

ORIGINAL

In the  
Supreme Court of Ohio

DALE JOHNSTON,

Plaintiff-Appellant,

v.

STATE OF OHIO,

Defendant-Appellee.

Case No. 2014-0530

On Appeal from the  
Franklin County  
Court of Appeals,  
Tenth Appellate District

Court of Appeals  
Case No. 12-AP-01022

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**MERIT BRIEF OF DEFENDANT-APPELLEE STATE OF OHIO**

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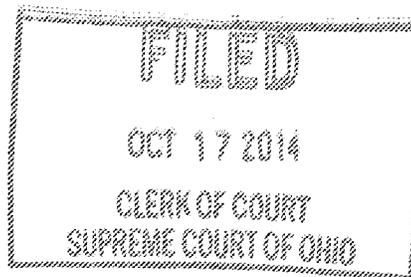
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## INTRODUCTION

Nearly a quarter-century ago, Appellant Dale Johnston sued the State under R.C. 2743.48(A) for wrongful imprisonment. Johnston had been convicted of the aggravated murders of his stepdaughter and her fiancé, but the conviction had been set aside on appeal. The court of common pleas denied Johnston's request for relief in that wrongful-imprisonment suit, finding that Johnston failed to prove that he was actually innocent of the murders as R.C. 2743.48(A)(5) required. Johnston's wrongful-imprisonment claim long ago reached a final judgment. Now, pointing to a 2003 statutory amendment to R.C. 2743.48(A)(5), Johnston argues that he deserves a rematch because that amendment retroactively rejuvenates his once-rejected wrongful-imprisonment claim. He is wrong for three reasons.

*First*, Johnston mistakenly asks this Court to read an *ordinary* statutory amendment to the wrongful-imprisonment statute as codifying an *unprecedented* legislative choice. He says that the amendment retroactively permits claimants to bring the *same* wrongful-imprisonment claims arising out of the *same* prior convictions that have already been rejected in prior cases that have reached *final judgments*. Yet “[i]t is well settled that a legislature cannot enact laws that revisit a final judgment.” *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424 ¶ 55. That is because legislative efforts to alter final judgments raise grave separations-of-powers concerns. *See id.* And “[t]here is no exception to [this] rule . . . in situations where the Legislature has enacted new legislation.” *Id.* ¶ 56 (citation omitted). Instead, R.C. 1.58 adopts the presumption that a later “amendment” does not affect a prior law’s operation or an “action” taken under the prior law before the amendment’s effective date. *See* R.C. 1.58(A); *cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995) (“Apart from the statute we review today, we know of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation.”).

This presumption applies here. Johnston seeks to relitigate the same wrongful-imprisonment claim arising out of the same prior conviction that he previously litigated to a final judgment (and lost) years ago. Yet no language in the 2003 amendment to the wrongful-imprisonment statute offers even a hint that the General Assembly intended to give all claimants who lost wrongful-imprisonment claims a second bite at the apple by effectively rendering their prior final judgment null and void. To the contrary, Section 3 of the amendment states that the amendment applies only to claims filed or pending in the court of claims after the effective date, necessarily excluding claims that reached final judgment before then. *See* 2002 Ohio Laws 3545, 3551 (Sub. S.B. 149). In short, because the amendment does not show a clear intent to cover claims already litigated to final judgment, it can only be read to exclude those claims.

*Second*, Johnston's action fails because it is barred by the doctrine of claim preclusion. Claim preclusion prevents parties who have had their day in court from bringing a new action based on the same underlying facts as the first action. In *Grava v. Parkman Twp.*, 73 Ohio St. 3d 379 (1995), the Court "adopted an expansive view of claim preclusion" that asked whether later claims were based on the same facts as the earlier action. *Holzemer v. Urbanski*, 86 Ohio St. 3d 129, 133 (1999). Once a plaintiff brings an action, the plaintiff may not later bring other actions arising out of the same facts. *See id.* Under Ohio's claim-preclusion doctrine, then, Johnston's unsuccessful wrongful-imprisonment action arising out of his imprisonment for the murders of his stepdaughter and her fiancé bars this action based on the same conviction.

The 2003 amendment to R.C. 2743.48(A)(5) in no way undermines the preclusive effect of Johnston's earlier action. Both in Ohio and around the nation, "the general rule is that a change in the statutory or case law will not alter the claim preclusion effect of a prior judgment." 18 James Wm. Moore et al., *Moore's Federal Practice* § 131.21[2] (3d ed. 2014). A statutory

change is not a call for a do-over. Though Ohio recognizes an “extremely narrow” exception to this general rule for “fundamental change[s]” like alterations to “school desegregation and racial discrimination” law, *Phung v. Waste Mgmt., Inc.*, 71 Ohio St. 3d 408, 413 (1994), that exception cannot be said to apply to a routine change in the elements of a wrongful-imprisonment claim.

*Third*, and perhaps most obviously given the Court’s recent guidance in this area, the plain language of the 2003 statutory amendment does not apply to Johnston. When the General Assembly initially adopted the wrongful-imprisonment statute, it required a claimant to prove, among other things, that the claimant did not factually commit the charged offense. Johnston failed to meet his burden to do so decades ago. He now claims a stronger basis for factual innocence, as others have since confessed to the crimes. But because he already lost his case, he seeks to revive his claim by using a different theory under a new part of the law added to the statute in 2003. In that year, the General Assembly permitted an alternative theory of recovery: A claimant could prevail by proving not that the claimant was actually innocent but that “[s]ubsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the [claimant’s] release” from prison. R.C. 2743.48(A)(5). In this, Johnston’s second wrongful-imprisonment action, he claims that the error-in-procedure amendment entitles him to the compensation that he did not obtain decades ago.

To allow Johnston to recover now, however, would give R.C. 2743.48(A)(5) a greater reach retroactively than it has prospectively. Earlier this year, the Court established the rule that claimants can recover under the “error in procedure” amendment only when the claimed error “occurred subsequent to sentencing and during or subsequent to imprisonment.” *Mansaray v. State*, 138 Ohio St. 3d 277, 2014-Ohio-750 syl. Claimants cannot recover “when a conviction is reversed based on a procedural error that occurred *prior to sentencing*.” *Id.* ¶ 10 (emphasis

added). But that is what Johnston seeks here, basing his renewed wrongful-imprisonment claim on two errors occurring *before* sentencing: the trial court improperly admitted certain testimony, and the State withheld exculpatory evidence. Those pre-sentencing trial errors do not meet the statutory requirements of R.C. 2743.48(A)(5) as interpreted by *Mansaray*, and thus Johnston's once-rejected wrongful-imprisonment claim must be rejected again.

