

ORIGINAL

In the
Supreme Court of Ohio

OMAR K. JAMES,

Plaintiff-Appellee,

v.

STATE OF OHIO,

Defendant-Appellant.

Case No. 14-0318

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

Court of Appeals
Case No. 2013-CA-28

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

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Appellant’s Proposition of Law No. 1:

Because the General Assembly does not silently amend independent subsections of a statute when it explicitly amends a different subsection, it did not amend R.C. 2743.48(A)(4) when it added language to R.C. 2743.48(A)(5).

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INTRODUCTION

A core principle of legislative action is that the General Assembly “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-Ohio-2928 ¶ 48 (internal quotation marks omitted). When the General Assembly amends one part of a statute, but leaves another untouched, “it cannot be said that the Legislature meant to change the meaning of [one] section by amending [another].” *Bd. of Comm’rs of Crawford Cty. v. Gibson*, 110 Ohio St. 290, 298 (1924). But that is exactly what the Second District did in this case involving the wrongful-imprisonment statute. The Second District treated the 2003 amendments to one subsection of the statute (subsection (A)(5)) as amending another subsection (subsection (A)(4)) even though the 2003 amendments did not change a single word in the latter subsection. And implicit in the Second District’s statutory analysis is that the General Assembly silently overruled one of this Court’s foundational wrongful-imprisonment precedents, *Gover v. State*, 67 Ohio St. 3d 93, 95 (1993). The Second District’s ruling merits review.

In the alternative, because the Second District’s judgment also interpreted language in subsection (A)(5) that this Court is already considering in two pending cases, the Court should accept and hold this case even if it declines review of the State’s first proposition of law.

The decision below, and the pending cases in this Court, all concern portions of Ohio’s wrongful-imprisonment statute, R.C. 2743.48. Three provisions of the statute weave throughout these cases. One provision is the requirement in 2743.48(A)(4) that wrongful-imprisonment claimants show that they were not “engaging in any other criminal conduct arising out of the incident for which they were initially charged.” *Gover*, 67 Ohio St. 3d at 95. This provision acts as an Otherwise Innocent restriction and bars compensation to those who committed other crimes associated with the crime under review in the wrongful-imprisonment litigation. Two other provisions reside in subsection (A)(5), and they offer alternate ways for a claimant to meet the

(A)(5) element of the statute. These provisions are an Actual Innocence requirement and an Error in Procedure requirement. Together, these provisions block compensation unless a claimant can show that he is either actually innocent of the crime or that an error in procedure caused his imprisonment.

Proposition One. The Court should review this case because the Second District's judgment contradicts legislative intent and obliterates the Otherwise Innocent requirement in 2743.48(A)(4). The (A)(4) subsection prohibits wrongful-imprisonment compensation if the prisoner committed *other* criminal acts associated with the crimes eventually overturned on appeal. The Second District's decision reads this Otherwise Innocent requirement out of the statute and excises the limitations this Court articulated in *Gover*, thereby opening the door to compensation for defendants even when they have committed other crimes not vacated or reversed on appeal.

Proposition Two. Independent of the reasons to review the lower court's *Gover* holding, review is warranted because this case raises a question encompassed by two pending appeals, *Mansaray v. State*, No. 2012-1727, and *Hill v. State*, No. 2013-1043. *Mansaray*, *Hill*, and this case all require interpretation of the "error in procedure" language of the statute's (A)(5) subsection. *Mansaray* has already been argued (October 8, 2013), and *Hill* was accepted and held for *Mansaray* (October 23, 2013). At minimum, this case should be accepted and held for *Mansaray* and *Hill*. See S. Ct. Prac. R. 7.08(B)(2).

For these reasons, and for the reasons below, the Court should accept review of this case on Proposition One and reverse. In the alternative, the Court should accept review over Proposition Two and hold it for the decision in *Mansaray*. If *Mansaray* does not mandate reversal, the case should then be further held for the decision in *Hill*.

STATEMENT OF THE CASE AND FACTS

- A. Omar James was convicted of several drug and weapons charges, all from actions he took on a single day in 1996. A federal habeas court later granted a writ as to some, but not all, of the convictions. No court, state or federal, has disturbed the conviction for possession of a weapon while under a disability.**

James was indicted, and faced trial, on four counts arising from his actions on a single day in September 1996: two counts of possession of crack cocaine, one count of carrying a concealed weapon, and one count of having a weapon while under a disability. *James v. State*, No. 2013-CA-28, 2014-Ohio-140 ¶¶ 3-4 (2d Dist.) (“App. Op.”) (Ex. 2). A 1997 trial resulted in a hung jury on all but the weapons-while-under-a-disability charge. *Id.* ¶ 4. The jury convicted James on that charge, but James did not appeal that conviction. *Id.* James served a one-year prison sentence for that conviction. *Id.*

Thereafter, at a second trial, a jury convicted James on the other three counts. *Id.* ¶ 5. This time, James did appeal, but the Second District affirmed, and this Court declined jurisdiction. *Id.* James then sought habeas relief in federal court, arguing that his waiver of the right to counsel (he represented himself at the second trial) was not knowing and voluntary because the trial judge did not explain the “risks and dangers in proceeding *pro se.*” *James v. Brigano*, 470 F.3d 636, 643 (6th Cir. 2006). A federal district judge granted a conditional writ, and the Sixth Circuit affirmed. App. Op. ¶ 6. The conditional writ ordered the State to release James or retry him by a given date. *Id.* The State never retried James. *Id.*

- B. James sought wrongful-imprisonment compensation. The trial court denied relief by granting summary judgment for the State. The Second District reversed and ordered that summary judgment be entered for James.**

After securing the habeas writ and after the State declined to retry him, James filed a civil action seeking wrongful-imprisonment compensation. James and the State cross-moved for summary judgment and the trial court granted the State’s motion while denying James’s. *James*

v. State, No. 09CV1251 (Feb. 15, 2013) (Ex. 3). James appealed, and the Second District reversed. Its reasoning focused on the *Gover* requirement in R.C. 2743.48(A)(4) that a claimant be otherwise innocent of any other criminal conduct and the Error in Procedure provision in R.C. 2743.48(A)(5) that was added to the statute in 2003.

