

ORIGINAL

In the
Supreme Court of Ohio

DAVID M. BUNDY,

Plaintiff-Appellee,

v.

STATE OF OHIO,

Defendant-Appellant.

Case No. 2014-

14-0189

On Appeal from the
Montgomery County
Court of Appeals,
Second Appellate District

Court of Appeals
Case No. 25665

MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANT-APPELLANT STATE OF OHIO

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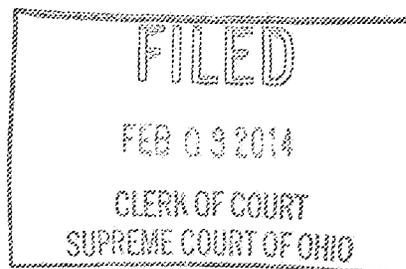


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INTRODUCTION

In this case, the appeals court dramatically expanded the scope of wrongful-imprisonment claims in Ohio, in conflict with at least one other appellate district, and that warrants review. The core of wrongful-imprisonment law in Ohio has never strayed from the General Assembly's intent "that the court of common pleas actively separate those who were wrongfully imprisoned from those who have *merely avoided criminal liability*." *Walden v. State*, 47 Ohio St. 3d 47, 52 (1989) (emphasis added). Here, however, the Second District declared David Bundy wrongfully imprisoned even though no one disputes, as a *factual* matter, that he committed the act for which he was convicted. Instead, he avoided criminal liability because the offense he committed, involving reporting requirements as a sex offender, was part of a scheme later declared unconstitutional. This Court invalidated, on separation-of-powers grounds, part of the Adam Walsh Act as applied, because the Act instructed the Attorney General to reclassify offenders from their old categories under Megan's Law to the new system. *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424. That does not make Bundy "wrongfully imprisoned," and, at a minimum, even if it somehow does so, such a declaration should come from this Court, both because it opens up a new category of wrongful-imprisonment claims, and because the lower courts are in conflict.

Bundy's facts provide a textbook example of the problem. He is a convicted sex offender who, in 2008, was reclassified as a Tier II sex offender under the 2007 revisions to the registration system in Revised Code Chapter 2950, better known as the Adam Walsh Act. That Tier II designation required Bundy to register with the county sheriff every 180 days for twenty-five years. He failed to do so. He was tried for, and convicted of, failing to verify his current address. The prosecutor eventually dismissed the case against Bundy, however, after it was remanded to the trial court in light of *Bodyke*. Pointing to that dismissal and relying exclusively

on *Bodyke*, a common pleas court declared Bundy a wrongfully imprisoned individual. The Second District Court of Appeals affirmed, likewise relying solely on *Bodyke* for support. *State v. Bundy*, 2013-Ohio-5619 ¶ 18 (2nd Dist.) (“App. Op.,” Ex. 2).

By failing to require that Bundy prove either actual innocence or a procedural error, the Second District violated both the text and purpose of the wrongful-imprisonment statute. If left unreviewed, the decision below will invite wrongful-imprisonment actions from individuals who undeniably committed the crime with which they were charged, but who “merely avoided criminal liability” because the underlying statute was struck down on separation-of-powers, single-subject, or any other constitutional ground. The Court should review this case for several reasons.

First, the Second District’s view conflicts with the Tenth District’s decision in *Haddad v. Department of Rehabilitation and Corrections*, 2002-Ohio-2813 (10th Dist.), and that conflict warrants review. *Haddad* squarely rejected the Second District’s view, holding that invalidation of the statutory basis for imprisonment does *not* trigger a wrongful-imprisonment claim: “The fact that the ‘bad time’ statute was declared unconstitutional does not mean that plaintiff did not commit the offense which served as the basis for the imposition of the” added imprisonment. *Id.* ¶ 19.

Second, the Second District’s decision undermines the “actual innocence” requirement, violating the statute’s text and purpose. A wrongful-imprisonment claimant must show that “the charged offense, including all lesser-included offenses, either was not committed by the individual or was not committed by any person.” R.C. 2743.48(A)(5). Here, Bundy admits that he committed the offense. True, the offense was found unconstitutional, but Bundy still committed it as the General Assembly defined it. So he cannot meet the requirement for “a

showing of innocence to be made affirmatively.” *Doss v. State*, 135 Ohio St. 3d 211, 2012-Ohio-5678 ¶ 21. Awarding funds to Bundy would violate not just the statute’s plain terms, but also its purpose of compensating those who were “wronged” by the judicial system. Here, no one involved—the prosecutor, the court, the jury—did anything “wrong,” whether intentionally or mistakenly; the trial process reached the “right” result under the statutory law. This Court’s later invalidation of the broader scheme in *Bodyke* does not mean that the judicial system wronged him. Compensating him would merely give a child-sex offender an unwarranted windfall, and punish prosecutors for doing their jobs and enforcing the law as written.

Third, the expansion here is dramatic, and such a fundamental change deserves this Court’s review. Indeed, Judge Hall wrote separately to acknowledge that the wrongful-imprisonment statute “does not anticipate subsequent unconstitutionality of the criminal statute (as applied to him) under which he was convicted,” and that “[i]t may be that the legislature intended to compensate those imprisoned under a statute later determined to be unconstitutional. If so, the legislature should say so explicitly.” App. Op. ¶¶ 21, 31 (Hall, J., concurring). But Judge Hall concurred “[i]n spite of the foregoing misgivings about the statutory scheme.” *Id.* ¶ 32. Judge Hall was right to have “misgivings” about the court’s holding, for it is far from the most natural, let alone the required, interpretation of the statutory language. And notably, this holding will extend to others whose sex-offender reporting requirements were invalidated, *see State v. Williams*, 129 Ohio St. 3d 344, 2011-Ohio-3374, and, more important, to any criminal imprisoned pursuant to a statute later declared unconstitutional, regardless of the subject matter.

For these reasons and others below, the Court should review this case and reverse.

STATEMENT OF THE CASE AND FACTS

A. Ohio compensates individuals for wrongful imprisonment only when all of R.C. 2743.48(A)'s requirements are met.

The State compensates those who have been wrongfully imprisoned, and R.C. 2743.48(A) establishes five requirements for showing “wrongful” imprisonment. Relevant here, R.C. 2743.48(A)(5) requires a claimant to affirmatively prove *either* that “(1) subsequent to sentencing and during or subsequent to imprisonment, ‘an error in procedure resulted in the individual’s release’” *or* that “(2) the charged offense (and any lesser included offense) was not committed by the individual or no crime was committed at all (actual innocence).” *Doss v. State*, 135 Ohio St. 3d 211, 2012-Ohio-5678 ¶ 12 (summarizing R.C. 2743.48(A)(5)). Bundy has not alleged the “error in procedure” prong of R.C. 2743.48(A)(5).

