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INTRODUCTION

The State's brief relies on the hope that this Court will ignore a simple truth – there are two different causes of action in Ohio whereby one may be declared wrongfully imprisoned and they rely on two different sets of relevant facts. In one, a person proves his innocence. In another, he proves that procedural errors occurred. In the first, it is irrelevant why an innocent was imprisoned – only that he was. In the second, innocence is irrelevant and the salient issue is whether sound procedures were followed in imprisoning the person.

For this reason, the fact that Johnston previously litigated an innocence claim to an unsuccessful conclusion is no bar to him litigating a different claim to a successful conclusion now. That is, claim preclusion prevents the assertion of causes of action which share the same nucleus of operative fact with previously-litigated causes of action and which could have been brought in the prior action. But these causes of action – one of innocence and one for errors – have different nuclei. At the center of one is the question of factual innocence. At the center of the other is procedural correctness. Moreover, one (innocence) could have been (and was) brought previously. The other could not have been (and has never been) litigated before.

In addition, the Mansaray decision is no bar to Johnston. In Johnston's case, evidence was withheld subsequent to sentencing and during imprisonment. This was an error that occurred and persisted during the limited timeframe identified in Mansaray.

Finally, the State's theme, that Johnston seeks a broad expansion of the wrongful imprisonment statute and that the denial of Johnston's claim is merely the necessary price to avoid such a costly expansion, is a phantasm. The procedural error cause of action was created in 2003 and wrongful imprisonment claims are governed by a six-year statute of limitations. Thus, anyone who had facts to support an error claim when the cause of action was created in 2003 had until 2009 to bring it. It is 2014. No glut of claims ever transpired and none now can.

ARGUMENT

Johnston has not Sought to Reopen or Revisit Anything – He Seeks to Bring a New Cause of Action

The divided panel of the Tenth District reversed the Franklin County Court of Common Pleas because it believed, contrary to the language of the statute, the legislative history, and Ohio history, that neither parts (A)(1) nor (H) of Ohio Revised Code, section 2743.48 provided a clear indication of the legislature’s intent that the statute be retroactive. Johnston v. State, 2014-Ohio-1452, at ¶¶ 21-24 (Ct. App.). Perhaps realizing that the divided panel misread the statute and the historical context from whence it came, the State Solicitor now attempts to reframe the issue:

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.

(State’s Resp. Brief at 13). This attempted reframing is a distraction – a ploy to stop this Court from considering the errors in reasoning the divided panel made and their incorrect conclusion that a statute, which had been in retroactive operation for nearly 30 years, was not retroactive.

More importantly, however, the attempted reframing is an incorrect view of this case. This case is not (and has never been) about whether the 2003 amendment legislatively reopened or overturned old cases – because it does not, it never has, and that is not what Dale Johnston has sought to do. What the 2003 amendment did was create a new cause of action.¹ In Nelson v. State, the Fifth District Court of Appeals explicitly stated:

¹ The State claims that the 2003 amendment “did no such thing.” (State’s Brief at 17). But the State neither cites legal authority for this flat denial nor explains why a cause of action based on a nucleus of fact comprised of errors in procedure is not distinct from a cause of action based on a nucleus of fact comprised of actual innocence.

[S]ubsection (5) [of section 2743.48(A)] was amended, effective April 9, 2003, to allow a person, such as appellant, who could not establish his or her actual innocence, but who could establish that an error in procedure resulted in his or her release to file a complaint against the State of Ohio seeking a declaration that he or she had been wrongfully imprisoned. Prior to such time, only individuals who could establish their actual innocence could file such a complaint. Thus, prior to the amendment, appellant would not have had a cause of action because he alleges an error in procedure resulted in his release. The amendment to R.C. 2743.48(A)(5) *created appellant's cause of action.*

2007-Ohio-6274, at ¶ 30 (Ct. App.) (emphasis added). Because this new cause of action was, like the rest of the statute, retroactive, persons (like Nelson) who had factual circumstances capable of supporting an error claim, were entitled to bring litigation for past injuries. See (Johnston's Brief at 7-19); Ohio Rev. Code § 2743.48(A)(1), (H) (2003); Johnston, 2014-Ohio-1452, at ¶¶ 34-40 (Connor, J., dissenting).

