

ORIGINAL

In the
Supreme Court of Ohio

YANKO MANSARAY	:	Case No. 2012-1727
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
STATE OF OHIO,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. 98171
	:	

REPLY BRIEF OF STATE OF OHIO

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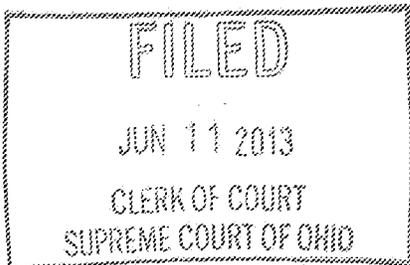


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**REPLY TO APPELLEE'S STATEMENT OF
FACTS AND STATEMENT OF THE CASE**

Initially, the Statement of the Case and Facts contained in the Appellee's Merit Brief contain several misstatements and references to information not in the record that demand a brief reply. First, Appellee's Merit Brief repeatedly cites to factual information contained in the Eighth District Court of Appeal's opinion from Mansaray's criminal appeal to that Court. Such factual information is nowhere to be found in the record in these proceedings. In fact, there is no evidentiary record in this case because the litigation never advanced beyond the pleadings and no discovery has ever been conducted.

Second, the State never stipulated that Mansaray met the other four elements of Ohio's wrongful-imprisonment statute and the Eighth District's "judicial notice" that these were satisfied was improper. Mansaray's attempt to claim, "[b]y appealing that ruling [to the Ohio Supreme Court], the State has actually missed and opportunity, on remand, to present its civil trial evidence of other wrongful activities by [him]" is misguided.

I. The Wrongful-Imprisonment Statute Unambiguously Denies Compensation to All Claimants Alleging Presentence Errors in Procedure Caused their Confinement.

In 1994, prior to the 2003 amendment, the opening phrase modified the verb *was determined* as shown in the prior version of (A)(5):

(A)(5) Subsequent to sentencing and during or subsequent to imprisonment, it was determined by a court of common pleas that the offense of which the individual was found guilty, including all lesser-included offenses, either was not committed by the individual or was not committed by any person. (eff. 10/6/1994)

After amendment in 2003, the leading prepositional phrase at issue modified both the error in procedure and the actual innocence prongs. After 2003, "[t]he [] substantive change "[e]xpand[ed] the criteria that an individual must satisfy to be considered a 'wrongfully

imprisoned individual' to include the *condition* that subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual's release as an alternative to the condition that subsequent to sentencing and during or subsequent to imprisonment it was determined by a court of common pleas that the offense of which the individual was found guilty was not committed by the individual or by any other person.” *Griffith v. Cleveland*, 128 Ohio St.3d 35, (2010). (Emphasis added).

The 2003 amendment added the "error in procedure" clause **after** the leading prepositional phrase. This converted the opening prepositional phrase to modifying both a noun, “an error” (or alternatively, the entirety of the “error in procedure” prong) and the same verb it always modified “was determined” (or, alternatively the entirety of the “actual innocence” prong). The amended statute then read as follows:

(A)(5) Subsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual's release, OR it was determined by a court of common pleas that the offense of which the individual was found guilty, including all lesser-included offenses, either was not committed by the individual or was not committed by any person. (eff. 4/9/2003)

Despite Mansaray’s attempt to argue otherwise, this case is a matter of interpreting a statute. Nothing more, nothing less. R.C. 2743.48(A)(5) governs the parties. As such, this Court must look to that statute and the words contained therein. In the film *A Man for All Seasons* (1966), Margaret confronts her father Thomas More with news of an oath going thru Parliament. When Sir Thomas asks what are the terms of the oath, Meg blurts out “Who cares what the words are, we know what it will mean!” More’s reply is vital: “*An oath is made of words. It will mean what the words say it means.*” Here, the statute is made of words – and it means what the words say it means.

A. The Final Element's Introductory Modifier Unambiguously Requires Any Claimed Procedural Error to Occur "Subsequent to Imprisonment..."

The great debate is on whether the leading prepositional phrase beginning with "subsequent to" is about the error or about the release. In other words, do we read (A)(5)'s first prong, as amended in 2003 to mean:

1) An error in procedure subsequent to sentencing resulted in release. (error must be after sentencing)

OR

2) An error in procedure resulted in release subsequent to sentencing. (release must be after sentencing).

