ORIGINAL

IN THE SUPREME COURT OF OHIO
CASE NO. 12-0565

LANG DUNBAR	)	
	)	On Appeal from the
Plaintiff-Appellee	)	Cuyahoga County Court
	)	of Appeals, Eighth
-vs-	)	Appellate District
	)	
STATE OF OHIO	)	Court of Appeals
	)	Case No. 97364
Defendant-Appellant	)	

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

TERRY H. GILBERT* (0021948)
Counsel of Record
Friedman & Gilbert
1370 Ontario Street, Suite 600
Cleveland, OH 44113-1752
Telephone: (216) 241-1430
Facsimile: (216) 621-0427
E-Mail: tgilbert@f-glaw.com

Counsel for Plaintiff-Appellee

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MICHAEL DEWINE (0009181)
Attorney General of Ohio

ALEXANDRA T. SCHIMMER* (0075732)
Solicitor General
Counsel of Record
LAWRENCE H. BABICH (0001386)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, OH 43215
Telephone: (614) 466-8980
Facsimile: (614) 466-5087
E-Mail:alexandra.schimmer@ohioattorneygeneral.gov

WILLIAM D. MASON (0037540)
Prosecuting Attorney of Cuyahoga County
MICHAEL A. DOLAN (0051848)
T. ALLAN REGAS (0067336)
1200 Ontario Street, Ninth Floor
Cleveland, OH 44113

Counsel for Defendant-Appellant

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RESPONSE TO PROPOSITION OF LAW NO. I:

A void and vacated guilty plea has no effect at law, and does not exist for purposes of determining whether a person has the right to seek compensation under 2743.48. A vacated plea, which has no legal consequence in a criminal proceeding, also cannot constitute a bar to relief under the Ohio wrongful imprisonment statute as long as all other elements of that statute are met 6

RESPONSE TO PROPOSITION OF LAW NO. II:

Under R.C. 2743.48(A)(4) a trial court's determination that a separate, earlier criminal offense did not constitute a criminal proceeding which can be brought against an individual for any act associated with the conviction, is a question of fact, not law, and should not be reversed unless there is an abuse of discretion. Moreover, once a claimant had completed the sentence for a separate earlier crime, any additional prison time served for a new crime he did not commit is cognizable under the Wrongful Imprisonment Statute 8

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EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case is not suitable for review by this Court, as the Eighth District decision applied longstanding jurisprudence regarding the purpose, scope, and meaning of Ohio's Wrongful Imprisonment statute. In an effort to convince this Court to accept jurisdiction, the State of Ohio is suggesting that any plea of guilty, regardless of its constitutional infirmity, regardless of the fact that there was a retrial, conviction, and two reversals, and regardless of the fact that two appellate decisions (one criminal, and one civil) found no crime was committed, the Appellee is not entitled to recovery for the years he spent imprisoned for a crime he did not commit.

By selectively, and cleverly, taking certain words from R.C. 2743.48 out of context and grafting meaning that cannot possibly be reasonable in view of the statute's remedial purpose, the State seeks to throw a wrench into longstanding case law regarding the fundamental notion that in criminal cases, guilty pleas are subject to strict constitutional conditions, subject to nullification without legal effect. The State is proposing a jurisprudential paradox: on one hand admitting it is perfectly appropriate to invalidate unconstitutional guilty pleas when life and liberty are at stake in a criminal case; and at the same time seeking a rule of law where the same voided guilty plea prevents a civil remedy. This idea is inimical to fundamental justice, and does not need a review by this Court to reiterate.

The State alleges a weak claim of conflict in the Appellate Courts as "whether a voluntary, knowing and intelligent plea of guilty in a felony trial, which is set aside and vacated on appeal, precludes a litigant from satisfying the statutory definition of a wrongfully imprisoned person under O.R.C. 2743.48(A)(2)." This section of the statute requires that the "individual [be] found guilty of,

but . . . not plead guilty to, the particular charge or a lesser-included offense by the court or jury involved, and the offense of which the individual was found guilty was an aggravated felony or felony." The Eighth District Court held that this section of the statute was satisfied where Appellee had pleaded guilty, and his plea had been vacated and a new trial concluded on a not guilty plea.

The Eighth District Court further stated that "[w]ithout knowledge that the court might impose a prison sentence, Dunbar's plea was not entered knowingly, voluntarily, and intelligently, was void, and therefore, does not preclude his wrongful imprisonment claim." This proposition was also supported in *State v. Moore*, 2006 Ohio 114, PP23-24 (4th Dist. 2006).

