

ORIGINAL

In the
Supreme Court of Ohio

DAVID M. BUNDY,	:	Case No. 2014-0189
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Montgomery County
v.	:	Court of Appeals,
	:	Second Appellate District
STATE OF OHIO,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. 25665
	:	

MERIT BRIEF OF DEFENDANT-APPELLANT STATE OF OHIO

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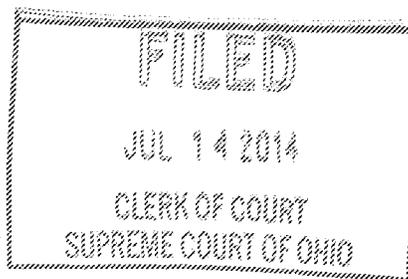


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INTRODUCTION

Since 1986, the General Assembly has seen fit to compensate a wrongfully imprisoned individual who proves, among other things, 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). In this case, there is no dispute that, as a factual matter, Appellee David Bundy “committed” his “charged offense.” (He failed to verify his address as the Adam Walsh Act requires for Tier II sex offenders. *See State v. Bundy*, 2009-Ohio-5395 ¶¶ 11-13, 50-55 (2d Dist.)). Instead, this case asks the legal question whether a wrongful-imprisonment claimant like Bundy can satisfy this actual-innocence requirement by showing that a court invalidated the statute under which the claimant was convicted as unconstitutional. (Here, the Court invalidated, on separation-of-powers grounds, the Adam Walsh Act’s reclassification provisions that required Bundy to verify his address. *See State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424 ¶¶ 55-56, 66). Traditional tools of statutory interpretation illustrate a clear answer to this question—wrongful-imprisonment claimants must prove their *factual* innocence and cannot merely rely on *legal* arguments, constitutional or otherwise, that allow them to evade criminal liability.

The Court should begin with the text. The key terms (“not committed” and “the charged offense”) require a claimant to prove that the claimant did not “commit” (i.e., perpetrate) the specific “offense” (i.e., the breach of the criminal laws) that a prosecutor has “charged” (i.e., listed in an indictment). This text focuses on whether a wrongful-imprisonment plaintiff engaged in the acts required to commit the particular statutory crime at issue. If, by contrast, the General Assembly had intended the wrongful-imprisonment statute to cover those who are factually guilty of that crime but who overturn their convictions on constitutional grounds, this text would be an odd way to convey that meaning. Far more likely that the legislature would

have added express language authorizing compensation for those claimants to whom a “charged offense” has been “unconstitutionally applied” (like it did for claimants who, while factually guilty, had their convictions invalidated based on a post-sentencing “error in procedure,” *see* R.C. 2743.48(A)(5)).

Precedent also supports this view. The Court has reached a similar conclusion for another wrongful-imprisonment requirement—that the claimant “did not plead guilty to” the offense. R.C. 2743.48(A)(2). In *Dunbar v. State*, 136 Ohio St. 3d 181, 2013-Ohio-2163, the Court held that this language prohibited compensation for all claimants who plead guilty, even those whose guilty pleas are vacated on *constitutional* grounds. *See id.* ¶¶ 14-18. In the process, the Court noted that if the General Assembly had intended to compensate claimants whose guilty pleas are constitutionally invalidated, it would have said so explicitly rather than through a judicial gloss on the meaning of the words “plead guilty.” *Id.* ¶¶ 19-20. Identical logic applies here.

The statutory purpose confirms this reading. The statute’s overarching goal—to “separate those who were wrongfully imprisoned from those who have merely avoided criminal liability”—has long guided the Court’s interpretation of the statute. *See Walden v. State*, 47 Ohio St. 3d 47, 52 (1989). The Court has, for example, interpreted R.C. 2743.48(A)(4)—which requires a claimant to prove that “no criminal proceeding is pending, can be brought, or will be brought” for the claimant’s conduct—to require a claimant to establish the claimant’s innocence of *all* criminal offenses, not simply the *particular* offense charged. *See Gover v. State*, 67 Ohio St. 3d 93 syl. (1993). So even if a court overturns a claimant’s conviction on a technicality—for example, that the container from which the claimant stole valuables was not a “safe” within the meaning of the safecracking statute—that does not permit the claimant to receive taxpayer funds.

See id. at 96. The State’s reading of subsection (A)(5) furthers this purpose in a similar way. It prevents claimants who engaged in the charged offense from recovering when their convictions are reversed on *legal grounds*, not on the *factual ground* that they did not commit the crime.

The Second District’s contrary decision rested solely on the premise that “Bundy could not have ‘committed’ the felony offense of failure to register where that offense itself was a nullity.” *State v. Bundy*, 2013-Ohio-5619 ¶ 18 (2d Dist.). To the extent this logic suggests that Bundy’s conviction was “void ab initio” because entered without jurisdiction, this Court has already held that an argument about a criminal law’s constitutionality does not raise “a question relating to the trial court’s jurisdiction.” *State v. Awan*, 22 Ohio St. 3d 120, 122 (1986); *see Dunbar*, 2013-Ohio-2163, ¶¶ 14-15. Nor can Bundy argue that subsection (A)(5)’s text meant to incorporate the old maxim that “[a]n unconstitutional act . . . is, in legal contemplation, as inoperative as though it had never been passed.” *Norton v. Shelby Cnty.*, 118 U.S. 425, 442 (1886). An unconstitutional act is still “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). One such consequence barred torts suits against government officials—the most analogous common-law situation to the modern-day wrongful-imprisonment statute. *See Middleton v. Village of Bloomdale*, 1914 WL 1199, at *3 (6th Dist. May 15, 1914). It is, to say the least, quite a leap to suggest that the General Assembly would have expressed its intent to compensate claimants who had their convictions overturned on constitutional grounds—not by including explicit language to that effect in the statute—but on the hope that the courts would incorporate an old legalism that did not even apply in the most analogous common-law setting.

For these reasons and those that follow, the Court should reverse the judgment.

STATEMENT OF THE CASE AND FACTS

- A. After a court convicted Bundy of gross sexual imposition and designated him a sexually oriented offender under the then-applicable Megan’s Law, Bundy pleaded guilty to violating that law by failing to register his address.**

In 1987, Appellee David Bundy was convicted of aggravated burglary, and sentenced to an indefinite range between 8 and 25 years’ imprisonment. *See State v. Bundy*, 2009-Ohio-5395 ¶ 6 (2d Dist.) (“*Bundy I*”). In 1995, while paroled from this aggravated-burglary conviction, Bundy 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. *See State v. Bundy*, 2013-Ohio-5619 ¶ 2 (2d Dist.) (“App. Op.,” attached as Ex. 3). A court sentenced Bundy to one year’s imprisonment for these new convictions, *see Bundy I*, 2009-Ohio-5395 ¶ 6, and also ordered Bundy to serve the remainder of his previous sentence for the aggravated-burglary conviction consecutively with that new one-year sentence, *see Bundy v. State*, No. 2011-cv-03948, at 2 (C.P. Montgomery Cnty. Feb. 5, 2013) (“Tr. Op.,” attached as Ex. 4). In January 2000, while Bundy remained in prison, the trial court designated him a sexually oriented offender under then-applicable R.C. 2950.01 and 2950.02 (“Megan’s Law”). *See Bundy I*, 2009-Ohio-5395 ¶ 8. Bundy remained in prison on his various convictions until April 2003. *See id.* ¶ 7. He did not challenge his designation as a sexually oriented offender.

Bundy’s designation required him to register his address each year with the relevant county sheriff under then-applicable R.C. 2950.04(A)(1). *See id.* ¶ 9. Bundy, however, failed to register his address after his release from prison. In December 2003, he pleaded guilty to failure to register, and the court sentenced him to five years’ community control. *See Tr. Op.* 2. Bundy did not appeal this conviction. Each October following this violation, Bundy did register with his local sheriff as Megan’s Law required. *See id.*

B. Bundy was convicted for failing to verify his address after the Adam Walsh Act changed his registration duties, but this Court reversed the judgment of conviction for reconsideration in the wake of its *Bodyke* decision.

In 2007, the General Assembly enacted Am. Sub. S.B. 10, the “Adam Walsh Act.” Bundy’s wrongful-imprisonment claim arose out of his violation of this Act’s new registration duties. The Act, among other changes, established three tiers of sex offenders. *See* R.C. 2950.01(E)-(G). Tier II sex offenders must verify their current address and employment every 180 days; Tier III sex offenders must verify their current address and employment every 90 days. *See* R.C. 2950.06(B)(2)-(3). The Act also applied retroactively, requiring the Attorney General to reclassify sex offenders who previously registered under Megan’s Law within one of the three different tiers of classifications. *See* R.C. 2950.031-.32.

The Attorney General’s Office notified Bundy that, under the new law, it would reclassify him as a Tier II sex offender. *Bundy I*, 2009-Ohio-5395 ¶ 10. The notice explained that this reclassification required Bundy to verify his address and to register with the sheriff’s office every 180 days for 25 years, instructing Bundy to call the sheriff’s office at the beginning of 2008 to determine his new registration date (which was March 14, 2008). *Id.* ¶ 11. When Bundy did not verify his address at the designated time, the Montgomery County Sheriff’s Office sent him a follow-up letter explaining that he should do so in the next week. *Id.* Bundy still did not verify his address, and a detective with the sheriff’s office attempted to communicate with Bundy about the registration. *Id.* ¶¶ 11-12. These additional efforts proved fruitless, and Bundy never verified his address as the Adam Walsh Act required. *Id.* ¶ 12.

In May 2008, Bundy was indicted for failure to verify his address under R.C. 2950.06(A) and (F). *Id.* ¶ 12 & n.1. The Montgomery County Court of Common Pleas held a bench trial, and determined that Bundy violated the statute by failing to verify his address. *Id.* ¶ 13. The trial court sentenced Bundy to three years’ imprisonment for this 2008 failure-to-verify

conviction. *Id.* Around the same time, the trial court also revoked Bundy's previous community-control sentence for his 2003 failure-to-register conviction under Megan's Law. In place of the community-control sentence, the court imposed a one-year sentence to be served concurrently with the new sentence for his failure-to-verify conviction. *Id.* The court revoked this community-control sentence for a host of reasons in addition to the 2008 failure-to-verify conviction, including Bundy's subsequent arrest for disorderly conduct, his arrest for failing to appear at a child-support hearing, his failure to notify his probation officers of having changed addresses, his failure to pass a drug test, and his arrest for drug possession. *See* Tr. Op. 14.