Addressing the *Gover* requirement, the court adopted wholesale the reasoning of the Tenth District in *Hill v. State*, No. 12AP-635, 2013-Ohio-1968 (10th Dist.). *See* App. Op. ¶ 18. That included repeating the Tenth District’s claim that *Gover* “cannot prevail over contradictory text in the current version of the statute.” *Id* (quoting *Hill*). In repeating that analysis, the Second District—like the Tenth—treated the 2003 amendments to subsection (A)(5) as modifying the Otherwise Innocent requirement that *Gover* located in subsection (A)(4).

Addressing the Error in Procedure language, the Second District reasoned that the self-representation error “ultimately led to the vacation of James’s convictions.” App. Op. ¶ 20. The court did not find that the self-representation error “resulted” in James’s release from prison. R.C. 2743.48(A)(5).

The State appeals to reaffirm this Court’s holding in *Gover* and to restore the proper interpretation of the Error in Procedure language in the wrongful-imprisonment statute.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

The main question in this appeal is whether the General Assembly silently overruled *Gover*, one of this Court’s key precedents interpreting the wrongful-imprisonment statute. Because the 2003 amendment to the statute left *Gover* intact, the Second District’s contrary holding countermands the limited reach of the statute and warrants review. The Second District also expansively interpreted the Error in Procedure language of the statute. Because that language is the subject of two pending cases in the Court, a decision accepting and holding this case is appropriate even if the Court declines review of the State’s first proposition of law.

A. The Court should grant review of Proposition One because the Second District’s opinion conflicts with the reasoning of other appellate districts.

Reasoning that the 2003 amendments contradict *Gover*, the Second District held that the Otherwise Innocent requirement in R.C. 2743.48(A)(4) does not bar James from receiving wrongful-imprisonment compensation even though he was *convicted* of another crime “associated with” the convictions for which he sought damages. App. Op. ¶¶ 18-19.

That holding conflicts with holdings in other appellate districts. At least two other districts have held, after the 2003 amendments to the statute, that associated criminal conduct, even if it does not result in conviction, bars recovery. The Sixth District has held that a prisoner does not satisfy subsection (A)(4) unless he proves that he “was innocent of *any* criminal activity during the incident that gave rise to his original charges.” *Ramirez v. State*, No. WD-02-075, 2004 WL 226109, at *3 (6th Dist. Feb. 6, 2004) (Lanzinger, J.) (emphasis added). And the Eighth District has ruled that a prisoner is ineligible for compensation if he “fail[s] to establish by a preponderance of the evidence that he did not engage in any other criminal conduct arising out of the incident for which he was initially charged.” *Jones v. State*, No. 96184, 2011-Ohio-3075 ¶ 14 (8th Dist.). The tension between the Second and other districts creates disharmony in Ohio law that should be resolved. The Court should accept jurisdiction over Proposition One.

B. The Court should grant review of Proposition One because the Second District scrambled the law of statutory interpretation and rewrote the meaning of this Court’s *Gover* decision.

The Second District bucked this Court’s precedents in two consequential ways. First, it treated an amendment to one part of a statute as a silent amendment to language the General Assembly left untouched. Second, it implicitly overruled *Gover*, a cornerstone of this Court’s wrongful-imprisonment precedent.

The Second District treated an amendment to one part of the statute as a silent amendment to language the General Assembly left untouched. That odd theory of statutory construction has consequences not only for wrongful-imprisonment cases, but for statutes across the range of legislative action. When the General Assembly acts, “the presumption is that it is aware of [the Court’s] decisions interpreting” the statute it is amending. *State v. Hassler*, 115 Ohio St. 3d 322, 2007-Ohio-4947 ¶ 16. So when the General Assembly tweaked the wrongful-imprisonment statute, it presumed that subsection (A)(4) meant what this Court said it meant in *Gover*. The General Assembly therefore thought it was working with a statute that prohibited recovery if a prisoner committed other crimes at the same time as the crime later reversed. *See Gover*, 67 Ohio St. 3d at 95. What the Second District held instead is that the General Assembly—far from relying on *Gover*—actually *overruled* it by amending another subsection of the statute. The Second District’s judgment warrants review because it unsettled legislative expectations about what the General Assembly must do when adjusting statutes that this Court has definitively interpreted. That is a problem not just for the wrongful-imprisonment statute, but for all statutes.

Apart from rewriting the rules of statutory interpretation, the Second District rewrote the meaning of *Gover*. The court implicitly rejected *Gover*’s limit on wrongful-imprisonment compensation by permitting (where *Gover* prohibited) recovery even when a prisoner has been convicted of conduct associated with the convictions reversed on appeal. But nothing in the statute shows an intent to abrogate *Gover*. And this Court continues to cite *Gover* without any hint that it has reduced force after the 2003 amendments to the wrongful-imprisonment statute. *See Dunbar v. State*, 136 Ohio St. 3d 181, 2013-Ohio-2163 ¶ 17.

C. The Court should grant review because the Second District’s decision has monetary and social costs of public and great general interest.

