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INTRODUCTION

“I [] admit that I am Guilty of the crimes of Aggravated Murder for the death of Todd Shultz and Margaret Cooper Johnston”

(App’x, McKnight Plea 12/18/08 at 92).

This was the confession of a psychopath – a man who murdered and dismembered a young teen couple. But, for Dale Johnston, it came too late. When Chester McKnight finally uttered these words and signed a guilty plea in 2008, Johnston had already been convicted and sentenced to death, his home had already been burned to the ground by neighbors who thought him a murderer, his wife had already left him, and his remaining daughter had already been placed in foster care.

Yet, the State persists. It has been six years since McKnight’s guilty plea, 30 years since Johnston was first imprisoned, and 32 years since his beloved daughter was hacked apart by a lunatic (who continued to roam free, hurting other women, while Johnston sat in prison). Yet still the State litigates – now before the highest court in this land – and all to deny that which everyone already knows.

“Johnston, who now lives in Grove City, finally was exonerated beyond any doubt. But he has received neither an apology nor one penny for the wrongful imprisonment.”

Randy Ludlow, Nonfiction / Guilty By Popular Demand - Veteran reporter revisits case derailed by false truths, Columbus Dispatch, Aug. 12, 2012 at 4E.

STATEMENT OF FACTS

On October 4, 1982, Annette Johnston and Todd Schultz were murdered and dismembered.¹ On September 29, 1983, Dale Johnston was indicted on two counts of aggravated murder for the killings and arrested. (App'x, Indictment 09/29/83 at 6-7); (App'x, Dispatch Art., "Death to be Asked" at 8).² His trial began on January 11, 1984. (App'x, Dispatch Art., "Murder Trial Begins" at 9).

The theory of the crime that the prosecution presented at trial was that Johnston had forced Annette Johnston and Todd Schultz into his car in Logan at around 6:30 p.m. He then, the State argued, took his victims back out of town to his home and killed them. Then he drove back to town where he disposed of the bodies – torsos in the river and appendages in shallow graves in an adjacent cornfield. (App'x, Suhr Aff. at 106:¶ 9). The State supported this theory with essentially two core pieces of evidence: A witness, Steve Rine, testified that he saw Plaintiff forcing Annette Johnston and Todd Schultz into a car at around 6:30 p.m. and a purported expert, Louise Robbins, testified that a cowboy boot belonging to Dale Johnston had made one of the footprints at the scene where the bodies were found. *Id.* at 107-08:¶ 15. Rine's testimony was obtained through suggestive hypnosis techniques and Robbins would later be declared a fraud. *See Id.* at 107-113:¶¶ 15-27; Craig M. Cooley, Reforming the Forensic Science Community to Avert the Ultimate Injustice, 15:2 Stan. L. & Pol'y Rev. 381, 404-05 (2004)

¹ The elements set out by Ohio Revised Code, section 2743.48 are all that is at issue in this action; thus, reciting the full (and very lengthy) history of these killings would be neither germane nor appropriate. However, a detailed history of the background facts, investigation, and unjust conviction of Dale Johnston is set out in a non-fiction account from the Kent State University Press: Bill Osinski, Guilty By Popular Demand: A True Story of Small-Town Injustice (2012).

² This and other Columbus Dispatch articles cited herein, to the extent they are cited for factual propositions (rather than legal history or as a barometer of public opinion), were copied from Dispatch microfilm and are ancient documents as contemplated in Ohio Rules of Evidence 803(16) and 901(B)(8).

(noting that Robbins “helped put people in prison for life, even though she had never actually proved she could match up a single unidentified shoe print with the person who made it.”). In addition, both Rine and Robbins would eventually be proven wrong by the 2008 discovery of the real culprits. See (App’x, McKnight Docket at 86-89); (App’x, McKnight Plea 12/18/08 at 90-92); (App’x, McKnight Sentencing 01/26/09 at 93-95); (App’x, Linscott Docket at 96-98); (App’x, Linscott Plea 06/18/09 at 99-101); (App’x, Linscott Sentencing 07/10/09 at 102-103). But in 1984, their testimony formed the twin pillars supporting the State’s case. See (App’x, Suhr Aff. at 107-108:¶ 15). In addition to supporting its theory, the State took steps to make sure the defense could not undermine it. The State, before, during, and after trial, withheld statements from four witnesses that suggested the time and place of death were different from the prosecution’s theory. Id. at 106-107:¶¶ 10-12; see also State v. Johnston, 39 Ohio St. 3d 48, 60-63 (1988); State v. Johnston, No. 425, 1986 Ohio App. LEXIS 8178, at *7-21 (Ct. App. Aug. 6, 1986). Furthermore, before, during, and after trial, the prosecution withheld evidence about an alternate suspect who, time would tell, was connected to the real perpetrators. (App’x, Suhr Aff. at 107:¶ 13); Johnston, 39 Ohio St. 3d at 60-63; Johnston, 1986 Ohio App. LEXIS 8178, at *7-21.

Johnston was found guilty of the aggravated murders for which he had been indicted on January 28, 1984. (App’x, Verdict 01/28/84 at 10-11). He was sentenced, on March 23, 1984, to imprisonment terminating in execution. (App’x, Sentence 03/23/84 at 12). Johnston appealed. The Fourth District reversed his conviction and remanded for a new trial for two reasons: First, the trial court should not have admitted Rine’s testimony without analyzing the reliability of the hypnosis techniques involved. State v. Johnston, No. 412, 1986 Ohio App. LEXIS 8159, at *8-22, *54 (Ct. App. Aug. 6, 1986). Second, the prosecutors had withheld material favorable

evidence from the defense (and continued to withhold it after trial and sentencing). Johnston, 1986 Ohio App. LEXIS 8178, at *7-21; *see also* (App’x, Suhr Aff. at 106:¶ 11). The State appealed the rulings to this Court, which affirmed the Fourth District. Johnston, 39 Ohio St. 3d at 49-56, 60-63.