B. Bundy, a sex-offender, was convicted for failing to verify his address, a requirement imposed as part of the registration scheme modified by the Adam Walsh Act.

While on parole for aggravated burglary, David Bundy committed several sexually oriented offenses. *State v. Bundy*, 2013-Ohio-5619 ¶ 2 (2nd Dist.) (“App. Op.”). He was convicted of two counts of gross sexual imposition (for a child under 13), two counts of sexual imposition, and one count of attempt to commit corrupting another with drugs. *Id.* In January 2000, while Bundy was still in prison, the trial court designated him a sexually oriented offender pursuant to then-applicable R.C. 2950.01 and 2950.02 (“Megan’s Law”). *State v. Bundy*, 2009-Ohio-5396 ¶ 8 (2nd Dist.).

When Bundy was released from prison, his designation as a sexually oriented offender imposed certain registration duties upon him. Those duties changed in 2007 when the General Assembly enacted Am.Sub. S.B. 10, the “Adam Walsh Act.” Under the new law, the Attorney General reclassified Bundy as a Tier II sex offender. *Id.* ¶ 10. That required Bundy to verify his address and to register personally with the sheriff’s office every 180 days for 25 years. *Id.*

Bundy did not comply with those registration and verification requirements. *Id.* ¶¶ 11-12. He was charged with failure to verify a current address pursuant to R.C. 2950.06(A) and (F). *Id.* ¶ 12 n.1. He was found guilty of failure to verify and was sentenced to three years in prison. *Id.* ¶ 13. His earlier community-control sanctions were revoked, and the trial court imposed a 12-month sentence, to be served concurrently with his sentence for failure to verify. *Id.*

C. On appeal, Bundy challenged his redesignation on statutory grounds, but eventually had his case remanded after *Bodyke* and the prosecutor dismissed the case.

Bundy appealed his conviction for failure to verify. *Id.* ¶ 1. He did not raise a constitutional challenge, but instead argued only that he could not be reclassified because he had completed his prison term for a sexually oriented offense before July 1, 1997. *Id.* ¶ 55. That is, Bundy argued that because he could not be properly designated a sexually oriented offender under Megan’s Law, he by extension could not be redesignated a Tier II offender under the Adam Walsh Act.

This Court accepted Bundy’s appeal and held it for the decision in *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424. *See State v. Bundy*, 124 Ohio St. 3d 1473, 2010-Ohio-354. After *Bodyke*, the Court remanded Bundy’s case to the trial court for further proceedings, but it did not disturb the decision upholding Bundy’s conviction. Instead, as part of an order disposing of many cases post-*Bodyke*, the Court held that the judgment of the court of appeals in Bundy’s direct appeal was “reversed as to those portions of the judgment[] that rejected constitutional challenges to the Adam Walsh Act on separation-of-powers grounds.” *In re Sexual Offender Reclassification Cases*, 126 Ohio St. 3d 322, 2010-Ohio-3753 ¶¶ 15, 55. The Court remanded the case “to the trial court[] for further proceedings, if any, necessitated by *State v. Bodyke*.”

Because Bundy did not bring a separation-of-powers challenge on direct appeal, *see Bundy*, 2009-Ohio-5395 ¶ 55, it is arguable that no proceedings were even necessary on remand, and his conviction should have been retained. Nevertheless, the prosecution on remand entered a nolle prosequi and dismissed the case against Bundy. App. Op. ¶ 5.

D. Bundy claimed that *Bodyke*'s invalidation of the Adam Walsh Act's re-designation provisions rendered him wrongfully imprisoned, and the trial court and Second District both agreed.

After the case against him was dismissed, Bundy sued in the Montgomery County Court of Common Pleas, seeking a declaration that he was a wrongfully imprisoned individual. In support, Bundy relied on this Court's *Bodyke* decision invalidating the Adam Walsh Act's reclassification provisions as an unconstitutional violation of the separation of powers. He did not provide any other evidence to show that he was actually innocent of the failure-to-verify offense for which he had been convicted. The trial court granted Bundy's motion for summary judgment, declaring him wrongfully imprisoned. The State appealed, arguing in part that he failed to satisfy R.C. 2743.48(A)(5), because it was undisputed that he committed the charged offense.

The Second District affirmed, holding that because this Court declared the reclassification provisions of the Adam Walsh Act unconstitutional, "Bundy could not have 'committed' the felony offense of failure to register where that offense itself was a nullity." App. Op. ¶ 18. Judge Hall, concurring, noted that the statute "does not anticipate subsequent unconstitutionality of the criminal statute" as an issue, stating "[i]t may be that the legislature intended to compensate those imprisoned under a statute later determined to be unconstitutional. If so, the legislature should say so explicitly." App. Op. ¶¶ 21, 31 (Hall, J., concurring).

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

This case warrants review for several reasons. The decision below conflicts with another appellate district's decision. It contradicts the statute's "actual innocence" requirement, violating both the statute's plain text and underlying purpose. And it creates a whole new category of wrongful-imprisonment claimants, as the decision below applies not just to sex-offender claims, but whenever a conviction is set aside because a criminal statute is found unconstitutional, either on its face or as applied. The decision is, in the State's view, plainly mistaken, but even if it is somehow right, an expansion of this magnitude warrants this Court's review.

