ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff/Appellant, v. C.K. Defendant/Appellee.	:	Case No. 14-0735 On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case No. CA-13-100193

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INTRODUCTION

"If an individual was truly innocent, the ***prosecution*** has discretion to determine whether that individual is entitled to compensation." (Br.19.) In one sentence, the prosecutor grants itself the power to decide whether wrongfully imprisoned Ohioans will receive any compensation. The prosecutors, not judges, decide who is "truly innocent."

How does the State reach this absurd result? It is the logical conclusion of defining a single word—"can"—in a vacuum, divorced from the rest of the statute. The State argues the word "can" in "no criminal proceeding . . . can be brought" means any possibility of an indictment, no matter how unjustified or wrongful. This absurd interpretation naturally leads to absurd results. Ohioans who endured the most wrongful imprisonment--imprisoned for murder, but actually innocent--are excluded from compensation because murder has no statute of limitations, even though the General Assembly never used the words "murder" or "statute of limitations" in the elements of a wrongful imprisonment claim--and without regard to whether they can prove their innocence.

Instead of acknowledging this absurdity, the State embraces it: only where the State decides, in its discretion, to dismiss a case with prejudice can an Ohioan the State wrongfully imprisoned seek redress.

The Appellate Court reached a simple, common-sense interpretation that harmonizes with the rest of the statute: "can be brought" requires some basis in law or fact, no matter how remote.

This changes nothing, really. Claimants like C.K. will still have to prove they have not, will not, and cannot be prosecuted. They will still have to prove their actual innocence.

C.K., an honorably discharged Air Force veteran and licensed concealed-carry permit holder, shot and killed an intruder in his home. The intruder--a convicted murderer high on crack cocaine, who forcibly entered C.K.'s home three times that morning, kicking in C.K.'s back door--was savagely beating C.K.'s tenant. C.K. was released after the Appellate Court found that C.K. proved every element of self-defense (of himself, and his tenant): the jury had lost its way under the newly passed castle doctrine. C.K. filed a wrongful imprisonment claim to try and prove his innocence.

Affirming the Appellate Court means C.K. and claimants like him retain the opportunity to prove their innocence as the statute contemplates: in court. The State's interpretation eliminates an entire class of claimants' right to prove their actual innocence, for no better reason than prosecutors think they are better judges of innocence than the courts. The General Assembly was clear: judges, not prosecutors, decide who is innocent.

STATEMENT OF THE CASE

This appeal arises from C.K.'s claimed wrongful imprisonment for murder. In the underlying civil wrongful imprisonment case, under R.C. 2743.48(A), the Trial Court granted the State summary judgment on a narrow legal holding: an Ohioan wrongfully imprisoned for murder can never be "wrongfully imprisoned" under the statute, because murder does not have a statute of limitations. The Appellate Court disagreed, reversing and remanding to the Trial Court for further proceedings to determine, among other things, if C.K. is actually innocent, an issue the Trial Court never reached. Because wrongful imprisonment cases involve an analysis of the claimant's criminal case, we start with that procedural history.

A. The Underlying Criminal Case

On Sept. 22, 2011, the Eighth District Appellate Court reversed C.K.'s August 23, 2010, murder conviction as being against the manifest weight of the evidence. State v. [C.K.], 2011-Ohio-4814 (Appellee Appx. 85-98 (redacted).). The Appellate Court held that "at trial, the evidence unequivocally established that [the intruder,] Coleman, who had previously been evicted from the residence, was unlawfully in the house on the day he was shot and killed by [C.K.]." Id. ¶26. Moreover, "[C.K.] had the lawful right to eject [Coleman], and use deadly force to defend himself" under the recently-strengthened Castle Doctrine. Id. Finally, "[C.K.] has established

all three elements of the affirmative defense of self-defense, and the Castle Doctrine fully applies to the facts of the instant case." Id. at ¶30.

The Appellate Court wanted to discharge C.K. outright, but was forced to "reluctantly remand the matter for a new trial because we are restrained by the standard of review under the manifest weight of the evidence and cannot discharge [C.K.]." Id. ¶31. This Court denied the State's petition for certiorari. State v. C.K., 131 Ohio St.3d 1439, 2012-Ohio-331, 960 N.E.2d 988 (2012) (Appellee Appx. 99). The prosecutor dismissed the case and no further prosecutorial action has been taken against C.K.

B. The Underlying Wrongful Imprisonment Case.

On June 1, 2012, C.K. filed a civil action for wrongful imprisonment against the State of Ohio in Cuyahoga County. (Appellate ("App.") R.1.) C.K. propounded discovery on the State's intention to re-file any charges against C.K. and other elements of R.C. 2743.48(A)(1)-(5). C.K. filed Motions to Compel and to Show Cause to get answers. (App.R.10, 17.)

Both C.K. and the State filed cross motions for summary judgment. (App.R.21, 22.) The first three elements of R.C. 2743.48 were uncontested; the Motions focused on whether C.K. met the fourth and fifth elements ("no criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney," and actual innocence, respectively).