Bundy appealed both his failure-to-verify conviction and the revocation of his community-control sentence. *See Bundy I*, 2009-Ohio-5395 ¶ 1. On appeal, Bundy opted *not* to raise any constitutional challenges to the Adam Walsh Act. *Id.* ¶ 55. He instead argued that he *statutorily* should not have been reclassified under the Adam Walsh Act because he had been wrongly classified earlier as a sexually oriented offender under the then-applicable Megan's Law. *See id.* ¶¶ 15-57. Specifically, he claimed that he had completed his prison term for his sexually oriented offenses before July 1, 1997, and so, under the earlier Megan's Law's time limits for classification, he should not have been treated as a sexually oriented offender and had no prior duty to register. *See id.* ¶ 17. The Second District thought that Bundy had been wrongly classified under Megan's Law. *Id.* ¶¶ 18-44. But it ultimately found this issue "irrelevant" to whether the Adam Walsh Act applied to Bundy, because the later Act "eliminate[d] any time-frames for registration of sex offenders" and required all such offenders to register regardless of when the offense was committed. *See id.* ¶¶ 44, 49, 54-55. The court went on to reject Bundy's separate challenge to the revocation of his prior community-control

sentence on the ground that he could not collaterally attack his prior unappealed conviction. *Id.* ¶¶ 58-90.

This Court accepted Bundy’s discretionary appeal and held his case (along with dozens of other cases) for its 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. In *Bodyke*, the Court held that the Adam Walsh Act’s reclassification provisions—which gave the Attorney General the authority to reclassify sex offenders who had been previously classified under Megan’s Law—violated the separation of powers by reopening closed court cases. *See* 2010-Ohio-2424 ¶¶ 55-56. To remedy this constitutional problem, the Court severed the reclassification provisions (R.C. 2950.031 and 2950.032) from the remainder of the new Act. *See id.* ¶ 66.

After *Bodyke*, the Court remanded Bundy’s case for further proceedings, but it did not outright reverse the decision upholding Bundy’s conviction. Instead, as part of an order disposing of numerous cases after *Bodyke*, the Court held that the district court’s judgment 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*.” *Id.* ¶ 15. But, of course, because Bundy did *not* bring a separation-of-powers challenge on his 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 on waiver grounds. Nevertheless, the prosecution on remand excused this waiver and agreed to enter a nolle prosequi to dismiss the case. *See App. Op.* ¶ 5.

C. The trial court and Second District both agreed with Bundy that *Bodyke's* invalidation of the Adam Walsh Act's reclassification provisions and the subsequent dismissal of the charges against him rendered him "wrongfully imprisoned."

After the prosecutor dismissed the failure-to-verify charge against him, Bundy sued in the Montgomery County Court of Common Pleas on the ground that he qualified as a wrongfully imprisoned individual under R.C. 2743.48 for the time that he spent in prison between 2008 and 2010. In support, Bundy relied solely on this Court's decision invalidating the Adam Walsh Act's reclassification provisions. He did not provide other evidence to show that he did not, as a factual matter, commit the failure-to-verify offense for which he had been convicted.

The trial court granted Bundy's summary-judgment motion, declaring him wrongfully imprisoned. Tr. Op. 16. There was no dispute that Bundy met three of the five statutory elements in R.C. 2743.48(A) to be considered "wrongfully imprisoned": the State had charged Bundy with a felony ((A)(1)); the trial court had found him guilty after a trial ((A)(2)); and the court had sentenced him to a three-year term of imprisonment ((A)(3)). The trial court instead focused on the requirement in (A)(5) that Bundy establish "that the charged offense, including all lesser-included offenses, either was not committed by [Bundy] or was not committed by any person." Citing three Eighth District decisions, the court found that Bundy met this test because the failure-to-verify conviction was "without valid legal consequence" after it had been vacated. Tr. Op. 11. The court continued that, "[i]rrespective of Plaintiff's conviction conforming to then-existing law, this Court can only conclude that Bundy could not have 'committed' the felony offense of Failure to Verify where that offense itself was a nullity." Tr. Op. 12.

The trial court did, however, concede that Bundy was validly incarcerated for one year of the time he had spent in prison based on the one-year sentence he received when the trial court separately revoked the community-control sanction for his 2003 failure-to-register conviction. *Id.* at 13-15. That was so because the community-control revocation sprang *not just* from the

2008 failure-to-verify conviction *but also* from several independent violations, including arrests for disorderly conduct and drug possession. *Id.*

The State appealed, but the Second District affirmed. App. Op. ¶ 20. With respect to R.C. 2743.48(A)(5)'s actual-innocence requirement, the Second District simply stated that this Court in *Bodyke* had 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.” App. Op. ¶ 18. It stated that “Bundy could not have ‘committed’ the felony offense of failure to register where that offense itself was a nullity.” *Id.*

Judge Hall, concurring, articulated his “misgivings” about the statutory scheme, *id.* ¶ 32, writing that R.C. 2743.48 “fail[s] to address two issues that could be dispositive” for determining whether Bundy was wrongfully imprisoned: “(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,” *id.* ¶ 21. To begin with, Judge Hall thought that Bundy constitutionally could have been convicted of a related charged that had been used to revoke his community-control sanction (his failure to notify the sheriff of his changed address). *Id.* ¶¶ 26-27. This charge showed that Bundy was not actually innocent, so compensating him would “thwart[] the General Assembly’s intention . . . to separate those wrongfully imprisoned from those who merely escape criminal liability.” *Id.* ¶ 27. Judge Hall added that Bundy had been charged by a sheriff’s office, prosecuted by a prosecutor, and convicted by a court—“all acting under a duly enacted statute that later was held not to apply to him on separation-of-powers grounds.” *Id.* ¶ 31. He suggested that the legislature should say “explicitly” whether it intended to compensate individuals, like Bundy, who had been “imprisoned under a statute later determined to be unconstitutional.” *Id.*

ARGUMENT

Appellant State of Ohio'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 wrongful-imprisonment statute requires a plaintiff to prove five things by a preponderance of the evidence to qualify as a “wrongfully imprisoned individual” entitled to compensation from Ohio’s taxpayers. *See Doss v. State*, 135 Ohio St. 3d 211, 2012-Ohio-5678 syl. ¶ 1. The first four factors—(1) that the individual was charged with a felony; (2) that the individual “was found guilty of, but did not plead guilty to, the particular charge”; (3) that the individual was sentenced to a term of imprisonment; and (4) that the individual’s conviction was overturned and “no criminal proceeding is pending, can be brought, or will be brought” for the same conduct—are not at issue here. *See* R.C. 2743.48(A)(1)-(4). While the State has serious doubt whether Bundy can satisfy the fourth factor, the State sought review in this Court only on the fifth factor, which is the heart of this case. It provides:

(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.

R.C. 2743.48(A)(5). Bundy cannot establish that a post-sentencing error in procedure led to his release, *see, e.g., Mansaray v. State*, 138 Ohio St. 3d 277, 2014-Ohio-750 syl., so he must prove that “the charged offense, including all lesser-included offenses, either was not committed by [him] or was not committed by any person,” R.C. 2743.48(A)(5). The Court should interpret this language to require wrongful-imprisonment claimants to show—as a factual matter—that they

did not engage in the acts making up the statutory offense for which they were convicted. *See* Part A. The Court should, by contrast, reject the lower courts' mistaken approach. *See* Part B.

A. Under subsection (A)(5)'s actual-innocence requirement, wrongful-imprisonment claimants must prove that they are factually innocent of the charged offense, not just that the charged offense could not be constitutionally applied to them.

No dispute exists in this case—either as a statutory matter or as a factual matter—that Bundy engaged in conduct (or, more accurately, failed to engage in conduct) that violated the criminal law. *See* R.C. 2950.06(A), (F). Bundy did not verify his address, and the Adam Walsh Act required him to do so. *See Bundy I*, 2009-Ohio-5395 ¶¶ 11-13, 50-55. Instead, this case asks whether—even though a wrongful-imprisonment claimant violated the then-applicable criminal law—the claimant still can seek compensation from the State because a court accepted the claimant's argument that application of the law to the claimant violated some provision of the Constitution. Numerous tools of statutory interpretation—including (1) R.C. 2743.48(A)(5)'s plain text; (2) subsection (A)(5)'s neighboring subsections; (3) the wrongful-imprisonment statute's general purpose; (4) the common-law background against which the statute was enacted; and (5) the wrongful-imprisonment practices in other jurisdictions—all illustrate that the answer to that question is a resounding no. Accordingly, Bundy cannot meet the requirements in R.C. 2743.48(A)(5) and cannot establish that he was wrongfully imprisoned.

1. Subsection (A)(5)'s plain text shows that wrongful-imprisonment claimants must prove that they did not engage in the underlying conduct that makes up the criminal offense for which they were charged.

This Court has made crystal clear that when courts interpret the wrongful-imprisonment statute (just like when they interpret every other statute), they should start with the statute's plain text and end there if the text is unambiguous. *See, e.g., Mansaray*, 2014-Ohio-750 ¶ 8; *Dunbar v. State*, 136 Ohio St. 3d 181, 2013-Ohio-2163 ¶ 17. The text of subsection (A)(5)—requiring a claimant to prove that “the charged offense, including all lesser-included offenses, either was not

committed by the individual or was not committed by any person”—unambiguously requires a claimant to show, as a factual matter, that the claimant did not engage in conduct that violates the criminal law. The key terms “committed” and “charged offense” focus on whether the claimant factually engaged in the acts that make up the crime. To “commit” means “[t]o do or perpetrate (an offense or crime).” *Webster’s New World Dictionary* 286 (2d coll. ed. 1986). And “the charged offense” refers to the specific criminal law in the statute books that is identified in the indictment against the claimant. *See Black’s Law Dictionary* 975 (5th ed. 1979) (defining “offense” as “[a] felony or misdemeanor; a breach of the criminal laws”); *id.* at 212 (defining “charged” as “[a]ccusation of crime by complaint, indictment, or information”); *see also Walden v. State*, 47 Ohio St. 3d 47, 50 (1989) (noting that this Court has long viewed “offense” and “crime” as interchangeable terms). Read together, this statute covers both those individuals wrongly blamed for criminal actions that occurred but by another person (“not committed by the individual”) and those individuals wrongly blamed for criminal actions that, as a factual matter, simply did not occur at all (“not committed by any person”).

