

In the  
**Supreme Court of Ohio**

|                      |   |                           |
|----------------------|---|---------------------------|
| OMAR K. JAMES,       | : | Case No. _____            |
|                      | : |                           |
| Plaintiff-Appellee,  | : | On Appeal from the        |
|                      | : | Clark County              |
| v.                   | : | Court of Appeals,         |
|                      | : | Second Appellate District |
| STATE OF OHIO,       | : |                           |
|                      | : | Court of Appeals          |
| Defendant-Appellant. | : | Case No. 2013-CA-28       |
|                      | : |                           |

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**MEMORANDUM IN SUPPORT OF JURISDICTION OF  
DEFENDANT-APPELLANT STATE OF OHIO**

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## INTRODUCTION

The decision below radically expanded the scope of Ohio’s wrongful-imprisonment law in ways that contradict both the statute’s text and this Court’s precedent. The court of appeals chose this radical step over following this Court’s earlier remand order to apply *Mansaray v. State*, 138 Ohio St. 3d 277, 2014-Ohio-750. The court’s initial decision had held that the “error in procedure” leading to the “vacation of [Omar] James’s convictions” was the trial court’s failure to ensure that his waiver of counsel was knowing and intelligent. *James v. State*, 2014-Ohio-140 ¶ 20 (2d Dist.) (“App. Op.”), (Ex. 5). Although that trial error did not occur “subsequent to sentencing,” the appeals court held that that modifying language did not relate to when an error *occurred*; rather, R.C. 2743.48(A)(5) was met as long as the determination or release was post-sentencing. *Mansaray* rejected that view, holding that the relevant “error in procedure” must *occur* after sentencing to trigger the law. This Court remanded James’s case to apply that rule.

On remand, the appeals court redefined the “error in procedure” in a dramatic way. The relevant error, it said, was not the waiver-of-counsel error—even though that was the error that led to the invalidation of James’s conviction and to his release from prison. Instead, it noted that the federal habeas court gave the prosecutor the option to retry James by a deadline, and it found that “the State’s failure to retry the case prior to the deadline was a procedural error that occurred after sentencing.” *James v. State*, 2015-Ohio-623 ¶ 10 (2d Dist.) (“Remand Op.”) (Ex. 3).

Review is needed because that view undermines *Mansaray* and renders almost everyone eligible for wrongful-imprisonment claims when a conviction is vacated and the prosecutor declines to retry. Retrial is allowed in almost all reversed cases. But prosecutors often decline to retry for practical reasons, such as cost, age of evidence, witness availability, or the mere fact that—as here—a defendant had already served most of his sentence anyway. Under the appeals

court's view, though, such defendants are eligible to be declared wrongfully-imprisoned, because the lack of retrial can almost always be described as an "error"—not just in James's case.

The decision's broad reach alone warrants review, but the decision also happens to be wrong. Far from an error, the lack of retrial is an *option* for the prosecutor. Moreover, it cannot be an error that "resulted in the individual's release," as the release results from whatever led to the first conviction being invalidated. Indeed, James had already been released when the later "non-retrial" was secured, so his release cannot have "resulted" from a later, post-release event.

The decision also warrants review for a separate reason—on an issue already before the Court in another case—because it also undercuts the "Otherwise Innocent" Requirement of R.C. 2743.48(A)(4), which requires claimants to show that "they were not engaging in any other criminal conduct arising out of the incident for which they were initially charged." *Gover v. State*, 67 Ohio St. 3d 93, 95 (1993). This bars compensation to those who, like James here, committed other crimes associated with the crime under review in the wrongful-imprisonment case. The court below wrongly held that *Gover's* reading of (A)(4) is no longer good law, based on the addition of the Error-in-Procedure prong to part (A)(5). The Court has already granted review of that issue in *McClain v. State*, No. 2014-1519, and should do so again here.

For these and other reasons, the Court should grant review and reverse on both grounds.