The Second District’s judgment expands the group of potential wrongful-imprisonment plaintiffs. That result, as in other cases the Court has accepted recently, requires the Court’s review. *See Doss v. State*, 135 Ohio St. 3d 211, 2012-Ohio-5678 (meaning of “was not committed” in R.C. 2743.48(A)(5)) (reversing lower court); *Dunbar*, 2013-Ohio-2163 (meaning of “did not plead guilty” in 2743.48(A)(2)) (reversing lower court); *Mansaray v. State*, No. 2012-1727 (meaning of “error in procedure” in (A)(5)) (pending); *Hill v. State*, No. 2013-1043 (same) (pending). And as those cases show, the Court is concerned about uniform and proper interpretations of the wrongful-imprisonment statute. This case presents the next chapter in that story, and asks whether the 2003 amendments both reached broader than the General Assembly intended and overturned this Court’s interpretation of subsection (A)(4).

As with recent cases the Court has considered, this case merits further review because the lower court’s statutory interpretation broadens compensation eligibility beyond the text and this Court’s interpretations of that text. The Second District concluded that a *conviction* contemporaneous with the convictions underlying the wrongful-imprisonment claim “does not preclude” recovery. App. Op. ¶ 19. Under the Second District’s interpretation, a claimant is eligible for compensation even when all parties agree that the claimant *actually committed and was convicted of* another crime arising out of the incident that led to the overturned conviction. By divorcing the statute’s reach from its text and this Court’s precedents, the Second District’s opinion imposes monetary and social costs that merit this Court’s further review.

The Second District’s judgment has significant monetary costs (both now and in the future). A successful wrongful-imprisonment claimant is entitled to over \$40,000 per year of imprisonment (adjusted for inflation). R.C. 2743.48(E)(2)(b). The State also pays successful

claimants' lost wages, attorney's fees, court costs, expenses, and other damages. R.C. 2743.48(E)(2)(c), (d). Thus it is possible for just *one* wrongfully imprisoned individual to receive a payment in the hundreds of thousands, if not millions, of dollars. And because the decision below could affect many claimants, it deserves review in this Court.

The Second District's judgment has social costs as well, and those costs affect the very prisoners that benefit from the statute.

First, when an appellate (or habeas) loss allows retrial, prosecutors will be more likely to retry defendants even in instances where a second trial may not represent the most efficient allocation of resources. For example, prior to the Second District's decision, if a defendant had his conviction reversed after serving four years of a five-year sentence, a prosecutor may have decided that a retrial was unwarranted because going through a costly trial to ensure that a defendant served the final year of that sentence would not serve the overall public interest, even if a conviction on retrial is likely. The Second District's decision has changed the calculus. Now the prosecutor must factor in potential costs to the State of those four years of imprisonment. That problem will be particularly acute in cases like this, where a federal court grants a conditional habeas writ that instructs the State of Ohio to "retry" a prisoner by a certain date or "forego further retrial." *James v. Brigano*, No. 3:00CV00491, 2008 WL 2949411, at * 5 (S.D. Ohio July 30, 2008). In the wake of the Second District's holding, prosecutors will be forced to retry defendants even when penological and budgetary considerations counsel against another trial. That benefits neither the prisoner nor the prosecutor.

Second, an expansive application of the wrongful-imprisonment statute may lead to appellate timidity in enforcing the rights of the accused. If enforcing those rights means not merely retrial or release, but also compensation from the State "it is at least doubtful that

appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage.” *United States v. Tateo*, 377 U.S. 463, 466 (1964) (explaining why retrial after collateral review is permitted). Ultimately, adhering to the statute’s text “serves defendants’ rights as well as society’s interest.” *Id.* The judgment below undercut both interests when it departed from the text and this Court’s precedents.

D. The State’s Proposition One merits review independent of the pending *Hill* appeal.

In addition to the costs discussed above, review of the State’s first proposition of law is warranted because, notwithstanding the Second District’s analytical piggybacking, this appeal raises a distinct and significant question not raised in *Hill*. The *Hill* appeal will consider subsection (A)(5); this appeal concerns subsection (A)(4). That is, while *Hill* will address the meaning of the “error in procedure” language in (A)(5), this appeal asks whether the 2003 amendment that added the “error in procedure” language to (A)(5) silently amended (A)(4) to *remove* the Otherwise Innocent requirement in (A)(4).

The distinctions between this case and *Hill* are plain. James was charged with committing four drug and weapons crimes on a single day. He was convicted of one weapons charge, but the other three charges resulted in a hung jury. At a second trial, he was convicted of the remaining three charges. Those three charges were eventually set aside after federal habeas proceedings and the prosecutor’s decision not to retry on those charges. In *Hill*, the defendant was charged with—and convicted of—several crimes arising from possession of cocaine. 2013-Ohio-1968 ¶ 3. Unlike this case, *all* of those charges were reversed when the appellate court concluded that evidence had been seized in violation of the Fourth Amendment. *Id.* As a result, the entire “criminal case” against the defendant was dismissed. *Id.*

The *Hill* opinion itself recognized (and anticipated) this distinction. *Hill* acknowledged that other criminal conduct “at the time of the incident” underlying the wrongful-imprisonment

claim can bar relief. 2013-Ohio-1968, at ¶ 37 (internal quotation marks omitted). But that kind of associated conduct was simply not present. *Id.*

Hill avoided liability for *all* crimes he committed on the same day, while James avoided liability for only some of those convictions. The Second District mistakenly treated the cases as identical. This Court should review the distinct question of whether the 2003 amendments silently overruled *Gover* without regard to the pending *Hill* appeal.

E. In the alternative, the Court should grant review of Proposition Two and hold for two similar cases, *State v. Mansaray* and *State v. Hill*, which will interpret R.C. 2743.48(A)(5).