Put simply, twenty-four years ago Johnston unsuccessfully sought compensation on the ground that he qualified as a wrongfully imprisoned individual. Nothing about the intervening amendment to the wrongful-imprisonment statute shows an unprecedented legislative intent to reopen that final judgment, undermines the prior judgment's claim-preclusive effect, or illustrates that Johnston is now entitled to wrongful-imprisonment compensation under the amended provision. Thus, the Court should affirm the Tenth District's judgment below.

#### STATEMENT OF THE CASE AND FACTS

In 1990, Dale Johnston sued the State of Ohio seeking compensation as a "wrongfully imprisoned individual" under R.C. 2743.48(A). Johnston had been convicted of the aggravated murders of his stepdaughter and her fiancé, but his conviction was overturned on appeal and the Hocking County Prosecutor chose not to retry him. In his 1990 wrongful-imprisonment suit, Johnston's claim failed. In 2008, he sued for wrongful imprisonment again, seeking compensation for the same period of imprisonment based on the same prior conviction. The Tenth District rejected Johnston's claim.

- A. The General Assembly initially authorized wrongful-imprisonment compensation for individuals who could prove that they were actually innocent, and later opened the door to those for whom post-sentencing errors resulted in their release.**

At common law, wrongfully imprisoned individuals had no right of action against the State. *Johns v. State*, 67 Ohio St. 2d 325, 328 (1981). Prisoners could sue the State only if they convinced the General Assembly to enact special "moral claims" legislation authorizing them to

sue for damages. *Walden v. State*, 47 Ohio St. 3d 47, 49 (1989); see *Spitzig v. State ex rel. Hile*, 119 Ohio St. 117, 123 (1928) (approving this practice). Who should be compensated and how much they should recover proved difficult questions for the General Assembly. Without consistent standards, this system of relying on the General Assembly in each case led to “widely disparate judgments.” Legislative Budget Office Fiscal Note of Sub. H.B. 609, 116th General Assembly, As Enacted, at 1 (June 3, 1986) (“H.B. 609 Fiscal Note”).

Accordingly, in 1986, the General Assembly enacted R.C. 2743.48, which established a general cause of action for wrongful imprisonment. See 1986 Ohio Laws, pt. III, 5351 (Sub. H.B. No. 609). The new statute, which would be administered by the courts, “eliminate[d] the need for the General Assembly to consider and enact distinct moral claims bills” for unlawfully detained prisoners. H.B. 609 Fiscal Note, at 1. As amended in 1989, the statute required a claimant to meet five 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; (4) that the individual’s conviction was overturned and “no criminal proceeding is pending, can be brought, or will be brought,” and (5) that the offense “either was not committed by him or was not committed by any person.” R.C. 2743.48(A).

The statute bisects “wrongful imprisonment” proceedings into a liability phase and a damages phase. A claimant first initiates a civil action in the court of common pleas that heard the underlying criminal action. R.C. 2743.48(B)(1). If that court determines that the claimant meets the statutory requirements in R.C. 2743.48(A), it enters a declaration that the claimant is a “wrongfully imprisoned individual” within the meaning of the statute. R.C. 2743.48(A), (B)(1). Declaration in hand, the claimant then can sue in the court of claims. R.C. 2743.48(B)(2),

(H)(2). That court calculates the extent of the claimant's injury and awards damages. R.C. 2743.48(E)-(F).

When the General Assembly enacted R.C. 2743.48 and amended it in 1989, it aimed to solve the “narrow legal problem” of compensating “innocent persons who have been wrongfully convicted.” *Bennett v. Ohio Dep't of Rehab. & Corr.*, 60 Ohio St.3d 107, 110 (1991). Recognizing the difference between “those who were wrongfully imprisoned” and “those who have merely avoided criminal liability,” *Walden*, 47 Ohio St.3d at 52, the General Assembly required claimants to prove that they were factually innocent both of the crime of conviction (R.C. 2743.48(A)(5)), and of any uncharged crimes arising out of the same factual predicate that led to the crime of conviction (R.C. 2743.48(A)(4)). *See Gover v. State*, 67 Ohio St.3d 93, syl. (1993). These dual requirements reflected the fact that “[n]ot every person who is released from prison because of a successful appeal is entitled to compensation.” *Doss v. State*, 135 Ohio St.3d 211, 2012-Ohio-5678 ¶ 22. Instead, compensation was limited to “demonstrably innocent persons.” *Id.*; *see Walden*, 47 Ohio St.3d at syl. ¶ 3 (holding that an acquittal is not enough to establish a claimant's actual innocence under the statute).

In 2003, the General Assembly created a different way to establish the fifth wrongful-imprisonment element in R.C. 2743.48(A)(5), separate from proving that the claimant was actually innocent of the charged crime. In addition to that traditional, actual-innocence showing, a claimant could alternatively prove that “[s]ubsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in the individual's release.” 2002 Ohio Laws 3545, 3546 (Sub. S.B. No. 149). But claimants could not recover as a result of errors in the course of their trials. Rather, the claimed errors “must have occurred subsequent to sentencing and during or subsequent to imprisonment.” *Mansaray*, 2014-Ohio-750 syl. This continues to be the rule

today: As long as they meet the other statutory requirements, wrongful-imprisonment claimants may meet R.C. 2743.48(A)(5)'s requirements if they prove either that they were actually innocent or that post-sentencing procedural errors led to their release.

**B. Dale Johnston was convicted of the murders of his stepdaughter and her fiancé, but his conviction was overturned on the basis of pre-sentencing, trial errors.**

This case arises out of Dale Johnston's imprisonment for double murder. Johnston's 18-year-old stepdaughter (Margaret Annette Johnston) and her fiancé (Todd Schultz) were last seen alive on October 4, 1982. *State v. Johnston*, 39 Ohio St. 3d 48, 48 (1988). On October 14, the local sheriff found their torsos in the Hocking River. *Johnston*, 39 Ohio St. 3d at 48. Two days later, other body parts of the victims were discovered on the outskirts of Logan, Ohio. *Id.* The victims had suffered several gunshot wounds from a .22-caliber firearm, and their corpses had been mutilated and dismembered. *Id.*

Suspicion centered on Dale Johnston. First, witnesses reported seeing him with the victims on the day of their disappearance. *State v. Johnston*, No. 412, 1986 WL 8799, at \*3 (4th Dist. Aug. 6, 1986) (per curiam). Second, he had denied owning a .22-caliber firearm or a knife, but several witnesses said they had previously seen him with both weapons. *Id.* at \*12. Third, he denied owning feedbags of the sort that police found near the corpses, but officers discovered identical feedbags in his barn. *Id.* Fourth, a footprint found at the crime scene seemed to match the print made by Johnston's boot. *Id.* at \*9. Finally, reports suggested that Johnston's stepdaughter had complained that he had engaged in inappropriate sexual conduct and made sexual advances toward her. *Johnston*, 1986 WL 8799, at \*2-3; *see also Johnston v. State*, No. 91-CIV-186, at 9-10 (Hocking C.P. Aug. 9, 1993) (Johnston App'x 75-76).