True, in the ordinary course of affairs, a person having facts to support both innocence and error claims would bring the claims together in accordance with Ohio Rule of Civil Procedure 18 and would later face claim preclusion if they failed to do so. That is, if they did not bring all the claims that they could have brought at the time of their first suit, they would be prevented, in later suits, from bringing them. See, e.g., Yeager v. Carpenter, 2010-Ohio-3675, at ¶ 27 (Ct. App.). However here, Johnston's error claim could not have been brought when Johnston first sued the State in the 1990s because the law, abrogating the State's sovereign immunity in order to allow a claim against the State for imprisonment damages caused by errors in procedure, had not yet been written. Compare Ohio Rev. Code § 2743.48 (1989) with Ohio Rev. Code § 2743.48 (2003). Or, in other words, "all the events which fix the government's alleged liability" for the error claim had not yet occurred and thus Johnston's error claim had not yet "accrued" in the 1990s. State ex rel. Nickoli v. Erie Metroparks, 124 Ohio St. 3d 449, 2010-Ohio-606, 923 N.E.2d 588, at ¶ 34 (internal quotation marks omitted). Because Johnston could

not have brought the claim in the 1990s, he is not to be precluded by the doctrine of claim preclusion from bringing the claim now.

The State argues against this conclusion by contending that claim preclusion has expanded and now operates to broadly preclude all claims arising from the same subject matter. (State's Resp. Brief at 19-22). Both Johnston's error and innocence claims, says the State, arise from the common fact of Johnston's imprisonment and, so the argument goes, the failure to previously litigate the error in procedure claim forecloses him from ever doing so. *Id.* However the State omits an important element of claim preclusion from its recitation – claims which are precluded are those which pertain to the same nucleus of operative fact *and* which *could have been brought* in the predecessor litigation. Indeed, even in the cases cited by the State for its incorrect view of the law, the Ohio Supreme Court has been perfectly clear that preclusive effect extends to those “claims which *were* or *might have been* litigated in the first lawsuit.” Grava v. Parkman Twp., 73 Ohio St. 3d 379, 382 (1995) (emphasis added); accord Holzemer v. Urbanski, 86 Ohio St. 3d 129, 133 (1999). People are not precluded from bringing claims in future litigation that they have never before had the opportunity to raise.

The State asserts, again without any legal authority, that even if courts have traditionally held that preclusive effect extends only to claims which could have been litigated in the prior lawsuit, that this is a sufficient, but not a necessary, condition of claim preclusion. (State's Resp. Brief at 21-22). However, this is not a fair reading of the cases. The principal, *inclusio unius est exclusio alterius* – the inclusion of one excludes others, dictates that by repeatedly stating that preclusive effect extends to “claims which were or might have been litigated in the first lawsuit” the Court has excluded the possibility that preclusive effect would extend to claims which neither were nor could have been litigated in the first lawsuit. Grava, 73 Ohio St. 3d at 382; Holzemer,

86 Ohio St. 3d at 133. To this attorney's knowledge, in fact, no court has ever held that a person is precluded from bringing claims in a future litigation which they had no opportunity to raise in prior litigations and the State's failure to cite anything in support of its argument corroborates this generalization.

The State also skates over the truth that the nucleus of facts involved in an actual innocence claim is quite different from the nucleus of facts involved in an error claim. The State suggests that the error in procedure and innocence claims amount merely to "different shading of the facts." (State's Resp. Brief at 20). However, common sense shows this is not so. If Johnston were, for instance, arguing an innocence claim, he could set forth the fact that Chester McKnight committed the murders for which Johnston was imprisoned and rest on his laurels. If he were arguing an error in procedure claim (and was not concerned about informing the Court about the equities of the situation) he could leave Chester McKnight out of it entirely and present only the errors in procedure that occurred in his case – for example, the favorable evidence that was withheld prior to, during, and after trial and sentencing. Not only would these be entirely different sets of facts, they would not even concern the same location or century. The bulk of the evidence relevant to the errors in procedure dates from the 1980s and Hocking County. The Chester McKnight evidence was developed in a number of different locations, not least the prison where he is housed, and primarily dates from the years shortly preceding 2008.