By accepting *Mansaray* and *Hill* for review, this Court has already recognized that Proposition Two—the proper interpretation of R.C. 2743.48(A)(5)—merits review. The questions presented in *Mansaray* and *Hill* significantly overlap with the State’s second proposition of law in this case. Because the meaning of the “error in procedure” language will also be addressed in *Mansaray* and *Hill*, review of the State’s second proposition of law should proceed by holding the case pending the resolution of those cases if the Court declines review of the State’s first proposition of law.

Because neither *Mansaray* nor *Hill* will necessarily resolve this case, consideration of this proposition may require full merits briefing after the Court resolves those cases. While a decision reversing the Eighth District (*Mansaray*) would necessitate reversal of the Second District in this case, the inverse is not equally true. In *Mansaray*, the Eighth District focused exclusively on *when* the error in procedure occurs, not *what* constitutes an error. *See Mansaray v. State*, No. 98171, 2012-Ohio-3376 (8th Dist.). If this Court rules (as urged in *Mansaray*) that R.C. 2743.48(A)(5) limits the time when error in procedure must occur, then that decision would mandate reversal in this case. It is undisputed that James’s claimed error did not occur “subsequent to sentencing and during or subsequent to imprisonment.” But should the Court

find that R.C. 2743.48(A)(5) places *no* time limitations on when the error occurred, questions about *what* constitutes an error in procedure will remain.

The interaction between *Hill* and this case is more nuanced: If *Hill* produces a published opinion, it will be because *Mansaray* left unresolved questions about *what* errors satisfy the language of subsection (A)(5). But *Hill* may not answer all of those questions. *Hill* involved a Fourth Amendment ruling by a state court and a prosecutor who concluded that he would be “unable to prove the matter beyond a reasonable doubt” without the suppressed evidence. *Hill*, 2013-Ohio-1968 ¶ 31. James’s case involves a Sixth Amendment ruling by a federal court and a prosecutor who declined retrial. App. Op. ¶ 6. Those differences of courts, errors, and prosecutorial discretion all suggest that, even after *Mansaray* and *Hill*, this appeal may pose questions that the Court should address through full merits briefing.

ARGUMENT

Appellant’s Proposition of Law No. I:

Because the General Assembly does not silently amend independent subsections of a statute when it explicitly amends a different subsection, it did not amend R.C. 2743.48(A)(4) when it added language to R.C. 2743.48(A)(5).

This case asks whether *Gover*’s Otherwise Innocent requirement in subsection (A)(4) barring relief for prisoners who “engag[e] in any other criminal conduct arising out of the incident for which they were initially charged,” 67 Ohio St. 3d at 95, has been superseded by the 2003 amendments to subsection (A)(5). The Second District concluded that the changes to (A)(5) surreptitiously changed (A)(4) as well. That is wrong for several reasons.

First, the General Assembly does not change statutes silently. “If, by what it does, the General Assembly intends in effect to change the law as previously announced by this court, it should express such an intention. Such an intention will not ordinarily if ever be implied from its

silence.” *Lynn v. Supple*, 166 Ohio St. 154, 159 (1957). That is especially true when this Court has authoritatively interpreted a provision the legislature left untouched because “it cannot be said that the Legislature meant to change the meaning of [one] section by amending [another].” *Gibson*, 110 Ohio St. at 298. Indeed, when the General Assembly reenacts language that this Court interprets, it gives its “express approval” to that interpretation. *Commercial Credit Corp. v. Pottmeyer*, 176 Ohio St. 1, 5 (1964), *overruled on other grounds by, Hardware Mut. Cas. Co. v. Gall*, 15 Ohio St. 2d 261 (1968). *Gover* interpreted subsection (A)(4); the General Assembly amended (A)(5), but did not alter a single word in (A)(4). *See* S.B. 149 (Dec. 10, 2002). The meaning of (A)(4) did not change.

Second, the appellate court simply confused the meaning of two adjacent provisions in the wrongful-imprisonment statute. Subsection (A)(4) codifies an Otherwise Innocent requirement: a prisoner must show that he did not engage in “any other criminal conduct arising out of the incident for which they were initially charged.” *Gover*, 67 Ohio St. 3d at 95. Subsection (A)(5) codifies an Actual Innocence requirement (and, not relevant to this proposition, an error-in-procedure alternative to that requirement). *See, e.g., Doss*, 2012-Ohio-5678 ¶ 12. A prisoner must satisfy both sections (indeed, all five) to be eligible for compensation. *See Dunbar*, 2013-Ohio-2163 ¶ 11. Innocence is not a free-floating concept in the statute; it has two distinct homes in subsections addressing different aspects of eligibility. The question in this case asks whether James was otherwise innocent, not whether he is actually innocent.

For these reasons, the Second District’s judgment should be reversed.

Appellant's Proposition of Law No. II:

An error in procedure for purposes of R.C. 2743.48(A)(5) is a trial error which, by its own operation and without further intervening acts, directly results in a prisoner's release.

The final prerequisite for wrongful-imprisonment-compensation eligibility requires claimants to demonstrate either actual innocence or that “an error in procedure resulted in” the release from prison. James makes no claim to actual innocence. Instead, he argues that his eventual release from prison after a federal court granted a conditional writ of habeas corpus satisfies this Error in Procedure requirement. The statute’s text shows that James cannot satisfy that requirement.

First, R.C. 2743.48(A)(5) does not refer to errors in procedure generally; instead, it refers more specifically to “error[s] in procedure [that] *resulted in the individual’s release.*” (Emphasis added). The “resulted” language limits the class of errors that entitle prisoners to compensation. “Resulted” is a word of causation and distinguishes errors that merely “contribute” to a prisoner’s release (when, for example, a prosecutor decides to drop the case) from errors that actually compel a prisoner’s release with no further action.