In September 1983, a grand jury indicted Johnston on two counts of aggravated murder, as well as specifications that would make him eligible for a capital sentence. *Johnston*, 39

Ohio St. 3d at 48-49. Johnston waived his right to a jury trial and was found guilty as charged by a three-judge panel. *Id.* at 49. The court imposed a capital sentence. *Id.* A few months later, Johnston moved for a new trial on the basis of newly discovered evidence, but the court denied the motion. *Id.*

Johnston filed two appeals in the Fourth District—an appeal of his conviction and sentence, and a separate appeal of the denial of his motion for a new trial. The court of appeals granted relief in both appeals. *See Johnston*, 1986 WL 8799 (appeal of conviction and sentence); *Johnston v. State*, No. 425, 1986 WL 8798 (Aug. 6, 1986) (per curiam) (appeal of denial of new-trial motion). In the appeal of his conviction and sentence, the court held that the trial court improperly admitted testimony refreshed by hypnosis. *Johnston*, 1986 WL 8799, at \*3-8. In the appeal of his new-trial motion, the court held that the State withheld material exculpatory evidence in violation of the due-process protections established in *Brady v. Maryland*, 373 U.S. 83 (1963). *See Johnston*, 1986 WL 8798, at \*2-8.

This Court consolidated the two appeals and affirmed. *See Johnston*, 39 Ohio St. 3d 48. The Court agreed in large part with the Fourth District’s analysis, and ordered a new trial on evidentiary and *Brady* grounds. *Id.* at 52-56, 60-63.

On remand, the trial court excluded several pieces of evidence that the State hoped to use at a retrial. *See Johnston v. State*, 2014-Ohio-1452 ¶ 4 (10th Dist.) (“App. Op.”). These included statements by Johnston, live testimony of another witness, and physical evidence. *Id.* The State took an interlocutory appeal of these evidentiary rulings, without success. *See State v. Johnston*, 64 Ohio App. 3d 238 (10th Dist. 1990). The State then dismissed the indictment. App. Op. ¶ 4.

**C. In 1990, Johnston sued for wrongful imprisonment, but the court rejected his claim.**

Seven months after the State dismissed the indictment, Johnston initiated a wrongful-imprisonment action against the State, seeking compensation on the ground that he was innocent of the murders. In support, he introduced the transcript of the murder trial, four depositions, and three live witnesses, as well as several stipulated facts. *Johnston*, No. 91-CIV-186, at 3 (Johnston App'x 69). Johnston presented two principal arguments: that he was seen far from the murders at the time experts said they occurred, and that a local butcher was the real killer. The Hocking County Court of Common Pleas rejected the arguments. First, it found inconsistencies in Johnston's story and thus disbelieved his alibi. *See id.* at 6-7 (Johnston App'x 72-73). Second, it found that Johnston also failed to prove that the local butcher had ever met the victims, much less killed them. *Id.* at 7-9 (Johnston App'x 73-75). The trial court also relied on what it found to have been Johnston's "troubled" relationship with his stepdaughter:

Plaintiff was sexually attracted to her. He admitted that he had sexual conduct with her a few years before. One witness testified that he admitted he masturbated in front of her. He took and possessed nude photos of Annette. He described Annette's body to the police in minute detail, including a small mole at the base of her spine and small little pimples on each of her breasts. In furtherance of plaintiff's sexual attraction to Annette, he and the family engaged in nudism.

*Id.* at 9 (Johnston App'x 75). After analyzing all of the evidence, the court held that Johnston had "failed to prove by a preponderance of the evidence that he did not commit the murders of Annette Johnston and Todd Schultz." *Id.* at 11 (Johnston App'x 77). Johnston did not appeal the trial court's judgment denying him wrongful-imprisonment compensation under R.C. 2743.48, a judgment which has long since become final.

**D. Years later, Johnston sued again for wrongful imprisonment for the same conviction, but the Tenth District denied relief.**

In 2008, another man pleaded guilty to the murders of Annette Johnston and Todd Schultz. *See State v. McKnight*, No. 08CR0152 (Hocking C.P. filed Sept. 2, 2008). An accomplice also pleaded guilty to one count of abuse of a corpse. *See State v. Linscott*, No. 08CR0151 (Hocking C.P. filed Apr. 30, 2008).

That same year, Johnston sued again for wrongful imprisonment based on his imprisonment for the murders. Johnston again sought compensation on the ground that he was innocent of the murders; he also relied on the new error-in-procedure theory of recovery created in the 2003 amendments to R.C. 2743.48. *See App. Op. ¶ 8*. The trial court denied the State's summary-judgment motion based on the Eighth District's decision in *Mansaray v. State*, 2012-Ohio-3376 (8th Dist.), which held that the amendment to the wrongful-imprisonment statute permits claimants to recover for errors in procedure occurring before or during their trials. *See Johnston v. State*, No. 11CVH-12-15900, at 4 (Franklin C.P. Sept. 27, 2012) (Johnston App'x 120). (As discussed below, this Court rejected that view. *See Mansaray*, 2014-Ohio-750, syl.) The trial court also held that the 2003 amendments to R.C. 2743.48 allowed Johnston to relitigate the question whether he had been wrongfully imprisoned. *Johnston*, No. 11CVH-12-15900, at 4-5 (Johnston App'x 120-21). The trial court later granted Johnston's summary-judgment motion for substantially the same reasons that it denied the State's motion. *See Johnston v. State*, No. 11CVH-12-15900 (Franklin C.P. Oct. 11, 2012) (Johnston App'x 124-32).

The State's appeal raised numerous assignments of error, including that Johnston's suit fell outside the statute of limitations, that the 2003 amendment to R.C. 2743.48 could not retroactively apply to Johnston, that res judicata barred Johnston's suit, that Johnston did not satisfy R.C. 2743.48(A)(4)'s requirement that he did not commit any other crimes related to the

charged conduct, and that Johnston did not satisfy R.C. 2743.48(A)(5). App. Op. ¶ 10. The Tenth District reversed, agreeing with the State’s second argument. The court held that the 2003 amendment to the wrongful-imprisonment statute did not retroactively give Johnston a new opportunity to litigate his claim. *Id.* ¶¶ 17-29. In doing so, the court rejected Johnston’s view that “the 2003 amendments create a new cause of action available to any qualified individual who has not recovered under prior law.” *Id.* ¶ 21. In light of its decision, the Tenth District found it unnecessary to address the State’s other assignments of error.