On remand, the defense was in possession of the formerly withheld evidence. Both the Fourth District and the Ohio Supreme Court had additionally noted that the circumstances under which Rine was hypnotized failed every standard of reliability. Johnston, 39 Ohio St. 3d at 55; Johnston, 1986 Ohio App. LEXIS 8159, at *18-20. Thus, of the three things that ensured the State’s victory in the original trial – withholding evidence, presenting Rine’s hypnosis-addled testimony, and using Robbins to link Johnston to the crime scene – Rine’s usefulness was in grave doubt and only Robbins testimony remained untouched.

On remand, the parties agreed that the hypnosis of Rine did not meet the Supreme Court’s guidelines for reliable hypnosis. (App’x, Suhr Aff. at 112:¶ 22). Moreover, the trial court indicated that it accepted the theory that once someone has been hypnotized, they cannot differentiate what they remembered before the hypnosis from the memory they have after the hypnosis. Id. at 112:¶ 23; *see also* (App’x, Motion Tr. at 54). The consequence of this was Rine, as a matter of law, would not be allowed to testify to anything he remembered post-hypnosis but, as a matter of psychological fact, it was unlikely he would be able to testify regarding his pre-hypnosis memory either, because he could not separate it from the tainted post-hypnosis memory. (App’x, Suhr Aff. at 112:¶ 24). The trial court therefore issued a decision barring Rine from testifying regarding his post-hypnosis memory and allowing testimony regarding his pre-hypnosis memory only “*subject to the credibility of experts and other witnesses.*” (App’x, Entry 07/17/89 – Testimony Excluded at 56) (emphasis added).

In the same hearing, the trial court heard evidence regarding an interrogation of Johnston. During that interrogation, police had seized Johnston's boots and coerced his "consent" to a search of his residence where they confiscated more boots. (App'x, Suhr Aff. at 113-115:¶¶ 28-32). The evidence showed an eight and one-half hour interrogation so rough, deceptive, and coercive that a BCI officer, Herman Henry excused himself in protest and would later testify that he felt the detective conducting the interrogation intended to question Johnston until he "broke." Id. The trial court suppressed all the boots seized during the interrogation or as a result of the "consent" obtained therein. (App'x, Entry 07/17/89 – Evidence Suppressed at 57). The State appealed, and, on May 10, 1990, the Tenth District affirmed the trial court's suppression ruling. State v. Johnston, 64 Ohio App. 3d 238, *in passim* (Ct. App. 1990).

The State had nothing left. The advantage of having withheld evidence was gone – the defense now possessed the evidence contradicting the State's theory and pointing to a different perpetrator. Rine and Robbins were effectively precluded from testifying: Rine, because the hypnosis was suggestive and inappropriate and it tainted both his pre and post-hypnosis memory; and Robbins, because the boots, on which she would have had to rely in order to offer her fraudulent testimony about the position of Johnston's footprints, were now excluded from evidence. Thus, all the things that had made the State's ill-gotten victory possible in the first place were gone. The State, on May 11, 1990, indicated to the court that it could not proceed and the court dismissed the case. (App'x, Suhr Aff. at 115:¶¶ 33-35); (App'x, *Nolle Prosequi* 05/11/90 at 66). Later that evening, Johnston was released. (App'x, Suhr Aff. at 115:¶ 35).

Despite the glaring flaws in how he was convicted, affirmatively proving his innocence was, in the 90s, beyond Johnston's reach. In 1993, his first wrongful imprisonment action (which Johnston brought shortly after his release) ended with a finding that, though he satisfied

conditions one (1) through four (4) of Ohio Revised Code, section 2743.48, he had not successfully satisfied condition five (5). (App’x, Decision 08/09/93 at 67-68, 77). Or, to put it another way, Johnston did not, in 1993, prove his innocence by a preponderance of the evidence. Id. at 77.

However, in 2003, the Ohio Legislature amended section 2743.48 to provide an alternative cause of action – rather than proving innocence under condition five (5), a claimant could prove “error in procedure.” S.B. 149, 124th Gen. Assemb., Reg. Sess. (Ohio 2001) (effective date April 9, 2003). Then, in 2008-09, two men, Chester McKnight and Kenneth Linscott, were implicated in, and convicted of, the dismemberment-style murders for which Johnston was originally imprisoned. See, e.g., (App’x, McKnight Plea 12/18/08 at 90-92); (App’x, Linscott Plea 06/18/09 at 99-101). McKnight’s plea reads, “I [] admit that I am Guilty of the crimes of Aggravated Murder for the death of Todd Shultz and Margaret Cooper Johnston” Id. at 92. Kenneth Linscott pled guilty to abuse of a corpse in connection with the dismemberment. (App’x, Linscott Docket at 96-98); (App’x, Linscott Plea 06/18/09 at 99-101); (App’x, Linscott Sentencing 07/10/09 at 102-103). In light of the new “error in procedure” cause of action provided by the 2003 amendment and the obvious shift in equities created by the revelation of the true perpetrators, Dale Johnston, again brought suit to be declared wrongfully imprisoned.