#### **STATEMENT OF THE CASE AND FACTS**

**A. Omar James was convicted of several drug and weapons charges, all from actions he took on a single day in 1996.**

James was initially tried on four counts arising from his actions on a single day in September 1996: two counts of possessing crack cocaine, one count of carrying a concealed weapon, and one count of having a weapon while under a disability. App. Op. ¶¶ 3-4. A jury

convicted James on the weapons-while-under-a-disability charge but hung on the other charges. *Id.* ¶ 4. James did not appeal, and he served a one-year prison term. *Id.*

At a second trial, a jury convicted James on the other three counts, and the court sentenced him to thirteen years in prison. *Id.* ¶ 5. On appeal, the Second District affirmed, and this Court declined jurisdiction. *Id.*

**B. James was released from prison after obtaining federal habeas relief, based on an error in waiving his right to counsel at trial, and he was not retried.**

James sought habeas relief in federal court, arguing that his waiver of the right to counsel (he represented himself at the second trial) was not knowing and voluntary. *James v. Brigano*, 470 F.3d 636, 643 (6th Cir. 2006). A federal district judge granted a conditional writ in June 2005, and the Sixth Circuit affirmed. *Id.* at 640, 644. James was released from the State’s custody in June 2007. *James v. Brigano*, 2008 WL 2949411, at \*3 (S.D. Ohio July 30, 2008). By then, James had served nearly three-quarters of his sentence. *Id.*

In July 2008, the federal district court ordered that James also be released from “bond and its accompanying conditions,” and ordered the State to retry him “on or before October 27, 2008 or forego [sic] further retrial.” *Id.* at \*1. The State never retried him. App. Op. ¶ 6. In August 2009, the state court dismissed the remaining counts of the indictment with prejudice. *Id.* ¶ 7.

**C. James sued for wrongful imprisonment, and the trial court denied relief, but the Second District reversed.**

After the habeas writ led to his 2007 release and after the State declined to retry him in 2008, James sued for wrongful imprisonment. On cross-motions for summary judgment, the trial court granted the State’s motion and denied James’s. *James v. State*, No. 09CV1251 (Feb. 15, 2013) (Ex. 6). On appeal, the Second District reversed and ordered that summary judgment be entered for James. App. Op. ¶ 25. It addressed both R.C. 2743.48(A)(4)’s Otherwise Innocent requirement and R.C. 2743.48(A)(5)’s “Error in Procedure” prong.

As to Error in Procedure, the court reasoned that the self-representation error during James's second trial "ultimately led to the vacation of James's convictions." *Id.* ¶ 20. Although that error occurred at trial, the court held that the error triggered the statute. Adopting a view that this Court later rejected in *Mansaray v. State*, 138 Ohio St. 3d 277, 2014-Ohio-750, it held that the error in procedure need not *occur* after sentencing, as "the phrase '[s]ubsequent to sentencing and during or subsequent to imprisonment' . . . describes the timing of the individual's release, or the court's determination that no offense was committed." App. Op. ¶ 23 (citing *Hill v. State*, 2013-Ohio-1968 (10th Dist.), *rev'd*, 139 Ohio St. 3d 451, 2014-Ohio-2365).

As to (A)(4), the court adopted the Tenth District's *Hill* reasoning, saying that *Gover v. State*, 67 Ohio St. 3d 93 (1995), "cannot prevail over contradictory text" in the 2003 amendments to subsection (A)(5). *See id.* ¶ 18 (quoting *Hill*). That is, the Second District said that the changes to (A)(5) overrode *Gover*'s reading of (A)(4)'s Otherwise Innocent provision.

**D. This Court reversed and remanded to apply *Mansaray*.**

The State appealed the Second District's decision. Just after the jurisdictional filing, this Court decided *Mansaray*. 2014-Ohio-750. It held that if a wrongful-imprisonment claimant "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.* at syl. The Court then granted the appeal in *James*, and reversed and remanded to apply *Mansaray*. *See James v. State*, 139 Ohio St. 3d 1401, 2014-Ohio-2245.

**E. On remand, the Second District redefined the relevant error and ruled for James.**

The appeals court limited its consideration on remand to whether James met the (A)(5) requirements in light of *Mansaray*. Remand Op. ¶¶ 1, 3. It reached the same result as in 2013, but this time for a new reason. The court had earlier said that the waiver-of-counsel error led to James's release. App. Op. ¶ 20. On remand, it conceded that such an error does not meet (A)(5).