Thirteen days after the Tenth District’s decision, in *Mansaray v. State*, 138 Ohio St. 3d 277, 2014-Ohio-750, this Court unanimously reversed the Eighth District’s decision on which the trial court had relied to grant summary judgment to Johnston. The Court held that “[w]hen a defendant seeks a declaration that he is a wrongfully imprisoned individual and seeks to satisfy R.C. 2743.48(A)(5) by proving that an error in procedure resulted in his release, the error in procedure *must have occurred subsequent to sentencing* and during or subsequent to imprisonment.” *Id.* syl. (emphasis added). According to the Court, “[n]othing in the statute” suggests that the General Assembly intended to authorize compensation “when a conviction is reversed based on a procedural error that occurred prior to sentencing.” *Id.* ¶ 10.

Johnston moved for *en banc* consideration and to certify a conflict. In response, the State noted this Court’s intervening decision in *Mansaray* as an additional ground supporting the Tenth District’s judgment. The Tenth District denied Johnston’s requests for *en banc* rehearing and to certify a conflict. *See* Order Denying *En Banc* Review in *Johnston v. State*, No. 12AP-1022, at ¶ 1 n.1 (Apr. 24, 2014); Order Denying Motion to Certify Conflict in *Johnston v. State*, No. 12AP-1022, at ¶ 1 n.1 (Apr. 24, 2014).

## ARGUMENT

Johnston cannot retroactively recover as a wrongfully imprisoned individual under the 2003 amendment to R.C. 2743.48(A)(5) because he previously litigated the same wrongful-imprisonment claim to a final judgment decades ago. He repeatedly appeals to equity, based on another man's 2008 confession to the crimes. Johnston did not have that confession when he lost his 1990 wrongful-imprisonment claim. And the State of course did not know about the other man's guilt when it charged Johnston given the evidence pointing to him. In any event, however equitable Johnston's situation might be, it does not give him a new day in court. That is almost always the case when evidence is discovered after a final judgment, whether in a tort case, a contract case, or any other case. Some legal procedures, such as Rule 60(b), can apply to some cases of late-discovered evidence, but they have narrow windows not applicable here.

In the end, Johnston himself recognizes that he cannot rely on the equities as the basis for his claim. Instead, he tries to revive his case by shoehorning his do-over request into a "new claim" based on the 2003 error-in-procedure amendment to the wrongful-imprisonment statute. That effort fails as a matter of law for at least three reasons. *First*, the 2003 amendment's language—as buttressed by the canon of constitutional avoidance—shows that the General Assembly did not intend to reopen wrongful-imprisonment claims litigated to final judgment before the amendment's enactment. *Second*, claim preclusion prohibits Johnston from avoiding this clear prohibition on the scope of the 2003 amendment by calling the same wrongful-imprisonment claim a new "claim." *See Grava v. Parkman Twp.*, 73 Ohio St. 3d 379, 382 (1995). *Third*, Johnston's view of the 2003 amendment's error-in-procedure prong directly conflicts with this Court's decision in *Mansaray* and would give that amendment a greater retroactive effect for previously litigated claims than it has for claims that have yet to reach a final judgment. *See Mansaray v. State*, 138 Ohio St. 3d 277, 2014-Ohio-750 syl.

**Defendant-Appellee State of Ohio's Proposition of Law No. 1:**

*The 2003 amendment to R.C. 2743.48(A)(5) does not apply retroactively to wrongful-imprisonment claims that had been litigated to final judgments in the court of common pleas before the amendment took effect.*

This case is not about whether the wrongful-imprisonment statute (R.C. 2743.48) applies retroactively to claims based on convictions entered before its 1986 enactment. Nor is it even about whether the 2003 error-in-procedure amendment to the wrongful-imprisonment statute (Sub. S.B. 149) applies retroactively to wrongful-imprisonment claims based on convictions entered before its enactment. Instead, this case is solely about whether the 2003 amendment retroactively rejuvenates *failed* wrongful-imprisonment claims that had already been litigated to a *final judgment* before then. Johnston necessarily must argue that the 2003 amendment applies retroactively *not just* to claimants who have never previously filed wrongful-imprisonment claims against the State *but also* to claimants who, like Johnston, previously litigated their wrongful-imprisonment claims to final judgments. The Court should reject this expansive view of the 2003 amendment's reach.

**A. The General Assembly nowhere indicated in its 2003 amendment to R.C. 2743.48 that it intended the amendment to reopen wrongful-imprisonment claims previously litigated to final judgments.**

For several reasons, the Court should not interpret the 2003 amendment to reach prior wrongful-imprisonment claims that have reached final judgments. *First*, nothing in the law amending R.C. 2743.48(A)(5) provides the slightest hint that the General Assembly intended for the amendment to apply to wrongful-imprisonment claims that had already been litigated to a final judgment before the amendment's effective date. 2002 Ohio Laws 3545, 3546 (Sub. S.B. 149). That is significant. R.C. 1.58 makes clear that a statutory "amendment" "does not" "[a]ffect the prior operation of the statute or any prior action taken thereunder" unless it expressly indicates the contrary. R.C. 1.58(A)(1). In other words, because the amendment "is

silent on the question of its retroactive application” to wrongful-imprisonment claims that have already proceeded to a final judgment, the Court should not interpret it to reach those claims. *Hyle v. Porter*, 117 Ohio St. 3d 165, 2008-Ohio-542 ¶ 10. Instead, the “statute must ‘clearly proclaim’ its retroactive application” to claims that have proceeded to a final judgment. *Id.* (citation omitted). Sub. S.B. 149 does no such thing.

*Second*, if anything, the only provision addressing the 2003 amendment’s temporal reach proves just the opposite of what Johnston seeks—namely, that it expressly does not reach claims that have already proceeded to a final judgment against claimants in the court of common pleas before its enactment. Section 3 says that its amendments to R.C. 2743.48 “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.” 2002 Ohio Laws at 3551 (emphases added). This language shows a legislative intent for the amendment to apply prospectively, governing claims filed or pending in the court of claims *after* its effective date, not claims that never reached the court of claims because they failed in the court of common pleas years before.

*Third*, it is implausible to believe that the General Assembly intended to reopen *all* final wrongful-imprisonment judgments denying relief on the ground that the claimants were not actually innocent. *See Griffith v. City of Cleveland*, 128 Ohio St. 3d 35, 2010-Ohio-4905 ¶ 25 (noting that courts may “consider[] ‘[t]he consequences of a particular construction’” (quoting R.C. 1.49(E)). But that is where Johnston’s interpretation inevitably leads. His view would open up R.C. 2743.48 not just to him but also to every claimant who unsuccessfully litigated a wrongful-imprisonment claim to a final judgment in the courts of common pleas between 1986 and 2003. It is unlikely that the General Assembly intended that far-reaching retroactive reach.