He filed a complaint on December 19, 2008, in the Franklin County Court of Common Pleas. Comp., Johnston v. State, Case: 08CV18082 (D8541 N08-N10). But his then attorney, Robert Suhr, voluntarily dismissed on December 28, 2010. Dismissal, Johnston v. State, Case: 08CV18082 (E0653 O43). On December 22, 2011, Johnston refiled the action pursuant to

Ohio's one year savings statute. Comp., Johnston v. State, Case: 11CV15900 (E1428 S42-S44); see also Ohio Rev. Code § 2305.19(A) (2010).

In that new action, the State filed, on September 27, a motion for summary judgment. Mot. for SMJ, Johnston v. State, Case: 11CV15900 (0A708 O30-O44). Though the State was the movant, it attached no evidence of any kind to the motion. Id. Johnston responded and cross-moved for summary judgment, attaching exhibits A-Q. Resp. in Opp. & Cross-Mot. for SMJ, Johnston v. State, Case: 11CV15900 (0A737 Q05-Q78). The State responded in opposition and, again, attached no evidence of any kind to its filing. Resp. in Opp., Johnston v. State, Case: 11CV15900 (0A768 V65-V77). The Common Pleas Court denied the State's motion for summary judgment and granted summary judgment to Johnston. (App'x, Denial of Def. Mot. SMJ 10/25/12 at 117-123); (App'x, Grant of P. Mot. SMJ 10/31/12 at 124-134). An entry formally declaring Johnston a wrongfully imprisoned person was filed on November 13, 2012. (App'x, Final Judg. 11/13/12 at 135-139).

The State appealed on December 4. Not. of App., Johnston v. State, Case: 12AP1022 (0A010 G39-G40). The Tenth District Court of Appeals reversed the trial court on the purported basis that the wrongful imprisonment statute, as it existed at the time of Johnston's 2011 lawsuit, was not retroactive. Johnston v. State, 2014-Ohio-1452, *in passim* (Ct. App.). This appeal now follows.

ARGUMENT

FIRST PROPOSITION OF LAW – The Wrongful Imprisonment Statute was Retroactive from its First Passage in 1986 Until it was Amended in 2012 and was Retroactive at the Time Dale Johnston Brought Suit in 2011 Based Upon Errors in Procedure

2743.48 – Retroactive Since its Inception

Section 2743.48 first became effective in 1986. Sub. H.B. 609, 116th Gen. Assemb., Reg. Sess. (Ohio 1986). Prior to that time, if someone was wrongfully imprisoned, he or she lobbied

for recompense in the form of a special act of the General Assembly that authorized suit, for that person only, against the state of Ohio. Robin Yocum, Starting Over – Not Easy After Wrongful Conviction, Columbus Dispatch, Dec. 21, 1986, at 2E. Being an elected legislative body, the General Assembly was typically moved to pass special acts based on wrongful imprisonment only after much lobbying.

“It was tremendously unfair,” said Rep. Vernon L. Sykes, D-Akron. He sponsored a bill that made compensation automatic for anyone wrongfully imprisoned. Sykes’ bill became law Sept. 24. Before that law went into effect, a legislator had to sponsor a bill allowing the victim to sue the state, and the General Assembly had to pass the bill. The Court of Claims then decided how much money, if any, the person was entitled to.

Starting Over, Dispatch, Dec. 21, 1986, at 2E. Section 2743.48 was thus designed to provide relief to those who, before, at, or after, the time of its passage deserved relief but lacked the political clout to obtain it. Id. (“Once the state has verified a wrongful imprisonment, the judgment is automatic.”).

Enacted to remedy past and future injustice, section 2743.48 was intended to have retroactive reach. As originally enacted in 1986, it applied to anyone who was, “**prior to**, or on or after the effective date of this section” subjected to certain conditions. Ohio Rev. Code § 2743.48(A)(1) (1986) (emphasis added). In fact, recognizing that it was to be a replacement for the individual lobbying process that preceded it and afford justice to those who had not successfully lobbied the legislature, the first enactment of section 2743.48 excluded from its ambit, only persons who had been, “prior to the effective date of this section, the subject of an act of the General Assembly that authorized an award of compensation for [their] wrongful imprisonment” Ohio Rev. Code § 2743.48(H) (1986). In the first instance, in 1986, section 2743.48 was intended to be retroactive.

When it was first amended, effective in 1989, the Legislature reaffirmed the retroactivity of section 2743.48 when it modified parts (A)(1) and (H) to refer to the effective date of the original enactment as “September 24, 1986” rather than “the effective date” but otherwise left the retroactivity language unaltered. Ohio Rev. Code § 2743.48(A)(1), (H) (1989). That is, under the 1989 amendment, (A)(1) changed from “**prior to**, or on or after the effective date of this section . . .” to “**prior to**, or on or after September 24, 1986” Compare Ohio Rev. Code § 2743.48(A)(1) (1986) (emphasis added) with Ohio Rev. Code § 2743.48(A)(1) (1989) (emphasis added). Part (H) was similarly altered:

a wrongfully imprisoned individual shall not have been, prior to ~~the effective date of this section~~ September 24, 1986, the subject of an act of the general assembly that authorized an award of compensation for the wrongful imprisonment

Compare Ohio Rev. Code § 2743.48(H) (1986) with Ohio Rev. Code § 2743.48(H) (1989). In 1989, the statute was still retroactive.