In short, the question is not whether Johnston can reopen the 1990s case and assert a cause of action or theory that he unjustifiably failed to assert the first time. The question is whether his failure to bring the error cause of action in the 1990s case prevents him from bringing it now in a new case. Since it could not have been brought in the 1990s (because it did not exist) and since it relies on a different nucleus of fact, Johnston is not precluded from

bringing it now. Hence, the only possible bar to Johnston bringing a new cause of action based on the 2003 creation of the error claim is if the new error cause of action was not retroactive in its reach. Thus, the issue in this case is whether the error in procedure cause of action was retroactive. If it was, Johnston could rightly have brought his new lawsuit. If it was not, then he will be denied justice once again.

Uncodified Section 3 of the 2003 Amendment does not Limit the Retroactive Reach of the Amendment as Applied to the Court of Common Pleas – Just the Court of Claims

Johnston has already explained the history of the wrongful imprisonment statute and why it has always been retroactive, from its inception in 1986, through the amendments (including the 2003 amendment), and until the retroactivity language was repealed in 2012. (Johnston’s Brief at 7-19). Rather than attempt to dispute the correctness of this exposition, the State narrows its focus to just the 2003 amendment and argues that uncodified Section 3 indicates that the amendment had only a prospective reach. That is, Section 3 reads:

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.

S.B. 149, 124th Gen. Assemb., Reg. Sess. (Ohio 2001).² Had the amendment to section 2743.48(A)(5) been intended to be retroactive, argues the State, the legislature “would have referenced *only* ‘R.C. 2743.48(E)’ rather than ‘R.C. 2743.48’ in its entirety.” (State’s Resp. Brief at 18).

However, Section 2, which precedes Section 3, reads thus, “Section 2. That existing section 2743.48 of the Revised Code is hereby repealed.” S.B. 149. In other words, the 2003 amendment not only amended section 2743.48, it actually repealed it in its entirety and then reenacted it with changes. So, if the State’s position were to be credited, and the legislature

² Available online at http://www.legislature.state.oh.us/bills.cfm?ID=124_SB_149.

really meant for Section 3 to limit the application of the entire act “as amended or enacted,” then the entire statute would only have “appl[ied] 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. That would mean that the entire statute is only prospective (as the State claims) but it would also mean that the entire statute only “appl[ies] to civil actions for wrongful imprisonment in the Court of Claims.” Id. In short, under the State’s view, all the parts of the statute, even parts (A)(1-5) which are exclusively directed to Courts of Common Pleas, would only be effective in the Court of Claims. That is a nonsensical idea that would interpret uncodified language so as to totally nullify the statute. Thus, that interpretation is incorrect. Ohio Rev. Code § 1.47(B-C) (1972) (statutes are to be interpreted with the presumptions that the entire statute is intended to be effective and that a reasonable result is intended).

The only sensible reading of Section 3 is the one already provided in Johnston’s merit brief – that the amendment portions that describe changes relevant to the Court of Claims take effect in “civil actions . . . in the Court of Claims commenced on or after the effective date of th[e amendment], or commenced prior to and pending on the effective date of th[e amendment].” S.B. 149. The remainder of the statute (including 2743.48(A)(1-5)) continued to be effective as provided in the codified language in the statute. Which is to say, according to section 2743.48(A)(1) and (H), the statute would apply to anyone who “prior to, or on or after, September 24, 1986” was subjected to certain conditions and who was not, “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(A)(1), (H) (2010). Or, to put it even more simply, it continued to apply retroactively.

Mansaray is no Bar to Johnston

Errors in Johnston's Case Persisted Subsequent to Sentencing and During Imprisonment

Mansaray v. State, said that when proving an error in procedure claim, “the error in procedure must have occurred subsequent to sentencing and during or subsequent to imprisonment.” 138 Ohio St. 3d 277, 2014-Ohio-750, 6 N.E.3d 35, at ¶ 12. This has the effect of limiting the universe of possible errors in procedure because few errors that occur in a case subsequent to sentencing or during imprisonment could result in an individual’s release.