Remand Op. ¶ 7. But it held instead that a *different* error applied, as “the State’s failure to retry the case prior to the deadline was a procedural error that occurred after sentencing and imprisonment, within the meaning of R.C. 2743.48(A)(5).” *Id.* ¶ 10. The “deadline” was the date the federal habeas court had set for the prosecutor to retry James, well after James had been released based on the waiver-of-counsel error.

The State sought reconsideration, objecting to the court’s new theory on several grounds. It argued that the lack of retrial, if it even qualified as an “error,” did not lead to James’s release, as the earlier waiver-of-counsel error was the basis for the habeas relief invalidating James’s convictions. The State added that James had actually been physically released long before the “error” of failure-to-retry, so that later event could not have caused his release. The State also asked the court to revisit its (A)(4) holding from 2013, which the court had re-incorporated into the remand decision, *see* Remand Op. ¶ 3, noting that this Court had overruled *Hill*.

The Second District denied the State’s motion. *See* Decision and Entry, June 11, 2015 (“Recon. Op.”) (Ex. 1). It reaffirmed its view that the lack of retrial, which occurred *after* James’s release from prison, was an error in procedure that resulted in James’s “release.” It reconciled this apparent impossibility by interpreting the term “release” in (A)(5) “to mean action that is more inclusive than just a discharge from prison.” *Id.* at 3. Rather, “the term ‘release’ within the meaning of subsection (A)(5) of the wrongful imprisonment statute may include a release from all ‘charges,’ in addition to a discharge from confinement.” *Id.* The court also declined to reconsider its previous holding on (A)(4). *Id.*

**THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST**

The lower court’s rulings on (A)(4) and (A)(5) both warrant review. By reading (A)(5)’s Error in Procedure prong to cover those who are not retried, the court below dramatically expanded the class eligible for wrongful-imprisonment compensation. That conflicts with the

law’s text and with *Mansaray*, and burdens prosecutors with a “duty to retry”—even where it is not practical to do so for reasons having nothing to do with the defendant’s culpability—simply to avoid wrongful-imprisonment liability. The decision’s reading of (A)(4)’s Otherwise Innocent requirement also warrants review, as it, too, conflicts with the statute and this Court’s precedent.

**A. The Error in Procedure issue warrants review because the decision below improperly expands wrongful-imprisonment eligibility and burdens prosecutors and criminal defendants alike.**

The Court should review the first issue to clarify that an error in procedure under (A)(5) must be one that results in a claimant’s “release” *from prison*. The Second District’s innovations—defining “release” as the dismissal of charges, and casting the lack of retrial as an “error”—are wrong and burden prosecutors who face retrial decisions.

**1. The decision below expands the class of claimants eligible for wrongful-imprisonment compensation, contrary to this Court’s *Mansaray* decision.**

*Mansaray* rejected the argument that (A)(5)’s Error in Procedure prong dramatically expanded the scope of claimants eligible for wrongful-imprisonment compensation. The decision below simply creates a broad expansion by another route. Not only does that clash with *Mansaray*’s holding, but it also conflicts with the Court’s reminder that broad expansions should not be found when “[n]othing in the statute indicates that the General Assembly intended” such a far-reaching result. *See Mansaray*, 2014-Ohio-750 ¶ 10.

James’s non-retrial scenario is a common one, so the decision’s expansion will affect many cases, thus warranting review even if the court is right (and it is not). Typically, when a conviction is reversed or invalidated—whether on direct appeal, state collateral review, or federal habeas—the prosecutor may retry. Only in rare cases (such as double jeopardy violations or insufficiency of the evidence) is retrial barred. And prosecutors often decline to retry, as detailed in part A.2 below, for reasons having nothing to do with guilt or innocence.

The decision below easily reaches all such cases, not just James’s. For example, the Court in *Mansaray* noted that after Mansaray’s conviction was reversed, he “was released on bond, and the charges against him were ultimately dismissed.” *Id.* ¶ 3. Mansaray himself might have won—not lost—under this alternate theory. So he, like many defendants, could have re-framed his claimed “release” as the later dismissal of charges.