All trial errors do not make imprisonment unlawful. That can be seen in the distinction between errors that bar retrial and errors that permit retrial. *Compare, e.g., State v. Brewer*, 121 Ohio St. 3d 202, 2009-Ohio-593 (evidentiary error did not bar retrial), *with State v. Kareski*, 137 Ohio St. 3d 92, 2013-Ohio-4008 (error amounting to insufficient evidence barred retrial); *see also Tateo*, 377 U.S. at 463-64 (retrial after habeas writ not barred). An error that permits retrial is not an error that “results” in a prisoner’s release because it is simply a recognition that the particular trial process that led to the conviction contained a flaw. A reversal on that basis does not mean that prisoner should be freed. That question is saved for a retrial.

Second, if the General Assembly intended to permit every prisoner whose conviction was reversed on appeal to get compensation from the State, it could have said so explicitly. *Cf. Walden v. State*, 47 Ohio St. 3d 47, 53 (1989) (finding that if the General Assembly had wanted to specify a certain standard of review, then would have specifically done so); *State v. Cowan*, 101 Ohio St. 3d 372, 2004-Ohio-1583 ¶ 11 (rejecting interpretation that General Assembly “could have explicitly” embraced, but did not). If the General Assembly intended to provide compensation whenever there is *any* error, then it would have referred to errors without limitation. But it did not. It included language that limited recovery only to a subset of errors in procedure—those that, without any intervening or additional steps, result in an individual’s release.

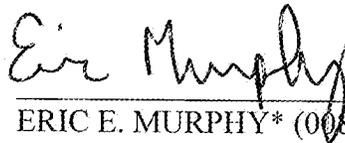
The Second District did not address these textual reasons that the error-in-procedure language bars James from being a “wrongfully imprisoned individual.” R.C. 2743.48(A). Instead, it simply observed that the error “ultimately led to the vacation of James’s convictions.” App. Op. ¶ 20. That observation ignores the significant limitation of the “results” clause and conflates the distinction between errors that require release and those that do not. The Second District’s judgment should be reversed.

CONCLUSION

The Court should accept jurisdiction over this case and reverse. In the alternative, the Court should hold this case pending the decisions in *Mansaray v. State*, No. 2012-1727 (granted Jan. 23, 2013), and *Hill v. State*, No. 2013-1043 (granted and held Oct. 23, 2013).

Respectfully submitted,

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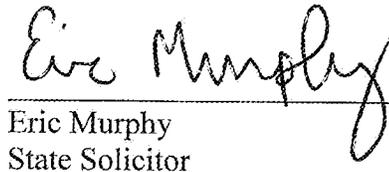
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CERTIFICATE OF SERVICE

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

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APPENDIX

EXHIBIT 1

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

OMAR K. JAMES, aka
AHMAD K. JAMES

Petitioner-Appellant

v.

STATE OF OHIO

Respondent-Appellee

Appellate Case No. 2013-CA-28

Trial Court Case No. 09-CV-1251

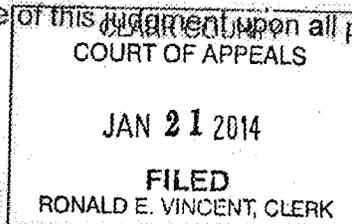
(Civil Appeal from
Common Pleas Court)

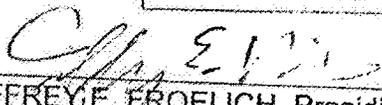
FINAL ENTRY

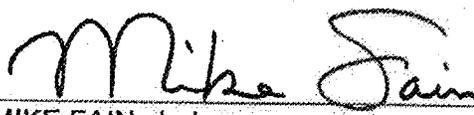
Pursuant to the opinion of this court rendered on the 17th day
of January, 2014, the judgment of the trial court is **Reversed**, and this cause is
Remanded to the trial court to render summary judgment in favor of Petitioner-Appellant,
Omar K. James, in accordance with the opinion.

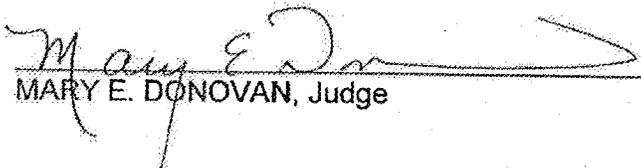
Costs to be paid as stated in App.R. 24.

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




JEFFREY E. FROELICH, Presiding Judge


MIKE FAIN, Judge


MARY E. DONOVAN, Judge

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Hon. Douglas M. Rastatter
Clark County Common Pleas Court
Courthouse, 101 N. Limestone
Springfield, OH 45502-1120

EXHIBIT 2

[Cite as *James v. State*, 2014-Ohio-140.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

OMAR K. JAMES, aka
AHMAD K. JAMES

Petitioner-Appellant

v.

STATE OF OHIO

Respondent-Appellee

Appellate Case No. 2013-CA-28

Trial Court Case No. 09-CV-1251

(Civil Appeal from
Common Pleas Court)

OPINION

Rendered on the 17th day of January, 2014.

DEREK A. FARMER, Atty. Reg. #0071654, Farmer Law Offices, 428 Beecher Road, Suite C,
Columbus, Ohio 43230

Attorney for Petitioner-Appellant

MICHAEL DeWINE, by PETER L. JAMISON, Atty. Reg. #0086539, Ohio Attorney General's
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and

D. ANDREW WILSON, by ANDREW P. PICKERING, Atty. Reg. #0068770, Clark County
Prosecutor's Office, 50 East Columbia Street, 4th Floor, Post Office Box 1608, Springfield, Ohio
45501

Attorneys for Respondent-Appellee, State of Ohio

FAIN, J.