C.K. presented evidence from the criminal trial record in support of his Motion and in opposition to the State's Motion, including evidence that there was no ongoing investigation or plan to re-indict him, and that C.K. was actually innocent of murder. (App.R.21 (C.K.'s Motion), 26 (C.K.'s Opp. to the State's Motion), 29 (C.K.'s Reply Supp. his Motion).)

On July 2, 2013, the Trial Court denied C.K.'s Motion and granted the State's Motion. (July 1, 2013 Journal Entry, App.R.34, Appellant's Appx.25.) The Trial Court did not reach the issue of C.K.'s actual innocence under R.C. 2743.48(A)(5). The Trial Court's decision turned on the narrow issue of whether anyone—actually innocent or not—imprisoned for murder can ever show it is more likely than not that "no criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney" under R.C. 2743.48(A)(4). The Trial Court held, as a matter of law, that because murder has no statute of limitations, "the mere possibility of being reindicted and retried precludes [C.K.] from being found to have been wrongfully imprisoned" under the fourth element, (A)(4). (Id., Appellant's Appx. 29.)

C.K. appealed to the Eighth District Appellate Court, in case number 13-100193, raising two assignments of error:

1. The Trial Court erred in granting the State of Ohio's Motion for Summary Judgment.

2. The Trial Court erred in denying C.K.'s Motion for Summary Judgment.

(R.6 at 3.)

The Appellate Court sustained the first assignment of error, reversing the Trial Court's grant of summary judgment for the State. C.K. v. State, 2014-Ohio-1243 ¶44 (8th Dist.). Because the Trial Court never reached the fifth element—actual innocence—the Appellate Court remanded for further proceedings without reaching that issue either. Id. at ¶43. It is from this decision that the State appeals. C.K. has ***not*** cross appealed as to the denial of his Motion, C.K.'s second assignment of error at the appellate court level.

C. Motion To Seal Criminal Records (Separate Proceedings).

During the course of the civil case, C.K. filed a separate action to seal the record of his murder conviction, which the State opposed. Applications to seal are heard by the same judge who presided over the criminal matter being sealed, in this case, Judge Matia in Cuyahoga County. Judge Matia granted the application, sealing record of C.K.'s conviction (and after which point the civil wrongful imprisonment case appeal adopted use of "C.K." instead of his full name).

The State appealed to the Eighth District in Case Number 13-099886. On November 21, 2013, the Eighth District affirmed the trial court's

decision granting the application to seal. (Appellee Appx. 76-84.) The State's motions for reconsideration and en banc consideration were rejected, and this Court declined jurisdiction to hear the appeal in Case No. 2014-0276. (Appellee Appx. 75.)

Relevant for purposes of the instant appeal, during a hearing on the application to seal in April, 2013, Judge Matia asked the Prosecutor's Office whether it intended to "ever reindict [C.K.]" relating to Andre Coleman's death. The Prosecutor admitted on the records they had no plan to reindict C.K. (App.R.30, Exhibit A (Transcript of April 16, 2013 Proceedings), Appellee Appx. 1-74.) Judge Matia--who presided over C.K.'s conviction--noted that further prosecution would be futile, as "any intellectually honest person would agree that [C.K.] would be basically incapable of being convicted of murder in a new trial." (Id. at 12-13.)

Despite believing C.K. could not be prosecuted, Judge Matia could not, procedurally, re-open C.K.'s murder case and dismiss it with prejudice, because the prosecutor had dismissed it earlier. Judge Matia believed he was therefore "without power . . . to prevent [C.K.] from having these charges brought against him," even if they would be baseless. (Id.) The same judge who presided over both of C.K.'s murder trials was willing to

seal all record of those trials to protect C.K., but was unable, procedurally, to end the threat of prosecution (albeit a remote and baseless threat).

If it were procedurally possible for Judge Matia to have dismissed the already dismissed case with prejudice, the only argument the State raises here--that it could, technically, bring charges against anyone in C.K.'s position, regardless of how baseless such charges might be, because there is no statute of limitations--would not exist.

STATEMENT OF FACTS

While this appeal is primarily focused on the narrow legal issue of whether the General Assembly intended to bar people wrongfully imprisoned for murder from recovery under the wrongful imprisonment statute, the underlying criminal case facts would be considered in deciding whether the State showed that there was no genuine issue of material fact that C.K. could have criminal proceedings brought against him for acts associated with his conviction. When the trial court reaches the issue, the same facts and evidence would be relevant as to whether C.K. is actually innocent of murder.

The Eighth District panel that reviewed the criminal trial appeal on a manifest weight of the evidence standard--reviewing the entire proceedings as a fact-finder--set forth a comprehensive review of the trial record in

State v. [C.K.], 2011-Ohio-4814. The Appellate Court in reviewing the instant civil case set forth a statement of facts as well, in C.K. v. State, 2014-Ohio-1243 (Appellant's Appx.004).

The below facts are uncontroverted in the record except as otherwise noted. "Tr." denotes the transcript of proceedings in the two criminal trials, which complete transcripts were part of the record in the civil wrongful imprisonment case from which this appeal arises. "App.R." refers to the documents in the record at the Appellate Court level in this case.