A. The conflict in the appellate districts on this issue illustrates the need for review.

The decision below conflicts with the Tenth District's decision in *Haddad*, and that alone justifies review here. In *Haddad*, the Tenth District likewise faced a case in which an inmate's imprisonment had been based, for part of its length, on a statute that this Court had invalidated on separation-of-powers grounds. *Haddad v. Dep't of Rehab. and Corr.*, 2002-Ohio-2813 (10th Dist.). Specifically, the Department of Rehabilitation and Corrections extended Haddad's sentence under a "bad time" statute, which had allowed the Department to extend a sentence administratively if the Department found that an inmate committed a crime in prison. *Id.* ¶ 5. This Court held the "bad time" statute unconstitutional as a violation of separation of powers, thus invalidating the extension of Haddad's sentence. *Id.* (citing *Haddad v. Russell*, decided as *State ex rel. Bray v. Russell*, 89 Ohio St. 3d 132, 133 (2000)). Haddad then pursued a wrongful-imprisonment claim as to the extended part of his sentence, arguing that the unconstitutionality of the "bad time" statute meant that he had never committed any offense authorizing that imprisonment. *Id.* ¶ 6. The appeals court rejected that argument soundly: "The fact that the 'bad time' statute was declared unconstitutional does not mean that plaintiff did not commit the

offense which served as the basis for the imposition of the” extended part of the sentence. *Id.* ¶ 19.

The Second District’s decision below squarely conflicts with the Tenth District’s holding in *Haddad*. The State urges that the Tenth is right, and the Second wrong, but the more important point at this stage is that the conflict is direct and undeniable. The Second District said below that the requirements of R.C. 2743.48(A)(5) were satisfied because the statute under which Bundy had been convicted was declared unconstitutional. App. Op. ¶ 18. It held: “Bundy could not have ‘committed’ the felony offense of failure to register where that offense itself was a nullity.” *Id.* The cases thus present the identical argument, with opposing results. In both cases, the statutory basis for imprisonment was invalidated. Indeed, coincidentally, in both cases, the invalidation was based on separation of powers, and in both cases, the challenged imprisonment was only part of the imprisonment. Neither of those additional coincidences is necessary to show a conflict, but the cases’ similarity is so striking that it is impossible to deny the conflict. And that alone warrants review.

In addition, the conflict between these two districts is supplemented by three separate Eighth District cases in which the Eighth District did the same as the Second, although those cases were all overruled on other grounds. See App. Op. ¶ 14 (citing *Mohammed v. State*, 2012-Ohio-5517, *Johnson v. State*, 2012-Ohio-3964, and *Ballard v. State*, 2012-Ohio-3086). As the Second District explained, in all three cases, the Eighth District found claimants to be wrongfully imprisoned, because they had failed to “comply with the Adam Walsh Act’s revised reporting requirements for sex offenders,” and their underlying duty to report had been invalidated. *Id.* (In *Mohammed* and *Ballard*, *Bodyke* was the invalidating case; in *Johnson*, it was *State v. Williams*, 129 Ohio St. 3d 344, 2011-Ohio-3374.)

Those three cases were all overturned by this Court after *Dunbar v. State*, 136 Ohio St. 3d 181, 2013-Ohio-2163. *Dunbar* held that an individual who had pleaded guilty could not be wrongfully imprisoned, and, in all three cases, the claimant had pleaded guilty. But, as the Second District noted, the reversal of those cases on that guilty-plea ground did not address the “logic from the remainder of the” three Eighth District decisions, which used invalidation of the statute as a basis for finding someone to be wrongfully imprisoned. App. Op. ¶ 14. Thus, those decisions further show the need for guidance from this Court to the lower courts on this issue, and further show how the issue arises frequently.

B. Review is needed because the decision below contradicts the actual-innocence requirement, violating both the statute’s plain text and underlying purpose.

The decision below conflicts with the statute’s text and purpose, as “actual innocence” is a hallmark of wrongful-imprisonment law. To be sure, this Court has never addressed the effect that a declaration of unconstitutionality has on wrongful-imprisonment analysis. But to the extent that the Court has insisted on “actual innocence” of the “I did not do it” variety, that leaves no room for the Second District’s view. The appeals court reasoned that because the reclassification provisions of the Adam Walsh Act had been declared unconstitutional, Bundy did not commit the failure-to-verify offense that he clearly committed as a factual matter.

The appeals court’s conclusion does not necessarily follow, and, at a minimum, it so contradicts the concept of actual innocence that review is warranted. After all, the text requires Bundy to show that the offense “was not committed by him.” R.C. 2743.48(A)(5). If the General Assembly meant to open the State’s coffers to those defendants who, in fact, *committed* the underlying offenses but who had their convictions overturned on constitutional grounds, this language in R.C. 2743.48(A)(5) would be a strange way to achieve that result. If the General Assembly intended such a result, it would have granted relief to those whose “offenses had been

invalidated on constitutional grounds.” And the law seeks to compensate those “wronged” by imprisonment, i.e., those unfairly convicted because they did nothing wrong.

Bundy’s failure to verify his address violated the law in place at the time, so he was not *actually* innocent, or *factually* innocent. Nothing that has happened since Bundy was convicted changes the fact that the law required him to do something and he did not do it. To be sure, this Court’s *Bodyke* decision led to Bundy’s release from prison, and invalidated the underlying re-classification that created his duty to register. But nothing erases the fact that Bundy still violated the law. Moreover, the Court in *Bodyke* did not find that the Adam Walsh Act’s registration requirements were themselves unconstitutional; it merely found the re-classification piece invalid, which left no foundation on which to require registration. It was an as-applied problem.

C. Review is needed because the decision below radically expands the class of people who can recover as wrongfully imprisoned individuals.

Review is also needed because the expansion here is dramatic in principle. That is, even if the decision did not sharply conflict with the statute and this Court’s cases applying it, the decision independently warrants review because it marks a whole new category of claimant. The Court has always stressed the requirement that claimants must “affirmatively prove [their] innocence by a preponderance of the evidence.” *Walden v. State*, 47 Ohio St. 3d 47, 51-52 (1989). The Court has held that a judgment of acquittal “is not to be given preclusive effect” in a wrongful-imprisonment proceeding. *Id.* The idea is to “actively separate those who were wrongfully imprisoned from those who have merely avoided criminal liability.” *Id.*

The Second District’s decision, however, has created a class of cases where claimants do not have to prove their actual innocence, and where a subsequent appellate decision *will* be given preclusive effect. The appeals court’s theory of “innocence”—an automatic conclusion of

innocence when a statute is invalidated, even as-applied, even if based on the procedure of a law's adoption, such as the single-subject requirement—is a new frontier in wrongful-imprisonment law. Judge Hall's "misgivings" about this expansion, expressed in his concurrence, support the need for review. He rightly acknowledged that this new category of claimants was not contemplated by the statute, and suggested that the General Assembly should address this problem. App. Op, ¶¶ 31-32. While the State disagrees with his decision to concur in the outcome, it fully agrees with his acknowledgment that this is a new area of claims, with questionable statutory support.