The statute was again amended, effective in 1994, but no changes were made other than to change “state penal or reformatory institution” to “state correctional institution” wherever it occurred. H.B. 571, 120th Gen. Assemb., Reg. Sess. (Ohio 1993-1994). The statute was still retroactive in 1994.

In 2003, the statute was amended again. S.B. 149, 124th Gen. Assemb., Reg. Sess. (Ohio 2001). Under the 1986, 1989, and 1994 versions, section 2743.48 had required a would-be claimant prove that “the offense of which he was found guilty, including all lesser-included offenses, either was not committed by him or was not committed by any person.” Ohio Rev. Code § 2743.48(A)(4) (1986); Ohio Rev. Code § 2743.48(A)(5) (1989); Ohio Rev. Code § 2743.48(A)(5) (1994). However, in 2003, the General Assembly amended section 2743.48 to add an alternative means of recovery. Effective April 9, 2003, Senate Bill 149 amended section 2743.48 as follows:

Subsequent to his sentencing and during or subsequent to his 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 ~~he~~the individual was found guilty, including all lesser-included offenses, either was not committed by ~~him~~the individual or was not committed by any person.

Compare Ohio Rev. Code § 2743.48(A)(5) (1994) with Ohio Rev. Code § 2743.48(A)(5) (2003); see also S.B. 149, 124th Gen. Assemb., Reg. Sess. (Ohio 2001). This created a new cause of action – an alternative way of being declared wrongfully imprisoned. Nelson v. State, 2007-Ohio-6274, ¶ 30 (Ct. App.) (recognizing that the 2003 amendment “created” a new cause of action). Rather than proving innocence, a claimant could prove that “an error in procedure resulted in [his or her] release” Ohio Rev. Code § 2743.48(A)(5) (2003). However, the 2003 amendment, which added the “error in procedure” language, wrought absolutely no changes to the retroactivity language in section 2743.48. Compare Ohio Rev. Code § 2743.48(A)(1) (2003) with Ohio Rev. Code § 2743.48(A)(1) (1986, 1989, 1994) (the only changes from 1986 to 2003 were as follows: “~~He~~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, ~~the effective date of this section~~September 24, 1986, and the violation charged was an aggravated felony or felony.”).³ After the 2003 amendment, which created the cause of action on which Johnston relies, the statute was still retroactive.

Effective in 2010, the statute was amended again. H.B. 338, 128th Gen. Assemb., Reg. Sess. (Ohio 2009). This amendment altered no text that is at issue in this litigation and again, reenacted the retroactivity language. Id. The statute remained retroactive in 2010.

In other words, Ohio's wrongful conviction statute applied, from the time it was first enacted to the filing of the instant lawsuit to anyone who was, “prior to, or on or after, September

³ ~~Struck through~~ text was subtracted and underlined text was added in 2003. ~~Double struck through~~ text was subtracted and double underlined text was added in 1989.

24, 1986, [the effective date of the section,]” subjected to certain conditions. Ohio Rev. Code § 2743.48(A)(1) (1986-2010). Indeed, not until an amendment in 2012, did the legislature finally remove the retroactivity language from section 2743.48:

(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.

H.B. 487, 129th Gen. Assemb., Reg. Sess. (Ohio 2011-2012). However, recognizing the historical background of the statute, the legislature left intact the prohibition on recovery by persons who were “prior to September 24, 1986, the subject of an act of the general assembly that authorized an award of compensation for the wrongful imprisonment” Ohio Rev. Code § 2743.48(H) (2012). This case, which was first filed in 2008 and then refiled in 2011, was filed before the legislature acted to remove the retroactivity language from the statute. Comp., Johnston v. State, Case: 08CV18082 (D8541 N08-N10); Dismissal, Johnston v. State, Case: 08CV18082 (E0653 O43); Comp., Johnston v. State, Case: 11CV15900 (E1428 S42-S44).

By its own terms then, the statute, both before and after the 2003 amendment which added the “error in procedure” cause of action, was retroactive and that should end the analysis. “The first rule of statutory construction is to look at the statute’s language to determine its meaning. If the statute conveys a clear, unequivocal, and definite meaning, interpretation comes to an end, and the statute must be applied according to its terms.” Columbia Gas Transmission Corp v. Levin, 117 Ohio St. 3d 122, 2008-Ohio-511, 882 N.E.2d 400, at ¶ 19. However, even if one looks to the uncodified legislative notes accompanying the 2003 amending act, as the Tenth District improperly did, the statute still clearly applies to Johnston. Johnston, 2014-Ohio-1452, at ¶ 27.

Uncodified Language, Even if Considered, does not Alter the Analysis

The 2003 amending act accomplished two substantive tasks: It inserted language regarding errors in procedure applicable to persons attempting to obtain a declaration of wrongful imprisonment status in the Court of Common Pleas and it changed the statutory compensation due to wrongfully imprisoned persons engaged in proceedings in the Court of Claims. S.B. 149, 124th Gen. Assemb., Reg. Sess. (Ohio 2001). In the notes, the legislature addressed the scope of the amendment on actions in the Court of Claims:

Section 3. Sections 117.52, 2743.48, and 2743.49 of the Revised Code, as amended or enacted by this act, apply to civil actions for wrongful imprisonment in the Court of Claims commenced on or after the effective date of this act, or commenced prior to and pending on the effective date of this act.

Id. In other words, if a claimant was in the Court of Claims at the time of the amendment or if the claimant would enter the Court of Claims after the amendment, the new compensation amounts and calculation methods would apply. Johnston, if he ultimately prevails in this case, will enter the Court of Claims after 2003, and thus falls within the ambit of the change made by the legislature.