A. C.K. Rents A Room of His Home to Valerie McNaughton.

In 2009, C.K. was a 53 year old electrical engineer and former part-time college professor and tutor for 20 years with Lakeland Community College. (Tr. 685-68 (C.K.); see generally State v. [C.K.], 2011-Ohio-4814 ¶11.) C.K. earned his master's degree from Cleveland State University after serving in the United States Air Force. (Id.) C.K. was recently laid off from Sprint after the company engaged in a major downsizing at the time of the events in this case, and living off of his savings while looking for more full time work. (Tr. 718 (C.K.).)

C.K. was trained in the use of firearms in his time with the Air Force. (Tr. 730-731 (C.K.).) He earned a concealed carry permit in 2005, and kept a properly licensed gun in his home for home protection. (Id.)

C.K. lived at 19101 Cherokee Avenue in Cleveland, his family home since 1999. (Tr. 685 (C.K.).) After being laid off from Sprint, C.K. began renting the second floor bedroom to tenants. (Tr. 721-22 (C.K.); 460 (neighbor Tim Frazier).) Valerie McNaughton asked to move into C.K.'s house in June or July of 2009. (State v. [C.K.], 2011-Ohio-4814 ¶11, "July 2009"; Tr. 688 (C.K.); Tr. 257 (McNaughton).)

B. Valerie McNaughton and Andre Coleman

In late July, 2009, McNaughton requested that her boyfriend, Andre Coleman, be allowed to move in as well. (State v. [C.K.], 2011-Ohio-4814 ¶12; Tr. 278 (McNaughton); 461 (Frazier); 688-89 (C.K.).) McNaughton, who was 25 at the time, had been dating Coleman, who was then 38 years old, for over 8 years, since McNaughton was a teenager. (Tr. 9-10, 576.)

McNaughton testified that she and Coleman had a violent relationship. (Tr. 278 (McNaughton).) According to neighbors, Coleman would fight loudly with McNaughton and assault her. (Tr. 478 (neighbor Timothy Frazier, "[Coleman] would like throw her on the ground, grab her hair, drag her on the ground. Stuff like that.").) Coleman was known to be an extremely violent man who would physically assault McNaughton, in public and in private. (Tr. 477-478 (Frazier), 577-81 (McNaughton), 663 (Walker, describing Coleman as a "[v]ery violent man"), 697-98.) As

McNaughton testified, Coleman was particularly violent when using crack cocaine or coming down from a crack cocaine high:

> Q: During those eight and-a-half years, you would agree with me that Andre was verbally abusive towards you?
>
> A: Yes.
>
> Q: He was physically abusive towards you?
>
> A: Yeah
>
> * * *
>
> Q: He told you he had killed somebody before with a gun?
>
> A: Yeah.
>
> * * *
>
> Q: He could be violent when he would be coming down off his high, right?
>
> A: Yeah.
>
> Q: If you didn't have money for him or more crack for him, he would take it out on you, right?
>
> A: Yeah.
>
> Q: You would agree with me that while Andre is using cocaine, when he's coming off the high, he becomes angry?
>
> A: Yeah.

(Tr. 576-578 (McNaughton).)

About a week before the shooting, Coleman punched McNaughton in the face with such force that her jaw was swollen to the size of a grapefruit.

(Tr. 581-82 (McNaughton).) McNaughton refused C.K.'s attempt to take her to the hospital out of fear that the police would require a statement against Coleman. (Tr. 568, 581-83 (McNaughton), 697-98 (C.K.).)

After a particularly violent episode, C.K. evicted Coleman, demanding that Coleman leave the premises and not return. (Tr. 692, 730 (C.K.).) Coleman returned and C.K. had a verbal altercation with Coleman on the street. C.K., who has a lawful concealed carry permit and kept a hand gun in his home safe, put his gun in a belt holster he wore during this altercation (this was not the first time Coleman had returned). (Tr. 269 (McNaughton).) The police responded and temporarily confiscated the gun, which was returned to C.K. (Tr. 264-69 (McNaughton), 692-95 (C.K.), 754-55 (C.K.).) C.K. made clear that Coleman was not welcome in C.K.'s home, but that did not deter Coleman. (Tr. 696-97 (C.K.).)

By September, 2009, C.K. had rebuffed every attempt Coleman made to visit the house. (T. 262-462 (McNaughton: C.K. threw Coleman out and "didn't want him there"), 583 (McNaughton: confirming that, "[a]fter [Coleman] was evicted from C.K.'s house in late August," both McNaughton and Coleman knew Coleman was not allowed on C.K.'s property), 733-34 (C.K.: repeatedly told Coleman to leave in the past).) See also, May 11, 2011 Affidavit of C.K., which affirmatively sets forth the factual basis for

Coleman being an unlawful intruder, without permission to be present, and whom C.K. had instructed to leave the premises. (R. 21, Ex. B-6.)