Because the Second District’s view applies to most defendants, it conflicts with *Mansaray*’s lessons and the statute’s text. In *Mansaray*, the Court explained that the General Assembly would be unlikely to hide such a massive expansion in such a quiet way. *Id.* ¶ 10. The Court added that the expansive view would also apply in virtually all cases that met (A)(1) through (A)(4), so that (A)(5) would be superfluous. *Id.* ¶ 11. The Second District’s expansion likewise could cover almost all cases, because retrial is almost always allowed and final dismissal is usually entered later by the state trial court.

James can point to nothing about his case that narrows the Second District’s broad ruling, and his alternative theories are no barrier to this Court’s review. He argued below that the error in procedure resulting in his release was either ineffective assistance of appellate counsel or a “continuing procedural error.” The appeals court expressly rejected the first claim and silently rejected the second. More important, the Second District adopted a broader theory; its *actual* decision warrants review and reversal.

## **2. The decision below burdens prosecutors and encourages wasteful litigation.**

The decision below, by imposing wrongful-imprisonment liability for a “failure to retry,” burdens prosecutors, encourages wasteful litigation, and causes uncertainty.

Prosecutors often have practical reasons not to retry defendants, but the decision below encourages them to retry defendants solely to avoid wrongful-imprisonment liability. Prosecutors need not think a defendant is innocent to forgo retrial: age of evidence, witness

availability, time served, and the severity of the offense are all factors. Here, for example, James had already served nearly three-quarters of a term for drug possession and carrying a concealed weapon. *James*, 2008 WL 294911 at \*3. In some cases, especially after federal habeas relief, a defendant might face only a remaining year of a ten-year sentence. The decision below, by imposing liability for failure-to-retry, encourages retrials that otherwise would not occur. Ironically, those same cases—with most of a sentence served—will often carry the greatest wrongful-imprisonment price tag, because the time served is longer.

While the Second District’s view might leave room for a prosecutor to avoid liability by affirmatively stating an intent not to retry, that path still burdens prosecutors. A prosecutor might want to avoid stamping the State’s imprimatur on a defendant by declaring that it will not seek further charges. Or, a prosecutor might recognize the futility of pursuing a retrial now, but hold out hope for advances in technology or a breakthrough in evidence that could crack the case. *Cf. Lefever v. State*, 2013-Ohio-4606 ¶ 27 (10th Dist.).

Further, uncertainty arises in remand cases because the “deadline” for retrial is not as clear as the Second District suggested, for several reasons. First, Ohio’s appellate courts generally do not issue retrial deadlines; they simply reverse existing convictions. Second, this Court has held that Ohio’s speedy trial “statute does not apply to criminal convictions that have been overturned on appeal.” *State v. Hull*, 110 Ohio St. 3d 183, 2006-Ohio-4252, syl. ¶ 1. Rather, the U.S. and Ohio Constitutions dictate that a new trial must be brought within “a reasonable period consistent with constitutional standards.” *Id.* ¶ 20 (internal quotation marks omitted). The “reasonable period” is of course not as precise as the speedy-trial statute. A prosecutor *planning* to retry will no doubt be cautious to secure a new conviction, but a

prosecutor willing to let a case go should not face pressure to ascertain the precise “deadline” for announcing a non-retrial decision to avoid triggering a wrongful-imprisonment claim.

Indeed, the specter of wrongful-imprisonment liability creates an incentive not just to retry, but to fight more on the underlying conviction, and *then* to fight over any retrial barrier—all of which harms criminal defendants as well. This case is a textbook example. The State could have sought certiorari on James’s habeas win, noting Judge Batchelder’s concurring view that she had “no doubt” that James’s changes in counsel were “dilatatory tactics,” and that the only issue was whether the trial court record adequately reflected that. *James*, 470 F.3d at 645 (Batchelder, J., concurring). The State could have challenged the federal district court’s order barring retrial after a deadline, as that order was plainly mistaken under federal habeas law. Habeas courts can only order *release* by a deadline, leaving a State free to retry, except in rare circumstances not at issue here. *See Eddleman v. McKee*, 586 F.3d 409, 413 (6th Cir. 2009); *Satterlee v. Wolfenbarger*, 453 F.3d 362, 370 (6th Cir. 2006); *Fisher v. Rose*, 757 F.2d 789, 791 (6th Cir. 1985). The state court order dismissing charges was equally flawed for relying on the federal mistake. All those mistakes might not have been worth correcting, but could be in a world of resulting wrongful-imprisonment liability.

