

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2023-0393
Plaintiff-Appellee,	:	
v.	:	On Appeal from the
	:	Cuyahoga County Court of Appeals,
	:	Eighth Appellate District
MICHAEL DUDAS,	:	
Defendant-Appellant.	:	COA Case No. CA 111875

**REPLY BRIEF OF AMICUS CURIAE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLANT MICHAEL DUDAS**

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INTRODUCTION

The issue in this case is whether delayed direct appeals should be treated the same as timely direct appeals when calculating the postconviction filing deadline under R.C. 2953.21(A)(2)(a). This court has recognized that timely and delayed direct appeals are “[s]ubstantively and procedurally” the same. *State v. Silsby*, 119 Ohio St.3d 370, 2008-Ohio-3834, 894 N.E.2d 667, ¶ 14. Revised Code 2953.21(A)(2)(a) is consistent with that understanding. Whether timely or delayed, a direct appeal is taken from the judgment of conviction or adjudication and the postconviction deadline begins to run when the trial transcript is filed in the court of appeals.

The state does not dispute that delayed and timely direct appeals are nearly identical. Instead, the state argues that the postconviction context requires the two to be treated differently. The state’s argument ignores the gatekeeping role that Ohio’s courts of appeals exercise under Appellate Rule 5. Evidencing that gatekeeping role, the Ohio Public Defender litigates in all 12 appellate districts, but has opened for review an average of only 18 delayed direct appeals per year since January 1, 2020. The state’s argument also mischaracterizes the effect that it would have on the ability of criminal defendants to file timely postconviction petitions and on the ability of the courts to resolve those petitions fairly and efficiently. When accounted for, those legal and practical considerations dispel the notion that the postconviction context requires this court to depart from R.C. 2953.21(A)(2)(a)’s plain language.

This court should reject the state’s incomplete and misguided account of the context surrounding delayed appeals and R.C. 2953.21(A)(2)(a), and it should hold that a petition for postconviction relief following a delayed direct appeal is timely when filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals.

STATEMENT OF INTEREST OF AMICUS CURIAE,
OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (“OPD”) is a state agency that represents indigent criminal defendants and coordinates criminal-defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio law and procedural rules. A primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The mission of the OPD is to protect and defend the rights of indigent persons by providing and supporting superior representation in the criminal and juvenile justice systems.

As amicus curiae, the OPD offers this court the perspective of experienced practitioners who routinely handle criminal cases in Ohio courts. This work includes representation at both the trial and appellate levels. The OPD has an interest in the present case because it advises clients on both direct appeal and in the postconviction process who must timely file their postconviction petitions to have their claims heard on the merits. In addition, the OPD distributes pro se packets that help people incarcerated in Ohio timely file and effectively litigate postconviction petitions.

STATEMENT OF THE CASE AND FACTS

The OPD relies on the statement of the case and facts provided in Mr. Dudas’s merit brief.

ARGUMENT

Appellant Michael Dudas’s Proposition of Law: Under the plain language of R.C. 2953.21(A)(2)(a), a petition for postconviction relief following a delayed direct appeal is timely when filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the Court of Appeals.

The Ohio Revised Code establishes a one-year deadline for the filing of a postconviction petition. R.C. 2953.21(A)(2)(a). That one-year deadline runs from one of two dates. If the postconviction petitioner directly appealed “the judgment of conviction or adjudication[.]” the deadline runs from “the date on which the trial transcript is filed in the court of appeals in the direct appeal[.]” *Id.* If the petitioner did not directly appeal the judgment of conviction or adjudication, by contrast, the deadline runs from “the expiration of the time for filing the [direct] appeal.” *Id.*

This court has recognized that direct appeals and delayed appeals are “[s]ubstantively and procedurally” the same. *State v. Silsby*, 119 Ohio St.3d 370, 2008-Ohio-3834, 894 N.E.2d 667, ¶ 14. Both are taken from a judgment of conviction or adjudication and seek “review of alleged trial court errors.” *Id.* at ¶ 16. “They differ only in the timeliness of the filing.” *Id.* at ¶ 14. It is thus immaterial under R.C. 2953.21(A)(2)(a) whether the direct appeal was timely or delayed. Either way, an appeal is taken from the “judgment of conviction or adjudication” and the postconviction deadline runs from when the trial transcript was filed in the court of appeals.