Section 3's function, in short, was to clarify that those who had already recovered from the Court of Claims were not eligible to come back to the Court of Claims for more money but that those who had yet to enter the Court of Claims, or who had already entered the Court of Claims but who had yet to recover, were entitled to the new amounts. Section 3 confines itself, however, to discussing the applicability of the law changes to those in the Court of Claims. It says nothing, whatsoever, about the Court of Common Pleas and does not place any limitation on the statute's applicability to persons suing for a declaration in the Court of Common Pleas. Id. in passim. Thus, the retroactivity language, which was a part of the statute since it was first passed in 1986, and continued to be a part of the statute until 2012 (long after this case was filed),

continued to make the statute retroactive in its application to claims brought before the Court of Common Pleas.

The Tenth District Panel Misunderstood the History of Wrongful Imprisonment Compensation in Ohio

Despite the clear history of retroactivity for section 2743.48, the Tenth District held in this case, that the “error in procedure” avenue of recovery was not retroactive and that Johnston, whose unjust journey through the prison system ended in 1990, could not bring a claim for relief based upon it. That is, the Tenth District interpreted section 2743.48(H) as excluding everyone who, prior to September 24, 1986, was wrongfully imprisoned and therefore “the subject of an act authorizing compensation for wrongful imprisonment” Johnston, 2014-Ohio-1452, at ¶ 24. That is to say, the divided panel apparently believed that there was a generally applicable wrongful imprisonment predecessor to section 2743.48 and that anyone “subject” to it (i.e., anyone wrongfully imprisoned prior to 1986), was excluded from recovery under section 2743.48(H). Id. Demonstrating this belief, the divided panel remarked, “Persons the subject of an act authorizing compensation for wrongful imprisonment prior to September 24, 1986, would be those persons who had been wrongfully imprisoned at that time.” Id. However, as explained above, this was not the case. Prior to the enactment of section 2743.48 in 1986, if someone was wrongfully imprisoned, he or she went before the General Assembly and lobbied for recompense in the form of a *special* act of the General Assembly that authorized suit *for that person only* against the state of Ohio. Starting Over, Dispatch, Dec. 21, 1986, at 2E. No one, in other words, except those few successful lobbyists, was, prior to September 24, 1986 “the subject of an act authorizing compensation for wrongful imprisonment” Ohio Rev. Code § 2743.48(H) (2010).

That the divided panel made this error is particularly puzzling since the Tenth District has previously recognized the history of wrongful imprisonment prior to the first enactment of section 2743.48. “Prior to 1986, a person who had been wrongfully imprisoned in Ohio could receive compensation for that wrongful imprisonment only if the General Assembly enacted a law specifically providing for payment of compensation to that named individual, i.e., enactment of ‘*ad hoc* moral claims legislation.’” Hill v. State, 2013-Ohio-1968, at ¶ 10 (Ct. App.).

The divided Tenth District panel incorrectly concluded that section 2743.48, as originally enacted, was not retroactive because it excluded everyone who had been living under a prior, generally applicable act. Johnston, 2014-Ohio-1452, at ¶ 24. However, it ignored the fact (previously explicitly recognized by the Tenth District) that there was no generally applicable prior act – only individual acts passed as to particular individuals. Thus, the vast majority of people who were wrongfully imprisoned prior to 1986 were not excluded because most people did not have the resources or political will to lobby the legislature for an individual bill. Though the rare individual who was successful in lobbying the legislature certainly was excluded from a second recovery by the language of section 2743.48(H), everyone else was included – *exclusio unius est inclusio alterius*.

The Panel Decision Violated Established Principles of Statutory Construction

The second mistake the divided Tenth District panel made in holding that section 2743.48 was not retroactive was one of statutory interpretation. The Tenth District has, itself, remarked, “In enacting a statute, it is presumed that * * * [a] just and reasonable result is intended.” State ex rel. Jefferson Smurfit Corp. v. Indus. Comm., 2010-Ohio-3521, at ¶ 34 (Ct. App.) (quoting Mishr v. Bd. of Zoning App. of Village of Poland, 76 Ohio St. 3d 238 (1996)) (citing Ohio Rev. Code § 1.47(C) (1972)). Moreover, in Wright v. State, it concluded that section 2743.48 is a remedial statute and therefore, pursuant to Ohio Revised Code, section 1.11, is to be “liberally

construed in order to promote [its] object and assist the parties in obtaining justice.” 69 Ohio App. 3d 775, 780 (Ct. App. 1990); see also, e.g., State v. Moore, 165 Ohio App. 3d 538, 2006-Ohio-114, 847 N.E.2d 452, at ¶ 21.

The wrongful imprisonment statute read, at the time this case was filed:

- (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.

Ohio Rev. Code § 2743.48 (2010).

The divided Tenth District panel, held that “the application of the phrase ‘prior to, or on or after’ is clearly limited to R.C. 2743.48(A)(1).” Johnston, 2014-Ohio-1452, at ¶ 22. That is, under the divided panel’s reading, the statute has a retroactive reach only to persons who were indicted or charged prior to September 24, 1986. Hence, if a person were indicted or charged

prior to 1986, they could only recover if they were also found guilty and sentenced (as required in subsequent parts, 2743.48(A)(2-3)) *after* 1986. If they were instead “found guilty” or “sentenced” before September 24, 1986, they would be out of luck because the retroactivity statement, under the panel’s reading, supposedly only applies to part (A)(1). In other words, the panel’s interpretation would accord the statute retroactive effect only to the tiny handful of people who were indicted or charged prior to September 1986 but not found guilty or sentenced until after September 1986. Is this the “reasonable result” or “liberal[] constru[tion]” that the law of Ohio requires when interpreting section 2743.48? Jefferson, 2010-Ohio-3521, at ¶ 34; Wright, 69 Ohio App. 3d at 780; Ohio Rev. Code § 1.47. Does this seem calculated to create “[a] just and reasonable result” or “to promote the[] object [of section 2743.48] and assist the parties in obtaining justice?” Id.