Now consider Bundy’s competing view. The language in subsection (A)(5) cannot reasonably be interpreted to open the State’s coffers to claimants who undoubtedly “committed” “the charged offense,” but who nevertheless escaped liability on constitutional grounds. If the General Assembly agreed with Bundy’s view of the proper scope of the wrongful-imprisonment statute, it would have added language in subsection (A)(5) granting compensation when the charged offense was “unconstitutionally applied to the individual.” *Cf.* N.Y. Ct. Cl. Act § 8-b(3)(b)(ii)(D), (4) (allowing claimant to seek relief by showing both actual innocence and that “the statute, or application thereof, on which the accusatory instrument was based violated the constitution of the United States or the state of New York”). But that text is nowhere to be found

in the statute. And this Court is not at liberty to add it. The Court must enforce the statute the General Assembly wrote, not the one a litigant thinks it should have written. *See Mansaray*, 2014-Ohio-750 ¶¶ 9-10.

Nor can the Court view the absence of this “unconstitutionally applied” language as some kind of legislative oversight. For one thing, the General Assembly is not naive; it well knows that courts sometimes invalidate its work. Accordingly, in other areas where a constitutional question might fairly be raised, the General Assembly has expressly accounted for constitutional invalidation of sentences, convictions, or laws. *See, e.g.*, R.C. 2929.06(A) (providing procedure to occur if death sentence “is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of death . . . is unconstitutional”); R.C. 2945.75(B)(3) (noting, with respect to statutory enhancements for prior convictions, that “[i]f the defendant claims a constitutional defect in any prior conviction, the defendant has the burden of proving the defect by a preponderance of the evidence”). That the General Assembly could have—but did not—include similar language in subsection (A)(5) regarding the constitutional invalidation of a criminal conviction speaks volumes as to whether it sought to provide compensation in those circumstances. *Cf. Dunbar*, 2013-Ohio-2163 ¶ 19 (comparing the wrongful-imprisonment statute’s use of the phrase “plead guilty” to other statutes’ use of similar language).

For another thing, the General Assembly has shown that it knows how to expand subsection (A)(5)’s reach beyond just *factually innocent* claimants when it desires to do so. In 2002, the legislature narrowly expanded that subsection to allow compensation for those individuals who are released from prison based on “an error in procedure” that occurred “subsequent to sentencing and during or subsequent to imprisonment.” R.C. 2743.48(A)(5); *see* 2002 Ohio Laws 3545, 3546. Aside from this narrow exception, however, the General Assembly

has not shown any interest in expanding the list of criminal defendants entitled to compensation under R.C. 2743.48 beyond those claimants who can assert what this Court has described as “a claim of actual innocence.” *Mansaray*, 2014-Ohio-750 ¶ 7.

In sum, if the General Assembly intended to reach individuals who are factually guilty of the charged offense but who overturned their convictions on constitutional grounds, “it did a remarkable job of keeping it to itself—and it will be able to enact such legislation upon learning that [this Court does] not think that it has already done so.” *Id.* ¶ 10.

2. Other subsections within R.C. 2743.48(A) confirm that subsection (A)(5) should be interpreted in accord with its plain meaning.

Two neighboring subsections within R.C. 2743.48(A) reinforce the plain meaning of subsection (A)(5). *See Ohio Neighborhood Fin., Inc. v. Scott*, 2014-Ohio-2440 ¶ 22 (noting that, when interpreting sections of the Revised Code, courts should read “all words and phrases in context”). One of these subsections reiterates that the General Assembly wrote the wrongful-imprisonment statute with a razor-sharp focus on compensating only those claimants who are factually innocent of criminal conduct; the other reiterates that the General Assembly would have expressly included language authorizing compensation for claimants subject to constitutionally invalid convictions if it had sought to provide them with that State compensation.

Subsection (A)(4). Subsection (A)(4) reinforces that the General Assembly generally sought to compensate the factually innocent. That subsection requires the claimant to prove that “no criminal proceeding is pending, can be brought, or will be brought” for the claimant’s conduct, R.C. 2743.48(A)(4), and this Court has interpreted that language to require the individual to be innocent of *all* criminal conduct, *see Gover v. State*, 67 Ohio St. 3d 93 syl. (1993). In *Gover*, the claimant robbed a restaurant and the prosecutor charged him with

safecracking. *Id.* at 93-94. An appellate court overturned that safecracking conviction on technical grounds—the claimant had taken materials from something that did not qualify as a “safe” within the meaning of the statute. *Id.* at 94. This Court rejected the claimant’s wrongful-imprisonment claim, holding that (A)(4)’s language requires claimants to “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.” *Id.* at 95. And the *Gover* claimant was plainly engaged in burglary at the relevant time (even if the Double Jeopardy Clause would bar a second prosecution for that distinct criminal offense). *See id.* at 96; *see also id.* (Wright, J., dissenting).

This interpretation of (A)(4) fits well with the State’s interpretation of (A)(5). The two provisions are designed to deal with distinct, but related, situations in which wrongful-imprisonment claimants seek compensation even though they violated the criminal laws. The General Assembly added (A)(4) to prevent claimants who undoubtedly engaged in *uncharged* criminal offenses from recovering solely because their convictions are reversed on the ground that they did not technically commit the specifically *charged* offense. Similarly, the General Assembly added (A)(5) to prevent claimants who undoubtedly engaged in the charged criminal offense from recovering when their convictions are reversed on *legal grounds*—constitutional or otherwise—rather than on the *factual ground* that they did not commit the charged offense. Both provisions implement the General Assembly’s general goal of providing compensation *only* for those who are factually innocent of the then-applicable criminal laws, not for those who indisputably committed a crime but who avoided liability through good lawyering (unless, of course, the claimant can meet subsection (A)(5)’s subsequently enacted “error in procedure” prong).

Subsection (A)(2). Subsection (A)(2), in turn, reiterates that the General Assembly did not intend for claimants to recover based on constitutionally invalid convictions and would have included language expressly allowing for compensation in those circumstances if it had wanted to do so. That subsection requires a claimant to prove that the claimant “was found guilty of, *but did not plead guilty to*, the particular charge or a lesser-included offense.” R.C. 2743.48(A)(2) (emphasis added). In *Dunbar*, this Court held that this provision prevented wrongful-imprisonment compensation for all individuals who plead guilty—including those individuals whose guilty pleas are invalidated on *constitutional* grounds. See 2013-Ohio-2163 ¶¶ 17-20. In the process, the Court recognized that “[a]lthough the vacated guilty plea no longer has any effect in Dunbar’s criminal case, the guilty plea nonetheless did occur and was entered on his behalf,” *id.* ¶ 20, thereby rejecting the claimant’s argument that the constitutional invalidation of the plea meant that it “no longer has any legal effect at all,” *id.* ¶ 17.

Dunbar’s reading of (A)(2) is notable here. In a trio of pre-*Dunbar* cases, the Eighth District approved wrongful-imprisonment compensation for individuals who pleaded guilty to similar violations of the Adam Walsh Act and had those pleas constitutionally invalidated by *Bodyke*. See *Mohammad v. State*, 2012-Ohio-5517 ¶¶ 17-18 (8th Dist.); *Johnson v. State*, 2012-Ohio-3964 ¶¶ 11-22 (8th Dist.); *Ballard v. State*, 2012-Ohio-3086 ¶¶ 26-27 (8th Dist.). The Eighth District in these cases reasoned that the those guilty pleas had “no force or effect at law” and did “not exist for purposes of” the wrongful-imprisonment statute because they were constitutionally invalid and thus void. *Ballard*, 2012-Ohio-3086 ¶¶ 26-27 (8th Dist.) (citation omitted). This Court flatly rejected the Eighth District’s premise, noting that “the fact that the plea was vacated on appeal does not mean it never existed.” *Dunbar*, 2013-Ohio-2163 ¶ 15. The Court thus reversed all three decisions in light of *Dunbar*. See *Mohammad v. State*, 136 Ohio St.

3d 326, 2013-Ohio-3669 ¶ 1; *Johnson v. State*, 136 Ohio St. 3d 84, 2013-Ohio-2413 ¶ 1; *Ballard v. State*, 136 Ohio St. 3d 83, 2013-Ohio-2412 ¶ 1.

This view of subsection (A)(2) reinforces the State’s reading of subsection (A)(5). It makes little sense to treat those claimants who plead guilty to obvious violations of criminal offenses (while preserving their right to challenge the constitutionality of their convictions on appeal) worse than those claimants who require the State actually to expend resources on a trial for the same obvious violations. *Cf. State v. Fitzpatrick*, 102 Ohio St. 3d 321, 2004-Ohio-3167 ¶ 79 (recognizing that one who pleads guilty may challenge constitutionality of statute on appeal). Such an interpretation of R.C. 2743.48 would encourage criminal defendants *not* to enter guilty pleas even for what they *themselves* agree are criminal violations solely to obtain wrongful-imprisonment compensation should the convictions turn out to be unconstitutional. The State’s interpretation of (A)(5) in this case, by contrast, reconciles it with this Court’s interpretation of (A)(2) in *Dunbar*: Whether a claimant pleads guilty or stands trial, arguments about the constitutionality of the statute under which the claimant is convicted cannot trigger wrongful-imprisonment compensation.

3. R.C. 2743.48’s general purpose to compensate the “actually innocent” supports the State’s interpretation of subsection (A)(5).

R.C. 2743.48(A)(5)’s text and its neighboring provisions both show that subsection (A)(5) is unambiguous. But even assuming (wrongly) that subsection (A)(5) were somehow ambiguous, it is notable that the wrongful-imprisonment statute’s underlying “purposes are furthered by according [subsection (A)(5)] its plain meaning.” *See State ex rel. Asti v. Ohio Dep’t of Youth Servs.*, 107 Ohio St. 3d 262, 2005-Ohio-6432 ¶ 31; *see also* R.C. 1.49(A) (instructing courts to examine “[t]he object sought to be attained” when interpreting statutes).