To determine grammatical meaning requires an inquiry into intention, logic, and placement. Pursuant to O.R.C. 1.42, "words and phrases shall be read in context and construed according to the rules of grammar and common usage, unless they have a particular or technical meaning. *State, ex rel. Data Trace Information Services, LLC v. Cuyahoga Cty. Fiscal Officer*, 131 Ohio St.3d 255, 2012-Ohio-753 at ¶49. Upon applying the rules of grammar, the introductory phrase modifies the noun for the following reasons:

First, each other element of wrongful imprisonment statute begin with "[t]he individual" (A)(1) through (A)(3) or "[t]he individual's" (A)(4). Had the 2003 amendment's drafters followed the existing statutory pattern and substituted the phrase "the individual was released because of an error in procedure" instead of "an error in procedure resulted in release" when they changed (A)(5), there would be no question that presentence error qualifies for compensation. Yet, the existing statutory pattern was *not followed*. Thus, we must infer drafter's intention was for the opening phrase to modify "error in procedure." This is especially true since the parties

agree that the precise meaning of “error in procedure” is undefined within the legislative history. Appellee’s Merit Brief at p. 14, ¶2.

Second, the leading phrase is closer to the noun (error in procedure), suggesting that term is what it's modifying. The phrase could have been put at the end of the clause (after "release"), which would have more obviously modified the verb. Thus, we must infer that the intention of the 2003 amendment's drafters that the noun was to be modified. This Court has stated, “[t]he preeminent canon of statutory interpretation requires us to ‘presume that [the] legislature says in a statute what it means and means in a statute what it says there.’” *Miller v. Miller*, 132 Ohio St.3d 424 (2012). (Internal citations omitted). “If the General Assembly is dissatisfied with our interpretation, it may amend the Revised Code.” *Anderson v. Barclay’s Capital Real Estate, Inc.*, (May 14, 2013) Slip Op. No. 2013-Ohio-1933, ¶ 25. (Interpreting another remedial law, but refusing to find mortgage servicers subject to the Ohio Consumer Sales Practices Act).

The Panel below *interpreted* a statute it professed had a “plain meaning.” Op. at ¶16. On many occasions, this Court has rejected such interpretations that re-write the text of the statute.

The appellate court improperly included words in the statute that were not there and ignored words that were there. *** We previously have cautioned against ‘judicial legislation’ by adding words to [the Revised Code], and we reiterate that caution again.

State ex rel. Carna v. Teays Valley Loc. School Dist. Bd. of Edn., 131 Ohio St.3d 478, 2012-Ohio-1484 , at ¶ 24 (internal citations omitted).

Mansaray argues that applying the statute’s plain meaning and denying him compensation solely on this ground is “unfair” and “contrary to the liberal intent” of the statute. These are identical arguments put forth by another wrongful imprisonment claimant, Lang Dunbar. This Court recently rejected Dunbar’s argument that a guilty plea vacated on appeal shouldn’t bar his recovery. “Unfortunately for Dunbar, the General Assembly did not provide an

exception for guilty pleas that are later vacated.” *Dunbar v. State*, --- N.E.2d --- (May 30, 2013) 2013-Ohio-2163 at ¶ 20. Unfortunately for Mansaray, the General Assembly did not provide an exception for claimants who allege presentence error resulted in their release from prison.

B. Mansaray’s Proffered Meaning Violates the Nearest Reasonable Referent Canon and Renders the Opening Phrase Utterly Superfluous.

The misplaced modifier and the force of proximity in determining meaning present a problem not only in everyday English, but - often more consequentially - in the law. The need for proximity between modifier and what it modifies is recognized in the interpretation of statutes. 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland on Statutes and Statutory Construction* § 47:33 at 487--88 (Thomson West 2007) (“Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent ... ‘the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.’”); The Nearest-Reasonable-Referent Canon differs from the rule of the last antecedent in that it applies not only to modifiers that follow the words or phrases that they modify but also to those that precede them. It refers to both “postpositive” and “prepositive modifiers,” and the commentary elaborating on the canon makes it clear that the canon “applies not just to words that precede the modifier, *but also to words that follow it.*” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 152–53 (Thomson West 2012) (Emphasis supplied). (“Nearest Reasonable Referent Canon: When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent.”) Consistent with this principle, the courts ordinarily assume that “a limiting clause or phrase ... modif[ies] only the noun or phrase that it immediately follows.” *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003).

Recently, the Sixth Circuit applied the Nearest Reasonable Referent (NRR) canon in *Carroll v. Sanders*, 551 F.3d 397 (2008). There, the Sixth Circuit interpreted the 2005 BAPCA¹ amendments to the Bankruptcy Code, prohibiting the so-called “Chapter 20.”² To stop a debtor’s ability to obtain multiple discharges by repeated filings, Congress enacted § 1328(f), which provides:

(f) Notwithstanding [chapter 13's provisions authorizing discharges], the court shall not grant a discharge of all debts provided for in the plan ... if the debtor has received a discharge-

- (1) in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under [chapter 13], or
- (2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.