In *McGrath v. State*, 2011-Ohio-639 (10th Dist. Ct. App.), a pro se claim which the State proffers as its evidence of conflict, the court explicitly noted the distinguishing circumstances of that case. First, the issue in the case was a vacated plea which was required by the trial judge's failure to journalize a finding of competence before accepting McGrath's plea. *Id.* at ¶ 4. Because he was previously found incompetent to stand trial, such an entry was necessary to assure a proper plea. However, in perfunctorily dismissing McGrath's claim, the court simply stated that at the time he made the plea, whatever the minor technical error, McGrath was judged competent to do so. Apparently the fact of his competence was sufficiently persuasive to permit denial of the claim. *Id.* at ¶ 7.Therefore, McGrath's plea, unlike Appellee's here, was as a matter of law knowing, intelligent, and voluntary. Additionally, in ¶ 8, the court noted that no court had ever found that the crime with which McGrath was charged had not been committed. Again, this is directly opposite to Appellee's circumstance, where he was explicitly held not to have committed the crime with which he was charged.

The State has claimed a conflict between the instant case and *McGrath*, but the cases are not only factually but legally distinguishable. There is no conflict between a ruling that an invalid plea voids a conviction and allows eligibility for wrongful imprisonment status, and a ruling that holds that a valid plea does not allow that status.

As to the idea that there are inconsistent decisions in Ohio Courts is flawed. The two Courts (Eighth and Fourth Districts) properly analyzed the effect of an invalid guilty plea in wrongful imprisonment cases, and both found substantive constitutionally invalid pleas. To use the *McGrath* case as proof of uncertainty or confusion in the lower courts is disingenuous as that pro se case had to do with a technical problem later cleared up without subjecting the defendant to any prejudice.

The State of Ohio further attempts to raise fears that voided guilty pleas would open the flood gates and expand the class of people who could recover. Such a claim is ridiculous. Vacated guilty pleas are extremely rare. And subsequent acquittals once the defendant returns to trial are even more rare. And even if a few more innocent people who wrongfully spend time in prison based on voided guilty pleas for which the prosecution cannot go forward, so what? Isn't that what the wrongful imprisonment statute was designed to accomplish in the first place?

It would be inconceivable that the Ohio legislature, when inserting the prohibition against a guilty plea, would mean anything more than a constitutional and legally valid plea. Any other interpretation simply makes no sense.

STATEMENT OF THE CASE

Appellee Lang Dunbar pled no contest to domestic violence charges in Cleveland Municipal Court in 2004, and received a six-month sentence on that charge. Just as that sentence was almost

concluded, Mr. Dunbar was indicted by a Cuyahoga County Grand Jury on charges of abduction and domestic violence related to the same incident for which he was serving time. Mr. Dunbar, with great reluctance, accepted a plea agreement in the Court of Common Pleas which would have allowed him to serve community control sanctions rather than prison. At sentencing, however, the Court handed down a two-year prison sentence without first offering Mr. Dunbar the opportunity to change his plea upon consideration of the punishment.

In *Dunbar I*, this Court vacated that sentence due to the trial court's failure to abide by the plea agreement, and remanded the case to a new trial. This second trial resulted in a conviction on one count of abduction, and a sentence of five years' incarceration. This Court reversed that conviction on grounds of insufficient evidence in *Dunbar II*.

Appellee then sought a declaration that he had been a wrongfully imprisoned person pursuant to O.R.C. § 2743.48. Both parties filed cross-motions for summary judgment. However, the trial court rejected the State's position (now once again advanced) and granted Dunbar's motion for summary judgment declaring him a wrongfully imprisoned individual.

On an appeal, the Eighth District held that a voided plea could not serve as a bar to relief under § 2743.48 because doing so would violate the remedial nature of the law. That court also found that no crime of abduction was committed, based upon the trial record, was sufficient evidence in the instant case to dispose of the need of further affirmative proof, and that the abduction was a second charge and imprisonment beyond the domestic violence case and sentence.

The appellate decision, on February 23, 2012, affirmed the trial court decision declaring Mr. Dunbar a wrongfully imprisoned individual, rejecting the same arguments now advanced by the

State. The Eighth District also denied the State's Motion to Certify a Conflict to this Court, another argument advanced by the State in its Memorandum in Support of Jurisdiction.

