not filed within the appropriate time period.

No. 13CA34, 2014-Ohio-693, 2014 WL 800488, ¶ 6 (pointing out that res judicata prevents defendant from re-litigating same issue over and over again).

{¶ 30} Furthermore, the doctrine of res judicata is not rendered inapplicable simply because appellant vitriolically believes that intervening decisions show that this court wrongly decided the re-opening of his direct appeal. Indeed, a change in case law after a final judgment ordinarily does not prevent the application of res judicata. *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, ¶ 97 (stating that "a new decision does not apply to convictions that were final when the decision was announced"); *see Montgomery v. Louisiana*, — U.S. —, —, 136 S.Ct. 718, 728, 193 L.Ed.2d 599 (2016), as revised (Jan. 27, 2016) (stating that "a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced"). Courts must, however, "'give retroactive effect to new substantive rules of constitutional law. Substantive rules include * * * "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."'" *Moore*, quoting *Montgomery*, 136 S.Ct. at 728, quoting *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). "Substantive rules * * * set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful." *Montgomery*, 136 S.Ct. at 729–30. Thus, "'when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral-review courts to give retroactive effect to that rule.'" *Moore* at ¶ 98, quoting *Montgomery*, 136 S.Ct. at 729.

{¶ 31} Accordingly, a change in the law ordinarily will not prevent a court from applying the doctrine of res judicata. *State v. Ayala*, 10th Dist. Franklin No. 12AP-1071, 2013-Ohio-1875, ¶ 14, quoting *Szefcyk*, 77 Ohio St.3d at 95 ("'There is no merit to [the] claim that res judicata has no application where there is a change in the law due to a judicial decision of this court.'"); *State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654 (8th Dist.), ¶ 16 ("It is well-established that the application of res judicata is mandatory, even if there is a subsequent change in the law by judicial decision."*).* Thus, absent a substantive change in constitutional law, "the res judicata consequences of a final judgment on the merits are not altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *State v. Braden*, 10th Dist. Franklin No. 17AP-321, 2018-Ohio-1807, 2018 WL 2113598, ¶ 13, citing *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981).

{¶ 32} We also note that the doctrine of res judicata applies to voidable, but not void, judgments. Thus, appellant's only apparent, remaining avenue of relief is to show that his 2006 judgment of conviction and sentence was void ab initio. *See State v. Simpkins*, 117 Ohio St.3d 420, 884 N.E.2d 568, 2008–Ohio–1197, ¶ 30. In an earlier decision in our *Sowards* line of cases, however, we rejected appellant's argument that "a failure to strictly comply with R.C. 2945.75 renders a judgment void." *State v. Sowards*, 4th Dist. Gallia No. 09CA8, 2011-Ohio-1660, 2011 WL 1279490, ¶ 10. Other courts have reached the same conclusion. *State v. King*, 5th Dist. Muskingum No. CT2017-0021, 2017-Ohio-4258, 2017 WL 2544799, ¶ 12, *appeal not allowed sub nom. State v. King*, 150 Ohio St.3d 1454, 2017-Ohio-8136, 83 N.E.3d 939 (holding that "a sentence is not rendered void by the court's failure to comply with R.C.