From its first decision interpreting R.C. 2743.48, the Court has not been shy in stating the wrongful-imprisonment statute's purpose—to “actively separate those who were wrongfully imprisoned from those who have *merely avoided criminal liability.*” *Walden*, 47 Ohio St. 3d at 52 (emphasis added). The Court has time and again stressed this purpose when interpreting particular provisions of R.C. 2743.48. *See Doss*, 2012-Ohio-5678 ¶ 22 (“Not every person who is released from prison because of a successful appeal is entitled to compensation.”). This purpose, for example, led the Court to hold that acquittals in the underlying criminal cases do not establish subsection (A)(5)'s actual-innocence requirement; instead, claimants must “affirmatively prove [their] *innocence* by a preponderance of the evidence.” *Id.* ¶ 14 (emphasis added); *see also State ex rel. Jones v Suster*, 84 Ohio St. 3d 70, 72 (1998) (plurality op.) (noting that a “previous finding of not guilty is not sufficient to establish innocence”). And this purpose is in line with the Court's view that subsection (A)(4) requires claimants to show that they could not have been charged with other criminal offenses even when they technically did not commit the charged offense for which they were convicted. *See Gover*, 67 Ohio St. 3d at 95.

This purpose also provides strong support for following subsection (A)(5)'s plain meaning. Bundy's failure to verify his address qualified as a knowing violation of the criminal law in place at the time, so he was not “actually” innocent or “factually” innocent of the charged offense. Indeed, the Attorney General's Office and local sheriff's office repeatedly notified Bundy that he had a mandatory duty to verify his address. *See Pl.'s Mot. for Summ. J. Ex. 1*, at 4. Yet he all but ignored this law. To be sure, this Court's *Bodyke* decision led to Bundy's release from prison, and invalidated the reclassification that created his duty to register. But nothing erases the fact that “the charged offense” required Bundy to do something and he did not do it. A finding in this case awarding compensation would only encourage litigants to flout the

criminal law when they believe that law cannot constitutionally apply to them—rather than comply with the law and challenge it through available channels such as a declaratory-judgment action. *Cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (noting that “the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity” (citation omitted)).

4. The common-law background against which R.C. 2743.48 was adopted also bolsters the State’s interpretation of subsection (A)(5).

The common-law backdrop against which R.C. 2743.48 was adopted also supports interpreting subsection (A)(5) as written. As a common-law matter, courts traditionally refused to grant civil damages to criminal defendants where, as here, their convictions were invalidated on constitutional grounds. As a result, subsection (A)(5)’s “not committed by the individual” language cannot be viewed as implicitly incorporating any type of common-law rule treating an unconstitutional conviction as a nullity for purposes of granting a civil award to those defendants. *See Griffith v. City of Cleveland*, 128 Ohio St. 3d 35, 2010-Ohio-4905 ¶¶ 15-18 (noting that courts may look to common-law rules on similar subjects when determining meaning of statute).

To be sure, in a variety of different settings, courts had at times stated the old adage that “[a]n unconstitutional act is not a law; . . . it is, in legal contemplation, as inoperative as though it had never been passed.” *Norton v. Shelby Cnty.*, 118 U.S. 425, 442 (1886) (discussing validity of state law creating board of county commissioners); *see also, e.g., City of Middletown v. Ferguson*, 25 Ohio St. 3d 71, 80 (1986). But that classic “legalism” never took courts very far. For example, well before the General Assembly adopted what is presently R.C. 2743.48(A)(5), *see* 1986 Ohio Laws 5351, 5352, courts had repeatedly qualified this principle. *See, e.g., Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940) (“It is quite clear, however,

that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications.”); *United States v. DePoli*, 628 F.2d 779, 782 (2d Cir. 1980) (noting that the principle “has been replaced by a more realistic approach”). As the U.S. Supreme Court recognized, “the actual existence of a statute, prior to such a [constitutional] determination, is an operative fact and may have consequences which cannot justly be ignored.” *Chicot Cnty.*, 308 U.S. at 374; *see Dobbert v. Florida*, 432 U.S. 282, 297 (1977) (rejecting “highly technical” argument that unconstitutional law did not exist for purposes of death-penalty conviction).

Notably for present purposes, most courts adhered to the qualification to this legal maxim—not the maxim itself—in the most analogous setting. Courts within and outside of Ohio rejected common-law tort claims that were predicated on the ground that the statute under which the plaintiff had been arrested or convicted was unconstitutional. *See Middleton v. Village of Bloomdale*, 1914 WL 1199, at *3 (6th Dist. May 15, 1914) (indicating that false-imprisonment action will not lie where officials “acted under a statute which was subsequently declared unconstitutional”); *see, e.g., Bricker v. Sims*, 259 S.W.2d 661, 664-65 (Tenn. 1953) (rejecting damages claim because “[t]he general public welfare, and more especially the peace and good order of society, will not admit of ministerial officers being the judge of the constitutionality of statutes and ordinances”); *Allen v. Holbrook*, 135 P.2d 242, 245 (Utah 1943) (rejecting damages claim because “[t]he 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.”); *see also State ex rel. Cruce v. Cease*, 114 P. 251, 252 (Okla. 1911) (noting that “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.”).

Given this common-law practice against awarding damages where, as here, a court reversed the claimant's conviction on the ground that the underlying statute could not be constitutionally applied, subsection (A)(5)'s language (that the charged offense was "not committed by the individual") cannot be interpreted to implicitly incorporate any notion that "the charged offense," if it is unconstitutional, is not an offense at all. To the contrary, the common law reaffirms that if the General Assembly intended to compensate individuals who escaped liability for their criminal convictions based on constitutional arguments, it would have added *express* language authorizing payment when a statute is constitutionally invalidated.

5. The plain-meaning approach to subsection (A)(5) conforms Ohio law to the law in other jurisdictions with wrongful-imprisonment statutes.

Finally, as far as the State is aware, Bundy's interpretation stands alone. Either as a statutory matter or as a precedential matter, other States have rejected similar claims tied to constitutional invalidation of criminal convictions. In some States, the state courts have refused to interpret their similar wrongful-imprisonment statutes to cover the situation presented here—where a court later declares the wrongful-imprisonment claimant's offense to be unconstitutional. *See, e.g., Lambert v. State Claims Bd.*, No. 78-306, 1979 WL 30360, at *2 (Wis. Ct. App. Apr. 3, 1979); *Dawson v. State*, No. 6673, 1973 WL 18052, at *2-3 (Ill. Ct. Cl. Mar. 22, 1973). In *Lambert*, the court reasoned that "[t]here was a 'crime' on the books when [the claimant] was convicted," that the claimant did "not argue that he [was] innocent of the acts leading to the conviction," and that the wrongful-imprisonment statute "was not intended to apply to this situation." 1979 WL 30360, at *2. Similarly, the *Dawson* court stated that this type of theory "would open up an entirely new concept where the unconstitutionality of statutes is involved," and rejected that theory because the claimant had not "prove[d] he was innocent of the fact of the crime." 1973 WL 18052, at *2.

In other States, the legislatures have made their intentions clear to exclude relief that is based solely on the constitutional invalidation of the claimant’s conviction. *See, e.g.,* Me. Rev. Stat. Ann. tit. 14, § 8241(3) (noting that a person is deemed to have committed a “criminal offense” disqualifying the person from wrongful-imprisonment compensation, “notwithstanding a finding by a state or federal court that the law under which the person was convicted” violates the state or federal Constitutions); N.Y. Ct. Cl. Act § 8-b(3)(b)(ii)(D), (4) (requiring claimants to show *both* that their conviction violated the state or federal constitution *and* that they did not commit the acts for which they had been charged).

In short, “[t]he fact that the statute under which a claimant was convicted was later determined to be constitutionally or otherwise invalid does not make the claimant eligible for statutory relief” under state wrongful-imprisonment statutes. Deborah F. Buckman, Annotation, *Construction and Application of State Statutes Providing Compensation for Wrongful Conviction and Incarceration*, 53 A.L.R.6th 305 § 2 (2010). Ohio would stand alone if this Court were to interpret its wrongful-imprisonment statute as establishing a different rule.

B. The Second District’s contrary view was mistaken.

The Second District’s decision considered none of this, not the plain meaning of the statutory language in subsection (A)(5), not this Court’s interpretation of subsection (A)(5)’s neighboring provisions, not the wrongful-imprisonment statute’s general purpose, not the common-law background against which it was adopted, and not the practice in other jurisdictions. The appellate court instead ruled—in a conclusory sentence without any real analysis—that “Bundy could not have ‘committed’ the felony offense of failure to register where that offense itself was a nullity.” App. Op. ¶ 18. The Court should reject this logic.

Indeed, the Court *has* rejected this logic. In *Dunbar*, the claimant argued that his constitutionally invalid guilty plea “is void and therefore has no legal consequence” as the basis

for his conclusion that the plea should not bar him from obtaining wrongful-imprisonment relief. 2013-Ohio-2163 ¶ 14. This Court disagreed, noting that the Court “has traditionally held that a judgment is void ab initio only when a court acts without subject-matter jurisdiction.” *Id.* ¶ 15. Applying that rule, the Court held that the trial court in *Dunbar* had jurisdiction when it accepted the claimant’s plea and merely “erred in the exercise of its jurisdiction” by failing to ensure that the defendant’s plea was knowing and voluntary. *Id.* “Therefore, the plea was voidable rather than void, and the fact that the plea was vacated on appeal does not mean it never existed.” *Id.* The same logic applies here. The Court long ago held that arguments concerning the constitutionality of a statute under which a criminal defendant was convicted do not raise “a question relating to the trial court’s jurisdiction.” *State v. Awan*, 22 Ohio St. 3d 120, 122 (1986). In other words, a criminal judgment is no more void when based on an unconstitutional guilty plea than it is void when based on an unconstitutional statute.

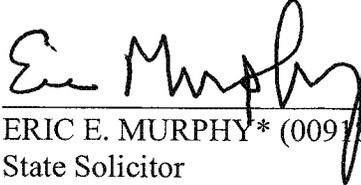
In addition, to the extent that the Second District’s logic is (implicitly) predicated on the old adage that an unconstitutional law is no law at all, *see Norton*, 118 U.S. at 442, that adage did not justify the appellate court’s result for the reasons explained. *See* Part A.4. If the General Assembly intended to compensate individuals who avoided liability based on constitutional arguments, it is implausible to think the General Assembly would have relied on judicial incorporation of an old legalism that did not even generally apply to the particular situation.

CONCLUSION

For these reasons, the Court should reverse the decision below and direct that judgment be entered in favor of the State.