**B. The Court should review the Otherwise Innocent issue under (A)(4) because the decision below undercuts this Court’s *Gover* decision and has broader consequences for statutory interpretation.**

The Court has already granted review on the same issue in *McClain v. State*, No. 2014-1519, and *C.K. v. State*, No. 2014-0735, and it should do so again here. The (A)(4) issue in this case arises because the Second District undercut this Court’s *Gover* decision, saying—in conflict with other districts—that the 2003 addition of the Error in Procedure prong in (A)(5) changed the meaning of the (A)(4)’s separate Otherwise Innocent requirement. In *Gover*, the Court held that (A)(4), by requiring that a claimant *cannot* be charged for another crime arising from the same

acts, means that he also *could not have been* charged. Here, James actually was *convicted* of another crime “associated with” the convictions for which he sought damages. App. Op. ¶¶ 3-4. The Second District said that *Gover*’s view of (A)(4) was changed by 2003 amendment to (A)(5), following the Tenth District’s reasoning in *Hill*. *Id.* ¶¶ 18-19. This Court reversed *Hill*, albeit on other grounds, but the Second District has stuck to this view. Remand Op. ¶ 3; Recon. Op. 3.

Both the Sixth and Eighth District have, in decisions after the 2003 amendments, continued to apply *Gover*, holding that associated criminal conduct, even if it does not result in conviction, bars recovery. See *Ramirez v. State*, 2004 WL 226109, at \*3 (6th Dist. Feb. 6, 2004) (Lanzinger, J.); *Jones v. State*, 2011-Ohio-3075 ¶ 14 (8th Dist.). That conflict is a reason for review, along with the conflict with standard statutory interpretation rules and with *Gover* itself.

First, the Second District’s approach treated an amendment to one part of the statute, (A)(5), as a silent amendment to (A)(4), which the General Assembly left untouched. That broad approach could lead to all sorts of reinterpretation of un-amended statutes based on amendments elsewhere. That runs counter to the rule that when the General Assembly acts, “the presumption is that it is aware of [the Court’s] decisions interpreting” the statute it is amending. *State v. Hassler*, 115 Ohio St. 3d 322, 2007-Ohio-4947 ¶ 16. So when the General Assembly tweaked (A)(5) or other parts without touching (A)(4), it presumed that (A)(4) still meant what this Court said it meant in *Gover*. If the Assembly cannot rely on that presumption—that an untouched section retains its meaning—then it has no sure way to counter that. Surely it should not repeal and re-enact statutes, or add empty text, just to signal that no change was intended. And the Second District’s view leaves the Assembly unsure whether it would, even then, need to somehow address the rest of a statute, or nearby statutes, or a whole chapter. The Second

District's approach needs review for what it does to wrongful-imprisonment law, and for what it does more broadly in unsettling legislative expectations about what the General Assembly must do when adjusting statutes that this Court has definitively interpreted.

Review is also warranted because the Second District undermined *Gover*. The court implicitly rejected *Gover*'s limit on compensation by permitting, where *Gover* prohibited, recovery even when a prisoner has been convicted of conduct associated with the reversed convictions. This theory is wrong not just because it involves the wrong section, but also because this Court has continued to cite *Gover* without any hint that it has reduced force after the 2003 amendments. See *Dunbar v. State*, 136 Ohio St. 3d 181, 2013-Ohio-2163 ¶ 17.

Finally, although James has argued that *Gover*'s Otherwise Innocent requirement does not apply to him, that is no roadblock to review. The appeals court did not adopt that view, but instead it said that *Gover* has been supplanted. *That* calls for review, and to the extent James has other arguments, the Court can address them while reversing the appeals court's mistaken view.