*Fourth*, “[i]f, as [Johnston] claim[s], the [2003 amendment] was designed to reach cases such as this one, it would conflict manifestly with a longstanding rule which insulates certain adjudicated rights from the reach of the legislature.” *Ga. Ass’n of Retarded Citizens v. McDaniel*, 855 F.2d 805, 810 (11th Cir. 1988). “[I]t is well settled that the Legislature cannot annul, reverse, or modify a judgment of a court already rendered.” *Bartlett v. Ohio*, 73 Ohio St. 54, 58 (1905); *Gompf v. Wolfinger*, 67 Ohio St. 144, syl. ¶ 3 (1902) (noting that “[a] judgment which is final by the laws existing when it is rendered cannot constitutionally be made subject to review by a statute subsequently enacted”). Most recently, the Court relied on this principle to invalidate provisions of the Adam Walsh Act requiring the Attorney General to reclassify previously designated sexual offenders, holding that those provisions violated the separation of powers by permitting the reopening of final judgments. *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424 ¶¶ 55-56. This view also comports with case law throughout the country. As the U.S. Supreme Court has held, “[t]he Constitution’s separation of legislative and judicial powers denies [the legislature] the authority” to “require[] federal courts to reopen final judgments entered before its enactment.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995); *see also People v. Bunn*, 37 P.3d 380, 395 (Cal. 2002) (noting that “*Plaut*’s constitutional analysis has similarly been adopted by the high courts of other states”).

Given the constitutional concerns that would arise if the General Assembly intended for a law retroactively to reopen claims that have proceeded to final judgments, an interpretation that requires that result triggers the canon of constitutional avoidance. “Courts have a duty to liberally construe statutes ‘to save them from constitutional infirmities.’” *Mahoning Educ. Ass’n of Developmental Disabilities v. State Employment Relations Bd.*, 137 Ohio St. 3d 257, 2013-Ohio-4654 ¶ 13 (citation omitted). Put another way, courts must “give a statute a constitutional

construction, if one is reasonably available, in preference to one that raises serious questions about the statute's constitutionality." *State v. Keenan*, 81 Ohio St. 3d 133, 150 (1998).

Indeed, federal courts have repeatedly relied on this canon in this very context. Given the separation-of-powers concerns arising from legislative reopening of final judgments, those courts have said that they should "not read a statute retroactively to alter a final judgment absent an express statement of intent." *QUALCOMM Inc. v. FCC*, 181 F.3d 1370, 1380 n.8 (D.C. Cir. 1999); *see also Ga. Ass'n*, 855 F.2d at 810; *Daylo v. Adm'r of Veterans' Affairs*, 501 F.2d 811, 823 (D.C. Cir. 1974). In *Georgia Association*, for example, the Supreme Court had interpreted the Education of the Handicapped Act not to authorize attorney's fees to the prevailing party, but Congress then passed a statute making clear that such fees were available and noting that the amendment applied retroactively to all claims "pending" on the date of the Supreme Court's decision. 855 F.2d at 807. The Eleventh Circuit refused to interpret this retroactive provision as "apply[ing] to cases in which final, unappealed judgments had been rendered prior to the statute's enactment date." *Id.* at 808; *see id.* 808-10.

This reasoning applies here. Johnston's view would interpret Sub. S.B. 149 as reopening final judgments entered years ago in many wrongful-imprisonment cases. Because that view could raise a constitutional question over whether the General Assembly acted within its authority, the statute should not be interpreted in Johnston's preferred manner. All told, the relevant text and canons of construction both point the same way—the 2003 amendment does not cover Johnston's previously litigated wrongful-imprisonment claim.

**B. Johnston's contrary arguments are mistaken.**

The Court should reject Johnston's contrary arguments. *First*, Johnston argues (at 7-11, 17-19) that the *original* wrongful-imprisonment statute was retroactive and that the Tenth District wrongly reached the opposite holding, which would allegedly "mean that almost every

wrongful imprisonment award in Ohio history was incorrectly awarded.” But Johnston greatly exaggerates the Tenth District’s decision. It nowhere held that the original 1986 law codifying R.C. 2743.48 did not apply retroactively to all convictions entered before its effective date. Rather, it merely held that “the 2003 amendments to R.C. 2743.48 do not apply retroactively to *appellee’s alleged injury . . .*” App. Op. ¶ 29 (emphases added). That holding says nothing about the many claimants that Johnston identifies (at 18) as receiving wrongful-imprisonment compensation for convictions arising before 1986. This case is about the amendment (and more narrowly its effect on final judgments). It is not about the statute as a whole.

*Second*, Johnston suggests (at 10) that the 2003 amendment should be interpreted to reopen his final judgment because it “created a new cause of action” when it added R.C. 2743.48(A)(5)’s error-in-procedure prong. But it did no such thing. The amendment merely lessened the statutory *elements* for proving that a claimant qualified as a wrongfully imprisoned individual entitled to compensation under R.C. 2743.48. *Cf. Plaut*, 514 U.S. at 228 (rejecting notion that Congress could retroactively “eliminate . . . a particular element of a cause of action that plaintiffs have found it difficult to establish” for cases that have reached final judgments). As this Court just recently said, “[t]here is no exception to the rule that the final judgments may not be legislatively annulled [sic] in situations where the Legislature has enacted new legislation.” *Bodyke*, 2010-Ohio-2424 ¶ 56 (citation omitted). Whether or not it created a new “cause of action,” the amendment falls squarely within the presumption that the General Assembly does not intend to undo final judgments.

An analogy to the Court’s cases confirms how untenable Johnston’s reading is. In *Dunbar v. State*, 136 Ohio St. 3d 181, 2013-Ohio-2163, the Court held that R.C. 2743.48(A)(2)’s ban on compensation for those who plead guilty covered even those claimants whose pleas had

been *voided* on appeal. *Id.* syl. If the General Assembly later amended this statutory limit to cover only *non-voided* guilty pleas without any indication of the amendment's temporal reach, Johnston's view means Lang Dunbar himself could reopen his final judgment and obtain compensation because the amendment created a new cause of action. Or take *Mansaray*, which held that the error-in-procedure amendment at issue here reached only *post-sentencing* errors. 2014-Ohio-750 syl. If the General Assembly later amended the statute to cover *pre-sentencing* errors without any indication of the amendment's temporal reach, Johnston's view means that Yanko Mansaray himself could reopen his final judgment and obtain compensation. The General Assembly's work should not be interpreted to have so cavalierly eviscerated the Court's final judgments. Just as those amendments would not have retroactive reach to Dunbar and Mansaray absent a *clear* indication that the General Assembly meant for the amendments to undo their final judgments, the same clear-statement rule applies to Johnston's final judgment.