And what would be a just result here? Johnston spent nearly seven years on death row. While imprisoned, his house burned down, his wife divorced him, and his surviving child was taken by children’s services. (App’x, Dispatch Art., “New Trial for Johnston” at 36). And we now know, beyond a shadow of a doubt, that Johnston did not commit the murders for which he was convicted and placed on death row. The real killer has confessed, been convicted, is, right now, in prison, and the record contains a certified copy of the paperwork associated with that. (App’x, McKnight Plea 12/18/08 at 90-92); (App’x, McKnight Sentencing 01/26/09 at 93-95). How, under these circumstances does the parsimonious construction preferred by the divided panel create a “just” result in this case or “promote the[] object” of a statute intended to compensate the wrongfully imprisoned? Jefferson, 2010-Ohio-3521, at ¶ 34; Wright, 69 Ohio App. 3d at 780; Ohio Rev. Code § 1.47.

The divided panel's construction in this case is not liberal, does not produce a reasonable or just result, and does not promote the object of the statute. As such, the construction preferred by the panel in this case directly conflicts with the rules of statutory construction common to Ohio courts and adopted by the Tenth District itself.

The Result of the Panel's Decision is that Almost Every Wrongful Imprisonment Recovery in Ohio History was Incorrectly Awarded

The third problem with the Tenth District's reasoning in this case is that it would mean that almost every wrongful imprisonment award in Ohio history was incorrectly awarded. That is, the divided panel's decision in this case is that section 2743.48, as amended in 2003, has no clear proclamation of retroactivity and thus, is not retroactive. Johnston, 2014-Ohio-1452, at ¶¶ 21-24. That is, the retroactivity statement in section 2743.48(A)(1), according to the panel, applied only to (A)(1)'s language regarding the individual having been charged or indicted – not to the other requirements of the statute (like being found guilty and sentenced). Id. at ¶¶ 21-22. And the retroactivity statement in section 2743.48(H) is not, according to the panel, a retroactivity statement at all. Id. at ¶¶ 23-24. However, since the statute's language in parts (A)(1) and (H) changed little from 1986 to when this case was filed in 2011, this also means that the panel effectively concluded that section 2743.48 was never retroactive. Compare Ohio Rev. Code § 2743.48(A)(1), (H) (1986) with Ohio Rev. Code § 2743.48(A)(1), (H) (2010); see also *supra* pp. 7-11; (App'x, Section 2743.48 (1986-2012) at 158-197).

But if the panel's reading were correct, surely Ohio decisions would frequently reject claims brought by persons who were found guilty and sentenced prior to 1986 on the basis that the statute was not retroactive. In fact, however, this has never happened before now. In the 146 Ohio decisions since the wrongful imprisonment statute was enacted in 1986, not a single one (besides the decision now appealed) has ever rejected a claim because the statute cannot

retroactively apply to a person who was found guilty and sentenced before 1986 or the effective date of any amendment.⁴ In fact, even Johnston's first wrongful imprisonment case in the 90s was heard on the merits – not dismissed – even though Johnston was originally “found guilty” and “sentenced” in 1984. (App'x, Verdict 01/28/84 at 10-11); (App'x, Sentence 03/23/84 at 12); (App'x, Decision 08/09/93 at 67-77). Ohio history, moreover, is replete with incidents of persons receiving wrongful conviction awards for imprisonments where they were “found guilty” and “sentenced” before 1986. See, e.g., James Nash, Man gets \$237,885 for his time, Columbus Dispatch, Aug. 13, 2010 at 1B (man who was imprisoned in 1983 recovers under wrongful imprisonment statute); Alan Johnson, \$1.5 million for freed man - Settlement finishes case of 2 innocent men who spent decades in prison, Columbus Dispatch, May 18, 2007 at 01B (man who was convicted, sentenced, and imprisoned in 1977 recovers under wrongful imprisonment statute); Alan Johnson, Man gets payback for years in prison - 26-year wrongful imprisonment leads to Ohio's top settlement, Columbus Dispatch, April 22, 2006 at 01A (another man who was convicted, sentenced, and imprisoned in 1977 recovers under wrongful imprisonment statute); STATE TO PAY MAN \$365,000 IN FALSE RAPE CONVICTION, Columbus Dispatch, Dec. 14, 1990 at 05D (man who was convicted and sentenced in 1982 recovers under wrongful imprisonment statute). Under the panel's interpretation, none of these people should have seen a cent – every one of them relied on the retroactive application of section 2743.48 to the address wrongs that had occurred prior to the enactment of the statute.

In fact, the Tenth District, in Nelson v. State, confronted a case procedurally on all fours with this one, and twice ruled in favor of the claimant. Nelson v. State, 183 Ohio App. 3d 83,

⁴ As of August 17, 2014, the Shepard's report for Ohio Revised Code, section 2743.48 shows 219 cites, 146 of which are Ohio courts and none, except this, holds that section 2743.48 does not have retroactive effects.