Respectfully submitted,

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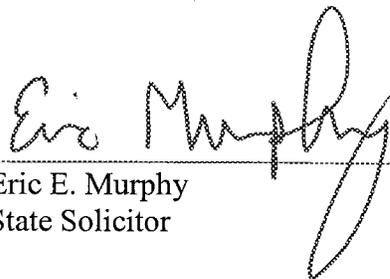
State of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction was served
by U.S. mail this 14th day of July, 2014, upon the following counsel:

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APPENDIX

EXHIBIT 1

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

NOTICE OF APPEAL OF DEFENDANT-APPELLANT
STATE OF OHIO

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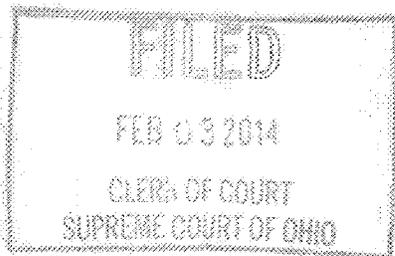
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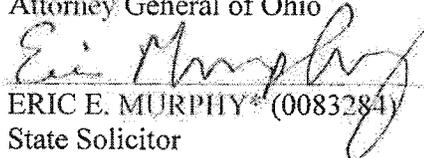
**NOTICE OF APPEAL OF DEFENDANT-APPELLANT
STATE OF OHIO**

Defendant-Appellant State of Ohio gives notice of its jurisdictional appeal to this Court, pursuant to Ohio Supreme Court Rule 5.02 and 7.01, from a decision of the Second District Court of Appeals captioned *David M. Bundy v. State of Ohio*, No. 25665 and journalized on December 20, 2013. Date-stamped copies of the Second District's Judgment Entry and Opinion are attached as Exhibits 1 and 2, respectively, to the Appellant's Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case involves a question of public and great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Defendant-Appellant State of Ohio was served by U.S. mail this 3rd day of February, 2014, upon the following counsel:

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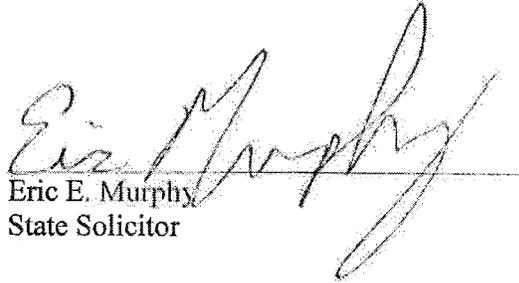

Eric E. Murphy
State Solicitor

EXHIBIT 2



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GRIGORIYUSH
CLERK OF COURTS
MONTGOMERY COUNTY, OHIO
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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

DAVID M. BUNDY

Plaintiff-Appellee

v.

STATE OF OHIO

Defendant-Appellant

C.A. CASE NO. 25665

T.C. NO. 11CV3948

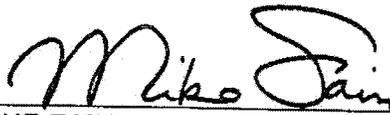
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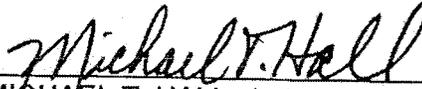
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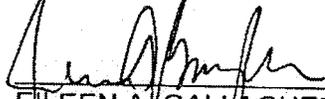
Pursuant to the opinion of this court rendered on the 20th day of December, 2013,
the judgment of the trial court is affirmed.

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)

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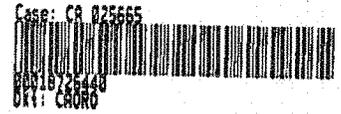
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EXHIBIT 3

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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 Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 20th day of December, 2013.

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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.2d 1157, ¶ 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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Hon. Mary L. Wiseman

EXHIBIT 4

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

DAVID M. BUNDY,

Plaintiff,

-vs-

STATE OF OHIO,

Defendant.

CASE NO.: 2011 CV 03948

JUDGE MARY WISEMAN

**DECISION, ORDER AND ENTRY
GRANTING PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

FINAL APPEALABLE ORDER

This matter is before the Court on the parties' cross-motions for summary judgment, both filed on May 7, 2012. (See *Plaintiff's Motion for Summary Judgment; Defendant, the State of Ohio's, Motion for Summary Judgment* ["*Defendant's Motion for Summary Judgment*"]). Each party also has filed a memorandum in opposition to the other party's summary judgment motion (see *Plaintiff's Memorandum in Response to Defendant's Motion for Summary Judgment* ["*Plaintiff's Opposing Memo*"], and *Defendant, the State of Ohio's, Memorandum in Opposition to Plaintiff's Motion for Summary Judgment* ["*Defendant's Opposing Memo*"], both filed on July 26, 2012), as well as a reply in support of his/its own motion. (See *Plaintiff's Memorandum in Response to Defendant's Motion for Summary Judgment* ["*Plaintiff's Reply*"], and *The State of Ohio's Reply in Support of Its Motion for Summary Judgment* ["*Defendant's Reply*"], both filed on August 2, 2012).

For the reasons that follow, *Plaintiff's Motion for Summary Judgment* is GRANTED, and *Defendant, the State of Ohio's, Motion for Summary Judgment* is DENIED.

EXHIBIT 4

FACTUAL AND PROCEDURAL BACKGROUND/THE PARTIES' CLAIMS

In 1995, while on parole from a 1987 aggravated burglary conviction, Plaintiff David Bundy was arrested, indicted and convicted in this Court 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. See *State v. Bundy*, Case No. 1995 CR 01774. As a result of those new convictions, Bundy's probation on the aggravated burglary conviction was revoked, and he was imprisoned to serve the remainder of his aggravated burglary sentence in addition to the sentence imposed for the sex offenses.

Plaintiff was released from prison in April 2003 as a convicted sex offender required to register his address with the local sheriff's office on a yearly basis, pursuant to "Megan's Law." On December 8, 2003, Plaintiff pled guilty in this Court to a felony five charge of failure to register as a sex offender, and was sentenced to five years of community control. See *State v. Bundy*, Case No. 2003 CR 03160 (Mont. Cty. Comm. Pls. Ct. Dec. 9, 2003) (Langer, J.) ("*Termination Entry – Community Control*"). Thereafter, however, Bundy registered annually each October, his assigned registration month, through 2007. See *State v. Bundy*, Case No. 2008 CR 1321 (Mont. Cty. Comm. Pls. Ct. Oct. 10, 2008) (Langer, J.) ("*Decision and Entry Overruling Defendant's Motion for Judgment of Acquittal*," p. 3); (see *Plaintiff's Motion for Summary Judgment*, Exh. 1, p. 3).

On October 17, 2007, Plaintiff received notice that his next such reporting date would be October 7, 2008. See *id.* On November 28, 2007, however, Plaintiff received a letter from the Ohio Attorney General, notifying him of a change in the law regarding sex offender classification and registration requirements. *Id.* This change was pursuant to Ohio's "Adam Walsh Act," Ohio R.C. § 2950.031, *et seq.*, which authorized the Ohio Attorney General to reclassify sex offenders who already had been classified under the previous "Megan's Law" version of registration requirements. The new law would require Plaintiff to register every 180 days for 25 years, with an initial

registration date of March 14, 2008. *Bundy*, Case No. 2008 CR 1321, 10/10/08 *Decision & Entry*, pp. 3-4.

Plaintiff failed to register on March 14, 2008, as required by the new law. *Id.*, p. 4. As a result, on May 15, 2008, Plaintiff was indicted in this Court for violating Ohio R.C. § 2950.05 (Failure to Verify). Following an October 23, 2008 bench trial, Plaintiff was found guilty of Failure to Verify, a third degree felony, and was sentenced to three years of mandatory imprisonment. See *id.*, p. 9. He arrived at the Department of Rehabilitation and Correction on October 24, 2008. (See *Plaintiff's Motion for Summary Judgment*, Exh. 6).

Plaintiff appealed that conviction to the Second District Court of Appeals, which affirmed. See *State v. Bundy*, 2nd Dist. 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.

On June 3, 2010, the Ohio Supreme Court held that Ohio 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. See *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E.2d 753. On September 10, 2010, that Court reversed Plaintiff's conviction, consistent with the *Bodyke* decision. See *In re Sexual Offender Reclassification Cases*, 126 Ohio St. 3d 322, 2010-Ohio-3753, 933 N.E.2d 801; (see *Plaintiff's Motion for Summary Judgment*, Exh. 2). As a result, the Montgomery County Prosecutor's Office dismissed the charges against Plaintiff on September 21, 2010, and he subsequently was released from prison. (See *Plaintiff's Motion for Summary Judgment*, Exh. 3).

On June 2, 2011, Plaintiff initiated the instant civil action, seeking a declaratory judgment that he is a wrongfully imprisoned person entitled to pursue an action for civil damages pursuant to Ohio R.C. § 2743.48. (See *Complaint for Declaration of Plaintiff as Wrongfully Imprisoned Person*). In its answer filed on July 19, 2011, Defendant asserted various affirmative defenses,

including, *inter alia*, that the Ohio Supreme Court's interpretation of Section 2743.48 "prohibits a finding that Plaintiff was a wrongfully imprisoned individual." (*Defendant the State of Ohio's Answer to Plaintiff's Complaint*, ¶15).

Consistent with that affirmative defense, the parties' cross-motions for summary judgment and the accompanying memoranda largely focus on the statutory language of R.C. § 2743.48, and whether its requirement that "no criminal proceeding" can be brought "for any act associated with" the purported wrongful conviction precludes Plaintiff from recovery. (See *Plaintiff's Motion for Summary Judgment*; *Defendant's Motion for Summary Judgment*; *Plaintiff's Opposing Memo*; *Defendant's Opposing Memo*; *Plaintiff's Reply*, and *Defendant's Reply*). In addition to arguing that the Ohio legislature did not intend to compensate individuals who are incarcerated for violating statutes that later are repealed (*Defendant's Motion for Summary Judgment*, pp. 6-7; see also *Defendant's Opposing Memo*, pp. 4-6), the State also contends that because Plaintiff 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 (*Defendant's Motion for Summary Judgment*, pp. 7-8; see also *Defendant's Opposing Memo*, p. 6),¹ Plaintiff was not wrongfully imprisoned.

This matter now is ripe for decision.