The state argues that the postconviction context requires timely and delayed direct appeals to be treated differently, but its argument is unpersuasive and should be rejected for two reasons. First, the state’s context argument fails to consider the courts of appeals’ gatekeeping role under Appellate Rule 5. A timely direct appeal may be filed as a matter of right, *see* App.R. 4, but a delayed direct appeal may be filed only “with leave of the court to which the appeal is taken[.]” App.R. 5(A)(1). The phrase “with leave of the court” in Appellate Rule 5 “necessarily mean[s]

that the court of appeals has the discretion to allow or refuse the appeal.” *State v. Bertram*, 80 Ohio St.3d 281, 283, 685 N.E.2d 1239 (1997) (discussing R.C. 2945.67 and former Crim.R. 12(J), which address the state’s right to appeal certain rulings). The courts of appeals’ discretion under Appellate Rule 5, which the state elides, provides meaning to the deadlines established in R.C. 2953.21(A)(2)(a) and ensures that delayed appeals cannot be used to circumvent those deadlines.

Second, the state mischaracterizes the context in which this case arises. This court’s decision will determine more than whether Mr. Dudas and other postconviction petitioners have “the optimal opportunity to file a petition for post-conviction relief.” Appellee Br. at 12. It will instead decide whether the people who are likely to have filed delayed direct appeals—those who received ineffective assistance of counsel or who struggled to navigate the complex practical and procedural barriers unique to youth cases—have a realistic opportunity to file timely postconviction petitions and have their claims heard on the merits. Revised Code 2953.21(A)(2)(a) provides those petitioners that opportunity and facilitates the courts’ review of their claims.

The postconviction context does not warrant departing from the plain language of R.C. 2953.21(A)(2)(a). This court should reject the state’s argument and hold that a petition for postconviction relief following a delayed direct appeal is timely when filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals.

I. The courts of appeals’ gatekeeping role under Appellate Rule 5 ensures that postconviction petitions are filed within a reasonable time

The state insists that context is critical, but it fails to consider the context in which delayed direct appeals are litigated. Ordinarily, a direct appeal of a judgment of conviction or adjudication is taken as of right by filing a notice of appeal within 30 days of when the judgment is entered. App.R. 4(A)(1). Less often, a direct appeal is taken with leave of court by filing a motion “set[ting]

forth the reasons for the failure * * * to perfect an appeal as of right” and obtaining judicial authorization. App.R. 5(A)(2). Both are direct appeals—the former timely, the latter delayed.

Ohio’s courts of appeals exercise a critical gatekeeping role when it comes to delayed direct appeals. The phrase “with leave of the court” in Appellate Rule 5 “necessarily mean[s] that the court of appeals has the discretion to allow or refuse the appeal.” *Bertram*, 80 Ohio St.3d at 283, 685 N.E.2d 1239. “If a movant establishes sufficient reasons justifying the delay, the appellate court may, in its discretion, grant the motion[.]” *Silsby*, 119 Ohio St.3d 370, 2008-Ohio-3834, 894 N.E.2d 667, at ¶ 12. But if the movant does not sufficiently justify the delay, the appellate court may deny the motion and the movant cannot appeal the judgment of conviction or adjudication.

“The decision to grant or deny a motion for leave to appeal under [Appellate Rule 5] rests within the appellate court’s sound discretion.” *State v. Jordan*, 10th Dist. Franklin No. 23AP-256, 2023-Ohio-2402, ¶ 8. When exercising that discretion, courts of appeals consider “the length of time it took to initiate an appeal.” *State v. Gibbs*, 11th Dist. Geauga No. 2014-G-3201, 2014-Ohio-5772, ¶ 11. *Accord State v. Hargrove*, 10th Dist. Franklin No. 22AP-455, 2022 Ohio App. LEXIS 3342, at *2 (Sep. 29, 2022); *State v. Lewis*, 10th Dist. Franklin No. 06AP-327, 2006-Ohio-2752, ¶ 11. Someone who waits years, months, or even weeks to move to file a delayed direct appeal could be denied leave absent a reasonable justification for the delay. That heightened burden helps explain why the OPD opens so few delayed direct appeal files for review.