After Coleman left, McNaughton told C.K. that Coleman was dangerous, had been convicted for carrying concealed weapons and drug offenses, and had been convicted for killing a man in 1990. (Tr. 577-78 (McNaughton), 695-96 (C.K.).); State v. [C.K.], 2011-Ohio-4814 ¶13.

C. The Shooting On September 20, 2009.

In the early morning hours of Sunday, September 20, 2009, Coleman and McNaughton were in a hotel room with Douglas Kapel and another person smoking crack cocaine. (Tr. 583-84 (McNaughton); Tr. 484-87 (Kapel).) When they ran out, they went out to buy more crack on East 152nd Street and returned to the hotel. (Tr. 274-81 (McNaughton), 487-88, 495-96 (Kapel).)

Once they had run out of crack, Coleman began acting stressed and McNaughton believed he was going to get violent. (Tr. 45-46 (McNaughton).) McNaughton concocted a story that she was going to get more crack if they drove to a store near to C.K.'s home. (Tr. 280-83, 586 (McNaughton), 487-89 (Kapel).) Instead, she slipped out and returned to C.K.'s home. (Tr. 497-98 (Kapel), 586 (McNaughton).) This Court summarized her testimony as follows:

> McNaughton testified that the foursome drove to the parking lot of a Save-A lot supermarket located near C.K.'s home. McNaughton exited the truck while the others remained inside; she then surreptitiously slipped away and made her way back home. Once home, McNaughton told C.K. that she had left Coleman a few streets away, that he was very upset, and that he would be there shortly looking for her.

State v. [C.K.], 2011-Ohio-4814 ¶6-7.

When Coleman realized the deception, he went looking for McNaughton. McNaughton told C.K. that she had left Coleman a couple streets away, that he was mad at her, and that he would be coming over looking for her. (Tr. 285-87, 586 (McNaughton).)

A few minutes later, McNaughton saw the red truck that the group had been using earlier that night pull into the driveway. She "jumped up hysterically and started yelling, 'He's here, don't let him in, lock the door.' She ran to the kitchen back door and made sure it was locked." (Tr. 700-01 (C.K.), 272, 283-85 (McNaughton).) Seeing McNaughton's hysteria, C.K. went and got his gun from the safe in his bedroom and put it in the conceal-carry holster in his pants pocket. (Tr. 701, 732-33, 754-55 (C.K.).)

Coleman immediately began banging on the locked back door; he kicked out the bottom panel and entered the house. (Tr. 288 (McNaughton); 701-02 (C.K.).) This was the first of three unlawful entries by Coleman that morning. Coleman completely kicked out the door's lower

panel leaving a big opening. (T. 287-88, 296, 587-88, 603 (McNaughton), 701-02, 734 (C.K.).) Coleman crawled through the door, threatened to "shoot it out" with C.K., and started searching for McNaughton. (Tr. 702 (C.K.).) C.K. told Coleman he was not allowed at the house, "[b]ut he didn't pay attention to me. He pushed me out of the way and went into the living room." (Tr. 702 (C.K.).) McNaughton shouted to Coleman that the police were on their way and his ride was leaving. (Tr. 557 (McNaughton).) Coleman crawled back out of the broken door and ran down the driveway to catch the departing truck. (Tr. 287-89, 562, 703 (C.K.).)

According to Kapel, who was driving the red truck, Coleman immediately wanted to return to C.K.'s house. (Tr. 489-90, 499 (Kapel).) Kapel testified he did not want to take Coleman back to C.K.'s house because he knew Coleman was not welcome there, and it was for this reason he made Coleman exit the truck down the street from C.K.'s home. (Tr. 490, 492.) Kapel could hear McNaughton screaming from inside the house to tell Coleman not to come in when they first went over, and he knew there would be trouble. (Tr. 490.)

When Coleman returned, he found C.K. repairing the door, and McNaughton gone. Coleman "forced his way in while [C.K.] was there trying to fix the back door." (Tr. 704; 737-40 (C.K.).) Again, Coleman

threatened C.K. and asked if he wanted to "shoot it out." C.K. told him: "You are not allowed here, what do you want here, you can't be here. You got to leave here." (Tr. 705.) As C.K. testified: "He pushed me out of the way and searched through all my rooms, looking over the living room, bedroom, bathroom, every room in the house until he was satisfied she wasn't there." (Tr. 705.) Coleman proceeded to burst into C.K.'s neighbor, Tim Frazier's house. As Mr. Frazier testified, "all of a sudden" an angry Coleman walked into the house through the back door. He "Just walks right in." (Tr. 434-35, 464.) Frazier said he told Coleman, at least 7-8 times, "Valerie is not here." After searching Mr. Frazier's home for Ms. McNaughton, Coleman left. Frazier testified that some 15 to 25 seconds after Coleman left his house he heard gunshots coming from C.K.'s house. (T. 438-39, 441.)