Moreover, while the principle alone is a dramatic expansion, the quantity of affected cases could grow quickly, too. While Judge Hall's concurrence said "Bundy's case is unusual," that is only so as to the particular factual application of the court's holding to someone who had the same sequence of pre-Megan's law convictions, post-Megan's enforcement under the Adam Walsh Act, and so on. But the general principle adopted—that any statutory invalidation leads to an automatic wrongful-imprisonment win—on its face applies broadly to all contexts. Indeed, even within the sex-offender-registration context, the State has already identified the three Eighth District cases cited above, which were reversed only because of the guilty pleas. Those defendants' counterparts, who were convicted at trial instead, would win under the Second District's view. *Haddad* shows another example, and further, *Haddad's* earlier *rejection* of the theory may have discouraged would-be claimants. The Second District's decision invites future claimants.

On top of all that, this expansion threatens to create a chilling effect for prosecutors who simply wish to follow the law in effect at the time and do their jobs right. Wrongful-imprisonment law properly deters prosecutors from seeking convictions for those who may be

innocent, whether intentional or mistaken. But statutory invalidation is between the courts and the legislature. A prosecutor who does everything right, following the law, should not fear that the conviction he obtained will not only be invalidated, but that the invalidation will also be billed to taxpayers. That encourages prosecutors to stop applying the law while a debate continues, reversing our normal presumption that a law is *followed* until the courts say otherwise.

In sum, this case changes the landscape greatly, and review is needed.

ARGUMENT

Appellant State's Proposition of Law:

A wrongful-imprisonment claim may succeed only if the claimant shows, under the actual-innocence requirement, that he did not commit the acts for which he was convicted. That requirement is not met if a claimant's conviction was set aside solely because a predicate criminal statute was invalidated as unconstitutional.

The fact that an individual's conviction is reversed or dismissed, and that he is released from prison, simply does not mean that he did not "commit" the offense in the first place. It is only where he can show that he did not do so that R.C. 2743.48(A)(5) operates to declare him a wrongfully imprisoned individual. That is what the Court meant when it concluded that the General Assembly intended for courts to "actively separate those who were wrongfully imprisoned from those who have merely avoided criminal liability." *Walden*, 47 Ohio St. 3d at 52; *see also Gover v. State*, 67 Ohio St. 3d 93, 95 (1993). It meant that the only people that Ohio's wrongful-imprisonment statute was intended to compensate were those who did not *factually* commit the underlying offense. Because Bundy indisputably did so, the courts below incorrectly determined that he qualified as a wrongly imprisoned individual.

A. R.C. 2743.48(A)(5) requires a wrongful-imprisonment claimant to prove affirmatively that he was factually innocent of the crime for which he was convicted.

A plaintiff seeking to be declared wrongfully imprisoned must prove, among other things, 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” or that “subsequent to sentencing and during or subsequent to imprisonment, ‘an error in procedure resulted in the individual’s release.’” R.C. 2743.48(A)(5); *see also Doss*, 2012-Ohio-5678 ¶ 12. Under the former test, time and again this Court has emphasized that a claimant “must produce more evidence than a judgment of acquittal, which is merely a judicial finding that the state did not prove its case beyond a reasonable doubt. The petitioner carries the burden of proof in affirmatively establishing his or her *innocence*.” *State ex rel. Jones v Suster*, 84 Ohio St. 3d 70, 72 (1998) (citing *Ellis v. State*, 64 Ohio St. 3d 391, 393 (1992)).

B. The mere invalidation of a criminal statute as unconstitutional does not, by itself, mean that a claimant is factually innocent of the crime for which he was convicted.

Although an unconstitutional statute is without future force or effect, the fact that a statute is later held unconstitutional does not mean that it never existed. *See People v. Blair*, 986 N.E.2d 75, 81 ¶ 29 (Ill. 2013) (“[T]he void ab initio doctrine does not mean that a statute held unconstitutional ‘never existed.’”). Courts have abandoned the old adage that “[a]n unconstitutional act . . . is, in legal contemplation, as inoperative as though it had never been passed,” *see Norton v. Shelby County*, 118 U.S. 425, 442 (1886), in favor of a more nuanced understanding of the effect of a declaration of unconstitutionality. *Perlstein v. Wolk*, 844 N.E.2d 923, 930 (Ill. 2006) (“Numerous courts are in agreement that *Norton* represents the old rule as to the effect of an unconstitutional statute.” (collecting cases)).

A finding that a statute is unconstitutional is therefore not a substitute for determining that no crime was ever committed. Simply because an individual cannot constitutionally be punished for certain acts does not mean that those acts did not occur. As the U.S. Supreme Court has recognized, “broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an

operative fact and may have consequences which cannot justly be ignored.” *Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940). The principle that a finding of unconstitutionality does not erase the past applies with even more force when it is not a statute’s substance that is declared unconstitutional, but only its application, and only for procedural reasons regarding its adoption (such as single-subject problems) or its operation (such as having the Attorney General process reclassifications). In such cases, the underlying conduct remains criminal, and it is only in certain circumstances that the criminal prohibitions cannot be enforced.

As a practical matter, allowing a later invalidation to serve as a substitute for showing actual innocence would only penalize prosecutors and judges for doing their duty and for fulfilling their obligations to enforce the law. It would not serve the General Assembly’s purpose of compensating only those who were wrongfully imprisoned. Instead, it would punish prosecutors who in good faith enforced the statutes passed by the General Assembly. Such a result would be mistaken. *Cf. Allen v. Holbrook*, 135 P.2d 242, 245 (Utah 1943) (“The rule that an unconstitutional law is a nullity cannot be applied to work hardship and impose liability on a public officer who, in performance of his duty, has acted in good faith in reliance on the validity of a statute before any court has declared it invalid,” *quoting* 16 C.J.S., Constitutional Law, § 101, p. 290); *see also State v. Vill. of Garden City*, 265 P.2d 328, 335 (Idaho 1953) (“An unconstitutional law should not be applied to work a hardship or impose a liability on one who has acted in good faith and relied on the validity of a statute before the courts have declared it invalid.”). After all, prosecutors are duty-bound to enforce the law and have no power to themselves declare a statute unconstitutional. *State ex rel. Cruce v. Cease*, 114 P. 251, 252 (Okla. 1911) (“Courts are the proper tribunals to pass upon such questions, and if they exercise such caution before declaring the statutes void, nothing would justify mere ministerial officers,

who have no judicial power, to assume that the statute is unconstitutional, and proceed to act in contravention of it.”).