After the BAPCA amendments, the Bankruptcy Code provides that a debtor may not receive a discharge if the debtor “received a discharge ... in a case filed under chapter 7 ... of this title during the 4-year period preceding” the filing of the debtor’s present chapter 13 petition. In other words, does the phrase “during the 4-year period preceding” refer to the remote term “received a discharge” or to the more proximate term “filed under chapter 7”? The Sixth Circuit followed the “nearest reasonable referent” rule, applied the four-year bar to the earlier filing, and held:

As we see it, the four-year prohibition began when Sanders filed his first petition, not when he received his first discharge. In reaching this conclusion, we start with a point of grammar—that “[w]hen a word such as a pronoun points back to an antecedent or some other referent, the true referent should generally be the closest appropriate word.” Bryan A. Garner, *Garner's Modern American Usage* 523–24

¹ Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, Pub.L. No. 109-8, § 312(2), 119 Stat. 23, 87 (codified as amended at 11 U.S.C. § 1328(f)).

² A “Chapter 20” was the colloquial term for a debtor obtaining a Chapter 7 discharge, to extinguish unsecured debt, and then immediately filing a successive Chapter 13, to extend payment of secured arrearage of secured (typically mortgage) debt over five years.

(2003); see also 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 47:33 (7th ed. 2007). Consistent with this principle, the courts ordinarily assume that “a limiting clause or phrase ... modif[ies] only the noun or phrase that it immediately follows.” *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003). Although not an “absolute” imperative, the “rule of the last antecedent” creates at least a rough presumption that such qualifying phrases attach only to the nearest available target.

Carroll v Sanders, 551 F.3d 397, 399 (2008).

Applying the canon of NRR to the final element of Ohio’s wrongful imprisonment statute, the opening prepositional phrase modifies “an error in procedure.” Consider the following hypothetical example,

Subsequent to assembly or during or subsequent to detonation, a mine with shrapnel resulted in casualties, or it was determined by the military that an improvised explosive device was either the main cause or a contributing cause of the arson.

Directing the Court’s attention to the underlined portion, grammar and logic both dictate that the land mine injured others after assembly. Under no plausible circumstances could it injure *prior* to detonation. The opening phrase therefore modifies what is closest to it, “a mine with shrapnel.” As a rule, “modifying words or phrases ‘only apply to the words or phrases immediately preceding or subsequent to the word, and will not modify the other words, phrases or clauses more remote, unless the intent of the legislature clearly require[s] such an extension.’” *State v. Bowen*, 139 Ohio App.3d 41, 742 N.E.2d 1166 (1st Dist., 2000) quoting *In re Shaffer* 228 B.R. 892, 894 (Bkrcty. N.D. Ohio 1998). Applying the canon of NRR to Ohio’s wrongful imprisonment statute, the introductory phrase modifies that which is closest to it, “an error...”.

Likewise, it is a cardinal rule of statutory interpretation that a court may not interpret a statute in a manner that effectively deletes words from the statute. “No part [of the statute] should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.” *State ex rel. Carna v.*

Teays Valley Local School Dist. Bd. of Edn., 131 Ohio St.3d 478, 2012-Ohio-1484, ¶ 19. *see also, D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, at ¶ 26 (noting that "words in statutes should not be construed to be redundant, nor should any words be ignored.") Accordingly, this Court should follow the canon of NRR and find the opening phrase unambiguously modifies the term, "error in procedure". An alternate reading renders the opening phrase of R.C. 2743.48(A)(5) superfluous. Sometimes courts adopt a technical, specialized, or otherwise unusual reading of a statute to avoid surplusage. *E.g., United States ex el. Mistick PBT v. Hous. Auth.*, 186 F.3d 376, 386- 88 (3d Cir. 1999) (Alito, J.). And sometimes courts insist on the ordinary reading of a statute even though that reading creates surplusage. *E.g., Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004). What courts never do is adopt an unusual reading of a statute that also creates surplusage. Mansaray would have this Court do so, and the Court should decline.

II. "The Consequences Of A Particular Construction" Demonstrate That the General Assembly Did Not Intend for Presentence Procedural Error to Qualify for Compensation Under the Statute.

If permitted to stand, the Panel's decision interpreted the 2003 amendment to (A)(5) as establishing the most benevolent cause of action³ for wrongful imprisonment in the nation. Across the United States, a narrow majority of 27 states have enacted wrongful imprisonment statutes, along with the District of Columbia and the federal government. *Nelson v. State*, 2010-Ohio-1777, ¶27. *See also*, Innocence Project, *Making up for Lost Time* (2010).⁴ However, "it appears that [no other jurisdiction] define[s] wrongful imprisonment in such language as appears

³ Ironically, this change in the law went largely unnoticed for nearly a decade. Only a handful of claimants alleging presentence errors in procedure have filed claims.