2009-Ohio-3231, 915 N.E.2d 729; Nelson v. State, 10AP-385 (Ohio Ct. App. Sept. 14, 2010). Nelson had been convicted and imprisoned in the 90s. Nelson, 2009-Ohio-3231, at ¶¶ 2-7. Then, after the 2003 amendment, he brought a wrongful imprisonment action based on the “error in procedure” option. Id. at ¶¶ 8-9. The Tenth District heard two appeals from that case, one of which challenged the validity of the section 2743.48 both on its face and as applied to Nelson. Nelson, 10AP-385 (Ohio Ct. App. Sept. 14, 2010) (reversing a decision of the Court of Claims finding 2743.48 vague); Nelson, 2009-Ohio-3231. In neither case did the Tenth District mention that the 2003 “error in procedure” amendment was prospective only in its application and therefore warranted dismissal of Nelson’s case because Nelson’s conviction and errors in procedure occurred in the 90s. Nelson, 2009-Ohio-3231; Nelson, 10AP-385 (Sept. 14, 2010). In fact, in both cases the District allowed Nelson to continue the litigation and he eventually recovered from the State of Ohio under the “error in procedure” portion of the statute. Nelson v. State, 2011-Ohio-4843, at ¶¶ 37-41 (Ct. Cl. Aug. 4, 2011).⁵

Nelson may not have squarely addressed retroactivity, but its existence and ultimate result are in direct conflict with the divided panel’s decision now being appealed – as is every other case in Ohio history where a claimant has recovered who was imprisoned before 1986.

SECOND PROPOSITION OF LAW – Johnston was not Barred by Either Issue or Claim Preclusion from Relitigating his Status as a Wrongfully Imprisoned Person Because the Trial Court, in 1993, Decided only that he had Failed to Prove his Innocence – it Did not Decide (and Could not, Under the Statutory Framework then Existing, have Decided) Whether Johnston Proved Errors in Procedure

Issue Preclusion

The doctrine of issue preclusion, also known as collateral estoppel, holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be

⁵ Note: Available through the Ohio Supreme Court website via the following link:
<http://www.supremecourt.ohio.gov/rod/docs/pdf/13/2011/2011-ohio-4843.pdf>

drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different.

State ex rel. Stacy v. Batavia Local Sch. Dist. Bd. of Educ., 97 Ohio St. 3d 269, 2002-Ohio-6322, 779 N.E.2d 216, at ¶ 16. In fact:

[T]he Ohio Supreme Court has held that “an absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action.”

State ex rel. Davis v. Public Emp.’s Ret. Bd., 174 Ohio App. 3d 135, 2007-Ohio-6594, 881 N.E.2d 294, at ¶ 31 (quoting Goodson v. McDonough Power Equip., Inc., 2 Ohio St. 3d 193, 201 (1983)).

In a prior wrongful imprisonment action in 1993, both Johnston and the State were parties to the litigation. In that case, what was “actually and directly at issue” and “essential to the judgment” was whether Dale Johnston could prove the elements of a wrongful conviction claim as they existed then. On that topic, the court opined as follows:

R.C. 2743.48 governs actions against the State for wrongful imprisonment. To recover, a plaintiff must prove that he was convicted of, but did not plead guilty to, an aggravated felony or felony; that he was sentenced to an indefinite term of imprisonment; that his conviction was vacated, dismissed or reversed on appeal; that no further prosecution can or will be brought, and, finally that the crimes he was convicted of were not committed by him. R.C. 2743.48.

On January 31, 1984 a three-judge panel found plaintiff guilty of two counts of aggravated murder with death penalty specifications. Following a mitigation hearing the panel sentenced plaintiff to death. On August 6, 1986, the Court of Appeals reversed the convictions and remanded the case for a new trial. The Supreme Court of Ohio affirmed the Court of Appeals decision, although for somewhat different reasons. State v. Johnson[sic] (1988), 39 Ohio St. 3d 48.

The new trial was moved to Franklin County, Ohio. There the trial court granted Johnson’s[sic] motion to suppress and the Court of Appeals affirmed. State v. Johnson[sic] (1990), 64 Ohio App. 3d 261. Thereafter the motion of the Hocking County Prosecuting Attorney to dismiss the case was granted by the court.

This court has previously found that “no criminal proceeding . . . can be brought or will be brought by any prosecuting attorney . . .” against this defendant[sic]. R.C. 2943.48(A)(4)[sic].

The remaining issue is whether the plaintiff has proven that the homicides for which he was convicted were not committed by him. R.C. 2943.48(A)(5)[sic]. Plaintiff must prove that he did not commit the murders by a preponderance of the evidence. Walden v. State (1989), 47 Ohio St. 3d 47.

(App'x, Decision 08/09/93 at 67-68).

In other words, the trial court in the 1990s found that Johnston satisfied the first four elements of section 2743.48 (which, incidentally, is another reason why the Tenth District was wrong to conclude the purported non-retroactivity of the statute prevents Johnston from satisfying any part of the statute except 2743.48(A)(1)). What remained in question, however, was whether Johnston had proven his innocence. That court (considering the case 18 years before the real killers were unmasked) ultimately ruled that he had not done so. (App'x, Decision 08/09/93 at 77). But that court never considered or decided whether Johnston could show that an error in procedure resulted in his release. Indeed, the court would have had no reason to consider such a question, since the law that would provide that cause of action would not be enacted until a decade later, in 2003.