{¶ 1} Plaintiff-appellant Omar K. James appeals from a summary judgment rendered in favor of defendant-appellee the State of Ohio on James's complaint for wrongful imprisonment. James contends that the trial court erred by granting the State's motion for summary judgment and in not finding that he was a "wrongfully imprisoned individual" pursuant to R.C. 2743.48(A).

{¶ 2} We conclude that the trial court erred in rendering summary judgment in favor of the State; it should have rendered summary judgment in favor of James. Accordingly, the judgment of the trial court is Reversed, and this cause remanded for the trial court to enter judgment for James.

I. Course of the Proceedings

{¶ 3} In 1996, James was indicted on one count of Possession of Crack Cocaine in an amount greater than twenty-five grams, a first-degree felony in violation of R.C. 2925.11; one count of Carrying a Concealed Weapon, a fourth-degree felony in violation of R.C. 2923.12; one count of Having Weapons While Under Disability, a fifth-degree felony in violation of R.C. 2923.13; and one count of Possession of Cocaine in an amount exceeding five grams, but less than twenty-five grams, a fourth-degree felony in violation of R.C. 2925.11(C)(4). All of the counts in the indictment related to events that transpired on September 7, 1996.

{¶ 4} In June 1997, James was tried on the four counts in the indictment. A jury found him guilty of Having Weapons While Under Disability. The jury could not reach a verdict on the remaining three counts of the indictment. James was sentenced to a prison term of twelve months. He did not appeal from his conviction and served his prison term.

[Cite as *James v. State*, 2014-Ohio-140.]

{¶ 5} A second trial on the remaining three counts of the indictment commenced in June 1998. On the first day of trial, James told the trial court that he wanted to represent himself. The jury trial proceeded with James representing himself. The jury returned guilty verdicts on the remaining three counts, and the trial court sentenced James to thirteen years in prison. James appealed; we affirmed. *State v. James*, 2d Dist. Clark No. 98-CA-54, 1999 WL 76815 (Feb. 19, 1999). James then sought to appeal to the Supreme Court of Ohio, which declined to hear the appeal. *State v. James*, 86 Ohio St.3d 1414, 711 N.E.2d 1010 (1999).

{¶ 6} James subsequently sought a writ of habeas corpus in the United States District Court for the Southern District of Ohio, challenging his three felony convictions that resulted from the second trial. In June 2005, the United States District Court granted James a conditional writ of habeas corpus. *James v. Brigano*, 201 F.Supp.2d 810 (S.D. Ohio 2002). The State appealed. In November 2006, the United States Court of Appeals for the Sixth Circuit affirmed the district court's decision insofar as it held that James did not knowingly and intelligently waive his right to counsel at trial. *James v. Brigano*, 470 F.3d 636, 644 (6th Cir. 2006). The District Court then ordered the State to retry James on or before October 27, 2008. *James v. Brigano*, S.D. Ohio No. 3:00CV00491, 2008 WL 2949411 (July 30, 2008). The State failed to retry James by this deadline.

{¶ 7} James thereafter moved in the court of common pleas to dismiss the remaining three counts of the indictment, with prejudice. In August 2009, the trial court sustained the motion and dismissed the remaining three counts of the indictment, with prejudice.

{¶ 8} In September 2009, James brought this action in the court of common pleas, alleging that he was a "wrongfully imprisoned individual" pursuant to R.C. 2743.48(A). James and the State both moved for summary judgment. The trial court overruled James's motion and

granted the State's motion, dismissing the action. From this judgment, James appeals.

**II. James Established by a Preponderance of the Evidence that He
Was a Wrongfully Imprisoned Individual Pursuant to R.C. 2743.48(A)**

{¶ 9} James's sole assignment of error states:

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT
RELIEF TO THE STATE AND IN FAILING TO SUSTAIN APPELLANT'S
MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF WHETHER
APPELLANT IS A WRONGFULLY IMPRISONED INDIVIDUAL UNDER
R.C. 2743.48(A)(5).

{¶ 10} When reviewing a summary judgment, an appellate court conducts a de novo review. *Village of Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

"De Novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland City Schools Bd. Of Edn.*, 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997), citing *Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 413 N.E.2d 1187 (1980). Therefore, the trial court's decision is not granted any deference by the reviewing appellate court. *Brown v. Scioto Cty. Bd. Of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993).

{¶ 11} R.C. 2743.48, the wrongful imprisonment statute, authorizes civil actions against the State, for specified monetary amounts, in the court of claims by wrongfully imprisoned individuals. *Doss v. State*, 135 Ohio St.3d 211, 2012-Ohio-5678, 985 N.E.2d 1229, ¶ 10.

Under the statutory scheme, a claimant must first be determined to be a “wrongfully imprisoned individual” by the court of common pleas before seeking compensation from the State in the court of claims. R.C. 2305.02 and R.C. 2743.48(B)(2); *Doss* at ¶ 10.

{¶ 12} R.C. 2743.48(A) defines a “wrongfully imprisoned individual” as “an individual who satisfies each of the following:

(1) The individual was charged with a violation of a section of the Revised Code by an indictment or information, 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, 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 the court of common pleas in the county where the underlying criminal action was initiated that the charged offense, including all lesser-included offenses, either was not committed by the individual or was not committed by any person.

{¶ 13} A claimant must satisfy all five criteria in R.C. 2743.48(A), by a preponderance of the evidence, to be declared a “wrongfully imprisoned individual.” *Gover v. State*, 67 Ohio St.3d 93, 95, 616 N.E.2d 207 (1993). The trial court failed to identify which of the five criteria James had failed to establish, as a matter of law. The parties agree that James established the first three criteria pursuant to R.C. 2743.48(A), but disagree over whether James established the last two criteria in R.C. 2743.48(A)(4) and (5). Based on our review of the record, we agree with the parties that James established the criteria in R.C. 2743.48(A)(1) through (3). We will now address whether he established the criteria in R.C. 2743.48(A)(4) and (5).