⁴ http://www.innocenceproject.org/docs/Innocence_Project_Compensation_Report.pdf, (Last accessed June 10, 2013).

in the 2003 amendment to R.C. 2743.48(A)(5).” *Nelson* at ¶27, overruled on other jurisdictional grounds by entry, *Nelson v. State*, (10th Dist. App. No. 10-AP-385) unreported. The only wrongful imprisonment statute clearly written in manner as to afford Mansaray relief is the hypothetical Model Legislation advanced by The Innocence Project⁵. In the proceedings below, the Panel “[found] that the State’s interpretation of R.C. 2743 .48(A)(5) would render the section absurd.” Ap. Op. at ¶15. The State respectfully suggests it is equally absurd to believe the Ohio legislature knowingly adopted the most liberal wrongful imprisonment scheme in the nation by what appears to be a unanimous vote. This new statutory method for which taxpayer money would compensate former criminal defendants successful on appeal was signed into law by Governor Bob Taft – an equally strange event.

At bottom, it is the Eighth District⁶ that could hardly have produced a more absurd result. Facing a statute that unambiguously rejects claimants alleging a presentence procedural error caused their wrongful incarceration, the court concluded, without any textual support, that presentence procedural error qualifies. Then, finding no indication from the General Assembly regarding what it meant by error in procedure, the Panel’s decision settled on a sequence of events that makes it impossible to tell what types of procedural errors qualify and which don’t. But, the House Civil and Commercial Law Subcommittee that inserted the error prong said,

⁵ http://www.innocenceproject.org/docs/Innocence_Project_Compensation_Report.pdf at Appx. B. (“A. In order to present an actionable claim for wrongful conviction and imprisonment, claimant must establish by documentary evidence that: *** 2. On grounds not inconsistent with innocence: a. He was pardoned for the crime or crimes for which he was sentenced and which are the grounds for the complaint; b. The statute, or application thereof, on which the accusatory instrument was based, violated the Constitution of the United States or the [State]; c. The judgment of conviction was vacated; or d. The judgment of conviction was reversed***”).

⁶ In dicta, the Tenth District also expressed its support of the Eighth District’s *Mansaray* decision presently before this Court. *Hill v. State*, 10th Dist. No. 12AP-635, 2013-Ohio-1968 at ¶45, fn. 4. Unless this Court reverses, it would appear the floodgates have been opened in Ohio’s two largest counties.

“[t]he bill will have no direct fiscal effect on local governments. More specifically, it will not create any additional work for courts of common pleas that make wrongful imprisonment determinations.” Fiscal Note & Local Impact Statement of Sub. S.B. 149, 124th General Assembly.⁷ The Eighth District’s holding that presentence errors qualify for compensation conflicts with the drafting committee’s own statements. Indeed, the legislative history does not favor Mansaray’s all-encompassing interpretation of the statute’s error in procedure prong. How many times does a reviewing court reverse a criminal ruling on suppression? What if a juror commits misconduct necessitating a mistrial after jeopardy has attached and retrial is barred? Are Ohio taxpayers to be burdened with substantial payouts in these circumstances? Certainly, the legislature never intended for the error in procedure prong to include these presentence issues.

The Eighth District’s decision fails to honor the General Assembly’s intent in enacting and keeping, the phrase “[s]ubsequent to his sentencing and during or subsequent to his imprisonment, an error in procedure resulted in the individual’s release. . .” R.C. 2743.48(A)(5). By prohibiting wrongful imprisonment compensation to individuals who allege pre-sentencing procedural error, the legislature intended to limit the class of individuals who could recover taxpayer’s money. The alternative would vastly expand the intended scope of Sub. S.B. No. 149. It would also be an insult to those who are properly found wrongfully imprisoned after years of incarceration, only to be freed after DNA evidence subsequently excludes them as suspects.

⁷ <http://www.lsc.state.oh.us/fiscal/fiscalnotes/124ga/sb0149h1.htm>, last accessed June 10, 2013.

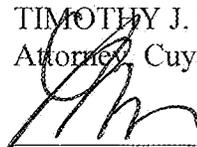
CONCLUSION

For these reasons and those stated in the State of Ohio's opening brief, the Court should reverse the judgment below and the remand the case to the Court of Appeals with instructions to reinstate the judgment of the trial court that dismissed Appellee's Complaint with prejudice.

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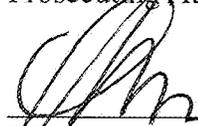
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