STATEMENT OF THE FACTS

The facts in this case have been delineated clearly in *Dunbar I* and *Dunbar II*. Therefore Appellee offers only a brief summary of events as recounted in *Dunbar I* and *Dunbar II*. On November 7, 2004 Appellee struck his live-in fiancée, knocked her to the ground, and twisted her legs. *Dunbar I* at P2. He pleaded no contest to domestic violence charges from this incident in Cleveland Municipal Court on December 7, 2004 receiving the maximum 180-day sentence. *Id.* at P3. While serving that sentence, on January 7, 2005, Mr. Dunbar was indicted by the Cleveland Grand Jury on three counts of abduction (referring to the fiancée and the couple's two children, who were home at the time of the incident) and one count of domestic violence. *Id.* at P6. Mr. Dunbar ultimately entered a plea of guilty to one count of abduction, on the understanding that doing so would result in a sentence of community control sanctions. *Id.* at PP6 & 8. The trial court, however, sentenced Mr. Dunbar to two years in prison without either warning him that this was possible or allowing him the opportunity to change his plea. *Id.* at P8. This failure on the part of the trial court was the basis of this Court's reversal of the sentence and vacation of the plea in *Id.* at P181.

In a subsequent trial, Appellee was convicted of one count of abduction, in a verdict this Court also reversed, in Dunbar II. In that decision, the court ruled that, based on the trial record, the crime of abduction had not been proven, because the supposed victim testified that not only did Appellee **not** forcibly confine her, but he even left her alone for extended periods, during which time she answered the door, spoke to Appellee's father, and told him of her plans to leave Appellee.

Dunbar II at PP25 & 28. The Court stated that "a rational person could conclude that she was free to move about, had numerous opportunities to leave, and could have summoned help during the time period under consideration." *Id* at P26. The court also cited testimony by the victim in which she described Appellee's behavior as contrite immediately following and ever after the incident, and specifically stating that he told her not to leave the house because of the condition of her face, not because he would forbid it with force or violence. *Id.* at P 22.

Mr. Dunbar spent an additional two years in prison for the abduction conviction before he was discharged for insufficient evidence. The maximum six months he served for the domestic violence conviction concluded before the prosecution for the felony abduction indictment.

ARGUMENT

Response to Proposition of Law No. I:

> **A void and vacated guilty plea has no effect at law, and does not exist for purposes of determining whether a person has the right to seek compensation under 2743.48. A vacated plea, which has no legal consequence in a criminal proceeding, also cannot constitute a bar to relief under the Ohio wrongful imprisonment statute as long as all other elements of that statute are met.**

O.R.C. § 2743.48 is a remedial statute; it was written expressly to right a wrong, in this case a wrong perpetrated by the state. *Walden v. State*, 47 Ohio St.3d 47, 52 (1989); *Wright v. State*, 69 Ohio App. 3d 775, 778 (10th Dist. Ct. App. 1990) (noting that remedial laws are enacted to correct past defects or to redress an existing wrong). Accordingly, the State waived its sovereign immunity and consented to a suit for declaratory judgment of status, followed by a right to sue for compensation. Remedial laws must be construed liberally, per O.R.C. § 1.11, in order to effect their

remedial purpose. Thus, even in matters of the State's waiver of sovereign immunity, liberal construction applies to a remedial statute.

Even if strictly construed, it remains arguable at best that the State's reading of O.R.C. § 2743.48 is correct. Liberally construed, that reading is impossible. Appellee entered a plea, which was then vacated by this court. A new trial commenced, at which Appellee did not plead guilty, and was convicted of the same charge for which he had previously entered a plea. There are two reasons, therefore, to be certain that the State's reading of the statute is plainly wrong.

The first is that a vacated plea has no legal effect. The Fourth District Court of Appeals, in *State v. Moore*, 2006 Ohio 114, PP 23-24 (4th Dist. Ct. App. 2006) addressed this particular issue to persuasive and thorough effect. In *Moore*, the court found that the defendant's plea was not knowing, intelligent, or voluntary. *Id.* at P 22. The *Moore* court noted, however, that the narrowest interpretation of the statute, which the State apparently wishes to invoke, "would preclude recovery even if the guilty plea is nugatory and has no effect at law, [which] would thwart the remedial goals of the statute." *Id.* at P 23. In *Moore*, the defendant's plea was found void *ab initio*, not merely vacated due to defect. *Id.* at P 22. However, as in the instant case, where the plea is offered knowingly and voluntarily, but not honored by the court, the legal effect of its vacation cannot logically be any less than void.. Since entirely new proceedings commenced, any prior plea by Appellee was irrelevant and equivalent to void, since he offered a new plea in a new proceeding, with a distinct result.

The second reason that the State's reading of the statute is logically wrong is that, as noted, Appellee entered a new trial, wherein he entered a new plea of not guilty. That plea, and that trial, effected a legally binding result valid until this Court vacated it on other grounds in *Dunbar II*. By

the State's reading, however, the original vacated plea retained legal force that superseded the subsequent not guilty plea in at least one respect: It barred Appellee from eligibility for wrongful imprisonment status. Leaving aside the need for liberal construction, this reading of the statute is simply incoherent on its face. A vacated plea, which was superseded in every other way by a subsequent trial and conviction, cannot logically retain one unique area of potency. Moreover, the Ohio Legislature could, had it wished to further limit the class of people eligible for wrongfully imprisoned status, have inserted the word "ever" into the statute to read "did not **ever** plead guilty to" the offense charged. The fact that the Legislature did no such thing merely emphasizes the remedial intent of the statute.