Claim Preclusion

The above observation also explains why claim preclusion (or, *res judicata*) does not bar this action. One Ohio court of appeals explained the law controlling the matter thus:

To the extent the trial court ruled that the doctrine of *res judicata* was inapplicable to [Plaintiff]'s claim . . . because he never alleged this claim in the first action, we disagree with the trial court's reasoning. It is irrelevant whether [Plaintiff], in fact, alleged [the] claim in the first action--he did not--the question for purposes of *res judicata* is whether he could have alleged the claim. Whether [Plaintiff] could have alleged the claim depends upon whether the claim arose out of the "transaction or occurrence that was the subject matter of the previous action." "Transaction" is defined as a "common nucleus of operative facts."

Yeager v. Carpenter, 2010-Ohio-3675, at ¶ 27 (Ct. App.) (citations omitted) (quoting Grava v. Parkman Twp., 73 Ohio St. 3d 379, 382 (1995)) (citing Restatement (Second) of Judgments § 24, cmt. b (1982)).

Johnston could not have alleged, in the 1990's wrongful imprisonment action, that an error in procedure resulted in his release and, therefore, that he was a wrongfully imprisoned person. That avenue of recovery had not yet been created and the facts essential for that inquiry do not comprise the same nucleus as those comprising the innocence claim. As the trial court put it in this case:

Although here the state argues that Johnston's wrongful imprisonment constitutes the "common nucleus of operative facts" necessary to trigger *res judicata* and foreclose his claim, this court disagrees. Instead, the operative facts that must be considered now concern whether "an error in procedure resulted in the individual's release." That new statutory test is the "nucleus of operative facts" and it did not exist until 2003. Only if Johnston had enjoyed an opportunity to litigate over those facts would claim preclusion apply.

Opinion at 7, Johnston v. State, 08CV18082 (E0321 U8-U18).

Moreover, this Court has explained that *res judicata* is not to be invoked in order to protect wrongdoing. This Court said:

[R]es judicata is not a shield to protect the blameworthy. The doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time, but rather a rule of fundamental and substantial justice, or public policy and of private peace. The doctrine may be said to adhere in legal systems as a rule of justice. Hence, the position has been taken that the doctrine of *res judicata* is to be applied in particular situations as fairness and justice require, *and that it is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice.*

Davis v. Wal-Mart Stores, Inc., 93 Ohio St. 3d 488, 491 (2001) (emphasis original) (citations omitted) (internal quotation marks omitted). The State violated Johnston's rights and, by virtue of those rights violations, sent an innocent man to death row. Now, decades later, it seeks to invoke *res judicata* to foreclose a claim that the innocent victim could never have brought when he first litigated against the State over 20 years ago in order to shield itself from liability for its misdeeds. This, as this Court has explained, is not the purpose of *res judicata*.

CONCLUSION

It is public knowledge, at this point, that Johnston's life was destroyed over a crime he did not commit. A non-fiction book, Guilty by Popular Demand, published by the Kent State University Press, details, for all the world to see, the horrible framing and wrongful conviction that Johnston suffered at the hands of this State – a book that the Columbus Dispatch recognized was devoid of factual missteps or unsupported statements and “rock solid” in its conclusions. Veteran reporter revisits case, Columbus Dispatch, Aug. 12, 2012 at 4E; Guilty By Popular Demand. The Dispatch, moreover, has publicly recognized that “Johnston, who now lives in Grove City, finally was exonerated beyond any doubt. But he has received neither an apology nor one penny for the wrongful imprisonment.” Veteran reporter revisits case, Columbus Dispatch, Aug. 12, 2012 at 4E. Moreover, as discussed above, we know that Johnston did not commit these murders – the real killer, having confessed and pled guilty, is in prison right now. (App'x, McKnight Plea 12/18/08 at 90-92); (App'x, McKnight Sentencing 01/26/09 at 93-95).

Under these circumstances, failing to address the merits of this case and bending over backwards to adopt a miserly reading of this statute that abandons sense, conflicts with decisions from courts throughout Ohio as well as the very history of wrongful imprisonment recovery, perpetrates a monstrous inequity and makes the Tenth District complicit in one of the most well-documented miscarriages of justice in Ohio history. Reversal is not only necessary because the Tenth District decision is erroneous, but it is necessary to preserve the reputation for justice that the Ohio courts have elsewhere earned.

August 29, 2014

Respectfully submitted,

Todd A. Long, Counsel of Record


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DALE N. JOHNSTON

CERTIFICATE OF SERVICE

I certify that the Appellant's Brief and Appendix were filed with the Ohio Supreme Court and copies of the same were sent by U.S. Postal Service First Class Mail to counsel for appellee, Eric E. Murphy, State Solicitor, Office of the Ohio Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215 on August 29, 2014.


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DALE N. JOHNSTON

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09/30/83	(App'x, Dispatch Art., "Death to be Asked" at [page]).	Dispatch article chronicling indictment and arrest of Dale Johnston	10/11/12, Ex. B to P. Cross-Mot. for SMJ.	8
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2003-2010	Not Cited. For reference only.	Changes in Ohio Revised Code, section 2743.48 from 2003 to 2010.	N.A.	182-185
2010	N.A.*	Ohio Revised Code, section 2743.48 as amended in 2010.	N.A.	186-189
2010-2012	Not Cited. For reference only.	Changes in Ohio Revised Code, section 2743.48 from 2010 to 2012.	N.A.	190-193
2012	N.A.*	Ohio Revised Code, section 2743.48 as amended in 2012.	N.A.	194-197