However, in Johnston’s case, the State, before, during, and after trial as well as subsequent to sentencing and during imprisonment, withheld statements from four witnesses that suggested the time and place of death were different from the prosecution’s theory. (App’x, Suhr Aff. 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 as well as subsequent to sentencing and during imprisonment, 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. This fits the timeframe limitation created by Mansaray. Moreover, as one commentator pointed out, the failure to divulge evidence favorable to the defendant is one of the few errors of criminal procedure that does persist post-trial and sentencing. Benjamin A. Tracy, Pride and Pocketbooks Above Justice: No Relief for Ohio’s Wrongfully Imprisoned, 28:4 Ohio Lawyer 18 n.17 (July/August 2014). Tracy’s observation, that Brady violations may be the sort of errors indicated by the statute, is supported by the text of the statute, a ruling from the Tenth District, stipulated admission by the State, and testimony offered by the authoring legislators themselves.

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

(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(A)(5) (2010) (emphasis added). Black's Law Dictionary defines "error" as, "An assertion or belief that does not conform to objective reality" Black's Law Dictionary 621 (9th ed. 2009). "Procedure," according to an older edition of Black's, is, "The mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the right, and which, by means of the proceeding, the court is to administer; the machinery, as distinguished from its product." Black's Law Dictionary 1203-04 (6th ed. 1990). In the current edition of Black's, "criminal procedure," is separately defined as, "the rules governing the mechanisms under which crimes are investigated, prosecuted, adjudicated and punished. It includes the protection of accused persons' constitutional rights." Black's Law Dictionary 431 (9th ed. 2009).

Johnston had a right to receive favorable evidence and the State had a procedural obligation, both ethical and constitutional, to turn it over. U.S. Const. amend V; U.S. Const. amend XIV, § 1; Ohio Crim. R. 16. The State did not do so and persisted in this failure until after Johnston was sentenced and imprisoned. (App'x, Suhr Aff. at 106-107:¶¶ 10-13); see also Johnston, 39 Ohio St. 3d at 60-63; Johnston, 1986 Ohio App. LEXIS 8178, at *7-21. Johnston was later released as a result of the State's conduct. (App'x, Suhr Aff. at 104-115:¶ 35 & *in passim*); (App'x, *Nolle Prosequi* 05/11/90 at 66).

In addition the State has stipulated and admitted (though not in this case) that a Brady violation counts as an "error in procedure." Larkins v. State, 2009-Ohio-3242, at ¶¶ 4-6 (Ct.

App.). The Tenth District in Larkins said, “Appellant entered into a joint stipulation with the state that appellant had been released as the result of an error in procedure. Based on that stipulation, the court of common pleas found that appellant was a wrongfully imprisoned individual.” Id. at ¶ 6.

Moreover, co-sponsors of the amendment that added the “error in procedure” language to the statute in 2003 confirm that violations of the duty to turn over favorable evidence to the defense were a particular focal point of the amendment. In a 2004 case, Former Ohio State House Majority Whip, William Seitz, III, swore to an affidavit regarding the intent behind the addition of the “error in procedure” language. So too did another co-sponsor of S.B. 149, Barbara Sykes.

By the phrase “error in procedure,” **this statute was intended to encompass procedural error in the form of failure by the state to turn over exculpatory evidence to the defendant** as required by Rule 16 of the Ohio Rules of Criminal Procedure.

We recognized that under Brady v. Maryland, 373 U.S. 83 (1963), due process also required the prosecution to disclose exculpatory evidence to the defendant in a criminal case. Nonetheless, by the phrase “error in procedure,” **this statute was intended to encompass procedural error in the form of a failure by the state to turn over exculpatory evidence to the defendant.** We considered a failure by the state to turn over exculpatory evidence to be an “error in procedure” even though such a failure violated the defendant’s due process rights under the Ohio and United States Constitutions in addition to the defendant’s rights under Rule 16 of the Ohio Rules of Criminal Procedure.

(App’x, Seitz Aff. at 80:¶¶ 13-14) (emphasis added); see also, (App’x, Sykes Aff. at 84:¶ 14).