Whether a motion for leave to file a delayed appeal is granted or denied is determinative. A successful motion places the movant in the same position as someone who timely appealed. *See Silsby*, 119 Ohio St.3d 370, 2008-Ohio-3834, 894 N.E.2d 667, at ¶ 14. An unsuccessful motion, by contrast, can mark the end of the direct-appeals process. *See State v. Houston*, 2d Dist. Montgomery No. 28330, 2019-Ohio-1479, ¶ 6 (holding that “res judicata bars a second or

successive motion” for leave to file a delayed appeal “made on the same grounds”); *State v. Ellis*, 10th Dist. Franklin Nos. 05AP-1048, 05AP-1049, 2005-Ohio-6059, ¶ 4 (same); *see also State v. Chandler*, 8th Dist. Cuyahoga No. 105246, 2022-Ohio-1391, ¶ 6 (holding that “[a] motion for delayed appeal cannot be used as a vehicle for successive appeals from the same judgment”); *State v. Cioffi*, 11th Dist. Trumbull Nos. 2009-T-0065, 2009-T-0066, 2009-Ohio-4932, ¶ 10 (same).

The appellate courts’ exercise of discretion under Appellate Rule 5 is reflected in R.C. 2953.21(A)(2)(a). If an appellate court determines that there is good cause “for the failure of the appellant to perfect an appeal as of right” and grants leave to proceed with a delayed appeal under App.R. 5(A)(2), then any subsequent postconviction petition would be due “no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals[.]” R.C. 2953.21(A)(2)(a). If an appellate court determines that there is not good cause for the delay and denies leave to appeal, however, then any postconviction petition would be due “no later than three hundred sixty-five days after the expiration of the time for filing the appeal.” *Id.* Revised Code 2953.21(A)(2)(a) establishes filing deadlines that account for both possibilities.

With this context in mind, the state’s concern that the filing deadlines established in R.C. 2953.21 could be rendered “meaningless” rings hollow. Appellee Br. at 9. The state’s argument is rooted in the Eighth District’s decision in *State v. Fields*, 136 Ohio App.3d 393, 736 N.E.2d 933 (8th Dist. 1999). There the appeals court suggested that “[s]ince there is no time limitation either under the appellate rules or statutes upon a motion for delayed appeal, there would consequently be no time limitation for filing a petition for post-conviction relief” if delayed direct appeals were treated like timely direct appeals under R.C. 2953.21(A)(2)(a). *Id.* at 396, quoting *State v. Price*, 10th Dist. Franklin No. 98AP-80, 1998 Ohio App. LEXIS 4690, at *5 (Sep. 29, 1998). Echoing the Eighth District’s suggestion, the state speculates that unless its interpretation of R.C.

2953.21(A)(2)(a) is adopted, criminal defendants will be able to file postconviction petitions at any time by “wait[ing] to have their convictions considered on direct appeal.” Appellee Br. at 12.

The Eighth District and the state conflate delayed appeals and motions for leave to appeal and ignore Appellate Rule 5. While a motion for leave to appeal may be filed any time after the time to pursue an appeal as of right has expired, a delayed direct appeal may be filed only if an appellate court determines that the delay was justified under the circumstances. *See* App.R. 5(A). The courts of appeals routinely deny leave to appeal where movants fail to provide a sufficient reason for the delay. *See Gibbs*, 2014-Ohio-5772, at ¶ 13 (leave denied where movant delayed nearly seven years); *Hargrove*, 2022 Ohio App. LEXIS 3342, at *2-3 (leave denied where movant delayed over eight years). It is therefore not the case that delayed direct appeals are free from time constraints. Delayed appeals must be filed within what the courts of appeals determine in their “sound discretion” to be a reasonable time. *Jordan*, 2023-Ohio-2402, at ¶ 8. Only when a defendant files his or her delayed direct appeal within that reasonable time will the postconviction filing deadline begin to run from when the trial transcript is filed in the court of appeals.