Meanwhile, Valerie had been hiding in the garage; when she returned, Coleman attacked her:

> McNaughton hid in the garage until Coleman left; she stayed for about 10 minutes, and reentered the house when she thought it was safe. When she entered the house, McNaughton found Coleman standing in the kitchen. Coleman immediately started yelling at McNaughton to give him money, followed her into the living room, grabbed her by the hair, threw her to the ground, and began hitting her. McNaughton testified that as Coleman was beating her, C.K. fired two shots, hitting Coleman, who spun around and fell to the ground. McNaughton testified that

> C.K. proceeded to shoot Coleman several times as he lay on the floor.

State v. [C.K.], 2011-Ohio-4814 ¶9-10; Tr. 594-95.

The Eighth District summarized C.K.'s testimony regarding the moment of the shooting as follows:

> C.K. described his thoughts at the moment of the shooting: "I thought I was dead. I thought, I was panicking, I thought it just about, I thought he was going to shoot me. My gun was brand new, I never tried it. I didn't even know if it would work. I was afraid it would fail me and he was going to shoot me. I was pretty much panicking at the time." C.K. maintained, "I thought he was going to shoot me."

State v. [C.K.], 2011-Ohio-4814 ¶17. (Tr. 711-712 (C.K.). Mr. Frazier said he heard the gunshots and that they came in rapid succession—in a "pop, pop, pop, pop, pop" fashion—with no breaks in between shots. (Tr. 467.)

C.K. walked onto his front porch, called the police, and waited.

D. McNaughton's Inconsistent Testimony

Because the State bases its recitation of the facts, and accusations against C.K.'s character, on Valerie McNaughton's testimony, it is important to note the inconsistencies in that testimony from the first to the second trial.

In the first trial, McNaughton wore a prison jumpsuit, as she was incarcerated at the time for possession of cocaine. (Tr. 9.) During the first trial, McNaughton testified that Coleman had been savagely beating her for

at least 40 seconds after finding her in C.K.'s living room, before any shots were fired. (Tr. 64-65.) After demanding Coleman stop beating McNaughton and leave C.K.'s home, Coleman turned towards C.K. with what appeared to be a gun. (Tr. 709.) C.K. fired two shots. According to McNaughton's testimony in the first trial, Coleman started falling, and McNaughton heard the other shots in rapid succession, without C.K. approaching, as Coleman was falling and turning. (Tr. 65-66.) This was confirmed by C.K.'s neighbor, who heard the shots fired in rapid succession without a noticeable pause between them, "pop pop pop pop pop." (Tr. 467.) It also fit with the scientific evidence that all shots were fired from more than four feet away, not at close range. (Tr. 373 (opinion that "the muzzle to-target distance was 4 feet or greater" for all of Coleman's gunshot wounds).)

The first trial ended in a mistrial caused by the prosecution.

At the second trial, McNaughton changed her testimony. Now McNaughton claimed that C.K. fired two shots, waited "at least 30 seconds," then approached Coleman and, from close range, fired four more shots into Coleman's back. (Tr. 595-96.)

McNaughton's "best friend" at the time, Carolyn Walker, testified that McNaughton later told her Coleman did have a gun, just as C.K. thought.

McNaughton told Walker she had returned to C.K.'s living room just after the shooting, while C.K. waited for the police on the porch, took Coleman's gun, and later sold it. (Tr. 662 (Walker, "best friends" for time), 678-79 (Walker: McNaughton confession that she disposed of Coleman's gun).) McNaughton, a crack-cocaine addict, admitted in court to returning to the scene even later to steal C.K.'s security video cameras to sell them for the money. (Tr. 596-97 (McNaughton: admitting she "stole the security cameras . . . for money").)

Sadly, McNaughton still professed her love for Coleman, even at trial. (Id.) She told C.K.'s neighbor, Mr. Frazier, that she intended to "put C.K. away" for taking Coleman away from her. (Tr. 601-602 (McNaughton)).

E. The State's Incorrect Factual Assertions.

The State continues to assert C.K. "executed" Coleman by relying on McNaughton's story—the one she told for the first time at the second trial—that C.K. shot twice, then ran over and shot four more times into Coleman's back. (Appellant's Br. at 2.) The State incorrectly cites to State v. [C.K.], 195 Ohio App.3d 343, 2011-Ohio-4814, ¶28, as if the Appellate Court believed this theory. In reality, this section of the case describes C.K.'s testimony that he had shot a number of times--C.K.'s CCW training was to empty the gun if being attacked by an intruder--until Coleman was down.

C.K. said he then walked over, and may have pulled the trigger once when Coleman twitched, but he does not remember if the gun went off. Id. In the following paragraph, the Court held that, having reviewed the entire criminal case, "[C.K.'s] testimony establishes that he had a bona fide belief that he was in imminent danger of death or great bodily harm at the hands of Coleman and that the only means of escape was the use of force." Id. ¶29.

The State also references a crack pipe and ATM receipts located in the home when searched later by police. (Appellant's Br. at 3.) The State knows full well that there has never been any allegation that C.K. was using drugs or doing anything else illicit or illegal at the time of the shooting. C.K. was not the reason Coleman kicked in C.K.'s back door, forced his way in three times, and attacked McNaughton. C.K. was not with McNaughton or Coleman as they binged on crack cocaine in a nearby hotel.