C. The courts below improperly gave preclusive effect to this Court’s determination that the reclassification provisions of the Adam Walsh Act were unconstitutional.

By giving preclusive effect to this Court’s *Bodyke* decision, the appeals court failed to require that Bundy affirmatively establish that he had not committed the crime for which he had been convicted. But the *Bodyke* decision stands only for the proposition that the reclassification provisions of the Adam Walsh Act violated the separation of powers. *Bodyke*, 126 Ohio St.3d 266 at syl.¶¶ 2-3. It says nothing about whether Bundy (or others like him) were factually innocent of the crimes for which they were convicted.

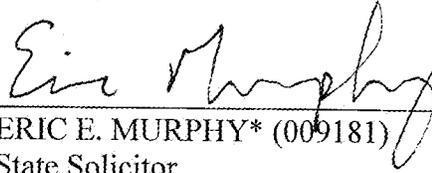
The court of appeals erred by treating the *Bodyke* decision as dispositive of the question of Bundy’s innocence for two reasons. *First*, it erred because a finding of unconstitutionality says nothing about a claimant’s culpability. Even when convictions are thrown out because of constitutional flaws in the underlying statute, claimants may have undeniably committed the crime for which they were charged (as Bundy did in this case). *Second*, it is black letter law that even when a conviction is reversed on appeal, R.C. 2743.48(A)(5) still requires a claimant to show affirmatively that the underlying crime “either was not committed by the [him] or was not committed by any person.” The failure to insist on such a showing contravenes the plain language of R.C. 2743.48(A)(5) and this Court’s decisions interpreting that provision. *See Walden*, 47 Ohio St. 3d at 51-52; *Doss*, 135 Ohio St. 3d 211 ¶ 21.

CONCLUSION

For these reasons, the Court should grant jurisdiction and reverse the decision below.

Respectfully submitted,

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A handwritten signature in cursive script that reads "Eric Murphy". The signature is written in black ink and is positioned above a horizontal line.

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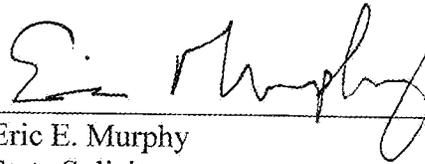
Counsel for Defendant-Appellant
State of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction was served by U.S. mail this 3rd day of February, 2014, upon the following counsel:

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Counsel for Plaintiff-Appellee
David M. Bundy

A handwritten signature in black ink, appearing to read "Eric E. Murphy", is written over a horizontal line.

Eric E. Murphy
State Solicitor

APPENDIX



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GREGORY C. WISH
CLERK OF APPEALS
MONTGOMERY COUNTY, OHIO
36

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

DS

DAVID M. BUNDY

Plaintiff-Appellee

v.

STATE OF OHIO

Defendant-Appellant

C.A. CASE NO. 25665

T.C. NO. 11CV3948

FINAL ENTRY

Pursuant to the opinion of this court rendered on the 20th day of December, 2013,
the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Montgomery
County Court of Appeals shall immediately serve notice of this judgment upon all parties and
make a note in the docket of the mailing.

MIKE FAIN, Presiding Judge

MICHAEL T. HALL, Judge

EILEEN A. GALLAGHER, Judge
(Sitting by assignment of the Chief
Justice of the Supreme Court of Ohio)

Copies mailed to:

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Hon. Mary L. Wiseman
Common Pleas Court
41 N. Perry Street
Dayton, Ohio 45422



FILED
COURT OF APPEALS

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CLERK OF COURTS
MONTGOMERY CO. OHIO

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

DAVID M. BUNDY	:	
Plaintiff-Appellee	:	C.A. CASE NO. 25665
v.	:	T.C. NO. 11CV3948
STATE OF OHIO	:	(Civil appeal from
Defendant-Appellant	:	Common Pleas Court)

OPINION

Rendered on the 20th day of December, 2013.

CHRISTOPHER W. THOMPSON, Atty. Reg. No. 0055379 and ANTHONY COMUNALE,
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GALLAGHER, J. (by assignment)

{¶ 1} The State of Ohio appeals from the decision of the Montgomery County
Common Pleas Court. The state argues the trial court erred in determining that David

Bundy was a wrongfully imprisoned person pursuant to R.C. 2743.48(A). Finding no merit to the instant appeal, we affirm the decision of the trial court.

{¶ 2} In 1995, while on parole from a 1987 burglary conviction, Bundy was arrested, indicted and convicted on two counts of gross sexual imposition of a person less than 13; two counts of sexual imposition and one count of attempted corruption of another with drugs. In April 2003, Bundy was released from prison as a convicted sex offender and required to register his address with the local sheriff's office on a yearly basis. On December 8, 2003, Bundy pleaded guilty to a fifth-degree felony charge of failure to register as a sex offender and was sentenced to five years of community control. *State v. Bundy*, Montgomery C.P. No. 2003 CR 03160 (Dec. 9, 2003). Thereafter, Bundy registered annually each October, his assigned registration month, through 2007.

{¶ 3} On November 28, 2007, Bundy received a letter from the Ohio Attorney General notifying him of a change in the law regarding sex offender classification and registration requirements. This change was authorized pursuant to Ohio's Adam Walsh Act, R.C. 2950.31, which authorized the Ohio Attorney General to reclassify sex offenders who already had been classified under the previous "Megan's Law" version of the registration requirements. The new law required Bundy to register every 180 days for 25 years, with an initial registration date of March 14, 2008.

{¶ 4} Bundy failed to register on March 14, 2008 and the Montgomery County Grand Jury indicted him with one count of failure to verify. Following an October 23, 2008 bench trial, the court found Bundy guilty of failure to verify and sentenced him to three years of mandatory imprisonment. Bundy arrived at the Department of Rehabilitation and Correction on October 24, 2008. Bundy appealed that conviction to this court, which

affirmed Bundy's conviction. See *State v. Bundy*, 2d Dist. Montgomery App. Nos. 23063, 23064, 2009-Ohio-5395. He then filed an appeal that was accepted for review by the Ohio Supreme Court. See *State v. Bundy*, 124 Ohio St.3d 1473, 2010-Ohio-354, 921 N.E.2d 245.