**C. The Court should review both issues, as this is a good vehicle to address either or both, and it need not hold the whole case for *McClain* or *C.K.***

Both issues merit review. The Court has often addressed Ohio's wrongful-imprisonment law to correct mistaken expansions of eligibility, and it should do so again. See *Bundy v. State*, \_\_\_ Ohio St. 3d \_\_\_, 2015-Ohio-2138 ¶ 32; *Mansaray*, 2014-Ohio-750 (meaning of "error in procedure" in (A)(5)); *Doss v. State*, 135 Ohio St. 3d 211, 2012-Ohio-5678 (meaning of "was not committed" in (A)(5)); *Dunbar v. State*, 2013-Ohio-2163 (meaning of "did not plead guilty" in (A)(2)); *C.K.*, No. 2014-0735 (pending); *McClain*, No. 2014-1519 (pending).

Here, the Second District's holdings on both issues are broad ones, affecting many or almost all claimants, and both issues conflict with the Court's precedent. By combining both issues, this case offers a chance to correct both problems. As noted above, James has offered

alternate arguments on each issue, but the court below either rejected or did not reach those other issues, adopting the above broad—and mistaken—rules instead. The Court should therefore not consider any of his arguments as reasons to deny review, but at most, reasons why his case might survive (though it should not) even with the court’s broad errors corrected.

As noted above, the Court has already granted review on the (A)(4) issue here, but it need not delay correction of the *Mansaray* issue. The Court may grant the (A)(5) proposition and hold the (A)(4) one for *McClain* to avoid duplicative briefing. See, e.g., 07/08/15 *Case Announcements*, 2015-Ohio-2747 at 3 (issuing similarly split orders in *Albanese v. Batman*, 2015-0120, and *Lippermand v. Batman*, 2015-0121). That path is preferable here because the (A)(4) issue awaits two cases. The *Gover* (A)(4) issue here is one of two distinct issues in *C.K.*, and it is the sole issue in *McClain*. *McClain* is already being held for *C.K.*, and will proceed if *C.K.* does not resolve the issue. Thus, although the issue warrants review, it is already covered, and the (A)(5) *Mansaray* issue here is so broad and wrong that its reversal should not be delayed.

For all these reasons, the Court should grant review here.

## ARGUMENT

### **Appellant State’s Proposition of Law No. 1:**

*No “error in procedure” occurs for purposes of R.C. 2743.48(A)(5) when the State does not retry a defendant whose conviction has been vacated, because lack of retrial is not an error and because it does not cause release from confinement.*

Subsection (A)(5) requires a claimant, if he cannot prove “actual innocence,” to show that an “error in procedure” occurred “subsequent to sentencing and during or subsequent to imprisonment” and resulted in his “release.” R.C. 2743.48(A)(5); *Mansaray*, 2014-Ohio-750 ¶ 12. James needs to meet all three, but cannot show *any* of them, as he cannot identify (1) an error in procedure (2) that occurred after sentencing and (3) that resulted in his release from

prison. James was released from prison in 2007 because of a pre-sentencing trial error. The new “error” that the Second District identified on remand is that the State did not retry James *over a year after he had already been released from prison*. In short, James has a pre-trial error that resulted in his release from prison, and a post-trial non-error that resulted in the dismissal of his indictment. Neither is enough, and the Second District’s contrary view is wrong.

*First*, James’s lack of retrial was not an error in procedure. The court below said that “the trial court was directed by the federal court to retry James within a set period of time, pursuant to the Speedy Trial Act” and that “the State’s failure to retry the case prior to the deadline was a procedural error that occurred after sentencing and imprisonment, within the meaning of R.C. 2743.48(A)(5).” Remand Op. ¶¶ 9-10. This was mistaken on several levels.

As a factual matter, the district court’s July 2008 Order directed the *State* (not the trial court) to “either retry [James] on or before October 27, 2008 or forego further retrial of [James] on the criminal charges underlying this case.” *James*, 2008 WL 2949411 at \*1 (emphases removed). The court framed its order as a binary choice: the State could “*either* retry” James “*or* forego further retrial.” *Id.* (emphases added). By declining to retry James, the State selected one of the two prescribed options. In no sense was this a procedural error.