LAW AND ANALYSIS

Standard Applicable to Motions for Summary Judgment

Summary judgment is a procedural device that terminates litigation, avoiding a formal trial in cases "where there is nothing to try." *Murphy v. City of Reynoldsburg*, 65 Ohio St. 3d 356, 358-59, 604 N.E.2d 138, 140 (1992). This relief should be awarded "with caution," construing evidence and resolving doubts in favor of the non-moving party. *Id.* Summary judgment is proper when: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) construing the evidence in the light most favorable to the non-moving party, reasonable

¹ See *Bundy*, 2003 CR 3160.

minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St. 2d 64, 66, 375 N.E.2d 46, 47 (1978). A “material” fact is one that would affect the outcome of the suit under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248, 106 S. Ct. 2505 (1986) (interpreting analogous Fed. R. Civ. P. 56).

The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists as to any essential element of the claim(s) involved in the case. *Dresher v. Burt*, 75 Ohio St. 3d 280, 293, 662 N.E.2d 264, 274 (1996). The moving party cannot satisfy this burden simply by asserting that the non-moving party has no evidence to support its claims. *Id.* Rather, the moving party is required to “specifically delineate the basis upon which summary judgment is sought,” so that the non-moving party has “a meaningful opportunity to respond.” *State ex rel. Coulverson v. Ohio Adult Parole Authority*, 62 Ohio St. 3d 12, 14, 577 N.E.2d 352, 353 (1991) (quoting *Mitseff v. Wheeler*, 38 Ohio St. 3d 112, 114, 526 N.E.2d 798, 800-01 n.5 (1998)). Additionally, the moving party’s evidence must be of the type listed in Civ.R. 56(C): pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact. *Dresher*, 75 Ohio St. 3d at 292-93, see also Civ.R. 56(C) (listing acceptable types of evidence). A party seeking summary judgment on the basis of an affirmative defense must demonstrate that no genuine issue of material fact exists with respect to every element of the defense. *McCoy v. Maxwell*, 11th Dist. No. 2001-P-0132, 2002-Ohio-7157, ¶33.

If the moving party fails to satisfy its initial burden, summary judgment is not proper. *Dresher*, 75 Ohio St. 3d at 293. However, if the moving party satisfies its initial burden, the non-moving party cannot rest on allegations or denials in its pleadings, but has a reciprocal burden as outlined in Civ.R. 56(E) to set forth specific evidence showing that a genuine issue of material fact exists. *Id.* It is the non-moving party’s task to negate the movant’s showing by establishing a triable issue. *Coulverson*, 62 Ohio St. 3d at 14 (citing *Harless*, 54 Ohio St. 2d at 66). “[W]hen

neither the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law[,] as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, 'and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.'" *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶¶36-37, 40-42 (quoting *Dresher*, 75 Ohio St. 3d at 276).

The trial court has "an absolute duty" under Civ.R. 56(C) to read and consider all appropriate materials filed by the parties when ruling on a motion for summary judgment. *Murphy*, 65 Ohio St. 3d at 359. When considering evidentiary material presented in favor of, or in opposition to, a summary judgment motion, the court does not weigh credibility. *Whiteside v. Conroy*, 10th Dist. No. 05AP-123, 2005-Ohio-5098, ¶75. Summary judgment is not appropriate if, when viewing the evidence in the light most favorable to the non-moving party, reasonable minds can reach differing conclusions. *Hounshell v. American States Ins. Co.*, 67 Ohio St. 2d 427, 433, 424 N.E.2d 311, 315 (1981).

Law re Civil Recovery for Wrongful Imprisonment

Ohio 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." *Bennett v. Ohio Dep't of Rehabilitation & Correction*, 60 Ohio St. 3d 107, 110, 573 N.E.2d 633 (1991). That statute prescribes the conditions under which a person who claims to have been wrongfully imprisoned may pursue a civil action for damages against the State, as follows:

§ 2743.48. Civil action against state for wrongful imprisonment

(A) As used in this section and section 2743.49 of the Revised Code, a "wrongfully imprisoned individual" means 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 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.

(B) (1) When a court of common pleas determines, on or after September 24, 1986, that a person is a wrongfully imprisoned individual, the court shall provide the person with a copy of this section and orally inform the person and the person's attorney of the person's rights under this section to commence a civil action against the state in the court of claims because of the person's wrongful imprisonment and to be represented in that civil action by counsel of the person's own choice.

(2) The court described in division (B)(1) of this section shall notify the clerk of the court of claims, in writing and within seven days after the date of the entry of its determination that the person is a wrongfully imprisoned individual, of the name and proposed mailing address of the person and of the fact that the person has the rights to commence a civil action and to have legal representation as provided in this section. The clerk of the court of claims shall maintain in the clerk's office a list of wrongfully imprisoned individuals for whom notices are received under this section and shall create files in the clerk's office for each such individual.

Ohio R.C. § 2743.48.

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.2d

1157, ¶1; see also *Ballard v. State*, 8th Dist. No. 97882, 2012-Ohio-3086, ¶22 (one wishing to file 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.”) (citing *State ex rel. Tubb Jones v. Suster*, 84 Ohio St. 3d 70, 1998-Ohio-275, 701 N.E.2d 1002 (1998)).

For purposes of Section 2743.48, “a previous finding of not guilty is not sufficient to establish innocence.” *Tubb Jones*, 84 Ohio St. 3d at 72 (emphasis in original). “The petitioner seeking to establish a claim for wrongful imprisonment 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.” *Id.* (citing *Ellis v. State*, 64 Ohio St. 3d 391, 393, 596 N.E.2d 428, 430 (1992)). Similarly, reversal of an inmate’s convictions for technical reasons does not dictate that such inmate did not commit the offense for which he was incarcerated. See *Mickey v. Ohio Dep’t of Rehab. & Corr.*, 10th Dist. No. 02AP-539, 2003-Ohio-90, ¶24 (citing *Ratcliff v. State*, 94 Ohio App. 3d 179, 182, 640 N.E.2d 560 (1994)) (an appellate court’s reversal of a conviction does not require a court to find that the claimant was not engaging in criminal conduct at the time in question). Rather, claimants who seek 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 th[at] incident.” *Chandler v. State*, 95 Ohio App. 3d 142, 148, 641 N.E.2d 1382 (8th Dist. 1994) (citing *Gover v. State*, 67 Ohio St. 3d 93, 616 N.E.2d 207 (1993) (syllabus)).

“The petitioner carries the burden of proof in affirmatively establishing his or her innocence under R.C. 2743.48(A)(5).” *Jones*, 84 Ohio St. 3d at 72 (emphasis in original); see also *Ellis*, 64 Ohio St. 3d at 395 (“the claimant in a wrongful imprisonment action against the state has the burden of demonstrating his innocence by a preponderance of the evidence”). “[T]he legislature, in providing access to the public coffers of this state, intended that only truly innocent individuals be allowed to recover damages.” *Mueller v. State*, 12th Dist. No. CA88-05-037, 1988 Ohio App.

LEXIS 4876, at **7-8 (Dec. 12, 1988). “If the legislature had intended all persons whose convictions are reversed . . . to receive compensation for wrongful imprisonment, the legislature would have written R.C. 2743.48 in such a manner.” *Ratcliff*, 94 Ohio App. 3d at 182.

Section 2743.48(A)(4)’s requirement that “no criminal proceeding . . . can be brought . . . against the individual for any act associated with that conviction” is “of critical importance.” *Gover*, 67 Ohio St. 3d at 95. That 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.” *Id.* In enacting the statute, Ohio’s General Assembly “intended that the court of common pleas actively separate those who were wrongfully imprisoned from those who have merely avoided criminal liability.” *Id.* (citing *Walden v. State*, 47 Ohio St.3d 47, 52, 547 N.E.2d 962, 967 (1989)). Accordingly, claimants seeking compensation for wrongful imprisonment must prove by a preponderance of the evidence “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.” *Id.* (citing *Walden, supra*). Where a “fair reading of the record reflects that at the time of the incident for which the [wrongful imprisonment claimant] was charged, [the claimant] was engaged in other criminal conduct,” that claimant has not sustained his burden under Section 2743.48(A). *Chandler*, 95 Ohio App. 3d at 148.

Bundy’s Wrongful Imprisonment Claim

In seeking summary judgment in his favor, Plaintiff Bundy urges that he qualifies as a wrongfully incarcerated person by virtue of having been imprisoned for an invalid conviction under the Adam Walsh Act. (*Plaintiff’s Motion for Summary Judgment*, p. 4). Defendant argues, however, that the repeal of that statute does not entitle Plaintiff to recover for wrongful imprisonment under Ohio R.C. § 2743.48 because he did engage in the conduct that resulted in his conviction, and thus was not actually innocent. (*Defendant’s Motion for Summary Judgment*, pp. 5-

7; *Defendant's Opposing Memo*, pp. 4-6). Defendant also contends that because Plaintiff concurrently was incarcerated for violating the conditions of his community control, his imprisonment was not wrongful. (See *Defendant's Motion for Summary Judgment*, pp. 6-8; *Defendant's Opposing Memo*, p. 6). Both parties maintain that no genuine issue of material fact exists regarding their entitlement to relief.

a. *Adam Walsh Act Conviction*

Three decisions out of Ohio's Eighth Appellate District have considered whether individuals convicted of and incarcerated for failure to comply with the Adam Walsh Act's revised reporting requirements for sex offenders, which requirements later were struck down by the Ohio Supreme Court in *Bodyke*, 2010-Ohio-2424, qualify as "wrongfully imprisoned individuals" for purposes of R.C. § 2743.48. See *Mohammad v. State*, 8th Dist. No. 98655, 2012-Ohio-5517; *Johnson v. State*, 8th Dist. No. 98050, 2012-Ohio-3964; *Ballard*, 2012-Ohio-3086. In all three cases, the trial court held that the sex offender plaintiff was not eligible to recover under the wrongful imprisonment statute; in all three cases, the appellate court reversed. See *id.*

In *Ballard*, the earliest of those three cases, the court of appeals determined that *Bodyke*'s invalidation of the Adam Walsh Act's reporting requirements meant that Ballard was wrongfully imprisoned for failure to register, despite the fact that he had entered a guilty plea and was incarcerated only after he failed to comply with the terms of his probation. See 2012-Ohio-3086, ¶¶9-10. Noting that "a void guilty plea 'does not exist for purposes of determining whether a person has the right to see[k] compensation under R.C. 2743.48,'" the court there concluded that the trial court had "acted improperly in granting the state's [] motion for summary judgment" on Ballard's declaratory judgment action. *Id.* (quoting *Dunbar v. State*, 8th Dist. No. 97364, 2012-Ohio-707, ¶16).