{¶ 5} On June 3, 2010, the Ohio Supreme Court held that R.C. 2950.031 and 2950.032, which required the reclassification of sex offenders already classified by court order under the former law, were unconstitutional. *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753. On September 10, 2010, the court reversed Bundy's conviction. See *In re Sexual Offender Reclassification Cases*, 126 Ohio St.3d 322, 2010-Ohio-3753, 933 N.E.2d 801. Consequently, the Montgomery County Prosecutor's Office dismissed the charges against Bundy and he was released from prison.

{¶ 6} On June 2, 2011, Bundy initiated the instant civil action seeking a declaratory judgment that he was a wrongfully imprisoned person entitled to pursue an action for civil damages pursuant to R.C. 2743.48. The parties filed cross motions for summary judgment with Bundy arguing that he met the five requirements for designation as a wrongfully imprisoned person and with the state arguing that the Ohio legislature did not intend to compensate individuals who are incarcerated for violating statutes that are later repealed. Additionally, the state claimed that because Bundy was serving time simultaneously for both the failure to verify conviction and a one-year sentence for violating community control sanctions in a separate case, he was not wrongfully imprisoned. The trial court agreed with Bundy, finding him to be a wrongfully imprisoned individual as defined in R.C. 2743.48(A) and thus entitled to commence a civil action for damages against the state of Ohio. The court denied the state's motion for summary judgment and granted Bundy's

motion.

{¶ 7} The State appeals, raising the following assignment of error:

The trial court erred when it failed to determine whether the Appellee satisfied each of the five provisions of the wrongful imprisonment statute, set forth in R.C. 2743.48(A)(5) as required by the Supreme Court in *Gover v. State*, 67 Ohio St.3d 93, 95, 616 N.E.2d 207 (1993); *Griffith v. City of Cleveland*, 128 Ohio St.3d 35, 40 (Ohio 2010), *Doss v. State*, 2012 Ohio 5678, P22 (Ohio December 6, 2012) and; *Dunbar v. State*, 2013-Ohio-2163; 2013 Ohio LEXIS 1355, P 17 (Ohio May 30, 2013).

{¶ 8} Within this assigned error, the state raises two issues, whether the trial court erred in determining that Bundy satisfied the requirements of R.C. 2743.48(A) and, whether the court erred in relying on a series of Eighth Appellate District cases that have since been reversed by the Ohio Supreme Court on the authority of *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111. We shall address these issues contemporaneously.

{¶ 9} Appellate review of a trial court's ruling on a summary judgment motion is de novo. *Capella III, L.L.C. v. Wilcox*, 190 Ohio App.3d 133, 2010-Ohio-4746, 940 N.E.2d 1026, ¶ 16 (10th Dist.), citing *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548, 2001-Ohio-1607, 757 N.E.2d 329. "De novo appellate review means that the court of appeals independently reviews the record and affords no deference to the trial court's decision." *Holt v. State*, 10th Dist. Franklin No. 10AP-214, 2010-Ohio-6529, ¶ 9. Summary judgment is appropriate where

the moving party demonstrates that (1) there is no genuine issue of material

fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made.

Capella III at ¶ 16, citing *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, 821 N.E.2d 564, ¶ 6. Therefore, we undertake an independent review to determine whether the state was entitled to judgment as a matter of law.

{¶ 10} R.C. 2743.48 "addresses a narrow legal problem by providing compensation to innocent persons who have been wrongfully convicted and incarcerated for a felony." *Bennet v. Ohio Dep't of Rehabilitation & Correction*, 60 Ohio St.3d 107, 110, 573 N.E.2d 633 (1991). Under R.C. 2743.48(A), a "wrongfully imprisoned individual" is an individual who satisfies the following criteria:

- (1) The individual was charged with a violation of a section of the Revised Code by an indictment or information prior to, or on or after, September 24, 1986, and the violation charged was an aggravated felony or felony.
- (2) The individual was found guilty of, but did 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.
- (3) The individual was sentenced to an indefinite or definite term of imprisonment in a state correctional institution for the offense of which the

individual was found guilty.

(4) The individual's conviction was vacated or was dismissed, or reversed on appeal, the prosecuting attorney in the case cannot or will not seek any further appeal of right or upon leave of court, and no criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney, city director of law, village solicitor, or other chief legal officer of a municipal corporation against the individual for any act associated with that conviction.

(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.

{¶ 11} Pursuant to that statute, "all claims for wrongful imprisonment must originate in a court of common pleas." *Griffith v. City of Cleveland*, 128 Ohio St.3d 35, 2010-Ohio-4905, 941 N.E.2d1157, ¶ 1. One wishing to file a suit in the Ohio Court of Claims for damages for wrongful imprisonment "first must obtain a declaratory judgment in the court of common pleas certifying that the petitioner was a 'wrongfully imprisoned individual' pursuant to R.C. 2743.48." *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 1998-Ohio-275, 701 N.E.2d 1002.

{¶ 12} In seeking summary judgment in his favor and on appeal before this court,

Bundy argues that he qualifies as a wrongfully incarcerated individual by virtue of having been imprisoned for an invalid conviction under the Adam Walsh Act. The state argues that the repeal of that statute does not entitle Bundy to recover for wrongful imprisonment under R.C. 2743.48 because he did engage in the conduct that resulted in his conviction and thus was not actually innocent. Additionally, the state also contends that because Bundy was incarcerated for violating the conditions of his community control, his imprisonment was not wrongful. We disagree in part with the state's arguments.

{¶ 13} In the present case, all five of the required factors of R.C. 2743.48(A) are present. A Montgomery County Grand Jury indicted Bundy with one count of failure to verify pursuant to R.C. 2950.05, a third-degree felony. See R.C. 2743.48(A)(1). The trial court found Bundy guilty of the third-degree felony failure to verify after a bench trial and as such, Bundy did not plead guilty to the charge. See R.C. 2743.48(A)(2). The trial court sentenced Bundy to a three-year term of imprisonment for the offense of failure to verify. See R.C. 2743.48(A)(3).