{¶ 14} In 1993, the Supreme Court of Ohio interpreted R.C. 2743.48(A)(4), holding: “claimants seeking compensation for wrongful imprisonment must prove that at the time of the incident for which they were initially charged, they were not engaging in any other criminal conduct arising out of the incident for which they were initially charged.” *Gover* at syllabus. The Supreme Court explained the rationale behind its interpretation of R.C. 2743.48(A)(4):

The requirement that “no criminal proceeding * * * can be brought * * * against the individual for any act associated with that conviction” is of critical importance. This statutory language 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.

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. at 95, quoting *Walden v. State*, 47 Ohio St.3d 47, 52, 547 N.E.2d 962 (1989).

{¶ 15} It is undisputed that James was charged with, and convicted of, Having Weapons While Under Disability for a criminal act that occurred at the same time as the criminal acts forming the basis of the remaining three counts of the indictment, which resulted in the subsequent thirteen-year prison sentence for which James claims he was wrongfully imprisoned. At first glance, the Supreme Court's holding in *Gover* appears to require that James's conviction for Having Weapons While Under Disability precludes him, as a matter of law, from satisfying R.C. 2743.48(A)(4). However, this result would ignore the particular facts addressed by the *Gover* court and the 2003 Amendment to R.C. 2743.48(A).

{¶ 16} At the time of *Gover*, R.C. 2743.48(A)(5) stated:

Subsequent to his sentencing and during or subsequent to imprisonment, it was determined by a court of common pleas that the offense of which he was found guilty, including all lesser-included offense, either was not committed by him or was not committed by any person.

{¶ 17} In December 2002, the 124th General Assembly enacted Sub.S.B. No. 149, which added language allowing a claimant to satisfy R.C. 2743.48(A)(5) by demonstrating an error in procedure that resulted in the individual's release. By adding this language, the General Assembly provided an alternative to the condition that a claimant either had not committed the offense or that the offense had not been committed by any other person. In other words, a

claimant no longer had to prove actual innocence in order to satisfy (A)(5). This amendment to (A)(5) became effective April 9, 2003.

{¶ 18} In *Hill v. State*, 10th Dist. Franklin No. 12AP-635, 2013-Ohio-1968, the Court of Appeals for the Tenth District recently addressed the effect of the 2003 amendment in relation to the *Gover* court's interpretation of R.C. 2743.48(A)(4). The Tenth District explained, at ¶ 26-30:

In *Gover*, the Supreme Court specifically interpreted subsection (4) of R.C. 2743.48, as in effect in 1993. *Gover*, the WI claimant, had been charged and convicted of the crime of safecracking based on his conduct on September 13, 1988. On that date, *Gover* was arrested after a police officer observed him emptying his pockets of coins, costume jewelry, and other items that had earlier been part of a restaurant display that apparently resembled, but was not, a safe. See *State v. Gover*, 67 Ohio App.3d 384 (1st. Dist.1990). The restaurant's general manager had previously observed *Gover* in the restaurant moving in a crouched position and exiting the restaurant with bulging pockets. On appeal, the court of appeals reversed the conviction as the state could not prove the existence of an actual safe or vault. Accordingly, the state had not proven all elements of the crime of safecracking of which *Gover* had been convicted, and the court of appeals reversed that conviction.

Gover subsequently filed an action seeking adjudication as a wrongfully imprisoned individual. The Supreme Court acknowledged that *Gover* had not committed the offense of safecracking with respect to his conduct on September

13, 1988, but opined that Gover “was nevertheless committing other criminal offenses,” *Gover v. State* at 96, and suggested that the prosecutor might have charged him with burglary, rather than safecracking. The Supreme Court remanded the wrongful-imprisonment case to the civil trial court for it to determine whether Gover had committed offenses other than safecracking on the date of the alleged criminal conduct.[] In an opinion written by Justice Pfeifer, the Supreme Court explained that subsection (4) is “intended to filter out those claimants [for compensation] 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.” *Id.* at 95. Similarly, consistent with the statute as then in effect, the court concluded that “[w]hen 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.*’ ” (Emphasis added.) *Id.*, citing *Walden* at 47 Ohio St.3d 52. These observations were made in 1993, prior to the 2003 amendment to R.C. 2743.48(A)(5) and at a time when a WI claimant was required to prove actual innocence.

In the case before us, the state argues that Hill, by pleading no contest, admitted that he was in possession of crack cocaine and that he therefore “merely avoided criminal liability” based on application of the exclusionary rule. The state relies on the Supreme Court’s statements in *Gover* and Hill’s plea of no contest after the trial court denied his motion to suppress. It argues that Hill may not be

deemed to be a wrongfully imprisoned individual because his lack of actual innocence on December 19, 2009 precludes a finding that Hill satisfied subsection (A)(4) of R.C. 2743.48. In making this argument, the state seeks to graft the innocence component of subsection (5) of R.C. 2743.48(A) into subsection (4) based on *Gover's* description of the overarching purpose of the wrongful-imprisonment statute as in effect in 1993. But, as discussed earlier in this decision, and as recognized by the Supreme Court of Ohio in *Doss*, the General Assembly in enacting Sub.S.B.No. 149 in 2002 effected a substantive change to the statutory wrongful-imprisonment compensation scheme. It “expanded the criteria by which a claimant could establish that he or she is a wrongfully imprisoned individual.” *Griffith [v. Cleveland]*, [128 Ohio St.3d 35.] 2010-Ohio-4905, ¶ 21. After that statutory change, a released prisoner may establish his status as a wrongfully imprisoned individual without proving his innocence if he can instead establish that he was released as the result of an error in procedure. *See Griffith* at ¶ 29 (describing the addition of the “error in procedure” provision of R.C. 2743.48(A)(5) as establishing an “alternative” to the determination whether the claimant “committed the offense”).