In Johnston’s case the State withheld, before, during, and after trial, witness statements that conflicted with the State’s theory of the case, as well as evidence that pointed to an alternate suspect (who, a later investigation discovered, was indeed connected with the real killer). (App’x, Suhr Aff. at 106-07:¶¶ 10-13). This is procedural error of exactly the sort contemplated by the plain statutory language. Ohio Rev. Code § 2743.48(A)(5). This fact is confirmed by the

State's admission that a Brady violation is "error in procedure" in Larkins, 2009-Ohio-3242, at ¶ 6. It is confirmed by the Tenth District's holding in Larkins based on the State's admission. Id. at ¶¶ 4-6 & *in passim*. It is finally confirmed by the sworn statements of the very authors of the bill itself. (App'x, Seitz Aff. at 79-80:¶¶ 8-14); (App'x, Sykes Aff. at 83-84:¶¶ 7-15). And these errors persisted, in Johnston's case, during the time identified by this Court in Mansaray, 2014-Ohio-750, at ¶ 12. Mansaray is no bar to Johnston.

If Mansaray is Interpreted, as the State Suggests, to Bar Johnston, it Bears Closer Scrutiny

If this Court is inclined to believe, as the State suggests it should, that Mansaray is a bar to Johnston, it should carefully reconsider the principles of Mansaray. Johnston's entire journey through the criminal justice system was a carnival of errors. Unsubstantiated hearsay allegations of sexual improprieties infested the trial, an improperly hypnotized witness testified to manufactured memories, a sham expert purported to link Johnston to the crime scene by fraudulent testimony based on a cowboy boot which was, itself, seized in an illegal search, and the State withheld evidence that contradicted their theory of the crime and pointed to an alternate suspect who, time would tell, was connected to the real killer. Johnston, 39 Ohio St. 3d at 49-56, 60-63 (discussing hypnotized witness and withheld evidence); State v. Johnston, 64 Ohio App. 3d 238, *in passim* (1990) (discussing coerced consent to search and abusive interrogation); State v. Johnston, No. 412, 1986 Ohio App. LEXIS 8159, at *8-22, *54 (Ct. App. Aug. 6, 1986) (discussing hearsay and hypnotized witness); Johnston, 1986 Ohio App. LEXIS 8178, at *7-21 (discussing withheld evidence); Craig M. Cooley, Reforming the Forensic Science Community to Avert the Ultimate Injustice, 15:2 Stan. L. & Pol'y Rev. 381, 404-05 (2004) (noting that purported expert, Louise 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."); Mark Hansen, Evidence: Believe it or Not, ABA Journal 64-67 (June 1993) (also

noting Robbins' disgrace); see also (App'x, Suhr Aff. at 104-115: *in passim*) (describing the case history). The Ohio Legislature surely meant something by "error in procedure." Ohio Rev. Code. § 2743.48(A)(5); Ohio Rev. Code § 1.47(B). If this case, in which almost every imaginable type of prejudicial error occurred, is not an error in procedure case under Mansaray, then none is and the State's reading of Mansaray will have erased all meaning from the "error in procedure" language. Under such circumstances, (and particularly given section 1.47's instructions that statutes are to be interpreted so that the entire statute is effective and so as to produce a "just and reasonable result") the reasoning of Mansaray might deserve a second look.

As mentioned above, the relevant portion of the wrongful imprisonment statute read, at the time this case was filed:

(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(A)(5) (2010) (emphasis added). The grammatical reading of this is that the clause, "[s]ubsequent to sentencing and during or subsequent to imprisonment," modifies everything between the following commas. In essence, it modifies, "an error in procedure resulted in the individual's release." Id. The timing language thus speaks not to when the error in procedure occurred in the first place, but when it "resulted in the individual's release" – after sentencing and imprisonment. Id.

This reading is not merely grammatical, but also sensible. Very few errors happen after sentencing and during imprisonment and none, that this writer can think of, happen after imprisonment is over. So interpreting the statute as requiring the error itself to occur "subsequent to sentencing and during or subsequent to imprisonment," if interpreted as literally as the State would have it, all but nullifies the statute. Id. If the State's argument from Mansaray

is the result of a desire to read a reasonable limitation into what an “error in procedure” is, other better options are available in the text. For instance, restricting compensable errors to those which “result[] in [an] individual’s release” (i.e., errors that raise doubt about the guilt of the accused – not harmless or technical errors) seems a very just limitation. *Id.*; see also (App’x, Seitz Aff. at 79:¶ 9) (emphasis original) (“the legislature was *especially* concerned with those errors in procedure affecting substantive rights; when an error in procedure occurs which affects a substantive right, the likelihood increases that an individual will be wrongfully convicted as a result”); see also, (App’x, Sykes Aff. at 83:¶ 10) (same).