Ignoring the fact that the pipe was not C.K.'s (McNaughton, a crack-cocaine addict, rented the room), and that ATM receipts are not evidence of a crime, the only possible relevance of insinuations against C.K. would be to show C.K. was engaged in other criminal activity for which he could be charged, arising from the underlying shooting. As the Appellate Court noted, the "state's allegation that C.K. engaged in illegal drug activity [at

some indeterminate earlier time] would appear to be, at best, a red herring and, at worse, an attempt to create a bias against C.K. in this wrongful imprisonment action." C.K., 2014-Ohio-1243, ¶41.

ARGUMENT

I. STANDARD OF REVIEW

Because the underlying decision from which this appeal arises is the grant and denial of cross motions for summary judgment, this Court's review is *de novo*, guided by Civil Rule 56(C). Vacha v. N. Ridgeville, 136 Ohio St.3d 199, 2013-Ohio-3020, 992 N.E.2d 1126, ¶19 (2013); Comer v. Risko, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8.

Under Civil Rule 56, this Court must construe all facts in the light most favorable to the non-moving party. Civ.R. 56. Summary judgment cannot be granted if the facts are subject to reasonable dispute, as the improper grant of summary judgment "precludes a jury's consideration of a case, and should, therefore, be used sparingly, only when reasonable minds can come to but one conclusion." Shaw v. Central Oil Asphalt Corp. (1981), 5 Ohio App.3d 42, 44, 449 N.E.2d 3.

II. "CAN BE BROUGHT" CANNOT MEAN "ANY POSSIBILITY WITHOUT REGARD TO FACTUAL OR LEGAL BASIS." (STATE'S FIRST PROPOSITION OF LAW)

A. The Plain Statutory Language Cannot Exclude C.K.'s Claim

The statutory language at issue on appeal is the third part of the fourth element, in R.C. 2743.48(A)(4):

> [N]o criminal proceeding is pending, can be brought, or will be brought by any prosecuting attorney . . . against the individual for any act associated with that conviction.

The General Assembly made "no criminal proceeding . . . can . . . or will be brought" an element of wrongful imprisonment for claimants like C.K. to prove.

Without regard to whether a statute or clause of a statute is ambiguous, courts must presume that, in enacting R.C. 2743.48, the General Assembly intended "the entire statute . . . to be effective," to obtain "a just and reasonable result," and that such just and reasonable result be "feasible of execution." R.C. 1.47(B), (C), (D).

The only reading of R.C. 2743(A)(4) that comports with those goals is that claimants must show the criminal proceedings are either not possible ("cannot") or not at all likely (because the prosecuting authority "will not" bring proceedings). To ignore that the prosecutor will not bring criminal proceedings would render "will not" surplussage, violating R.C. 1.47(B). It

would also violate R.C. 1.47(B), a "just and reasonable result," because even when a claimant can prove that no prosecuting authority will bring criminal proceedings, and prove they are actually innocent, the claimant is still denied recovery under a statute designed to provide wrongfully imprisoned people compensation. That is neither just nor reasonable.

The "cannot" bring criminal proceedings likewise cannot mean "totally impossible despite being factually and legally supportable." As the State admits, "can" means both "possession of a specified power, right or privilege" or "possibility or probability." (Appellant's Br. at 12.) It makes no sense to assume "can" always means "any possibility" when the context involves an entity--prosecutors--that always has the absolute right to initiate criminal proceedings. This would render every other element irrelevant: no one could ever be wrongfully imprisoned.

That prosecutors "can" always initiate criminal proceedings is indisputable. While "[t]he term 'criminal proceedings' is not defined by the Revised Code," State v. Z.J., 2007-Ohio-552 ¶17 (8th Dist.), this Court defined "'prosecution' as '[a] criminal action; a proceeding instituted and carried on by due process of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime." Id. (quoting State ex rel. Unger v. Quinn (1984), 9 Ohio St.3d 190,

459 N.E.2d 866). Likewise, "Proceeding" means the "[r]egular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment." State ex rel. Towler v. Ron O'Brien, 2005-Ohio-363 (10th Dist.) (quoting State ex rel. Steckman v. Jackson, 70 Ohio St.3d 420, 432, 639 N.E.2d 83, 92 (1994)) (emphasis added). "Criminal Proceeding" necessarily includes seeking a criminal indictment--something prosecutors can always do.

Nor is "can bring criminal proceedings" defined by or limited in any way to criminal charges within a specified statute of limitations, as the State argues. Prosecutors can and do charge defendants outside the statute of limitations period--sometimes successfully, where there is tolling available, and sometimes unsuccessfully, resulting in a violation of the defendant's Sixth Amendment rights. This Court decided a wrongful imprisonment case, in fact, based on the plaintiff being charged after more than twice the applicable statute of limitations, in the Kendle Jenkins matter (decided on other grounds).