{¶ 14} Pursuant to R.C. 2743.48(A)(4), Bundy's conviction was dismissed and no criminal proceeding is pending, can or will be brought by the prosecutor against Bundy for any act associated with his failure to verify under the Adam Walsh Act. In *Mohammed v. State*, 8th Dist. Cuyahoga No. 98655, 2012-Ohio-5517, *Johnson v. State*, 8th Dist. Cuyahoga No. 98050, 2012-Ohio-3964, and *Ballard v. State*, 8th Dist. Cuyahoga No. 97887, 2012-Ohio-3086, the Eighth District Court of Appeals determined in each of the three cases that individuals convicted of and incarcerated for failure to comply with the Adam Walsh Act's revised reporting requirements for sex offenders qualify as "wrongfully imprisoned individuals" for purposes of R.C. 2743.48. The state cites as error the trial

court's reliance on these three cases as all three were overturned on the authority of *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111. However, the basis for the reversal in *Dunbar* was that each of the three defendants in the above-cited cases pleaded guilty to the charges of failure to register. The Ohio Supreme Court held that a guilty plea under those circumstances disqualified an individual from qualification under R.C. 2743.48. *Id.* In the present case, we have no guilty plea, and we find the logic from the remainder of the opinions in *Mohammad*, *Johnson* and *Ballard* applies to the remainder of the analysis.

{¶ 15} We further disagree with the state's argument that because Bundy did not register under the Adam Walsh Act, he did engage in conduct defined as criminal at the time of his conviction. It is this court's conclusion that an involuntary conviction to an unconstitutional offense is without valid legal consequence and cannot be used as a basis to prevent Bundy from qualifying under R.C. 2743.48(A)(4).

{¶ 16} We do, however, find merit with the state's argument that Bundy's one-year incarceration in 2008 for violating conditions of community control in case No. 2003 CR 03160, independent of Bundy's failure to register, means that Bundy was not wrongfully imprisoned during his time in custody for those unrelated community control violations. The record demonstrates that the court revoked Bundy's probation in the above-mentioned case because he was arrested for disorderly conduct, he had a warrant issued for failure to appear for a child support hearing, he failed to report to his probation officer as ordered, he tested positive for marijuana, he failed to make payments towards his financial obligations and, he violated probation by failing to register. These other alleged violations that led to the revocation of his probation in Case No. 2003 CR 03160 were not related to

the failure to register charge and thus provided a separate, valid basis for his re-incarceration. The trial court agreed and determined that Bundy was not wrongfully imprisoned within the meaning of R.C. 2743.48 to the extent that any time served during his 2008 to 2010 incarceration related to his reinstated sentence in Case No. 2003 CR 03160.

{¶ 17} We agree with the trial court's conclusion and further hold that Bundy's conviction for failure to register did not provide a valid legal basis for the state of Ohio to retain him in custody after his sentence in Case No. 2003 CR 03160 had expired and thus, Bundy qualifies as a wrongfully imprisoned individual.

{¶ 18} Lastly, pursuant to R.C. 2743.48(A)(5), during Bundy's prison term for failure to register, the Ohio Supreme Court held that R.C. 2950.031 and 2950.032, which required the reclassification of sex offenders already classified by court order under the former law, were unconstitutional and reversed Bundy's conviction. See *State v. Bodyke* and *In re Sexual Offender Reclassification Cases*, 126 Ohio St.3d 322, 2010-Ohio-3753, 933 N.E.2d 801. Thus, Bundy could not have "committed" the felony offense of failure to register where that offense itself was a nullity.

{¶ 19} We conclude that Bundy qualifies as a wrongfully imprisoned individual pursuant to R.C. 2743.48(A) and, as such, he is entitled to pursue a civil action in the Ohio Court of Claims. We affirm the decision of the trial court to deny the state's motion for summary judgment and grant Bundy's motion for summary judgment.

{¶ 20} The judgment of the trial court is affirmed.

FAIN, P.J., concurs.

HALL, J., concurring:

{¶ 21} I concur in the result on this record that David Bundy was properly determined to be a “wrongfully imprisoned individual.” However, I am compelled to comment that subsections (4) and (5) of R.C. 2743.48(A) fail to address two issues that could be dispositive for such a determination: (1) that he is not actually innocent; and (2) that R.C. 2743.48 does not anticipate subsequent unconstitutionality of the criminal statute (as applied to him) under which he was convicted.

{¶ 22} My observations stem from the Ohio Supreme Court’s interpretation that “[t]he statutory language [of R.C. 2743.48(A)(4)] is intended to filter out those claimants who have had their convictions reversed, but were committing a different offense at the time that they were engaging in the activity for which they were initially charged.” *Gover v. Ohio*, 67 Ohio St.3d 93, 95, 616 N.E.2d 207 (1993). “When the General Assembly enacted Ohio’s wrongful imprisonment legislation, it ‘intended that the court of common pleas actively separate those who were wrongfully imprisoned from those who have merely avoided criminal liability.’” *Id.*, quoting *Walden v. State*, 47 Ohio St.3d 47, 52, 547 N.E.2d 962, 967 (1989). My observations also are supported by case law interpreting language in R.C. 2743.48(A)(5)—that the offense “was not committed by the individual”—as a requirement that an applicant prove “actual innocence.” *Doss v. State*, 135 Ohio St.3d 211, 2012-Ohio-5678, 985 N.E.2d 1229, ¶ 12; *Nelson v. Ohio*, 183 Ohio App.3d 83, 2009-Ohio-3231, 915 N.E.2d 729, ¶ 13–14 (10th Dist.).

{¶ 23} For a person to be declared a “wrongfully imprisoned individual,” R.C. 2743.48(A)(4) and (5) require determinations that:

(4) The individual’s conviction was vacated or was dismissed, or reversed on

appeal, the prosecuting attorney in the case cannot or will not seek any further appeal of right or upon leave of court, and no criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney, city director of law, village solicitor, or other chief legal officer of a municipal corporation against the individual for any act associated with that conviction.

(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.

{¶ 24} Here Bundy was imprisoned for a 2008 "failure to verify" conviction, which involved not appearing at the designated interval to verify his registration address. The Ohio Supreme Court reversed his conviction based on the holding of *State v. Bodyke*, supra, that a sexual offender previously designated under Megan's Law could not be reclassified under the Adam Walsh Act on separation-of-powers grounds. Instead of an annual interval for verification, Bundy's purported re-classification had required him to verify his address every 180 days. When he did not, he was charged.