Granting Johnston Relief Creates no Bad Precedent or Negative Broader Consequence

The State more or less admits that Johnston may deserve to be compensated. See, e.g., (State’s Resp. Brief at 25) (“It is understandable to feel compassion for Johnston for the time he spent in prison on the murder charges.”). Yet, the State defends its attempt to deny compensation to this deserving claimant based on the theme that Johnston seeks a broad expansion of the wrongful imprisonment statute and that the denial of Johnston’s claim is merely the just price to avoid such a costly expansion. The State even suggests that it might be willing to compensate Johnston if it could do so without opening the proverbial and hypothetical flood gates:

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.

Id. at 25.

Here, then, is the limiting principal.

This cause of action is governed by a six-year statute of limitations. Ohio Rev. Code § 2305.07 (1993). And “[a] cause of action against the government has first accrued only when all the events which fix the government’s alleged liability have occurred and the plaintiff was or should have been aware of their existence.” Nickoli, 2010-Ohio-606, at ¶ 34 (internal quotation marks omitted). The simultaneous abrogation of sovereign immunity and the creation of the cause of action is, logically, an “event which fix[es] the government’s [] liability” Id. Thus, the statute of limitations for all persons who had factual circumstances that would have allowed them to bring error in procedure claims began to run on April 9, 2003, when the statute was created. That period expired six years later when midnight came at the end of April 9, 2009. See S.B. 149 (effective date, April 9, 2003); Ohio Rev. Code § 2305.07. It is now 2014. Anyone who had a claim at the time the statute was enacted in 2003, but did not sue in the six year window, never can now. Or, in other words, the State’s assertion that “all wrongful-imprisonment plaintiffs who unsuccessfully litigated actual-innocence actions between 1986 and 2003 would be able to bring new error-in-procedure actions” is wrong. (State’s Resp. Brief at 25). Finding in Johnston’s favor would not allow even one new person to bring a claim.³

³ In fact, the only reason Johnston, himself, is not foreclosed by the limitations period is because of Ohio’s savings statute. Johnston brought his “error in procedure” claim in case number 08 CV 18082 on December 19, 2008. Comp., Johnston v. State, Case: 08CV18082 (D8541 N08-N10). This was within six years of the effective date of the statute and therefore of the accrual of the new cause of action. Case number 08 CV 18082 was voluntarily dismissed on December 28, 2010, and then refiled pursuant to Ohio’s saving’s statute on December 22, 2011. See Dismissal, Johnston v. State, Case: 08CV18082 (E0653 O43); Comp., Johnston v. State, Case: 11CV15900 (E1428 S42-S44); Ohio Rev. Code § 2305.19(A) (2010). Johnston’s present suit is within the statute of limitations but, had it been filed other than pursuant to the savings statute, it would be outside the limitations period.

CONCLUSION

With due respect to the Attorney General's office, the State forgets its role in this case. The Ohio Legislature has seen fit to compensate persons who have been wrongfully imprisoned. Dale Johnston did not murder his step-daughter and her lover – Chester McKnight did. Thus, when Dale Johnston was imprisoned on death row there is no doubt that the imprisonment was wrongful. Yet, the Attorney General's office twists and turns this statute, framing and reframing the issues, in an attempt to create loopholes in which Johnston's hopes can strangle – even going so far as to suggest that the statute's plain retroactivity language might create an unconstitutional result. See, e.g., (State's Resp. Brief at 15). By what right does one branch of the State seek to undo the work of another?

It is time for this to end. Johnston did not kill his step-daughter or her lover. His trial was a circus of errors (some of which, like the withholding of evidence, persisted post sentencing and during imprisonment). And none of those essential facts are in reasonable dispute. "The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution." Falbo v. United States, 320 U.S. 549, 561 (1944) (Murphy, J., dissenting). Johnston has waited over 30 years for that hour. How much longer must he wait and will it ever come?

November 6, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the Appellant's Reply Brief was filed with the Ohio Supreme Court and a copy of the same was 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 November 6, 2014.


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