As a legal matter, the district court did not issue its July 2008 Order “pursuant to the Speedy Trial Act.” *Contra* Remand Op. ¶ 9. The district court’s July 2008 Order does not mention the Act or any basis for the deadline. *See James*, 2008 WL 2949411 at \*1. The underlying federal magistrate’s Report and Recommendation mentioned the Act regarding an earlier order, but it *rejected* James’s claim that the Act precluded retrial. *Id.* at \*2-3, 5. Indeed, Ohio’s Speedy Trial Act does not apply to retrial after a conviction has been reversed on appeal. *See* above at 8; *Hull*, 2006-Ohio-4252 ¶ 19. So no such “error” occurred.

*Second*, even if the lack of retrial was an error in procedure, that “error” did not “result[] in [James’s] release.” James had been out of prison for over a year before the federal court even issued its July 2008 Order. The Second District was wrong to read “release” to mean a “release from all ‘charges,’ in addition to discharge from confinement.” Recon. Op. 3. While the term “release” is undefined, it occurs in the context of a law about wrongful *imprisonment*, so it sensibly refers to release from *imprisonment*. *Mansaray*, 2014-Ohio-750 ¶ 16 (“We conclude that the error in procedure, if that is what led to Mansaray’s *release from prison*, did not occur subsequent to sentencing and during or subsequent to imprisonment.” (emphasis added)).

*Finally*, the legislative history suggests that the General Assembly did not intend a radical expansion of the class of eligible claimants when it passed the 2003 amendments. Those amendments added the Error in Procedure prong to (A)(5) and increased the amount of recovery for each year of imprisonment. *See* R.C. 2743.48(E)(2)(B); Sub. S.B. 149 (124th G.A.). The Legislative Service Commission, in assessing the fiscal impact of these changes, noted the increase in the *amount payable* to each wrongfully imprisoned individual. Ohio Legis. Serv. Comm’n, Fiscal Note & Local Impact Statement for Sub S.B. 149 at 3 (Dec. 10, 2002). But it did not suggest an expected increase in the *volume* of claimants; to the contrary, it referred to the status quo in noting the range of annual claimants. *See id.* (noting range of recovering claimants from zero to historical high of four). Any expected expansion should have been noted there.

**Appellant State’s Proposition of Law No. 2:**

*The General Assembly did not amend R.C. 2743.48(A)(4) when it added language to R.C. 2743.48(A)(5) because it does not silently amend independent subsections of a statute when it expressly amends a different subsection.*

The Second District wrongly held that *Gover*’s reading of (A)(4)’s Otherwise Innocent requirement—barring relief for prisoners who “engag[e] in any other criminal conduct arising

out of the incident for which they were initially charged,” 67 Ohio St. 3d at 95—was superseded by the 2003 amendments to (A)(5).

*First*, “it cannot be said that the Legislature meant to change the meaning of [one] section by amending [another].” *Bd. of Commrs. of Crawford Cnty. v. Gibson*, 110 Ohio St. 290, 298 (1924). The changes to (A)(5) did not change (A)(4)’s meaning. While that alone resolves the issue, it is confirmed by the rule that the General Assembly does not change statutes silently. *Lynn v. Supple*, 166 Ohio St. 154, 159 (1957) (“Such an intention will not ordinarily if ever be implied from its silence.”). Indeed, when the Assembly reenacts language that this Court interprets, it gives its “express approval” to that interpretation. *Commercial Credit Corp. v. Pottmeyer*, 176 Ohio St. 1, 5 (1964), *overruled on other grounds by Hardware Mut. Cas. Co. v. Gall*, 15 Ohio St. 2d 261 (1968).

*Second*, the appeals court failed to recognize that the “innocence” requirement always had two aspects, located in two places. The “actual innocence” rule of (A)(5) refers to actual innocence of the crime for which the claimant was imprisoned; the Otherwise Innocent rule of (A)(4) refers to innocence of other crimes. So although the Error in Procedure prong may have changed (A)(5)’s scope, it did not affect (A)(4)’s independent notion of innocence.

For these reasons, the Second District’s judgment should be reversed.

## CONCLUSION

The Court should accept jurisdiction over the State’s first Proposition of Law and reverse. The Court should hold the State’s second Proposition of Law pending its decision in *McClain v. State*, No. 2014-1519 (granted and held February 18, 2015).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Defendant-Appellant State of Ohio was served by U.S. mail this 27th day of July, 2015, upon the following counsel:

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