B. <u>The General Assembly's Intent Cannot Include Excluding C.K.'s Claim.</u>

Finding that the clause is ambiguous, then, is unnecessary to know that the State's interpretation--that "criminal proceedings can be brought" must mean "the statute of limitation has run"--cannot be correct. But the

mere fact that there can be multiple reasonable interpretations of the clause means the clause is ambiguous, and this Court should consider the legislative intent. State ex rel. Toledo Edison Co. v. Clyde (1996), 76 Ohio St.3d 508, 513, 668 N.E.2d 498, 504 (Ambiguity exists if the language is susceptible of more than one reasonable interpretation).

The State presents no evidence that the intent of the General Assembly to exclude anyone who was wrongfully imprisoned for murder, and further, that the General Assembly did so without bothering to use the words "statute of limitations" or "murder" anywhere in the elements of the claim. Because that would be silly. The State never explains why the General Assembly would provide recovery to those wrongfully imprisoned for a crime, but implicitly exclude the people most deeply wronged by the false conviction. This would be a fundamental rewrite of the statute.

In construing a statute:

> It is well accepted that the cornerstone of statutory construction and interpretation is legislative intention. State ex rel. Francis v. Sours (1944), 143 Ohio St. 120, 124, 28 O.O. 53, 55, 53 N.E.2d 1021, 1023. *492 In order to determine legislative intent it is a cardinal rule of statutory construction that a court must first look to the language of the statute itself. Provident Bank v. Wood (1973), 36 Ohio St.2d 101, 105, 65 O.O.2d 296, 298, 304 N.E.2d 378, 381. . . . Moreover, it is well settled that to determine the intent of the General Assembly " '[i]t is the duty of this court to give effect to the words used [in a statute], not to delete words used or to insert words not used.' " Bernardini v.

> Conneaut Area City School Dist. Bd. of Edn. (1979), 58 Ohio St.2d 1, 4, 12 O.O.3d 1, 3, 387 N.E.2d 1222, 1224, quoting Columbus-Suburban Coach Lines v. Pub. Util. Comm. (1969), 20 Ohio St.2d 125, 127, 49 O.O.2d 445, 446, 254 N.E.2d 8, 9. . . . If a statute is ambiguous, the court, in determining the intent of the General Assembly, may consider several factors, including the object sought to be obtained, the legislative history, and other laws upon the same or similar subjects. R.C. 1.49.

State v. Jordan, 89 Ohio St.3d 488, 491-92, 733 N.E.2d 601, 605 (2000).

Here, the intent of R.C. 2743.48 is remedial, because its purpose is "to correct past injustices." Wright v. State, 69 Ohio App.3d 775, 779, 591 N.E.2d 1279 (10th Dist. 1990); State v. Moore, 165 Ohio App.3d 538, 2006-Ohio-114, 847 N.E.2d 452, ¶ 21 (4th Dist.). Denying compensation through such a flawed interpretation would contravene the liberal interpretation afforded R.C. 2743.48 as a remedial statute. "Remedial laws . . . shall be liberally construed to promote their object and assist the parties in obtaining justice." R.C. 1.11.

The Eighth District held that "there is a factual question as to whether C.K. satisfies the fourth prong" and "[a]dditional evidentiary inquiry is necessary to determine whether another criminal proceeding in connection with his prior murder conviction "can be brought, or will be brought" against C.K." C.K. v. State, 2014-Ohio-1243, ¶35. This Court has already declined jurisdiction to review a case that reached precisely the same

conclusion, and on which the C.K. court relied: LeFever v. State, 2013-Ohio-4606 ¶ 26 (10th Dist.), appeal not allowed, 2014-Ohio-2021.

The Tenth District held that the "will be brought" language in subsection (A)(4) is "an alternative means for the claimant to satisfy R.C. 2743.48(A)(4) in cases where future criminal proceedings are both factually supportable and legally permissible, but the prosecutor has elected not to proceed." LeFever v. State, 2013-Ohio-4606 at ¶29 (10th Dist.) (emphasis added). The LeFever court looked to traditional statutory interpretation principals: it could not ignore the "will be brought" language by finding the mere possibility of reindictment under the "can be brought" language was dispositive in a murder case. Id.

The State cites LeFever for the contrary proposition because the LeFever court ruled against the plaintiff. But its reasoning is instructive. The LeFever case involved a woman convicted of poisoning her husband over twenty years ago; she claimed it was a suicide, not murder. Twenty years later, her conviction was reversed and a new trial ordered when it was discovered that the toxicologist who testified as to the poisons found in the husband's body had lied regarding his qualifications. Id. at ¶5. When the State did not re-prosecute—because, in part, there is no currently available

method to test the 20 year old biologic samples from the victim to confirm the poisons' presence—the wife filed for Wrongful Imprisonment status.

Under the State's theory, the LeFever appellate court should have viewed this as a simple case: there is no statute of limitations for murder, therefore the State can re-prosecute LeFever indefinitely, therefore LeFever can never be wrongfully imprisoned as a matter of law.