Response to Proposition of Law No. II:

> Under R.C. 2743.48(A)(4) a trial court's determination that a separate, earlier criminal offense did not constitute a criminal proceeding which can be brought against an individual for any act associated with the conviction, is a question of fact, not law, and should not be reversed unless there is an abuse of discretion. Moreover, once a claimant had completed the sentence for a separate earlier crime, any additional prison time served for a new crime he did not commit is cognizable under the Wrongful Imprisonment Statute.

While it is true that both *Walden v. State*, 47 Ohio St. 3d 47, 52 (1989) and *Gover v. State*, 67n Ohio St.3d 93 (1993) stand for the proposition that an acquittal does not suffice to demonstrate wrongful imprisonment status, it is fundamental as recognized in *State v. Chandler*, 95 Ohio App.3d 142, 149 (8th Dist. Ct. App. 1994), "the very same transcript of a criminal proceeding which results in a conviction and which is subsequently overturned on the weight or sufficiency of the evidence may nonetheless be insufficient to support a claimant's innocence by a preponderance of the

evidence." The obvious implication of that statement is that the record may equally well be sufficient, given the specific facts of the case.

The record in the instant case is sufficient to a finding that abduction not only was not proved, but did not happen. In *Dunbar II*, the Eighth District held that the alleged victim of abduction was not threatened or restrained by force, had ample opportunity to leave during the alleged period of abduction, and even spoke to Appellee's father of her intention to leave Appellee during the relevant period. *Id.* at PP 25-29. The court therefore found the trial record adequate to determine not only that insufficient evidence had been produced, but that *based upon the evidence of the record itself*, no crime had been committed which could have "arisen out of" the original domestic violence charge. Furthermore, in the instant case, the State offered no additional evidence to support its contention that criminal activity amounting to abduction had taken place. Appellee contends that no further proof on his part is necessary, as this Court and the trial court below found the record of the abduction trial adequate to demonstrate that no crime was actually committed, since an essential element of it was affirmatively **disproved** by the victim's testimony.

Finally, the fact that Dunbar committed a separate misdemeanor offense for which he was prosecuted in a municipal court and sentenced to the maximum period of incarceration prior to indictment for the abduction for which he served an additional two years, is not a bar to a remedy. As the Eighth District stated, "once someone completes a prison sentence and has 'served his debt to society,' he is entitled to freedom. *State v. Bradley*, 8th Dist. No. 79094, 2002-Ohio-3540, section10." Further, any additional prison time for a crime not committed constitutes wrongful imprisonment. There is no further prosecution which could occur for "any act associated with that

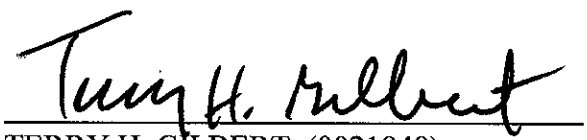
conviction" which could possibility co-exist with the prison time Mr. Dunbar served for the abduction.

CONCLUSION

For the above reasons, this Court should not accept jurisdiction in this case.

Respectfully submitted,

FRIEDMAN & GILBERT



TERRY H. GILBERT (0021948)
1370 Ontario Street, Suite 600
Cleveland, OH 44113-1752
Telephone: (216) 241-1430
Facsimile: (216) 621-0427
E-Mail: tgilbert@f-glaw.com

Counsel for Plaintiff-Appellee

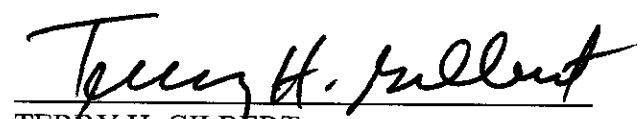
CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum of Plaintiff-Appellee Opposing Jurisdiction was sent by ordinary U.S. Mail on May 4, 2012, to the following:

MICHAEL DEWINE
Attorney General of Ohio
ALEXANDRA T. SCHIMMER*
Solicitor General
**Counsel of Record*
LAWRENCE H. BABICH
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, OH 43215

WILLIAM D. MASON
Prosecuting Attorney of Cuyahoga County
MICHAEL A. DOLAN
T. ALLAN REGAS
1200 Ontario Street, Ninth Floor
Cleveland, OH 44113

Counsel for Defendant-Appellant



TERRY H. GILBERT
Counsel for Plaintiff-Appellee