2945.75(A)(2), and the claim must be raised on direct appeal"); *State v. Rarden*, 12th Dist. Butler No. CA2015-12-214, 2016-Ohio-3108, 2016 WL 2957057, ¶ 15, appeal not allowed, 146 Ohio St.3d 1515, 2016-Ohio-7199, 60 N.E.3d 7 (stating that "the failure of a jury verdict form to comply with R.C. 2945.75(A)(2) does not render a resulting conviction or sentence void"); *Perry v. Sloan*, 11th Dist. Ashtabula No. 2015-A-0064, 2016-Ohio-1605, 2016 WL 1573980, ¶ 7, aff'd, 149 Ohio St.3d 690, 2017-Ohio-1404, 77 N.E.3d 942 (explaining that "[a]ny error in a verdict form under R.C. 2945.75(A)(2) merely renders the subsequent conviction voidable, not void" and "raising it as error in any proceeding except a direct appeal is barred by the doctrine of res judicata"); *State v. Evans*, 2nd Dist. Montgomery No. 26574, 2015-Ohio-3161, 2015 WL 4708856, ¶ 11 (stating that verdict form's failure to comply with R.C. 2945.74 "does not render a judgment void"); *State v. Walburg*, 10th Dist. Franklin No. 12AP–637, 2013–Ohio–1150 (finding that res judicata barred defendant's claim sentence was void for failing to comply with R.C. 2945.75); *see State v. Martin*, 9th Dist. No. 25534, 2011–Ohio–1781, at ¶ 7 (determining that res judicata barred *Pelfrey* challenge to 23–year–old conviction when appellant could have raised issue on direct appeal); *see also State ex rel. Love v. O'Donnell*, 150 Ohio St.3d 378, 2017-Ohio-5659, 81 N.E.3d 1250, ¶ 6 (finding res judicata barred defendant's insufficient-verdict-form claim when he failed to raise issue in direct appeal and twice unsuccessfully sought to vacate his sentence as void); *Wells v. Hudson*, 113 Ohio St.3d 308, 2007-Ohio-1955, 865 N.E.2d 46 (concluding that res judicata precluded defendant from seeking writ of habeas corpus on basis that verdict form failed to set forth all elements of offense for which defendant convicted and sentenced); *State v. Rinehart*, 4th Dist. Ross No. 17CA3606, 2018-Ohio-1261, 2018 WL 1597411, ¶ 12, appeal not allowed, 153 Ohio St.3d 1452,

2018-Ohio-3026, 103 N.E.3d 831 (concluding that even if trial court engaged in improper "judicial fact findings," defendant's sentence would not be "void" but only "voidable"). Consequently, we disagree with appellant that the trial court abused its discretion by dismissing his petition for postconviction relief.

{¶ 33} We also reject appellant's argument that the trial court committed reversible error by failing to issue findings of fact and conclusions of law. Ohio law generally requires a trial court to issue findings of fact and conclusions of law when it dismisses or denies a postconviction relief petition. R.C. 2953.21© & (G); *State v. Mapson*, 1 Ohio St.3d 217, 218, 438 N.E.2d 910 (1982) (stating that "R.C. 2953.21 mandates that a judgment denying post-conviction relief include findings of fact and conclusions of law, and that a judgment entry filed without such findings is incomplete"). However, "a trial court need not issue findings of fact and conclusions of law when it dismisses an untimely [postconviction relief] petition." *State ex rel. Kimbrough v. Greene*, 98 Ohio St.3d 116, 2002–Ohio–7042, 781 N.E.2d 155, ¶ 6. "This rule applies even when the defendant * * * claims, under R.C. 2953.23, that he was unavoidably prevented from discovery of the facts to present his claim for post-conviction relief." *State ex rel. Hach v. Summit Cty. Court of Common Pleas*, 102 Ohio St.3d 75, 2004–Ohio–1800, 806 N.E.2d 554, ¶ 9; *see also State ex rel. Dillon v. Cottrill*, 145 Ohio St.3d 264, 2016–Ohio–626, 48 N.E.3d 552, ¶ 5.

{¶ 34} In the case at bar, appellant did not timely file his petition. The trial court, therefore, was not required to issue findings of fact and conclusions of law. We additionally note that on March 15, 2018, the trial court entered findings of fact and conclusions of law. The court found that appellant's postconviction petition was untimely and does not meet any of the

exceptions that would excuse the untimely filing. Thus, appellant's argument that the trial court committed reversible error by failing to issue findings of fact and conclusions of law is meritless.

{¶ 35} Accordingly, based upon the foregoing reasons, we overrule all of appellant's assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

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

The Court finds there were reasonable grounds for this appeal.

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

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J. & McFarland, 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.