In both *Johnson* and *Mohammad*, the State similarly contested each plaintiff's "wrongfully imprisoned" status because each had pled guilty to a charge under the Adam Walsh Act, but the

appellate court again concluded that the plaintiffs' void convictions made them wrongfully imprisoned, irrespective of their pleas. See *Johnson*, 2012-Ohio-3964; *Mohammad*, 2012-Ohio-5517. The court in *Johnson* echoed *Ballard*'s observation that "the purpose of R.C. 2743.48 'would not be served by withholding relief from individuals who were induced to enter a guilty plea that carries no force or effect at law.'" 2012-Ohio-3964, ¶22 (quoting *Ballard*, 2012-Ohio-3086, ¶27).

Significantly, in all three cases, the sole substantive issue considered by the appellate court – and apparently, the only objection raised by the State – as a possible obstacle to Section 2743.48 "wrongfully imprisoned" status was the fact that each sex offender plaintiff had entered a guilty plea to the underlying Adam Walsh Act felony charge. Presumably that factor presented an issue because the wrongful imprisonment statute on its face defines a "wrongfully imprisoned individual" as including only those who were "found guilty of, but did not plead guilty to, the particular charge." R.C. § 2743.48(A)(2) (emphasis added). Yet despite Section 2743.48(A)(2)'s clear exception for persons who entered guilty pleas, the Eighth District Court of Appeals three times concluded that such language should not preclude recovery by individuals whose guilty pleas were void as having been induced under an unconstitutional statute. See *Mohammad*, 2012-Ohio-5517; *Johnson*, 2012-Ohio-3964; *Ballard*, 2012-Ohio-3086.

Plaintiff Bundy did not plead guilty to the Failure to Verify charge against him, so the lone factor that gave pause to the court in *Mohammad*, *Johnson* and *Ballard* does not exist in this case. Moreover, while the State adamantly maintains that Plaintiff Bundy does not qualify as "wrongfully imprisoned" under Section 2743.48 because he did engage in conduct defined as criminal at the time of his conviction, that argument is not sustainable in light of the compelling contrary precedents of *Mohammad*, *Johnson* and *Ballard*. If a guilty plea to an unconstitutional offense "carries no force or effect at law," see *Johnson*, 2012-Ohio-3964, ¶22, surely an involuntary conviction of the same offense also is without valid legal consequence.

Given the Ohio Supreme Court's unequivocal determination that the registration requirements of the statute under which Bundy was convicted were unconstitutional and void as applied to him, see *Bodyke*, 2010-Ohio-2424; *In re Sexual Offender Reclassification Cases*, 2010-Ohio-3753, this Court cannot conclude that Bundy's failure to register nonetheless constituted criminal conduct that justified his incarceration. While the Court concurs in the State's observation that "both the trial court and prosecuting attorney were acting within their respective realm of authorities under existing statutory law" with respect to Plaintiff Bundy's 2008 Failure to Verify conviction (see *Defendant's Motion for Summary Judgment*, p. 7), the good faith of those entities is not determinative of Bundy's status as a "wrongfully imprisoned individual" under R.C. § 2743.48. Rather, Bundy was wrongfully imprisoned if he was incarcerated for a felony offense that "was not committed by" him. See R.C. § 2743.48(5). Irrespective of Plaintiff's conviction conforming to then-existing law, this Court can only conclude that Bundy could not have "committed" the felony offense of Failure to Verify where that offense itself was a nullity.

Defendant's opposition to Bundy's cause of action is not salvaged by the State's implicit suggestion that Bundy's failure to register in compliance with the Adam Walsh Act also violated the conditions of his post-release control in Case No. 2003 CR 03160, thereby disqualifying him from recovery pursuant to R.C. § 2734.48(A)(4). (See *Defendant's Motion for Summary Judgment*, p. 7). As Defendant correctly observes, in order for one to qualify as a "wrongfully imprisoned individual," Section 2734.48(A)(4) requires that "no criminal proceeding . . . can be brought . . . against the individual for any act associated with that conviction." (See *id.*). Defendant appears to propose that because Bundy's probation in Case No. 2003 CR 03160 could have been revoked -- and in fact, an action to do so was brought (see *Plaintiff's Reply*, Exh. 7) -- premised on Bundy's failure to register in March 2008, he therefore was not wrongfully imprisoned even though his conviction in Case No. 2008 CR 01321 later was struck down. This Court rejects any such suggestion.

Logically, if Bundy's failure to register in March 2008 was not punishable under the provisions of the Adam Walsh Act because that statute was unconstitutional as applied to him, then neither could his violation of that Act's unconstitutional registration requirements be deemed a cognizable violation of his community control conditions. As interpreted by this Court, the Ohio Supreme Court's holdings in *Bodyke*, 2010-Ohio-2424, and *In re Sexual Offender Reclassification Cases*, 2010-Ohio-3753, stand for the proposition that the State had no valid basis for requiring Plaintiff Bundy to register in March 2008. As such, Bundy's incarceration for a community control violation consisting only of the same failure to register – the only other “criminal conduct” plausibly arising out of Bundy's act of failing to register – also would have amounted to wrongful imprisonment as defined by Ohio R.C. § 2743.48.

b. Community Control Violations/Probation Revocation on Other Grounds

Further arguing that Bundy was incarcerated in 2008 not only for his Failure to Verify conviction in Case No. 2008 CR 01321, but also for violating conditions of community control in Case No. 2003 CR 03160 independent of Bundy's failure to register, the State also contends that Bundy was “not wrongfully imprisoned” during his time in custody for those unrelated community control violations. (See *Defendant's Motion for Summary Judgment*, pp. 7-8; see also *Defendant's Reply*, pp. 2-3). The State's alternative argument on this basis is somewhat more availing. See *Jones v. State*, 8th Dist. No. 96184, 2011-Ohio-3075, ¶13 (re-incarceration for parole violation related to charge on which acquitted was not wrongful imprisonment).

Although Plaintiff counters that his probation in Case No. 2003 CR 03160 “was revoked as a result of the unconstitutional conviction, nothing more” (*Plaintiff's Reply*, p. 3) (emphasis added), his assertion to that effect is belied both by the probable cause hearing notice issued in that case (see *id.*, Exh. 7), and by the remainder of Plaintiff's own argument. (See *id.*, p. 3). Plaintiff urges that “[o]f his five alleged probation violations” in Case No. 2003 CR 03160, “only one could be considered as ‘arising out of []’ . . . the crime of failure to register.” (*Id.*). By Plaintiff's own

admission, then, the 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 presumably provided a separate, valid basis for his re-incarceration.

That conclusion is substantiated by the “Notice of Community Control Violation Hearing and Order” issued in Case No. 2003 CR 03160, which states as follows, in pertinent part:

At [your] Court appearance [re alleged violation of the terms of community control], you will be called upon to admit or deny the following violations:

You violated Rule #1, “I shall refrain from violation of any law (Federal, State, County and City). . .” You were arrested on June 6, 2005, for Disorderly Conduct and Probation Violation[;] on October 11, 2006, for a warrant through the Montgomery County Juvenile Court for failing to appear for a child support hearing[;] on December 4, 2006, for failing to appear for a hearing at Dayton Municipal Court[;] on August 31, 2007, for Drug Abuse, on October 27, 2007, for Possession of Drugs[;] and on May 6, 2008, for Failure to Register (F-3) and Probation Violation.

You violated Rule #3[,] “I shall notify my Probation Officer of any change of residence immediately after the change . . .” You failed to notify your probation officers when you moved to 1580 Gift Ridge Road, Manchester, Ohio 45144.

You violated Rule #5, “I shall report at such time and place as directed by my Probation Officer . . .” You were declared an absconder on April 11, 2008 after failing to report as ordered.

You violated Rule #6, “I shall not use or possess any controlled substances or drugs of abuse . . .” You tested positive for marijuana on October 12, 2007, and were arrested for Drug Possession on October 17, 2007.

You violated Rule #7[,] “I shall accomplish all case plan objectives which are now and will be set for me through my supervision.” You have failed to make a payment towards your financial obligations since March 7, 2008, and haven’t made a payment of \$10 per month as outlined in your case plan, since July 5, 2007. In addition, you have not abided by all registration requirements for sex offenders.

(Plaintiff’s Reply, Exh. 7). Based on the foregoing enumeration of Bundy’s multiple arrests and other prohibited conduct while on probation that constituted violations wholly unrelated to his failure to comply with the registration requirements of the Adam Walsh Act, the State articulated

alleged violations of all five mentioned rules governing Bundy's community control, and thus identified valid legal bases for re-incarcerating him in Case No. 2003 CR 03160.

This Court therefore agrees that Plaintiff 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.

The State also argues, however, that the proper remedy for Plaintiff's continued incarceration after he had served all time remaining for his conviction in Case No. 2003 CR 03160 would be a False Imprisonment claim "brought directly in the Court of Claims," not this wrongful imprisonment claim brought pursuant to R.C. § 2743.48. (See *Defendant's Opposing Memo*, p. 6). On this point, the Court finds Plaintiff's argument far more persuasive. (See *Plaintiff's Reply*, pp. 3-4). The record in this matter clearly demonstrates that Plaintiff was not simply "held too long for his sentence in 03CR3160." (*Id.*, p. 4). Rather, Plaintiff was kept in custody through September 2010 based on his erroneous conviction in Case No. 2008 CR 1321, and was released only after the Ohio Supreme Court reversed that conviction as unconstitutional. See *Bodyke*, 2010-Ohio-2424; *In re Sexual Offender Reclassification Cases*, 2010-Ohio-3753. As such, the circumstances of Bundy's continued incarceration fall within the parameters of R.C. § 2743.48, and his claim for relief therefore properly was initiated in this Court.

Because Plaintiff Bundy's conviction in Case No. 2008 CR 01321 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, Plaintiff's motion for summary judgment must be granted, and the State's motion for summary judgment must be denied.