*Third*, Johnston attempts (at 12-13) to reconcile the 2003 amendment's uncodified language in Section 3 indicating that it has only a prospective reach to *pending* cases with his broad view of the provision's retroactive reach even to *finished* cases. Because Section 3 only references the "Court of Claims," Johnston argues, it only limits the retroactive reach of Sub. S.B. 149's particular amendments to R.C. 2743.48(E) that change the amount of compensation awarded to claimants *in the court of claims*. See 2002 Ohio Laws at 3548. Not so. If the General Assembly had intended to limit the retroactive reach *only* of subsection (E) of R.C. 2743.48, Section 3 would have referenced *only* "R.C. 2743.48(E)" rather than "R.C. 2743.48" in its entirety. 2002 Ohio Laws at 3551.

**Defendant-Appellee State of Ohio’s Proposition of Law No. 2:**

*When a claimant has previously sued for wrongful imprisonment and lost, he cannot sue again based on the same underlying criminal proceedings.*

Johnston seeks to sidestep the clear limits on the scope of the 2003 error-in-procedure amendment not by showing that his old action should be reopened, but by filing an identical new action. But claim preclusion prevents him from avoiding the clear limits on the reach of the 2003 amendment merely by filing a new “claim” arising out of the same facts.

**A. Johnston’s second wrongful-imprisonment action is barred by claim preclusion arising from his unsuccessful 1990 wrongful-imprisonment action related to the same period of imprisonment at issue here.**

The common-law doctrine of *res judicata* prevents parties from relitigating claims or issues that were, or could have been, resolved in an earlier action. In Ohio, *res judicata* involves two related but distinct concepts: “claim preclusion (historically called estoppel by judgment in Ohio) and issue preclusion (traditionally known as collateral estoppel).” *Grava*, 73 Ohio St. 3d at 381. This case involves claim preclusion. “Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action.” *O’Nesti v. DeBartolo Realty Corp.*, 113 Ohio St. 3d 59, 2007-Ohio-1102 ¶ 6. That rule can be broken into three elements:

- (1) “a final judgment or decree rendered upon the merits” in the first action;
- (2) the “same claim or cause of action” in both actions; and
- (3) the same “parties or those in privity with them” in both actions.

*Grava*, 73 Ohio St. 3d at 381 (internal quotation marks omitted).

The second requirement—same claim—requires some explanation. In times past, courts equated the term “claim” with a single *theory* of recovery, meaning plaintiffs could maintain as many different actions as they had theories of recovery, even if each theory of recovery arose out

of the same alleged act or wrong. Claim preclusion barred a second action only if it involved the “same legal theory of recovery” as the first action. *Grava*, 73 Ohio St. 3d at 382. Accordingly, this Court had held that a final judgment on the merits in one action did not preclude a subsequent action “where the causes of action are not the same, even though each action relates to the same subject matter.” *Norwood v. McDonald*, 142 Ohio St. 299, syl. ¶ 2 (1943); see *Whitehead v. Gen. Tel. Co.*, 20 Ohio St. 2d 108, syl. ¶ 2 (1969).

In 1995, the Court rejected that outdated view of the meaning of “claim” and adopted the “modern application” of claim preclusion as expressed in the Restatement (Second) of Judgments. *Grava*, 73 Ohio St. 3d at 382 (overruling the quoted sections of *Norwood* and *Whitehead*). Since 1995, the Court has taken “an expansive view of claim preclusion,” focusing on *factual allegations* rather than *legal theories*. *Holzemer v. Urbanski*, 86 Ohio St. 3d 129, 133 (1999). Under this rule, a final judgment in one action precludes any subsequent action “arising out of the transaction or occurrence that was the subject matter of the previous action.” *Grava*, 73 Ohio St. 3d at 382; see also Restatement (Second) of Judgments §§ 24-25. The Court has described a “transaction” as a “common nucleus of operative facts,” tracking the standards of the Restatement. *Grava*, 73 Ohio St. 3d at 382 (quoting Restatement (Second) of Judgments § 24, cmt. b). The fact that one factual transaction may give rise to “a number of different legal theories” of liability “does *not* create . . . multiple claims.” *Id.* (quoting Restatement (Second) of Judgments § 24, cmt. c). “This remains true” even if the legal theories in each action “depend on different shading of the facts.” *Id.* (quoting Restatement (Second) of Judgments § 24, cmt. c). So a claim is defined by the factual transaction—or nucleus of operative facts—out of which it arises, not the legal theory upon which relief is sought.

Given that background, Ohio’s claim-preclusion rule can be stated in three simple elements: same transaction, same parties, judgment on the merits. Johnston does not challenge that the Ohio courts entered final judgment on the merits of his first wrongful-imprisonment action. And Johnston agrees (at 20) that that this action involves the same parties as his first action. Instead, Johnston contends (at 22) only that this action arises out of a different transaction than his first action.

It is hard to see how that might be so. In both actions, Johnston sought redress for his imprisonment for the murders of Annette Johnston and Todd Schultz. In both actions, he invoked the same statute in seeking a declaration that he was a “wrongfully imprisoned individual.” R.C. 2743.48(A). And in both actions, the wrong complained of (imprisonment) and the demand for recovery (money damages) are the same. The only difference is Johnston’s *theory of recovery*. In his first action Johnston sought recovery under the legal theory that he was actually innocent of the murders, and now he seeks recovery under the legal theory that an error in procedure resulted in his release from prison. As explained, however, claim preclusion bars a subsequent claim ““even though the plaintiff is prepared in the second action [t]o present . . . *theories of the case* not presented in the first action.”” *Grava*, 73 Ohio St. 3d at 383 (quoting Restatement (Second) of Judgments § 25) (emphasis added). Both of Johnston’s actions were grounded on the same fact—the fact of his imprisonment.

Johnston resists, contending (at 22) that claim preclusion should not apply because he could not have argued in his 1990 action that an error in procedure resulted in his release. While the Court has held that claim preclusion bars subsequent actions raising claims that could have been, but were not, litigated in a previous suit, *see, e.g., O’Nesti*, 2007-Ohio-1102 ¶ 6, the Court has *not* suggested that claim preclusion bars *only* those claims. Put another way, the ability to

raise the claim in a previous suit is a sufficient, but not a necessary, condition of claim preclusion. If the rule were otherwise, every change in statutory or case law would grant litigants the right to bring a new action arising out of the same factual transaction as a previous action. As the next section will explain, that is not the law.

**B. The intervening amendments to the wrongful-imprisonment statute do not change the preclusive effect of Johnston's previous action.**

Because claim preclusion applies, the only remaining question is whether one of the rare exceptions to that doctrine comes into play. Johnston's principal argument is that the Tenth District erred by failing to hold that the 2003 amendments to R.C. 2743.48 undermined the preclusive effect of the final judgment in his 1990 action. He contends (at 22) that, based solely on the change in the statutory law, he may file a second wrongful-imprisonment action seeking compensation even though the material facts have not changed. The contention lacks merit.