But the LeFever court did the opposite, holding that whether the State "will" prosecute LeFever is a separate question, and carefully considering the evidence put forward by the State and LeFever on that issue. The State's evidence included: (1) press releases detailing the prosecutor's intent to reindict and hope for scientific advances in forensic testing of 20 year old biological samples (¶17); (2) deposition testimony that the Prosecutor would consider attempted murder charges if testing remained impossible when the six-year statute of limitations for attempted murder approached (¶18-19); (3) evidence the Prosecutor was conferencing with witnesses to secure favorable testimony against LeFever (¶20); (4) a new witness, obtained after the reversal of LeFever's conviction, corroborating the prosecution witness's testimony (¶20); and (5) that the Prosecutor was engaged in an active ongoing investigation, including preserving biologic samples for future testing (¶27).

It was only in this context that the LeFever court found "the State has conclusively demonstrated that appellant cannot prove a critical element of her claim—namely, that the State cannot or will not bring criminal proceedings." Id. at ¶27. LeFever was "unable to present evidence to support an inference that, more likely than not, no criminal proceeding can or will be brought against her for an act associated with her conviction." Id. at ¶33.

C.K.'s case is the polar opposite: C.K. has produced evidence that the State will not re-prosecute him–conclusive, unrebutted evidence, including State's admission that it has no intention to reindict C.K. There is no ongoing investigation, and prosecution would be fruitless because C.K. was acting in self-defense.

The Amicus argument that this and the underlying appellate decision somehow "shift the burden" misunderstands the law: these are cases involving summary judgment, for which the moving party must affirmatively demonstrate there is no genuine issue of material fact on an issue, even where the other party bears the burden of proof on that issue at trial.

C. The State's Proposition of Law is Inapplicable.

Perhaps to distract from the simplicity of the issue, the State created a proposition of law totally inapposite to this case. There is no "investigation" pending, and the State admitted, on the record in open court before the same trial judge that presided over C.K.'s criminal trial, that it has no intention of ever prosecuting C.K. The Proposition is further flawed in describing C.K. as a claimant "in which the criminal statute of limitations has not expired." The statute of limitations for murder has no expiration. The State cannot point to anything in the statute or its legislative history suggesting the General Assembly secretly intended to eliminate claimants wrongfully imprisoned for murder from recovery.

III. "OTHER CRIMINAL CONDUCT" MUST ARISE FROM THE SAME UNDERLYING CRIME. (STATE'S SECOND PROPOSITION OF LAW)

The State argues that C.K. cannot be declared wrongfully imprisoned because he was engaged in other criminal conduct at the time.

First, this issue was never reached, and should not be considered by this Court for the first time--it will be addressed by the Trial Court on remand.

Second, the State's argument is incorrect on its face. The State points to a crack pipe and ATM receipts, totally unable to explain how this proves,

as a matter of law (as this appeal arises from a motion for summary judgment), that C.K. was involved in contemporaneous criminal conduct for which he could be prosecuted, "arising out of" the shooting. That a Motion in Limine to exclude evidence does not "confirm guilt" should not have to be stated.

Finally, the State's legal argument is bizarre: the State ignores the clear language of this Court's precedents that the criminal conduct must "arise out of" the facts of the original conviction:

> [S]tatutes demand that "claimants seeking compensation for wrongful imprisonment must prove that at the time of the incident for which they were initially charged, they were not engaging in any criminal conduct arising out of the incident for which they were initially charged."

Brown v. State, 2006-Ohio-1393 ¶24 (quoting Gover v. State (1993), 67 Ohio St. 93) (emphasis added). C.K. met this standard, but in any event, the trial court never reached it.

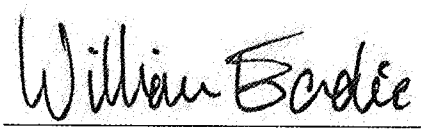
Because C.K.'s evidence that he was not, "at the time of the incident . . . engaging in any criminal conduct arising out of the incident for which [C.K. was] initially charged," remains unrebutted, C.K. was entitled to summary judgment on this issue, which should be considered by the trial court on remand. Brown v. State, 2006-Ohio-1393 ¶24; Dresher v. Burt (1996), 75 Ohio St.3d 280, 292-93, 662 N.E.2d 264.

IV. CONCLUSION

The Appellate Court determined that R.C. 2743.48(A) cannot disqualify every person wrongfully imprisoned for murder, the only reasonable interpretation of the language. This Court should likewise find that "no criminal proceeding can . . . or will be brought" requires claimants to prove that either the prosecuting authority has no legal or factual basis to bring further proceedings, or that the prosecuting authority has chosen not to do so and will not do so.

The Eighth District did not determine that C.K. met this burden, but remanded for the trial court to consider the issue for the first time. Nor has the trial court made any factual findings regarding the other elements of the wrongful imprisonment statute, including whether C.K. is actually innocent. C.K. will not be declared a Wrongfully Imprisoned Individual unless he proves those elements.

Respectfully submitted,



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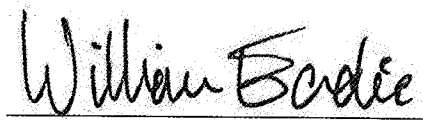

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