CONCLUSION

Based on the foregoing analysis, *Plaintiff's Motion for Summary Judgment* hereby is GRANTED, and *Defendant[] the State of Ohio's Motion for Summary Judgment* hereby is DENIED. Accordingly, the Court ENTERS declaratory judgment in favor of Plaintiff, as follows:

1. David Bundy was charged with Failure to Verify, a third degree felony, by indictment dated May 15, 2008, in this Court's Case No. 2008 CR 01321;

2. David Bundy was convicted of, but did not plead guilty to, the felony offense of Failure to Verify, on October 10, 2008;

3. David Bundy was sentenced to a three year term of imprisonment in a state correctional institution for the Failure to Verify conviction, and began his sentence on October 24, 2008;

4. Concurrently, David Bundy also was re-incarcerated for violating his conditions of community control in this Court's Case No. 2003 CV 03160;

4. David Bundy's conviction for Failure to Verify was reversed as void by the Ohio Supreme Court on September 10, 2010, in *In re Sexual Offender Reclassification Cases*, 126 Ohio St. 3d 322, 2010-Ohio-3753, 933 N.E.2d 801, based on the decision in *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E.2d 753;

5. The Failure to Verify case against David Bundy was dismissed without prejudice on September 21, 2010, at the request of the Montgomery County Prosecutor's Office;

6. The prosecuting attorney in David Bundy's Failure to Verify case cannot or will not seek any further appeal of right or upon leave of court, and upon information and belief, no criminal proceeding is pending, can be brought, or will be brought by any other entity against David Bundy for any act associated with that conviction;

6. This Court has determined that the charged offense of Failure to Verify, including all lesser-included offenses, could not have been committed by David Bundy because the Ohio Supreme Court has found the underlying statute to be unconstitutional, and the charge therefore was void;

7. David Bundy is a wrongfully imprisoned individual as defined at Ohio R.C. § 2743.48(A) to the extent that his incarceration on the 2008 felony Failure to Verify conviction exceeded the remainder of his sentence in Case No. 2003 CR 03160; and

8. David Bundy is entitled to commence a civil action for damages against the State of Ohio in the Court of Claims as provided in Ohio R.C. § 2743.48.

In addition, pursuant to Ohio R.C. § 2743.48(B)(3), within seven (7) days of the date hereof, the Clerk of this Court is DIRECTED to provide a written copy of this Decision, Order and Entry to

the Clerk of the Ohio Court of Claims, in order to notify that Court of the name and proposed mailing address of David Bundy, and of the fact that David Bundy has the right to commence a civil action and to have legal representation as provided in Ohio R.C. § 2743.48.

THIS IS A FINAL APPEALABLE ORDER UNDER CIV.R. 58. PURSUANT TO APP.R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED:

JUDGE MARY WISEMAN

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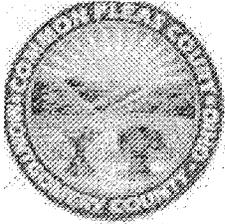
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Copies of this document were sent to all parties listed below by ordinary mail:

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General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Case Title: DAVID M. BUNDY vs STATE OF OHIO

Case Number: 2011 CV 03948

Type: Order:

So Ordered

A handwritten signature in black ink that reads "Mary Wiseman".

Mary Wiseman

EXHIBIT 5

R. C. 2743.48 Wrongful imprisonment civil action against state.

(A) As used in this section and section 2743.49 of the Revised Code, a “wrongfully imprisoned individual” means 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.

(B)

- (1) A person may file a civil action to be declared a wrongfully imprisoned individual in the court of common pleas in the county where the underlying criminal action was initiated. That civil action shall be separate from the underlying finding of guilt by the court of common pleas. Upon the filing of a civil action to be determined a wrongfully imprisoned individual, the attorney general shall be served with a copy of the complaint and shall be heard.
- (2) When the court of common pleas in the county where the underlying criminal action was initiated determines in a separate civil action that a person is a wrongfully imprisoned individual, the court shall provide the person with a copy of this section and orally inform the person and the person’s attorney of the person’s rights under this section to commence a civil action against the state in the court of claims because of the person’s wrongful imprisonment and to be represented in that civil action by counsel of the person’s own choice.

(3) The court described in division (B)(1) of this section shall notify the clerk of the court of claims, in writing and within seven days after the date of the entry of its determination that the person is a wrongfully imprisoned individual, of the name and proposed mailing address of the person and of the fact that the person has the rights to commence a civil action and to have legal representation as provided in this section. The clerk of the court of claims shall maintain in the clerk's office a list of wrongfully imprisoned individuals for whom notices are received under this section and shall create files in the clerk's office for each such individual.

(4) Within sixty days after the date of the entry of the determination by the court of common pleas in the county where the underlying criminal action was initiated that a person is a wrongfully imprisoned individual, the clerk of the court of claims shall forward a preliminary judgment to the president of the controlling board requesting the payment of fifty per cent of the amount described in division (E)(2)(b) of this section to the wrongfully imprisoned individual. The board shall take all actions necessary to cause the payment of that amount out of the emergency purposes special purpose account of the board.

(5) If an individual was serving at the time of the wrongful imprisonment concurrent sentences on other convictions that were not vacated, dismissed, or reversed on appeal, the individual is not eligible for compensation as described in this section for any portion of that wrongful imprisonment that occurred during a concurrent sentence of that nature.

(C)

(1) In a civil action under this section, a wrongfully imprisoned individual has the right to have counsel of the individual's own choice.

(2) If a wrongfully imprisoned individual who is the subject of a court determination as described in division (B)(2) of this section does not commence a civil action under this section within six months after the entry of that determination, the clerk of the court of claims shall send a letter to the wrongfully imprisoned individual, at the address set forth in the notice received from the court of common pleas pursuant to division (B)(3) of this section or to any later address provided by the wrongfully imprisoned individual, that reminds the wrongfully imprisoned individual of the wrongfully imprisoned individual's rights under this section. Until the statute of limitations provided in division (H) of this section expires and unless the wrongfully imprisoned individual commences a civil action under this section, the clerk of the court of claims shall send a similar letter in a similar manner to the wrongfully imprisoned individual at least once each three months after the sending of the first reminder.

(D) Notwithstanding any provisions of this chapter to the contrary, a wrongfully imprisoned individual has and may file a civil action against the state, in the court of claims, to recover a sum of money as described in this section, because of the individual's wrongful imprisonment. The court of claims shall have exclusive, original jurisdiction over such a civil action. The civil action shall proceed, be heard, and be determined as provided in sections 2743.01 to 2743.20 of

the Revised Code, except that if a provision of this section conflicts with a provision in any of those sections, the provision in this section controls.

(E)

(1) In a civil action as described in division (D) of this section, the complainant may establish that the claimant is a wrongfully imprisoned individual by submitting to the court of claims a certified copy of the judgment entry of the court of common pleas associated with the claimant's conviction and sentencing, and a certified copy of the entry of the determination of the court of common pleas that the claimant is a wrongfully imprisoned individual under division (B)(2) of this section. No other evidence shall be required of the complainant to establish that the claimant is a wrongfully imprisoned individual, and the claimant shall be irrebuttably presumed to be a wrongfully imprisoned individual.

(2) In a civil action as described in division (D) of this section, upon presentation of requisite proof to the court of claims, a wrongfully imprisoned individual is entitled to receive a sum of money that equals the total of each of the following amounts:

(a) The amount of any fine or court costs imposed and paid, and the reasonable attorney's fees and other expenses incurred by the wrongfully imprisoned individual in connection with all associated criminal proceedings and appeals, and, if applicable, in connection with obtaining the wrongfully imprisoned individual's discharge from confinement in the state correctional institution;

(b) For each full year of imprisonment in the state correctional institution for the offense of which the wrongfully imprisoned individual was found guilty, forty thousand three hundred thirty dollars or the adjusted amount determined by the auditor of state pursuant to section 2743.49 of the Revised Code, and for each part of a year of being so imprisoned, a pro-rated share of forty thousand three hundred thirty dollars or the adjusted amount determined by the auditor of state pursuant to section 2743.49 of the Revised Code;

(c) Any loss of wages, salary, or other earned income that directly resulted from the wrongfully imprisoned individual's arrest, prosecution, conviction, and wrongful imprisonment;

(d) The amount of the following cost debts the department of rehabilitation and correction recovered from the wrongfully imprisoned individual who was in custody of the department or under the department's supervision:

(i) Any user fee or copayment for services at a detention facility, including, but not limited to, a fee or copayment for sick call visits;

(ii) The cost of housing and feeding the wrongfully imprisoned individual in a detention facility;

(iii) The cost of supervision of the wrongfully imprisoned individual;

(iv) The cost of any ancillary services provided to the wrongfully imprisoned individual.

(F)

(1) If the court of claims determines in a civil action as described in division (D) of this section that the complainant is a wrongfully imprisoned individual, it shall enter judgment for the wrongfully imprisoned individual in the amount of the sum of money to which the wrongfully imprisoned individual is entitled under division (E)(2) of this section. In determining that sum, the court of claims shall not take into consideration any expenses incurred by the state or any of its political subdivisions in connection with the arrest, prosecution, and imprisonment of the wrongfully imprisoned individual, including, but not limited to, expenses for food, clothing, shelter, and medical services. The court shall reduce that sum by the amount of the payment to the wrongfully imprisoned individual described in division (B)(4) of this section.

(2) If the wrongfully imprisoned individual was represented in the civil action under this section by counsel of the wrongfully imprisoned individual's own choice, the court of claims shall include in the judgment entry referred to in division (F)(1) of this section an award for the reasonable attorney's fees of that counsel. These fees shall be paid as provided in division (G) of this section.

(3) The state consents to be sued by a wrongfully imprisoned individual because the imprisonment was wrongful, and to liability on its part because of that fact, only as provided in this section. However, this section does not affect any liability of the state or of its employees to a wrongfully imprisoned individual on a claim for relief that is not based on the fact of the wrongful imprisonment, including, but not limited to, a claim for relief that arises out of circumstances occurring during the wrongfully imprisoned individual's confinement in the state correctional institution.

(G) The clerk of the court of claims shall forward a certified copy of a judgment under division (F) of this section to the president of the controlling board. The board shall take all actions necessary to cause the payment of the judgment out of the emergency purposes special purpose account of the board.

(H) To be eligible to recover a sum of money as described in this section because of wrongful imprisonment, both of the following shall apply to a wrongfully imprisoned individual:

(1) The wrongfully imprisoned individual shall not have been, prior to September 24, 1986, the subject of an act of the general assembly that authorized an award of compensation for the wrongful imprisonment or have been the subject of an action before the former sundry claims board that resulted in an award of compensation for the wrongful imprisonment.

(2) The wrongfully imprisoned individual shall commence a civil action under this section in the court of claims no later than two years after the date of the entry of the determination of the court of common pleas that the individual is a wrongfully imprisoned individual under division (B)(2) of this section.