As the Court has recognized, the doctrine of claim preclusion serves several important interests: It protects litigants from unnecessary expense, conserves scarce judicial resources, and promotes reliance on judicial action by ensuring the finality of judgments. *See Grava*, 73 Ohio St. 3d at 383-84. Recognizing these strong interests, this Court has not lightly found exceptions to it. The "few existing exceptions" that it has recognized apply "only in specialized situations in which a specific policy is deemed to outweigh judicial economy concerns." *Nat'l Amusements, Inc. v. City of Springdale*, 53 Ohio St. 3d 60, 63 (1990).

Like most courts, this Court has been particularly reluctant to create exceptions to claim preclusion for changes in the law. It has been long established that "a change in decisional law" ordinarily will "not bar the application of *res judicata*." *Id.* This rule is so strict that it even "applies to changes in constitutional law." *Id.* The only exception is "when there has been a fundamental change in the controlling law." *Phung v. Waste Mgmt., Inc.*, 71 Ohio St. 3d 408,

413 (1994) (internal quotation marks omitted). What constitutes a “fundamental change”? The Court clarified in *Phung* that the exception applies “only to some cases involving changes in constitutional law, such as school desegregation and racial discrimination.” *Id.* (citing *Nat’l Amusements, Inc.*, 53 Ohio St. 3d at 63). Given that high standard, this exception is “quite narrow.” *Nat’l Amusements, Inc.*, 53 Ohio St. 3d at 63. It does not apply here.

In *Phung*, the Court held that the enactment of Ohio’s Whistleblower’s Protection Act did not alter the claim-preclusion effect of a prior judgment. After his employment with Waste Management was terminated, Dr. Peter Phung sued his former employer for wrongful discharge and intentional infliction of emotional distress. *Phung*, 71 Ohio St. 3d at 408. After several rounds of litigation, the court of appeals ultimately reversed the trial court’s dismissal of Phung’s emotional-distress claim, but affirmed the dismissal of his wrongful-discharge claim. *Id.* This Court denied leave to appeal. *Id.* While Phung’s emotional-distress claim remained pending on remand in the trial court, the Whistleblower’s Protection Act became effective. *Id.* at 412-13. Phung argued that “his case should [have been] reopened and this new law should [have been] applied to his wrongful-discharge claim.” *Id.* at 413.

In a unanimous opinion, this Court disagreed. It held first that its decision denying leave to appeal “constituted a valid and final judgment” as to his wrongful-discharge claim. *Id.* at 412. It then rejected Phung’s argument that the enactment of the Whistleblower’s Protection Act should allow him an exception to claim preclusion. *Id.* at 412-13. Finding that the exception to claim preclusion for changes in law was “extremely narrow,” applying only to “fundamental change[s]” such as those involving “school desegregation and racial discrimination,” the Court rejected Phung’s attempt to reopen his wrongful-discharge claim. *Id.* at 413.

This Court's case law on exceptions to *res judicata* for changes in statutory law squares with law in other jurisdictions. As stated by *Moore's Federal Practice*, "the general rule is that a change in the statutory or case law will not alter the claim preclusion effect of a prior judgment." 18 James Wm. Moore et al., *Moore's Federal Practice* § 131.21[2] (3d ed. 2014). The treatise notes some "contrary authority" providing additional exceptions to the general rule, such as when there are "threatened or continuing acts" that "involve substantial public policy concerns, such as terrorist activity, environmental pollution, or civil rights violations," or when the statutory change confers upon a court subject-matter jurisdiction over claims that were "previously beyond its jurisdiction." *Id.* § 131.22[3]. But beyond these "limited circumstances," it remains the rule "that a change in the law will not abrogate the preclusive effect of a prior judgment." *Id.*; see also *Jackson v. Smith*, 387 S.W.3d 486, 493 (Tenn. 2012) ("[T]he general rule, recognized throughout this nation" is that "enactment of a new statute after the previous litigation has been finally concluded will ordinarily not provide a basis for relitigating the same dispute.").

In contending that the 2003 amendments to the wrongful-imprisonment statute revive his claim, Johnston does not meet Ohio's "extremely narrow" and "limited exception." *Phung*, 71 Ohio St. 3d at 413. The 2003 amendments did not involve "changes in constitutional law." *Id.* (citing *Nat'l Amusements, Inc.*, 53 Ohio St. 3d at 63). Nor can the amendments be seen as "a fundamental change" on the order of changes to "school desegregation and racial discrimination" law. *Id.* (quoting *Nat'l Amusements, Inc.*, 53 Ohio St. 3d at 62). The amendments also did not involve a change to the trial court's subject-matter jurisdiction, or to "threatened or continuing acts" related to "substantial public policy concerns" 18 *Moore's Federal Practice* § 131.22[3]. Johnston cannot fit the 2003 amendments into any of the very

narrow exceptions to the general rule that statutory changes do not alter the claim-preclusion effect of prior judgments.

Johnston's request for an exception in his case might be a small matter were it not for a broader consequence. If the 2003 amendments to R.C. 2743.48 abrogated claim preclusion, all wrongful-imprisonment plaintiffs who unsuccessfully litigated actual-innocence actions between 1986 and 2003 would be able to bring *new* error-in-procedure actions. Johnston does not explain why allowing him to relitigate his claim would not also allow these other claimants to relitigate their claims. Without a limiting principle, Johnston's broad rule should not be adopted.

In a last-ditch effort to avoid the preclusive effect of his 1990 action, Johnston argues (at 16) that it is now clear that he was actually innocent and that denying him relief in this action would not be a "just result." Indeed, his innocence is a central theme of his brief, and he relies heavily on materials outside the record to make his equitable case. *See* Johnston Br. 2 & nn.1-2, 23. He raises these points not to establish that he satisfies the actual-innocence requirement of R.C. 2743.48(A)(5), but to argue that the new proof of his innocence creates an "obvious shift in equities" and that, as a matter of fairness, *res judicata* should not apply. Johnston Br. 6, 22. Yet the Court has already addressed how to treat the argument that applying claim preclusion on the facts of a particular case "would be unfair." *Grava*, 73 Ohio St. 3d at 383. In the Court's words: "The instability that would follow the establishment of a precedent for disregarding the doctrine of *res judicata* for 'equitable' reasons would be greater than the benefit that might result from relieving some cases of individual hardship." *Id.* at 384. It is understandable to feel compassion for Johnston for the time he spent in prison on the murder charges. That compassion, however, does not justify a novel exception to claim preclusion—particularly for a claim that, as discussed below, would fail on the merits under *Mansaray* in any event. And to the extent Johnston truly

believes he has a strong “equitable” case under the totality of the circumstances, he could always take his case to the General Assembly by seeking the same individualized “moral claims legislation” that preceded the wrongful-imprisonment statute. *See Walden*, 47 Ohio St. 3d at 49.