{¶ 25} Ordinarily, a registrant in Bundy's situation (classified under Megan's Law and reclassified under Adam Walsh), still would have been required to comply with the Megan's Law requirements which, among other things, required prompt notification of a change of address, under R.C. 2950.05, or "failure to notify" (not notifying the sheriff of a

change of address).¹ At the time of Bundy's 2008 conviction, "failure to notify" also would have been a subsequent offense requiring a mandatory three-year sentence.² Moreover, a "failure to notify" offense would not have been affected by the unconstitutionality found in *Bodyke* because the requirement to notify the sheriff of a change of address was the same under either Megan's Law or the Adam Walsh Act. See *State v. Brunning*, 134 Ohio St. 3d 438, 2012-Ohio-5752, 938 N.E. 2d 316.

{¶ 26} When Bundy did not appear to verify his address on March 14, 2008, a seven-day letter was sent to him. *State v. Bundy*, 2d Dist. Montgomery Nos. 23063, 23064, 2009-Ohio-5395, ¶ 11. When he did not respond, a detective attempted to call him but the phone was disconnected. *Id.* The detective went to his last known address and left a business card. *Id.* The electronic docket of the consolidated probation case (appellate case number 23064, trial court case number 2003-CR-3160) contains a May 23, 2008 notice of community control violation. It states, among other things: "You failed to notify your probation officer when you moved to 1580 Gift Ridge Rd., Manchester, Ohio 45144." It is

¹Bundy's case is an anomaly. As a result of this court's holding in his direct appeal, *State v. Bundy*, 2d Dist. Montgomery Nos. 23063 & 23064, 2009-Ohio-5395, Bundy was required to register under the Adam Walsh Act. That holding was reversed by the Ohio Supreme Court. But this court also had determined that because Bundy's 2000 court designation as a sexually oriented offender under Megan's Law occurred after he had completed the sexual offense part of his prison sentence, that designation occurred too late and he was not required to register or report under Megan's Law either.

²In *State v. Howard*, 134 Ohio St.3d 467, 2012-Ohio-5738, 983 N.E.2d 341, the Ohio Supreme Court determined that the penalty for a Megan's Law violation after enactment of the more onerous Adam Walsh Act should be the penalty that was in place immediately before the change from Megan's Law to Adam Walsh. Failure to verify or failure to notify were then both felonies of the third degree with a one-to-five-year, non-mandatory sentence. The applicable sentence is irrelevant to the discussion at hand because a conviction precludes one from being a wrongfully imprisoned individual, regardless of the sentence served.

apparent that Bundy could not be contacted because he had moved and had failed to notify the sheriff of his new address. But none of this was argued by the State in its appellate brief or in its opposition to the appellant's motion in the trial court. Had it been raised by the State, it would have been apparent that Bundy could have been charged, convicted, and imprisoned for "failure to notify" at the same time, and arising out of the same set of facts and circumstances, as his "failure to verify" conviction.

{¶ 27} This leads to the inadequacy of R.C. 2743.48(A)(4). If, at the inception of a prosecution, an individual could have been charged and imprisoned for ancillary criminal conduct but was not, it is often too late to pursue the ancillary charge a year or two later after the conviction is reversed. Adding an additional charge after an initial reversal is likely to raise several legal challenges. Moreover, other factual reasons may prevent pursuit of an additional charge. Therefore, under the strict wording of subsection (4) of the statute, Bundy may have been "committing a different offense," *Gover*, supra, but it may no longer be charged, thwarting the General Assembly's intention, enunciated in *Gover and Walden*, to separate those wrongfully imprisoned from those who merely escape criminal liability.

{¶ 28} Likewise, if subsection (5) of the statute is to require "actual innocence," it is also flawed. Subsection (5) contains alternative requirements. Either the individual was released as a result of an "error in procedure," or the individual did not commit the offense (*i.e.*, actual innocence). The "error in procedure" language has been applied when a conviction is reversed because of a speedy trial violation, *Nelson v. State*, 5th Dist. Tuscarawas No. 2006 AP 0061, 2007-Ohio-6274, or as a result of an illegal search and seizure, *Hill v. State*, 10th Dist. Franklin No. 12AP-635, 2013-Ohio-1968, or the result of *Brady* violations, *D'Ambrosio v. State*, 8th Dist. Cuyahoga No. 99520, 2013-Ohio-4472.

None of those errors in procedure apply to a case like Bundy's. Therefore, he must demonstrate that the offense "was not committed by him" (or not committed at all).

{¶ 29} A sex offender is required promptly to "notify" the sheriff of a change of address, regardless of the applicable reporting interval. As previously explained, an offender failing to notify the sheriff of a new address arising out of the same set of facts and circumstances as a failure to verify could have been charged with either offense or both. Moreover, a "failure to notify" would not be affected by the unconstitutionality found in *Bodyke*.

{¶ 30} Here the possibility of an alternate charge being pursued from the beginning was not argued by the State in its brief or in its opposition to the appellant's motion in the trial court. But if the legislature intended for those wrongfully incarcerated to show "actual innocence" before being eligible for compensation, the statute does not address the situation where the defendant could have been convicted and sentenced on an ancillary offense at the same time or arising out of the same events that led to the reversed conviction. The result, as here, is that an incarcerated individual may recover when not actually innocent simply because the prosecutor, in hindsight, chose the wrong charge to pursue. Bundy's "failure to verify" conviction was reversed because of a later determination of unconstitutionality. An equally available "failure to notify" charge would not have been reversed for that reason.

{¶ 31} Finally, Bundy was charged by a sheriff's office, prosecuted by a prosecutor, and convicted by a trial court, which was affirmed on appeal—all acting under a duly enacted statute that later was held not to apply to him on separation-of-powers grounds. It may be that the legislature intended to compensate those imprisoned under a statute

later determined to be unconstitutional. If so, the legislature should say so explicitly.

{¶ 32} In spite of the foregoing misgivings about the statutory scheme, I concur in the judgment. As indicated above, Bundy's case is unusual. This court eventually held that he was not required to register under Megan's Law (even though he had registered for several years and had a prior, unappealed conviction under that statute). The Ohio Supreme Court held that the Adam Walsh Act did not apply to him. Therefore, in retrospect, he had no duty to "verify" his address or to "notify" the sheriff of any change. Applying R.C. 2743.48 as written, he is a "wrongfully imprisoned individual."

.....
(Hon. Eileen A. Gallagher, Eighth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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