II. This case will have far-reaching consequences for both criminal defendants who seek to file postconviction petitions and the courts that are tasked with fairly and efficiently resolving the claims raised in those petitions

The state also misses the mark when it suggests that this case is about merely whether Mr. Dudas and other postconviction petitioners will have “the optimal opportunity to file a petition for post-conviction relief.” Appellee Br. at 12. Delayed direct appeals are a critical tool in cases where external forces make timely appeals difficult or impossible. The resolution of this case will determine whether the people who are confronted with those difficult circumstances have a realistic chance at having their postconviction claims fairly and efficiently heard on the merits.

Raymond Morgan's story is illustrative. Mr. Morgan was a seventeen-year-old who, like Mr. Dudas, was not told about his right to file an appeal or about the deadline to file his appeal. *State v. Morgan*, 10th Dist. Franklin No. 13AP-620, 2014 Ohio App. LEXIS 5612, at *2 (Jan. 16, 2014). After he was sentenced, Mr. Morgan was held in a county jail for three weeks and did not attend a legal orientation until after his appeal deadline had lapsed. *Id.* at *2-3. Mr. Morgan nonetheless wished to appeal his transfer from juvenile court to common pleas court, which the OPD facilitated by filing a successful motion for leave to file a delayed direct appeal. *Id.* at *4.

The resolution of this case will affect the ability of people like Mr. Morgan and Mr. Dudas to file timely postconviction petitions. Under R.C. 2953.21(A)(2)(a), the deadline to file a postconviction petition begins to run when the trial transcript is filed in the court of appeals. Tying the filing of a postconviction petition to the filing of the trial transcript makes practical sense because a postconviction petition must "rely on evidence outside the trial record to establish [a] claim for relief." *State v. Blanton*, 171 Ohio St.3d 19, 2022-Ohio-3985, 215 N.E.3d 467, ¶ 2. Neither a defendant nor a court can determine whether a claim relies on evidence outside the trial record until the trial record is filed. If the state's proposition of law were adopted, however, defendants who overcome difficult headwinds in filing a delayed direct appeal would be placed in the untenable position of preparing a postconviction petition without the trial transcript.

The increased burden that the state would place on defendants who filed delayed direct appeals would impose a significant cost on the fair administration of justice. As Mr. Dudas's and Mr. Moran's cases demonstrate, delayed appeals are often necessary where defendants receive ineffective assistance of trial counsel. *See Garza v. Idaho*, ___ U.S. ___, 139 S.Ct. 738, 742, 203 L.Ed.2d 77 (2019) (prejudice presumed when "an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, * * * regardless of whether

the defendant has signed an appeal waiver”); *Roe v. Flores-Ortega*, 528 U.S. 470, 484, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). Although those cases are likely to support strong claims for postconviction relief, the state would discourage those defendants from filing postconviction petitions by making the process unnecessarily onerous. Revised Code 2953.21(A)(2)(a) avoids that unjust result by providing all defendants who directly appealed their judgment of conviction or adjudication one year to review the trial transcript and to file a postconviction petition.

The state’s efforts to minimize the practical consequences that would follow if its proposition of law were adopted should be rejected. Interpreting R.C. 2953.21(A)(2)(a) consistent with its plain language ensures that the postconviction process is available to those most in need and empowers the courts of appeals to fairly and efficiently resolve postconviction petitions.

CONCLUSION

This court should reverse the Eighth District’s judgment below and hold that a petition for postconviction relief following a delayed direct appeal is timely when filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing **Reply Brief of Amicus Curiae Ohio Public Defender in Support of Appellant Michael Dudas** has been served by electronic mail to Assistant Public Defender Jonathan Sidney at jsidney@cuyahogacounty.us, and to Assistant Cuyahoga County Prosecutor Daniel T. Van, dvan@prosecutor.cuyahogacounty.us, on this 14th day of November, 2023.

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