**Defendant-Appellee State of Ohio’s Proposition of Law No. 3:**

*When a defendant seeks a declaration that he is a wrongfully imprisoned individual and seeks to satisfy R.C. 2743.48(A)(5) by proving that an error in procedure resulted in his release, the error in procedure must have occurred subsequent to sentencing and during or subsequent to imprisonment.*

In all events, the Court need not even reach the thorny issues of retroactivity and preclusion, because this case is resolvable on an obvious ground given this Court’s recent decisions. Johnston seeks wrongful-imprisonment compensation on the ground that, “[s]ubsequent to sentencing and during or subsequent to imprisonment, an error in procedure resulted in [his] release.” R.C. 2743.48(A)(5). After the Tenth District decision below, however, this Court decided *Mansaray*, which foreclosed any possibility that Johnston could satisfy that “error in procedure” requirement. In a unanimous decision, the Court held that the “clear and unambiguous” language of R.C. 2743.48(A)(5) requires a claimant to prove that the error in procedure “occurred *subsequent* to sentencing and during or subsequent to imprisonment.” 2014-Ohio-750 syl.; *see also id.* ¶¶ 8, 12 (emphasis added). This is because “[n]othing in the statute indicates that the General Assembly intended” to authorize compensation for “a procedural error that occurred *prior to sentencing.*” *Id.* ¶ 10 (emphasis added). The statute draws a bright line: If a claimant relies on an error that occurred prior to sentencing, he cannot recover. But if a claimant relies on an error that occurred subsequent to sentencing, he may be entitled to compensation if he meets the other statutory requirements.

That principle applies here, so Johnston cannot recover as a “wrongfully imprisoned individual.” He identifies two errors that led to the vacating of his convictions: (1) the trial

court improperly admitted testimony refreshed by hypnosis and (2) the State withheld material exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). See App. Op. ¶ 3; *Johnston*, 39 Ohio St. 3d at 56, 63. Both are trial errors, occurring *prior to* sentencing and imprisonment. They thus do not satisfy the statutory requirement that the claimed error in procedure occur “[s]ubsequent to sentencing and during or subsequent to imprisonment.” R.C. 2743.48(A)(5); *Mansaray*, 138 Ohio St. 3d at syl.

Affirming on the basis of *Mansaray* is the narrowest and clearest basis for resolving this case. Because affirming on this ground provides a narrower basis for resolving this matter, the Court need not address the other questions presented by the other Propositions of Law. Indeed, since the Court decided *Mansaray*, it has reversed four cases on the authority of *Mansaray*. See *Jenkins v. State*, No. 2014-1098, *10/08/2014 Case Announcements*, 2014-Ohio-4414 at 1 (Oct. 8, 2014); *Hill v. State*, 139 Ohio St. 3d 451, 2014-Ohio-2365 ¶ 1; *D’Ambrosio v. State*, No. 2013-1864, *06/11/2014 Case Announcements*, 2014-Ohio-2487 at 2 (June 11, 2014); *James v. State*, No. 2014-0318, *05/28/2014 Case Announcements*, 2014-Ohio-2245 at 1 (May 28, 2014). One of these cases, *D’Ambrosio*, involved the same type of claims that Johnston raises here, a *Brady* claim. See *D’Ambrosio v. State*, No. 99520, 2013-Ohio-4472 ¶ 3 (8th Dist. Oct. 10, 2013). In addition, at least two pending court of appeals cases have also been resolved in light of *Mansaray*. See, e.g., *Holloway v. State*, No. 100586, 2014-Ohio-2971 ¶¶ 16-18 (8th Dist. July 3, 2014); *Worley v. State*, No. 100200, 2014-Ohio-1429 ¶¶ 1, 15 (8th Dist. Apr. 3, 2014). These decisions all recognize *Mansaray*’s clear rule. Those claimants—like Johnston here—relied on an error that occurred prior to sentencing, and as a result could not recover. The Court should walk the same path in this case.

To be sure, the Tenth District did not address the *Mansaray* issue, but that is no surprise: This Court decided *Mansaray* thirteen days *after* the court of appeals entered judgment. It thus had no reason to know this narrow ground for decision was available. The fact that the court below did not address the issue does not bar this Court from ruling on this ground; the Court commonly affirms on grounds not reached by the lower courts when those grounds provide narrower avenues of resolution. For example, last year the Court reviewed a court of appeals decision striking down as unconstitutional a statute requiring ten days' notice before public-employee unions engage in picketing. *See Mahoning Educ. Ass'n*, 2013-Ohio-4654. The court of appeals had held that applying the statute to informational picketing violated the First Amendment. *See id.* ¶ 11. This Court affirmed, but on narrow statutory, rather than broad constitutional, grounds. *Id.* ¶¶ 4, 12. That approach makes sense here. The alternative ground for affirmance was preserved in the record and was expressly raised in the State's Memorandum Opposing Jurisdiction. Accordingly, the Court should apply *Mansaray* and resolve this case narrowly. *See* Sup. Ct. Prac. R. 16.03(B)(1) ("The appellee's brief shall . . . answer the appellant's contentions, and *make any other appropriation contentions* as reasons for affirmance." (emphasis added)).

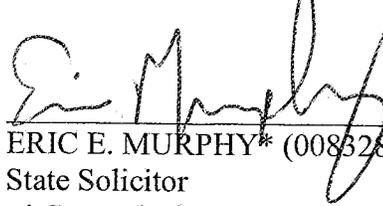
At bottom, nothing that the Court could say about the other issues will change the fact that Johnston cannot prevail in this matter. Even if the Court accepted Johnston's arguments, reversed, and remanded to the Tenth District, the final outcome is certain: *Mansaray* bars Johnston from recovering compensation under the "error in procedure" clause. Rather than address new issues, the Court can and should affirm on the ground that Johnston's claimed error did not occur "[s]ubsequent to sentencing and during or subsequent to imprisonment," as required by R.C. 2743.48(A)(5).

## CONCLUSION

For these reasons, the Court should affirm the judgment below.

Respectfully submitted,

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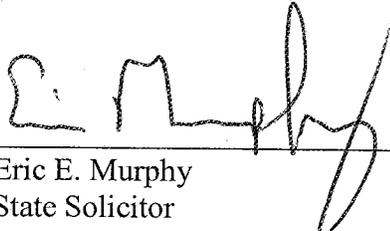
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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Merit Brief of Defendant-Appellee State of Ohio was served by U.S. mail this 17th day of October, 2014, upon the following counsel:

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