In determining whether Hill established the R.C. 2743.48(A)(4) criterion, we must apply the current text of that provision, rather than decide the case based on observations made in *Gover* concerning the pre-2003 version of the statute. That is, we must determine whether Hill proved by a preponderance of the evidence[] that “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” and not whether Hill’s release from prison represented merely the avoidance of criminal liability. In short, comments in *Gover* based on the text of a prior version of R.C. 2743.48(A) simply cannot prevail over contradictory text in the current version of the statute.

{¶ 19} We agree with the Tenth District’s analysis in *Hill*. Consequently, James’s conviction for Having Weapons While Under Disability does not preclude James from satisfying R.C. 2743.48(A)(4) if James can establish that his convictions on the other charges have been vacated and the prosecuting attorney cannot pursue further criminal proceedings on those charges. R.C. 2743.48(A)(4). It is undisputed that James’s convictions were vacated as a result of federal habeas corpus proceedings. Furthermore, the State cannot re-try James on those underlying charges because the trial court dismissed those three charges with prejudice in 2009. Therefore, James has established, through a preponderance of the evidence, that he has satisfied the criteria in R.C. 2743.48(A)(4).

{¶ 20} Next, James must satisfy R.C. 2743.48(A)(5). Pursuant to this section, James must establish that “[s]ubsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in [his] release * * * .” The “error in procedure” occurred when the trial court proceeded to trial without obtaining from James a knowing and intelligent waiver of his right to counsel at trial. This error ultimately led to the vacation of James’s convictions. We conclude that this satisfies R.C. 2743.48(A)(5).

{¶ 21} The State contends that only “structural error” can qualify as “procedural error”

pursuant to R.C. 2743.48(A)(5). We do not agree. The plain language of R.C. 2743.48(A)(5) does not limit the term “procedural error” to structural error. If the General Assembly had intended that only structural errors could satisfy R.C. 2743.48(A)(5), then the General Assembly presumably would have used the term structural error, rather than procedural error. Furthermore, a failure to obtain a knowing and intelligent waiver of a defendant’s right to counsel at trial arguably satisfies even the more strict structural error standard, since the result is that the defendant is totally deprived of counsel at trial. See *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, ¶ 54-56 (Moyer, C.J., concurring in judgment only).

{¶ 22} The State also contends that the error in procedure that occurred must have occurred after sentencing. According to the State, the error of procedure in this case occurred during trial, and therefore cannot satisfy R.C. 2743.48(A)(5). We do not agree. As the *Hill* court explained, at fn. 4:

[W]e note that the initial phrase of R.C. 2743.48(A)(5) provides that “[s]ubsequent to sentencing and during or subsequent to imprisonment” (emphasis added), an error in procedure resulted in the prisoner’s release or a trial court determined that the claimant was actually innocent. The text emphasized above existed in the statute prior to the 2003 amendment, and we do not believe that this modifying language relates to the timing of the commission of errors of procedure. We are unaware of any procedural error that could conceivably result in a convict’s release from prison if the error occurred after conviction and sentencing. To read the phrase as including only post-sentencing procedural errors would render the amendment meaningless. * * * Rather, we believe that the “subsequent

to sentencing” phrase modifies the timing of the convict's release, i.e., it mandates that the individual be released from prison subsequent to sentencing, based on an error of procedure that occurred before sentencing. We further note that the Legislative Service Commission in its Final Bill Analysis of Sub.S.B. No. 149, described the bill as including a new provision that “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 the 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.”

{¶ 23} We agree with the Tenth District’s reasoning in *Hill*. The only logical interpretation of the phrase “[s]ubsequent to sentencing and during or subsequent to imprisonment” is that this phrase describes the timing of the individual’s release, or the court’s determination that no offense was committed. R.C. 2743.48(A)(5).

{¶ 24} James’s sole assignment of error is sustained.

IV. Conclusion

{¶ 25} James’s sole assignment of error having been sustained, the judgment of the trial court is Reversed, and this cause is Remanded for the trial court to enter summary judgment in James’s favor.

.....
FROELICH, P.J., and DONOVAN, JJ., concur.

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D. Andrew Wilson
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Derek A. Farmer
Hon. Douglas M. Rastatter

EXHIBIT 3

In the Court of Common Pleas of Clark County, Ohio

**OMAR K. JAMES
Aka AHMAD K. JAMES**

**Plaintiff/Petitioner,
vs.**

CASE NO: 09CV1251

STATE OF OHIO

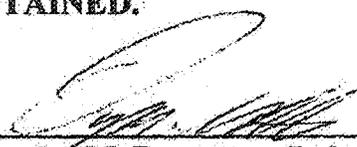
Defendant/Respondent

ENTRY

RASTATTER, JUDGE

This matter came on for consideration on the plaintiff's motion for summary judgment and defendant's motion for summary judgment.

Upon a review of the case file, trial transcripts, motions and memorandum of the parties and construing the evidence most strongly in favor of the plaintiff, the Court finds, there are no genuine issues as to any material fact; therefore, plaintiff's motion for summary judgment is hereby **OVERRULED and defendant's motion for summary judgment is **SUSTAINED**.**



Douglas M. Rastatter, Judge

**cc:
D. Farmer
L. Babich/A. Pickering**

FILED
2013 FEB 15 PM 1:05
CLERK OF COURT

EXHIBIT 3